

Opinion No. 63-113

August 29, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Mr. Alex J. Armijo State Auditor Capitol Building Santa Fe, New Mexico

QUESTION

FACTS

The names and job descriptions of thirty employees of the State Highway Department have been submitted to the Attorney General's office. The State Auditor has requested that the office of the Attorney General review the job status of these employees to determine if they were properly hired by the Highway Department. Since this request was made it has been found that three of the persons in question were residents of the state for more than one year when they were employed by the Highway Department. Of the remaining twenty-seven persons, one was employed in 1951, one in 1953, one in 1956, one in 1957, three in 1958, two in 1960, two in 1961, three in 1962, and seven in 1963 (of the seven hired in 1963, six were hired under the 1961 laws, one under the law which came into effect June 7, 1963).

QUESTIONS

1. Under the Appropriation Act in effect in 1951 through 1961 were the employees mentioned above properly hired by the highway Department?
2. Does N.M.S.A., Section 5-1-5 authorize the hiring of the one non-resident employed subsequent to the passage of Chapter 46, Laws of 1963?

CONCLUSIONS

1. Yes.
2. Yes.

OPINION

{*253} ANALYSIS

N.M.S.A., 5-1-5 (1953) prior to its amendment in 1963 provided:

"5-1-5. Public employees -- Residence requirement -- Percentage of residents on public works projects. -- Hereafter all employees of the state of New Mexico, including all political subdivisions thereof and including all of the departments, bureaus, boards,

commissions and institutions in said state, and all of its political subdivisions, shall be residents of the state of New Mexico, having resided in this state for a period of at least one (1) year prior to the commencement of their employment and it shall be the duty of every employer of labor, including the state of New Mexico and all political subdivisions thereof and including all of the departments, bureaus, boards, commissions or institutions, engaged in the construction, erection, alteration, repair or maintenance of any public work with the state of New Mexico, for at least one (1) year previous to the time of employment, to the extent of ninety (90) per centum of the total number of persons of each class of labor so employed, whenever such equally skillful resident labor is available."

{*254} In the years 1951, 1953, 1956, 1957, 1958, 1960, 1961, January through June 7, 1963 the legislature provided in the appropriation acts that the residence requirements of Section 5-1-5 should not apply to those departments which needed personnel with "professional or technical training" when there were no New Mexico residents available to fill the positions. See Laws of 1951, Chapter 227, Section 12, Laws of 1953, Chapter 156, Section 11, Laws of 1955, Chapter 287, Section 11, Laws of 1957, Chapter 235, Section 9 (C), Laws of 1959, Chapter 288, Section 20, Laws of 1961, Chapter 254, Section 20. It seems to us a fundamental proposition that in order to meet the criteria mentioned above the following requirements must be met: (1) there is no New Mexico resident available to fill the position; (2) the non-resident hired must have professional or technical training; (3) the job for which the non-resident was hired requires technical or professional training, (4) the technical or professional training which the non-resident has is that which his job requires.

We are informed by the Highway Department that the Chief Highway Engineer issued affidavits prior to the employment of the people whose jobs are here in question, swearing that there was no resident available to fill the positions. While the affidavits used do not follow the language of the statute, it is clear that the Department intended to follow the requirements of the Appropriation Act. Requirement number one has been met.

As we said in Opinion of the Attorney General No. 63-91, August 6, 1963, the term "professional person" may have many different meanings depending upon the context in which it is used. Some cases have held that a man's profession is that branch of activities wherein he expends his usual efforts to gain a livelihood, **State v. District Court of Douglas County**, 138 Miss. 103, 164 N.W. 366. Other cases say that a "profession" is an occupation which involves intellectual rather than manual skills, **State v. Cohn**, 184 La. 53, 165 So. 449 (1936), **Maryland Casualty Co. v. Crazy Water Co.**, 160 S.W.2d 102. In Opinion of the Attorney General No. 63-91, following the cases of **U.S. v. Laws**, 163 U.S. 258, **Traub v. Goodrich**, 143 N.Y. S.2d 334 (1955) **Teague v. Graves**, 38 N.E. 2d 222, the following test was proposed: Does the specialty require a knowledge of an advanced type in a given field of science or learning gained through a prolonged course of specialized instruction and study? None of the above mentioned definitions are particularly helpful in construing the law as it existed prior to the 1963 amendment. The legislature by requiring that a non-resident have professional or

technical training in order to be exempt from the residential requirement of N.M.S.A., 5-1-5 obviously intended that a person have some particular skills, and not merely that the person was one who was engaged in an intellectual rather than physical endeavor. It is also apparent that the legislature did not limit the exemption to those persons who could be classified professional people within the meaning of the test used in **Traub v. Goodrich**, supra, **Teague v. Graves**, supra, and Opinion of the Attorney General No. 63-91.

The Supreme Court of Washington in **Stoor v. City of Seattle**, 44 Wash. 2d 405, 267 P.2d 902 (1954) had occasion to define the term "professional skill" for the purpose of determining whether employees of the City of Seattle would be required to take examinations as a prerequisite to being {*255} promoted. In this particular situation the Court defined "profession" as a calling in which one professes to have acquired some special knowledge by way either of instruction, guiding or advising others or of serving them in some art -- synonymous with trained, skilled, expert. It then went on to say: "We think that in the context in which words 'professional skill' are used in the charter, clearly indicates that it (sic) refers to a position, vocation, or employment which requires education, training, experience, ability, and personality characteristics of a specialized nature not possessed by persons generally".

The reasoning of the Washington Court is equally applicable to the instant case. When the definition used in that case is applied to the twenty-six non-resident persons hired by the Highway Department prior to the passage of Chapter 46 of the Laws of 1963 it is apparent that all of these persons are persons with "professional or technical training".

The third requirement which must be met is that the job for which the non-resident was hired requires technical or professional training. We have examined the job descriptions of the persons hired and find that they are jobs which require professional or technical training. We also believe that the fourth criteria has been fulfilled. The training of the persons in question is needed for the jobs for which they were hired.

Of the twenty-seven persons whose job status is being questioned twenty-six were hired before the passage of Chapter 46, Laws of 1963 being N.M.S.A., 5-1-5. This section now provides:

"A. Hereafter all employees of the state, including all political subdivisions thereof and including of its departments, bureaus, boards, commissions and institutions, except those employees excluded in Paragraph B of this section below, shall be residents of the state, having resided in this state for a period of at least one year prior to the commencement of their employment. Every employer of labor, engaged in the construction, erection, alteration, repair or maintenance of any public work within the state shall employ persons who have resided in New Mexico, for at least one year previous to the time of employment, to the extent of ninety percent of the total number of persons of each class of labor so employed, whenever equally skillful resident labor is available.

"B. Specifically excluded from the requirement of residency are the following:

- (1) teaching and professional employees of state educational institutions;
- (2) **professional or supervisory employees of all state institutions, departments, agencies, bureaus, boards, commissions and political subdivisions;** and
- (3) certificated employees of the public schools." (emphasis supplied)

The legislature now requires different qualifications of a non-resident than it formerly did. A non-resident may no longer be exempt from the residence requirement of N.M.S.A., 5-1-5 by being a person with professional {256} or technical training. In order to come within the terms of the exemption of N.M.S.A., 5-1-5 (B) (2), one must either be a professional person or a supervisor. Under the test set forth in **U.S. v. Laws**, supra, **Traub v. Goodrich**, supra, and **Teague v. Graves**, supra, the one person which the Highway Department has hired under the new 1963 law is not a professional person. He is, however, a party chief of a survey crew. As such he acts in a supervisory capacity. See **N.Y. Life Insurance Co. v. Rhodes** 60 S.E. 828. Section 5-1-5 (B) (2) exempts him from the residency requirement.

In summary, of the thirty people whose employment status was questioned, all have been validly hired by the Highway Department. Three were residents of this state at the time they were employed. Twenty-six were hired under statutes which allowed the Highway Department to hire non-residents for posts which required professional or technical training if no residents were available. Following the reasoning of **Stoor v. City of Seattle**, supra, all twenty-six people must be classified as persons with professional or technical training. They were not illegally employed. The twenty-seventh person was hired after the effective date of Chapter 46, Laws of 1963. He may not be classified as a professional person, but he may be classified as a supervisory employee exempt from the residency requirement of Section 5-1-5.

By: Joel M. Carson

Assistant Attorney General