

Opinion No. 62-79

June 27, 1962

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

TO: Mr. Milton E. Scudder, Director of Personnel, New Mexico State Personnel Board, Santa Fe, New Mexico

QUESTION

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1. Under what conditions can a state agency not now included under the Personnel Act of 1961 come under the Act, where the particular state agency has previously elected to be exempt?
2. When a state agency elects to come under the provisions of the Personnel Act, is this action binding on a permanent basis, or may the particular state agency remove itself from the provisions of the Act?

CONCLUSIONS

1. Officials exempt from the Personnel Act may elect at any time to have their employees covered by the Act.
2. See analysis.

OPINION

ANALYSIS

The answer to your first question is governed by Section 4 of the 1961 Personnel Act (Ch. 240 L. 1961) which provides in pertinent part as follows:

"The Personnel Act and the service cover all state positions except; officials elected by popular vote . . . and . . . their employees, **unless the elected officials elect to have their employees covered by the Personnel Act.**" (Emphasis added)

Upon close analysis, it is to be observed that no election by the exempt official is necessary to keep the employees of his agency or department exempt. They are expressly and automatically exempt by the statute in the absence of an election **to be covered.**

We are aware that shortly after passage of the Personnel Act, many, if not all, of the exempt officials notified the Personnel Board that they "elected" not to have their employees covered by the Act. However, such action being neither necessary nor required under the terms of the Act had no legal effect. The only time exempt officials must make an election is when they decide to have their employees covered. Consequently, the "election" by the Corporation Commission in June of 1961 to have its employees exempt from coverage under the Act was, in legal contemplation, a nullity. Thus the **only** election which has been made is the recent decision to place Corporation Commission employees under the Act. No time limit having been placed upon exempt officials for electing to place their employees under the Personnel Act, such action can be taken at any time.

Lest it be thought that we have overlooked one facet of the problem, reference should be made to Section 5-6-17, N.M.S.A., 1953 Compilation (P.S.), which requires that final decisions by public bodies be made at meetings open to the public. As we understand it, the Corporation Commission's decision to place its employees under the Personnel Act was not made at a meeting, open or otherwise. However, as we held in Opinion 59-105, this fact does not invalidate the action taken.

Another legal issue which we deem it necessary to discuss in answering your inquiry involves the question of delegation of power. It might be argued that the somewhat unusual feature of the 1961 Personnel Act, granting to exempt officials the option to have their departments placed under the Personnel Act, is an unconstitutional delegation of legislative power to executive officers. We find, however, that the law is otherwise. A case closely in point is **Henderson v. Thomy**, 307 Ky. 783, 212 S. W. 2d 303. The legislature had passed a statute providing that municipalities could, at their option, be covered by a civil service system. The argument was made that granting such a choice to the governing bodies of the municipalities violated the constitutional provision vesting legislative power in the General Assembly. In rejecting this contention, the Court said that the statute was complete in itself and was in full force and effect regardless of the action of any city with respect to operating under it. In the course of its opinion the Court said:

"The city, by electing to avail itself of the provisions of the statute, does not exercise the power of legislation reserved to the general assembly. The statute is a complete legislative enactment requiring only acceptance to incorporate its provisions in the scheme of local government."

It is our opinion that the option feature of the Personnel Act, granting to exempt officials the right to place their department or agency under the Act, is merely enabling legislation and not an unconstitutional delegation of legislative power. **Marr v. Fisher**, 182 Or. 383, 187 P.2d 966; **Reynolds v. Dallas County, Tex.** 203 SW 2d 320 and 207 S.W. 2nd 362. See **State v. Spears**, 57 N.M. 400, 259 P.2d 356.

We conclude then that the Corporation Commission's action was effective in placing its employees under the rules, regulations and recommendations of the Personnel Board

so long as in actual practice there is no conflict with the constitutional powers and duties of the Commission. See e.g., Article XI, Section 4, New Mexico Constitution.

Since the Legislature did contemplate that perhaps some exempt agencies might wish to come under the Act at some future date, we think your proposed Rule XIV relative to the probationary period for employees of any such subsequently joining agency is in harmony with the legislative intent, and a valid exercise of your rule making powers.

Your second question is whether the action of an agency in placing its employees under the Act is binding or whether the agency can subsequently withdraw from coverage.

It is imperative to keep in mind that the constitutional powers and duties of the departments which are under elected officials, and which are exempt from the Personnel Act in the absence of an election to have their employees covered, vary to a considerable degree. The powers and duties of some of these departments are spelled out in a great deal of detail in the Constitution itself. Other departments and offices were created by the Constitution but the framers of that document expressly gave the Legislature the authority to prescribe their powers and duties.

Since the Constitution controls in the case of any conflict between it and a statute, the answer to your second question may depend upon what the fundamental law of the State (the Constitution) provides as to the powers and duties of a particular department or office. See **In Re Atchison, T. & S. F. Ry., Co.**, 37 N.M. 194, 20 P. 2d 918.

To give you a general across-the-board answer to your second question would be to decide in a vacuum that the answer is either black or white. Since we are not aware of any contemplated action by a department seeking to remove its employees from coverage, we are of the opinion that a general answer is unnecessary and could subsequently prove to be misleading to you. Since the question is premature at this time, we feel that an all-inclusive answer taking it department by department would necessitate an unwarranted amount of research by this office to give our answer to what is presently a hypothetical question.

If a withdrawal issue ever becomes a reality as to any particular department, we will give immediate attention to an opinion request in connection therewith.

For the benefit of the Legislature and other interested groups and persons, we wish to mention that from the very day that the Personnel Act became effective this office has been called upon to interpret and explain various provisions of the Act. It is our view that the Act as presently drafted is sorely in need, at the very least, of clarifying amendments.