

Opinion No. 63-33

April 17, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

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

QUESTION

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What criteria should be utilized to determine who are "heads of divisions of agencies" within the meaning of paragraph M, Section 4 of the Personnel Act?

CONCLUSION

See Analysis.

OPINION

{*68} **ANALYSIS**

The applicable portion of the statute to be interpreted is set out as follows:

"5-4-31. Coverage of Service. -- The Personnel Act and the service cover all state positions **except:**

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M. **heads of divisions of agencies** and such other employees serving in policy making capacities as may be determined by the personnel board." (Emphasis supplied).

This provision of the state personnel act was recently interpreted in Attorney General's Opinion No. 63-27, dated March 29, 1963, as meaning that heads of divisions of state agencies are exempted from application of the State Personnel Act. In addition, such paragraph was construed to mean that the Personnel Board may, upon proper determination, specify that other designated employees of a state agency are exempted from the scope and application of the Personnel Act where such employees serve in policy making capacities.

The Personnel Act does not specify by statutory definition the precise meaning of "heads of divisions of agencies". The term "agency" is defined in Section 3 of the Personnel Act (Section 5-4-30, N.M.S.A., 1953 Comp.) as including any "state

department, bureau, division, branch or administrative group which is under the same employer".

In the absence of a statutory definition or indication that a technical meaning is intended to be placed upon certain language by the legislature, the courts in construing such terms generally adopt the rule of statutory construction that such words should be read in their common and ordinary sense. **Albuquerque Lumber Company v. Bureau of Revenue**, 42 N.M. 58, 75 P.2d. 334; **State v. Martinez**, 48 N.M. 232, 149 P. 2d 124; **State Highway Commission v. Marquez**, 67 N.M. 353, 355 P. 2d. 287.

The generally accepted connotation of "heads of divisions of agencies" is that of subordinate posts within a specified state department or agency. The term "division" is defined in White's Political Dictionary at page 91 to mean: "a subdivision of a government department."

Examination of various texts {*69} upon state government indicates the most common meaning given to the term "division" is that of a sub-organization within a state agency. It is stated in the text "State Government", Third Edition, by Bates and Field, at page 312:

"The departmental form of administrative organization is common in state government. A department is a single-headed administrative agency, usually arranged so there are subordinate divisions, offices, or bureaus within it. Authority is granted to the head of the department and, in turn, is delegated to subordinate administrators in charge of each of the subdivisions with each accountable to a superior administrator . . . Subordinate divisions of a larger organization, often called bureaus, divisions, or offices are usually organized with respect to a single function."

In the government text "**Elements of American Government**", by Ferguson and McHenry, at page 240, it is stated in respect to state administrative organization that:

"The typical department is subdivided into bureaus, divisions, offices or agencies directed by chiefs who are responsible to the department head."

No exact or precise definition indicating the number of personnel or type of internal organization which constitutes a "division of an agency" is possible, however, from a careful reading of the statute and in accordance with the above authorities, we believe that it is clear that the phrase "heads of divisions of agencies" as utilized in the Personnel Act, Section 4, paragraph M, was intended to mean and have reference to only those major or key posts created within the internal administrative framework of an individual state agency and which posts are invested with authority over an intra-agency "division" which has been created and specifically so designated by legislative enactment or by virtue of a formal written executive order signed by the elected officer or governing body designated by the state constitution to exercise executive control over such state agency.

Although, as discussed above, a precise statutory definition for "heads of divisions of agencies" has not been enacted in the Personnel Act, nevertheless, from a reading of the act and a survey of existing divisions within state agencies, certain general legal criteria may be established for assisting in determining what actually comprises a true division of a state agency. It was obviously within the contemplation of the legislature that such term, for Personnel Act purposes, be applied only to large intra-agency divisions specifically so entitled and which bear the responsibility for administering certain prescribed major duties of the particular state agency, and in addition, such divisions should comprise a relatively large personnel force and each having at their head an administrator who is entrusted with and possesses decision making and policy formulating responsibilities.

A detailed study of the operational structure of the executive branch of the state government of New Mexico indicates that the legislature has in some instances specifically designated by statute particular divisions of state agencies and, in other instances, the individual state agencies have acted administratively without legislative action to create internal {*70} divisions or departments within the state agency to handle or process certain specified duties devolving upon the agency.

As to those divisions within state agencies which are expressly recognized as divisions of agencies by statute, we believe that such divisions were intended under Paragraph M, Section 5-4-31, supra, to have their administrative head automatically exempted from coverage under the state Personnel Act.

We next direct our consideration to the problem of whether the heads of administratively created divisions within state agencies organized by executive administrative order are permitted to be exempted from the coverage of the state Personnel Act.

Generally it is recognized that the internal administration or operation of a state agency is a matter of departmental organization, and in the absence of a controlling statute the executive officers in charge of such state agency may reorganize or create divisions within the state agency as in their discretion will best facilitate the work of the agency.

Stockton v. Department of Employment, 153 P. 2d. 741, 25 Cal. 2d. 264;
Starkweather v. Blair, 71 N.W. 2d. 869, 245 Minn. 371; **New Jersey Pharm. Association v. Furman**, 162 A. 2d. 839, 33 N. Jer. 121.

Numerous instances in the organizational pattern of New Mexico state government may be cited where state agencies, boards, commissions and departments have acted in the past to organize administratively subordinate divisions within such state body.

Examination of the various legislative general appropriation acts reveal that legislative appropriations have from time to time been made to certain administratively organized and designated divisions of state agencies. Since the details of the internal organization within a state agency are by necessity intimately connected to the operational performance and economy of the agency, it is apparent that each state agency in the absence of express legislative restriction or specification may organize and streamline itself internally so as to carry out its duties in the most productive and efficient manner.

We think it is clear that the legislature at the time of the enactment of the recent 1963 amendments to the Personnel Act took cognizance of the fact of the existence of those nonlegislatively created divisions within state agencies then actually in operation and intended that such division heads be treated the same as legislatively recognized divisions. At the same time it is clear that the legislature did not intend that the state agencies would organize into divisions to abrogate the effectiveness of the Personnel Act. The legislative declaration of purpose contained in the Personnel Act states in part:

"The purpose of the Personnel Act is to establish for New Mexico a system of personnel administration based solely on qualification and ability, which will provide greater economy and efficiency in the management of state affairs."

In our opinion, in formulating the Personnel Act, the legislature intended to permit some flexibility whereby a proper balance might be struck between the inherent power of a state agency or department to continue to act administratively to internally adjust or organize itself so as to ^{*71} more effectively and efficiently carry out its duties, and the legislature's stated objective of establishing and creating an effective system of state personnel administration.

Since historically divisions of state agencies have been created, both by means of legislative action and by executive order, it is obvious that in phrasing the language of the 1963 amendments to the Personnel Act the legislature took cognizance of such facts. However, in the case of administratively created divisions of state agencies organized after the 1963 amendment the legislature provided certain checks and standards to prevent or curtail possible abuse of administrative power.

Under paragraph M, Section 5-4-31, N.M.S.A, 1953 Compilation it is apparent that the legislature invested the authority in the state Personnel Board to review plans submitted to the Board of actual or contemplated state agency internal reorganizations which involve the creation of divisions within state agencies or the creation of subordinate administrative posts within a state agency, necessitating the exercise of policy making responsibilities, and where it is desired by such agencies to obtain exemptions for the head of such posts under the Personnel Act. Such statutory provision provides for an exemption to Personnel Act coverage for "heads of divisions of agencies and such other employees serving in policy making capacities as may be determined by the personnel board." This language, we believe, gives the Personnel Board final sanction over the issue of whether or not an administratively reorganized state agency has created internal agency divisions of a bona fide nature and policy making positions of the type entitled to be exempted and which are within the contemplation of the Personnel Act. Under such statute, if in the opinion of the State Personnel Board after its review of submitted applications from state agencies, it determines that a major division of a state agency has been organized by executive administrative order **and** that it would be in keeping with the declared purposes of the state Personnel Act that the division head be exempted from Personnel Act coverage, then the board may issue its order to such effect.

If, however, the Board does not feel after full review of the state agency's administrative plan of reorganization that such comprises a true division of a state agency within the contemplation of the State Personnel Act it may refuse to grant its approval for such exemption.

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