Opinion No. 63-27

March 29, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

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

QUESTION

QUESTIONS

1. Under the State Personnel Act as originally enacted in 1961, a number of state agencies, departments, bureaus, divisions, branches or administrative groups were exempted from coverage by reason that they could elect not to be covered, they were expressly exempted by law, or they were not specifically within the contemplated coverage of the Act. Which of these previously exempted bodies are now subject to the Personnel Act due to the recent amendments to the Personnel Act enacted by the Twenty-Sixth Legislature as SB 103?

2. Does the newly added amendment to the Personnel Act (§ 5-4-31, N.M.S.A., 1953 Compilation, Par. M.) require Personnel Board determination as to which "heads of divisions of agencies" and "other employees serving in policy making capacities" will be allowed to be exempted from the provisions of the State Personnel Act?

3. How should Paragraph I of Section 5-4-31, N.M.S.A., 1953 Compilation, be interpreted in respect to the number of assistants which are exempted from coverage under the State Personnel Act? The particular question is raised as to whether two assistants under each head of division of an agency are exempt?

4. Under Section 5-4-36, N.M.S.A., 1953 Compilation, Paragraph E, the Personnel Act was amended to require the State Personnel Board to extend the period of probation of employees from six months to one year. What affect does this amendment have upon individuals employed prior to the passage of Chapter 200, Laws of 1963, and who are still on probationary status? Also, how would such amendment affect employees who have completed six months service and who have already been awarded permanent employee status within one year prior to the passage of this amendment?

CONCLUSIONS

1. See analysis.

2. See analysis.

3. See analysis.

4. See analysis.

OPINION

*{*54}* **ANALYSIS**

In your first question posited above, inquiry is made as to which state agencies, departments, bureaus, divisions, branches or administrative groups previously exempted under the Personnel Act are now subject to coverage under the law because of the enactment of Chapter 200, Laws of 1963, amending the State Personnel Act.

Section 5-4-31, N.M.S.A., 1953 Compilation, specifies that the Personnel Act covers all State positions except those exempted under such section as set forth therein. In Attorney General's Opinion No. 61-28, dated April 7, 1961, this office designated the public positions which were exempt from the provisions of the *{*55}* 1961 State Personnel Act. Taking into consideration the recent 1963 amendments to the Personnel Act, we are of the opinion that the following departments, agencies or offices are no longer exempted from the coverage of the State Personnel Act:

Attorney General

Auditor

Corporation Commission

Department of Education

State Treasurer

State Land Office

Secretary of State

Old Lincoln County Memorial Commission

The following departments, agencies or offices remain exempt from coverage:

Adjutant General

Eastern New Mexico University

Governor's Staff

Lieut. Governor

Highlands University

Institute of Mining & Technology

Law Library

N.M. Western University

Northern New Mexico Normal

State Police

District Judges

Probation Officers

Legislature

Legislative Council

Legislative Fiscal Analyst

Interim Legislative Committees

N.M. Military Institute

N.M. School for the Deaf

N.M. State University

N.M. School for the Visually Handicapped

Supreme Court

University of New Mexico

State Bar of New Mexico

In your second question you ask whether § 5-4-31, N.M.S.A., 1953 Compilation, Paragraph M of the Personnel Act, as amended, requires Personnel Board determination as to which "heads of divisions of agencies" and "other employees serving in policy making capacities" will be allowed to be exempted from the provisions of the State Personnel Act.

Section 5-4-31, N.M.S.A., 1953 Compilation, states in applicable part:

"Coverage of Service. -- The Personnel Act and the service cover all state positions except:

* * * *

M. Heads of divisions of agencies and such other employees serving in policy making capacities as may be determined by the personnel board."

In interpreting this newly added language of the statute it is our opinion that the cogent meaning of this paragraph is that heads of divisions of state agencies are automatically exempted from application of the State Personnel Act. In addition, the Personnel Board may, upon proper determination, specify that other designated employees of a State agency are exempt from the scope and application of the Personnel Act. This reading is supported by the rule of Statutory construction that where qualifying language is employed in a statute such qualifying terms are applicable to the phrase immediately preceding and not to other provisions more remote. This rule was enunciated in **In Re Goldsworthy's Estate** (1941), 45 N.M. 406, 115 P.2d 627, wherein the Court quoted with approval Corpus Juris:

"In 59 C.J., Statutes, Sec. 583 it is said: 'By what is known as the doctrine of the **last antecedent,** relative and qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more *{*56}* remote.'"

In your third question you ask whether under § 5-4-31, N.M.S.A., 1953 Compilation, Paragraph I should be construed to mean that a head of a division and two assistants under him are not subject to coverage under the State Personnel Act.

The applicable part of § 5-4-31, N.M.S.A., 1953 Compilation, is set out as follows:

"Coverage of Service. -- The Personnel Act and the Service cover all state positions except:

* * *

I. Not more than two assistants in the office of each elective official and in the office of each head of an agency, **head of the division** and one secretary in the office of each gubernatorial appointee who serves in a full-time capacity. . . ." (Emphasis supplied)

In construing the above paragraph, it is apparent that two assistants in the office of each of the designated executive positions may be exempted from the Act. We believe that this language evidences an intent that each head of a division shall be entitled to designate two assistants not covered by the Personnel Act. It is well known that a number of divisions of State agencies are larger than individual State agencies in other branches of the executive department. Construing the amendments made to § 5-4-31, supra, it is evident that the purpose of the amendments to this section, and that the actual legislative intent in this regard was to liberalize and to take into consideration the fact that in large divisions of State agencies two exempted assistants would be authorized to be hired outside the scope of the Personnel Act.

We believe the interpretation reached above is further supported by a careful reading of Paragraphs I and M of § 5-4-31, supra, when they are read together. Paragraph M (interpreted in our answer to your second question) exempts heads of divisions of state agencies. Paragraph I of the same section authorizes two assistants under each head of a division to be exempted. If this interpretation is not reached then the two 1963 amendments to § 5-4-31, supra, would be repetitious and duplicative of each other. After carefully reading these two paragraphs together, the language we conclude is indicative of a clear intention on the part of the legislature that the heads of divisions of state agencies are automatically exempted under Paragraph M., and in addition, under the provisions of Paragraph I., not more than two assistants in the office of each head of a division of a state agency may be exempted. Also as stated in Paragraph M., upon application to the State Personnel Board, additional positions may be declared exempted within a State agency by the Board where such employees serve in policy making capacities.

In your last question you ask what effect § 5-4-36, N.M.S.A., 1953 Compilation (as recently amended by SB 103 to extend the period of probation of employees from six months to one year) would have upon individuals employed prior to the effective date of the 1963 amendment and who are still employed on a probationary status.

Section 5-4-36, N.M.S.A, 1953 Compilation reads in applicable part as follows:

"Rules -- Adoption -- Coverage. -- Rules promulgated by *{*57}* the board shall be effective when filed as required by law. The rules shall provide, among other things for:

* * *

E. a period of probation of one year during which a probationer may be discharged or demoted or returned to the eligible list without benefit of hearing."

Under the above statutory provision it is evident that the legislature clearly intended to require the personnel board to promulgate a rule requiring that employees covered under the Personnel Act and who are hired in classified positions, serve a one year probationary period prior to obtaining regular employee status. As originally enacted (Laws 1961, Chapter 240, § 9), the Personnel Act authorized the Personnel board to prescribe by rule "a period of probation **not longer than one year."** By rule the personnel board set the probationary period of State employees at six months. By the 1963 amendment of the Twenty-Sixth Legislature it is obvious that the legislative intent was to declare that a definite probationary period of one year would be applicable to all positions filled under the State Personnel Act.

Since the original language of the Act was amended to require a one year probationary period, it is our opinion that any employee who was employed in a probationary status and who has not yet completed such probationary period must serve the additional period of probation required by the legislature, prior to becoming a regular State employee. It should be noted, however, that the 1963 amendment requires the state

personnel board to adopt board rules extending such probationary period. Such extension of the probationary period does not become effective until a rule to such effect is duly adopted by the board and properly filed in accordance with law.

The additional question was asked as to whether individuals who have already completed six months probationary service and who have been awarded permanent employee status within one year prior to the passage of the amendment are required to serve the additional six months probationary period.

This question we feel must be answered in the negative. Numerous decisions of the courts adhere to the proposition that statutes are presumably intended to operate prospectively, and words should not be given a retrospective operation unless it can be clearly ascertained that such was the legislative intention. **Gallegos v. Atchison T & SF Ry. Co.** (1923) 28 N.M. 472, 214 Pac. 579 **Wilson v. New Mexico Lumber & Timber Co.** (1938) 42 N.M. 438, 81 P.2d 61; **State v. Sunset Ditch Co.** (1944) 48 N.M. 17, 145 P.2d 219; **Board of Ed. of City of Las Vegas v. Boarman** (1948), 52 N.M 382, 199 P. 2d 998; **Davis v. Meadors-Cherry Co.** (1958). In the recent case of **Bradbury & Stamm Construction Co. v. Bureau of Revenue** (1962), 70 N.M. 226, 372 P.2d 808, the New Mexico Supreme Court held:

"It has long been the rule in this jurisdiction that statutes are presumed to operate prospectively only and will not be given a retroactive effect unless such intention on the part of the legislature is clearly apparent."

Since the statute we hold is not to be interpreted retroactively, any personnel board rule promulgated pursuant to such statute would possess no retroactive effect.

By: Thomas A. Donnelly

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