

Opinion No. 61-80

September 6, 1961

BY: OPINION OF EARL E. HARTLEY, Attorney General Oliver E. Payne, Assistant Attorney General

TO: Mr. Jack M. Campbell, Speaker of the House of Representatives, P. O. Drawer 640, Roswell, New Mexico

QUESTION

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1. Do the provisions of the State Personnel Act apply to the Los Lunas State Hospital and Training School?
2. Is the business manager of the Los Lunas State Hospital and Training School exempt from coverage under the State Personnel Act?
3. Is it within the discretion of the Board of Directors of the Los Lunas State Hospital and Training School to determine whether an employee shall be covered by the State Personnel Act?

CONCLUSIONS

1. Yes.
2. No.
3. No.

OPINION

ANALYSIS

In answer to your question as to whether the State Personnel Act, being Chapter 240, Laws of 1961, applies to the Los Lunas State Hospital and Training School, it is our opinion that it does and we so held in Opinion No. 61-28, dated April 7, 1961.

By constitutional enactment (Article XIV, Section 1), the Los Lunas State Hospital and Training School is a State institution and it falls within the category of departments covered by the Personnel Act (Sections 5-4-30 and 5-4-31, N.M.S.A., 1953 Comp. (P.S.)).

Your second question is whether the business manager of the Los Lunas State Hospital and Training School is exempt from the Personnel Act by virtue of Section 4 thereof (Section 5-4-31, supra). Undoubtedly, you are referring to Paragraph I of this section which exempts from coverage not more than two assistants in the office of each head of an agency. The answer to your question then depends upon whether the business manager at this institution is to be categorized as an "assistant" to the superintendent.

"Assistant" is a flexible and slippery term and to our way of thinking whether the occupant of a particular office or position is an assistant to the head of an agency must be determined by the actual operation and organizational alignment of that agency.

It is our understanding that the Los Lunas State Hospital and Training School is set up administratively as a horizontal organization. At the apex is the Board of Directors. Directly responsible to the Board is the Superintendent of the Institution. At the next level horizontally are eight separate department heads, one of whom is the business manager. In a general sort of way perhaps each of these eight department heads is an "assistant" to the superintendent. We do not believe, however, that the Legislature was using the term "assistant" so broadly in the Personnel Act. What was contemplated was a policy-making administrative officer such as an assistant superintendent.

No such position exists by virtue of New Mexico Statutes and no such office exists in the organizational structure of the Institution in question as can be ascertained by examining the authorized positions in the Institution as approved by the Budget Division. Further, the minutes of various staff conferences make it clear that the Superintendent of the Institution does not consider that he has any assistants as such.

In answer to your third question, it seems to us that in the absence of a Statute creating assistants, such designation is a function which the agency head, in this case the Superintendent, would have to make initially. No such designation has been made by the Superintendent of the Los Lunas State Hospital and Training School.

Section 34-3-4, N.M.S.A., 1953 Compilation, provides that the Board of Directors shall appoint the Superintendent and that he shall serve at the pleasure of the Board. This indicates to us a legislative intention to leave the hiring and firing of other personnel, as well as the appointment of assistants, to the Superintendent. The Board retains full control of policy by virtue of its power to appoint and remove the Superintendent. Administratively, an intolerable situation is created if the agency head is denied the authority to designate his own assistants. Consequently, if the Superintendent desires that two assistants be exempt from coverage under the Personnel Act, it is within his prerogative to name these assistants.