

## Opinion No. 61-18

February 10, 1961

**BY:** OPINION OF EARL E. HARTLEY, Attorney General F. Harlan Flint, Assistant Attorney General

**TO:** Mr. Robert D. Castner, State Auditor, Capitol Building, Santa Fe, New Mexico

### QUESTION

#### QUESTIONS

1. Pursuant to the provisions of § 5-4-22, N.M.S.A., 1953 Comp. (P.S.), did the terms of office of State Personnel Board members appointed by former Governor John Burroughs expire upon the expiration of Governor Burroughs' term of office?
2. Did the "Personnel Policy and Pay Plan" promulgated by the State Personnel Board pursuant to § 5-4-23 N.M.S.A., 1953 Comp. (P.S.), become null and void as of December 31, 1960.
3. Is there any conflict between §§ 56-1-6 and 56-1-7 N.M.S.A., 1953 Comp., and an executive memorandum dated February 1, 1961, stating that the legal holidays honoring Lincoln's and Washington's Birthdays would be considered as normal working days for all state agencies?

#### CONCLUSIONS

- (1) See analysis.
- (2) See analysis.
- (3) See analysis.

### OPINION

The first question propounded by your request requires consideration of § 5-4-22, N.M.S.A., 1953 Comp. (P.S.), which reads as follows:

"There is established a state personnel board consisting of seven (7) officers or employees of the state to be designated by the governor. **Members of the Commission shall serve terms of two (2) years or less coterminous with the term of governor.**" (Emphasis added)

A reading of the quoted statute alone would seem to demand the conclusion that board members hold office only until the end of the term of the Governor who appointed them.

However, this conclusion must be tempered by a consideration of Article XX, Section 2, of the New Mexico Constitution and a determination of its applicability to the facts presented here. That section provides that:

"Every officer, unless removed, shall hold his office until his successor has duly qualified."

It is necessary that we determine whether members of the Personnel Board are public officers and subject to the overriding constitutional provision quoted above. It is our conclusion that board members are such officers for reasons which will be discussed below. The question of what constitutes a public officer has been considered at length by the New Mexico Supreme Court in *State ex rel. Gibson vs. Fernandez*, 40 N.M. 288, 58 P. 2d 1197. The court therein quoted and relied heavily upon a definition of public office contained in the Montana case of *Barney v. Hawkins*, 79 Mont. 506, 257 Pac. 411. We repeat the quoted section because of its importance in the resolution of the present question:

"After an exhaustive examination of the authorities we hold that five elements are indispensable in any position of public employment in order to make a public office of a civil nature: (1) it must be created by the Constitution or 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 office or body; (5) it must have some permanency and continuity and not be only temporary or occasional. In addition, in this state, an officer must take and file an official oath, hold a commission or other written authority and give an official bond if the latter be required by proper authority".

It is our conclusion that the members of the State Personnel Board meet the requirements necessary to constitute them as state or public officers. The members of the board are appointed by the Governor rather than being simply employed. They serve for a definite term. The office is created by the legislature. The powers or duties are defined by the legislature. The office is permanent, continuous and certainly a portion of the sovereign power of government is delegated to the board. See § 5-4-23, N.M.S.A., 1953 Comp. (P.S.), wherein it is declared that:

"It shall be the duty of the board, subject to the approval of the State Board of Finance:

A. To establish schedules of job classifications,

B. To establish schedules of job descriptions and salary scales, \* \* \*".

This section clearly delegates certain duties to the board which may not be exercised by any other agency or officer and grants to the members of the board considerable discretion and permits them the exercise of independent judgment.

The New Mexico court in the Fernandez case expressed the view that the necessary and distinctive element of public office is the delegation of sovereign power. In New Mexico one is not a public officer **because** he takes an oath. The rule could be more properly expressed that if he **is** an officer, he must take an oath. See Art. XX, Sec. 1, N.M. Constitution.

It is clear from reading § 5-4-22 that the Personnel Board is a permanent and continuing body, and we conclude that under the rationale of the Fernandez case, the board members are public officers. We must then determine the effect of Article XX, Section 2, New Mexico Constitution on the expiration of terms as prescribed by the statute.

The leading New Mexico case interpreting Article XX, Section 2, is Haymaker vs. State ex rel. McCain, 22 N.M. 400, 163 Pac. 248. This was an action to remove appellant from the office of member of the Board of Education for the City of Roswell. After qualifying and entering upon the duties of office, Mrs. Haymaker, the appellant, was appointed as Clerk of the Board. The Supreme Court held that the two offices were incompatible and could not properly be held at the same time by the same person. However, the court concluded that even though the offices were incompatible and even if the taking of an incompatible position constituted a resignation from membership on the board, the appellant continued to hold the office until her successor was duly qualified. The court declared at page 406 of the New Mexico Reports that:

"Since the adoption of the Constitution no office becomes vacant in the sense that there is no incumbent to fill it except in the case of death, perhaps, because under Sec. 2 of Art. XX of the State Constitution every officer holds until his successor qualifies except when he is removed".

The court further stated as follows in this regard:

"Assuming that the resignation of the plaintiff in error of the first office had been accepted, a vacancy . . . did occur in the office of member of the Board of Education of the city. But in view of the constitutional provision cited supra, the vacancy, so-called, was not a corporeal vacancy; a condition simply arose thereby which gave the right to the appointing or electing power to appoint or elect some person to the said office in the place and stead of plaintiff in error. In other words, the right to fill the first office, by the proper power, was initiated thereby, but such right had no effect whatever upon the status of the plaintiff in error with respect to that office until the successor qualified for the office".

It is our conclusion that the holding of the court in the **Haymaker** case clearly prohibits the occurrence of a de facto vacancy in the State Personnel Board under the circumstances presently existing. The term of office of the member of the board

appointed by Governor Burroughs expired when the former Governor's term in office terminated. However, they continue as de facto members of the board until such time as their successors are qualified. To conclude otherwise would result in giving the appointing authority the power to defeat the purpose of the legislature by declining to appoint members to the board. The Governor may effectively remove present members by appointing and securing the qualification of successors to the office.

Your second question queries the continuing effectiveness of the "Personnel Policy and Pay Plan" adopted by the Personnel Board in October, 1959. We have already concluded that the Personnel Board is a permanent and continuing body created by the legislature. Its official acts performed within the scope of its statutory powers or duties would clearly continue in existence until modified or rescinded by subsequent action of the board, or its successors. The most serious problem raised by your question is not the abstract question of continuity of the "Plan" as such, but rather is the practical question of whether all portions of said personnel policy and pay plan are within the power of the board to enact. The duties of the Personnel Board are defined by statute in § 5-4-23 which is quoted in part above. The applicable portions of that section are "A" and "B" which authorize the board to establish schedules of job classifications, job descriptions and salary scales. In order to be valid, any rules included within the adopted personnel policy and pay plan must be within the scope of the statutorily described duties. It is clear from a reading of § 5-4-19 which states the purpose of the personnel act that the legislature intended to provide the Personnel Board with broad powers to deal with personnel problems of state employees. However, the board has no powers which are not specifically or by necessary implication granted to them by the legislature. In this regard we direct our attention to that portion of the personnel rules and regulations dealing with holidays with pay, and particularly that portion declaring Lincoln's Birthday and Washington's Birthday to be holidays with pay for salaried employees in the state government. This section is made pertinent by an executive memorandum dated February 1, 1961, issued upon direction of the Governor, which declared that the legal holidays honoring Lincoln's and Washington's Birthdays would be considered as normal working days for all state agencies. The memorandum further stated that no compensatory time would be granted. The question which must be answered is whether there is power and authority in the State Personnel Board to declare these days as holidays for state employees. We feel constrained to conclude that regardless of the broad purpose stated in § 5-4-19, the power to designate holidays for state employees is not one which may reasonably be said to be included in the powers or duties granted to the board by the legislature in § 5-4-23. There does not appear to be a reasonable or necessary connection between the power to establish job classifications, descriptions and salary scales and the power to make such a designation of holidays.

When the Personnel Act was adopted in 1959, § 5-4-1, N.M.S.A., 1953 Comp., was repealed. However § 5-4-2, N.M.S.A., 1953 Comp., governing the fixing of hours of labor continued in full effect. Pursuant to that section the Governor is authorized, subject to the approval of the State Board of Finance, to fix the hours of labor in state offices, departments or institutions. We conclude that there would be a conflict between

that section and the presently considered section of the personnel rules and regulations and that the statute must prevail.

You asked in question three whether there is a conflict between §§ 56-1-6 and 56-1-7, N.M.S.A., 1953 Comp., and the above mentioned executive memorandum. The subject sections of the statute are quoted in their entirety below.

"Section 56-1-6. In appreciation of the greatness and humanitarian deeds of our expresident Abraham Lincoln, the great emancipator, February 12, of each and every year hereafter is hereby designated as Lincoln's birthday. Said day shall be a legal holiday in the State of New Mexico."

"Section 56-1-7. February 22 (Washington's birthday), be and the same is hereby declared to be a legal holiday in the State of New Mexico. On such day the various state offices and the public schools shall be closed."

It will be noted that there is a significant difference between the two sections. Lincoln's birthday is designated as a legal holiday. Washington's birthday is also declared to be a legal holiday but it is further stated that state offices and public schools shall be closed. It is clear beyond question that state offices and public schools shall be closed on Washington's birthday. The language is mandatory and leaves no room for construction. However, there is considerably more doubt with regard to Lincoln's birthday.

In order to interpret § 56-1-6, it is necessary to define the phrase "legal holiday." The meaning of this phrase within a statute such as that now under consideration is discussed at 50 Am. Jur. 602, which reads in part as follows:

"On a holiday any business may be transacted except that which is positively forbidden and no act will be held illegal merely by reason of being performed on a legal holiday unless prohibited by statute."

Another section of the same reference throws further light on this subject.

"A legal holiday has only the sanctity attached to it by statute . . . Statutory holidays do not have the sacredness of the Sabbath and any legal business may be transacted and any legal act performed upon a holiday other than that which is positively or by necessary implication forbidden by the terms of a statutory enactment." 50 Am. Jur. 861.

In treating §§ 56-1-6 and 56-1-7, we must give some significance to the different language used in the two statutes. We conclude that a legal holiday need not be observed by state offices and agencies unless the language of the statute so directs, or unless the Governor designates such day as a holiday for state employees. § 56-1-8, N.M.S.A., 1953 Comp., (P.S.), declares the effect of public holidays on financial transactions. This section is the only one which specifically states the effect of a legal holiday. In the absence of positive legislation, we conclude that a statutory designation

of legal holidays does not result in that day being a business holiday for state employees.

With specific reference to the executive directive of February 1, 1961, we must conclude that it is within the executive authority of the Governor insofar as it is directed to Lincoln's Birthday. However, since the statute specifically directs that all state offices and schools **shall** be closed on Washington's Birthday, February 22, the statute controls and the executive directive is invalid as to that date.