

Opinion No. 58-29

February 10, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General

TO: Mr. Edward M. Hartman, Director, Department of Finance and Administration,
Santa Fe, New Mexico

QUESTION

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Do the Governor and the State Board of Finance have authority to regulate salaries of Assistant Attorneys General in the same manner as they regulate other salaries paid from state funds?

CONCLUSION

No.

OPINION

ANALYSIS

The basic question presented above is who may regulate and fix the salaries of Assistant Attorneys General. The answer to this question is found at Sec. 4-3-5 N.M.S.A., 1953 Comp., 1957 Pocket Supplement. This section states as follows:

"The attorney general may appoint a first assistant attorney general, and as many other assistant attorneys general together with stenographic, clerical and other necessary employees on a full or part time basis, **at salaries to be fixed by him** within budget allowances and appropriation limits, as the business of the department shall require, and who shall hold office during the pleasure of the attorney general. The assistant attorneys general shall, subject to the direction of the attorney general, have the same power and authority as the attorney general." (Emphasis supplied)

The above statute clearly indicates that the Attorney General of New Mexico shall fix the salaries of his assistants subject only to budget allowances and appropriation limits.

The above statute appears to be determinative on this issue. Since, however, we have been asked to differentiate salaries paid to Assistant Attorneys General from other salaries paid from state funds, we will do so. The statutory authority authorizing the Governor, subject to the approval of the State Board of Finance, to set executive department salaries is that commonly called the Personnel Act. (Sec. 5-4-1 through 5-4-4, NMSA, 1953). It should be noted that the Act applies only to state **employees**. To

subject an Assistant Attorney General's salary to classification under the Personnel Act, it would be necessary to hold that an Assistant Attorney General is an employee as differentiated from a public officer. The distinction between public office and public employment is considered in **State ex rel. Gibson v. Fernandez, 40 N.M. 288, 58 P. 2d 1197**. In that case, the Court set forth certain requirements absolutely indispensable to make a position of public employment a public office. These requirements are as follows:

"(1) It must be created by the Constitution or by the Legislature or created by a municipality or other body through authority conferred by the Legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the Legislature, and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity, and not be temporary or occasional . . ."

Applying the above rules to the instant case, we find the office of Assistant Attorney General is created by Sec. 4-3-5, thus meeting Requirement 1 stated above. In accordance with Requirement 2, Sec. 4-3-5, delegates the same power and authority, subject to the direction of the Attorney General, to his assistants as is vested in the Attorney General. Such powers are defined in Sec. 4-3-2, NMSA, 1953 Comp., in accordance with Requirement 3 above. As required by Requirement 4 above Assistant Attorneys General's duties are performed independently subject only to the direction of the Attorney General. Lastly, in conformity with Requirement 5 above, the positions now occupied by the present assistants are full time and presumably permanent for at least the period to be served by the Attorney General. Inasmuch as Assistant Attorneys General meet all of the requirements of a state official, they are not subject to the Personnel Act.

In addition to meeting the requirements stated above, the **Gibson v. Fernandez** case, *supra*, by implication states that an Assistant Attorney General holds a state office.

By way of summary, this office holds that an Assistant Attorney General is a state officer not subject to the salary classification of the Personnel Act. Further, that the legislature has delegated to the Attorney General of the State of New Mexico the exclusive right to set the salaries of his assistants. Such power is subject only to the budget allowances and appropriation limits. Thus, it is apparent if the Attorney General has the funds available for the payment of his assistants, he may pay them individually such salaries as in his opinion shall be warranted.