

Opinion No. 62-39

March 5, 1962

BY: OPINION OF EARL E. HARTLEY, Attorney General William E Snead, Assistant Attorney General

TO: Mr. Gordon Shermack, Director, Fair Employment Practices Commission Santa Fe, New Mexico

QUESTION

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Does Sec. 59-4-4 (F), N.M.S.A., 1953 Comp., apply to private business doing work by contract with state, county, or city government?

CONCLUSION

No.

OPINION

ANALYSIS

Section 59-4-4 (F), N.M.S.A., 1953 Comp., provides as follows:

"Any person, firm, association or corporation who shall expend any public money in violation of any of the provisions of sections 59-4-1 to 59-4-14 shall be guilty of a misdemeanor, and shall, upon conviction thereof, be fined not less than fifty dollars (\$ 50.00) nor more than five hundred dollars (\$ 500.00) or imprisoned for not more than ninety [90] days in the county jail of the county wherein such violation may have occurred, or both such fine and imprisonment at the discretion of the court."

It is clear that if private businesses come under this provision upon making a contract with a political subdivision of the State, they are subjecting themselves to criminal liability. The only other liabilities are civil in nature. Section 59-4-5, N.M.S.A., 1953 Comp., provides that each contract with any political subdivision of the State will contain a clause requiring the employer-contractor not to be discriminatory. Violation of this clause may be regarded as a material breach of the contract. The contract could thus be avoided by the government.

It is obvious from reading Sec. 59-4-4 (F), *supra*, that in order to come within the provisions of this section, the business entering the contract must expend public money. The question therefore resolves itself into an inquiry as to whether a business which receives money from a political subdivision of the State for work performed pursuant to

a contract and who later expends the money in operating his business is expending public money. In our opinion, he is not.

The law is clear that the phrase "public money" distinguishes funds from money privately owned; that public funds are those moneys belonging to the State or to any city, county or political subdivision of the State. **Beckner v. Commonwealth**, 174 Va. 454, 5 S.E. 2d 525 (1939); **Morgan v. Crow**, 183 Ga. 147, 187 S.E. 840 (1936); **City of Youngstown v. Youngstown Municipal Ry. Co.**, 134 Ohio St., 308 16 N.E. 2d 541 (1938). The rule also is that money legally paid by the State ceases to be public money in the hands of the recipient. **Krebs v. Board of Trustees of Teachers' Retirement System**, 410 Ill. 435, 102 N.E. 2d 321 (1951); see also 43 Am. Jur. "Public Funds", Sec. 2 (Supp). Although it could be argued that money paid by a public official to a contractor directly to violate the provisions of the Act would be an illegal payment, where the money is paid to the contractor pursuant to a valid contract the money becomes private money and regardless of what the money is used for, the contractor would not come within the provisions of Sec. 59-4-4 (F), N.M.S.A., 1953 Comp. This section would subject officials of a political subdivision of the State to criminal liability for failing to follow the Fair Employment Practices Act.