

Opinion No. 63-105

August 19, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Colonel Harold S. Bibo State Personnel Director New Mexico Personnel Department Santa Fe, New Mexico

QUESTION

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1. May the State Personnel Office return a payroll voucher to an agency for correction and / or adjustment in case the Personnel Office has an objection to the voucher?
2. To what extent does the State Personnel Office have authority to delay, or hold a payroll voucher, or return involuntarily the payroll voucher to an agency where the State Personnel Office has an objection to the voucher?
3. May the State Personnel Office withhold the certification of a payroll voucher if the rate of pay of an unclassified employee has not been approved by the Department of Finance and Administration, if such authority has been delegated by the Department of Finance and Administration to the State Personnel Office?
4. May the State Personnel Office request information concerning the employment and compensation or **unclassified** employees if such authority has been delegated by the Department of Finance and Administration to the State Personnel Office?
5. In the event of payment in error, after certification by the State Personnel Office, where does the responsibility for the error lie?
6. If an agency employs an individual without the approval of the State Personnel Office, who shall assume responsibility for his compensation, since the employee must be paid for his services?

CONCLUSIONS

1. See analysis.
2. See analysis.
3. No.
4. No.

5. See analysis.

6. Speaking generally, the employing agency.

OPINION

{*227} ANALYSIS

Your first question reads as follows:

"May the State Personnel Office return a payroll voucher to an agency for correction and / or adjustment in case the Personnel Office has an objection to the voucher?"

The answer to this question depends primarily upon the type of objection that the Personnel Office has to the voucher.

The authority of the Personnel Office in this area is set out in Section 5-4-39, N.M.S.A., 1953 Compilation (P.S.), enacted in 1961 as Chapter 240, Section 12, as follows:

"No person shall make or approve payment for personnel services to **any person in the service**, unless the payroll voucher or account of the pay is certified by the director that the person being paid was employed in accordance with the Personnel Act." (Emphasis added)

The definition of "service" is contained in Section 5-4-30, N.M.S.A., 1953 Compilation (P.S.) and reads as follows:

"'Service' means the state personnel service created by the Personnel Act, and **includes all positions covered by the Personnel Act.** . . . (Emphasis added)

We see then that the certification authority applies only to positions which are covered under the Personnel Act. The legislature has specifically exempted from coverage the positions enumerated in Chapter 200, Section 2, Laws 1963, compiled as § 5-4-31, N.M.S.A., 1953 Compilation. When the employing agency employs a person to hold a position which is exempt from coverage and so notifies the Personnel Department, the determination by the employing agency is to be considered as prima facie correct. Thus, the certification provision quoted above is not applicable, and the Department of Finance and Administration is to honor the voucher so long as it meets that Department's requirements. If the Personnel Department is of the opinion that the position is not exempt, a legal question involving statutory interpretation arises and the matter should be referred to the {*228} Office of the Attorney General for determination.

If the objection of the Personnel Office to the voucher goes to errors in computation or something of like nature, it is for the Department of Finance and Administration to see that such errors are corrected. See for example §§ 11-2-65, 11-2-70 and 11-2-43, N.M.S.A., 1953 Compilation (P.S.).

The only concern of the Personnel Department under Section 5-4-39, supra, is to certify whether the person shown on the payroll voucher "was employed in accordance with the Personnel Act." Involved here would be such matters as eligibility for the particular **covered** position at the particular salary shown on the payroll voucher. In situations of this kind, if the employee was not eligible, the Personnel Department could refuse to certify the payroll voucher as to that position. However, as a matter of comity, administrative practicality and expediency, it would seem that when such a question arises, immediate consultation with the employing agency and the Department of Finance and Administration would be in order, as well as consultation with this office if any legal implications are involved.

Your second question is very similar to the one just treated and reads as follows:

"To what extent does the State Personnel Office have authority to delay, or hold a payroll voucher, or return involuntarily the payroll voucher to an agency where the State Personnel Office has an objection to the voucher?"

When the payroll voucher is submitted to the Personnel Department for certification that the "person being paid was employed in accordance with the Personnel Act," such a determination, in the cases where such certification is necessary, as discussed above, should be made with all reasonable dispatch. Delay in processing such payroll vouchers can only lead to great inconvenience to the individual employee, an inconvenience which § 5-4-5, N.M.S.A., 1953 Compilation (P.S.) was designed to prevent. This Section provides that "all persons employed by and on behalf of the State of New Mexico . . . shall receive their salaries or wages for services rendered, at least semimonthly. . . ." Delay in making the determination in instances where the Personnel Department has jurisdiction to do so might well lead to a mandamus action against the Director of the Personnel Department.

You next ask whether "the State Personnel Office may withhold the certification of a payroll voucher if the rate of pay of an **unclassified** (exempt) employee has not been approved by the Department of Finance and Administration, if such authority has been delegated by the Department of Finance and Administration to the State Personnel Office?"

First it is to be noted that legislatively created agencies -- and both the Department of Finance and Administration and the Personnel Department fall into this category -- have only such powers as are expressly conferred upon them or are necessarily implied therefrom. **Maxwell Land Grant Co. v. Jones**, 28 N.M. 427, 213 Pac. 1034; **Vermejo Club v. French**, 43 N.M. 45, 85 P. 2d 90.

In order for the delegation of authority referred to in your question to be valid, the legislature must have granted to the Department of Finance and Administration the power to delegate the authority {229} mentioned, and it must also have granted the Personnel Department the authority to accept such a delegation. If statutory authorization is lacking on either end, such a delegation cannot be validly made, and in

this case the authorization is lacking on both ends. See Section 11-1-26 et seq., N.M.S.A., 1953 Compilation (P.S.) and Section 11-2-56 et seq., N.M.S.A., 1953 Compilation (P.S.); Chapter 200, Laws 1963. Thus, the answer to your third question is that the Department of Finance and Administration cannot delegate the authority in question. We would also mention at this point that the status and compensation of unclassified (exempt) employees is of no concern to the Personnel Department. Its statutory authority is limited to the "service," which, as we have previously pointed out includes only: "positions covered by the Act." Section 5-4-30, supra.

Your fourth question also concerns delegation of authority by the Department of Finance to the Personnel Department, and again the answer is that there is no statutory authorization for such delegation. This is certainly not unusual. There is little sense in the legislature creating an agency if that agency can then delegate its statutory powers to another agency without express legislative authorization.

In your fifth question you ask "where does the responsibility fall in the event of payment in error after certification by the State Personnel Office?" Since the Personnel Department is certifying only that the covered person has been employed in accordance with the Personnel Act, I assume you refer to errors made in this particular determination as distinguished from a mechanical error. Actually, as we visualize it, the only legal question that would arise in the case of such a good faith error would be whether the State can and should recover the money paid to the employee for services rendered. We prefer to withhold an overall answer to this question at this time for two reasons, namely, (a) each such case will stand on its own peculiar facts, and (b) the question of recovery of public moneys paid under mistake is now pending before our Supreme Court.

Your sixth question reads as follows:

"If an agency employs an individual without the approval of the State Personnel Office, who shall assume responsibility for his compensation, since the person must be paid for his services?"

As already discussed, the Personnel Department does not "approve" the employment of an individual. The Personnel Act was never intended to, nor does it remove all discretion from agency heads in matters of hiring eligible individuals to positions covered by the Personnel Act. As to **covered** positions, the Personnel Department simply makes a determination whether the person was employed in accordance with the Personnel Act, and, if so, the Director of the Personnel Department so certifies. As a general answer to this question, the employing agency is the one which assumes the responsibility for the employee's compensation.

By: Oliver E. Payne

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