Opinion No. 63-163

December 4, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: John F. Otero, Director New Mexico Fair Employment Practice Commission 137 East DeVargas Santa Fe, New Mexico

QUESTION

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1. Since Commission members are appointed for a definite period, with the termination date designated, must they be reappointed by the Governor in order to continue to serve officially?

2. In a letter dated September 24, 1963, from the Mountain States Telephone and Telegraph Company, permission is asked to use security forms which among other things asks for the **race** of an individual. Would this be considered in violation of the Act?

CONCLUSION

1. No.

2. No, so long as the information is used purely for security purposes.

OPINION

*{*381}* **ANALYSIS**

For clarity in answering Question No. 1 above, we quote the following from Section 59-4-6, N.M.S.A., 1953 Compilation:

"59-4-6. State fair employment practice commission. -- (a) There is hereby created a commission to be known as New Mexico Fair Employment Practice Commission consisting of five (5) members to be known as Commissioners, one (1) of whom shall be the duly elected and qualified attorney general of the state of New Mexico and one (1) of whom shall be the duly appointed qualified and acting labor commissioner of the state of New Mexico, each of whom shall serve ex-officio, and three (3) members who shall be appointed by the governor, by and with the advice and consent of the senate. One (1) of such commissioners shall be designated as chairman by the governor. The term of office of each appointive member of the commission shall be for three (3) years. Provided, however, that of the commissioners first appointed, one (1) shall be appointed for a term of one (1) year, one (1) for a term of two (2) years, one (1) for a term of three

(3) years. Any member chosen to fill a vacancy occurring otherwise than by expiration of term shall be appointed for the unexpired term of the member whom he is to succeed. A majority of said commissioners shall constitute a quorum to transact business and for the exercise of any of the powers or authority conferred by this article . . . . A vacancy in the commission shall not impair the right of the remaining members to execute all the powers of the commission."

The answer to your Question No. 1 above is provided for in Article XX, Section 2, New Mexico Constitution, which reads as follows:

"Sec. 2 (Tenure of Office.) Every officer, unless removed, *{*382}* shall hold his office until his successor has duly qualified."

We conclude, therefore, that the Commission members are not automatically relieved of their duties upon expiration of their respective terms; rather, they continue to "hold over" and serve officially until removed or until a successor has been duly qualified by a subsequent appointment.

The pertinent portion of the New Mexico Fair Employment Practices Act with which we are concerned in regard to our consideration of the second question above is Subsection C of Section 59-4-4, N.M.S.A., 1953 Compilation which reads as follows:

"59-4-4. Unlawful employment practices -- Penalty. -- It shall be unlawful employment practice:

. . . ."

C. For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry or record in connection with employment which expresses, directly or indirectly any limitation, specification or discrimination as to **race,** color, religious creed, national origin or ancestry or any intent to make any such limitation, specification or discrimination, or to discriminate in any way on the ground of **race,** color, religious creed, national origin or ancestry, **unless based upon a bona fide** occupational qualification." (Emphasis Added)

. . ."

As may be seen from the above statute the prohibitions placed upon employers and employment agencies are quite extensive and specifically encompass inquires or reference to the "race" of an individual who is being considered for employment. Our Act varies only slightly and insignificantly from those which have been enacted in various states. It is believed that the underlying purpose of all these is basically alike, that is, to prevent and eliminate practices of discrimination in employment because of race, creed, color or national origin. And, while we must at all times be cognizant of and protect the rights of those persons covered by our Act, we must not in the application

thereof hinder the furtherance of another and equally, if not more, important endeavor -- that of maintaining national defense. Conversely, violations of our Act should not be permitted under the guise of promoting national defense. There is of course no doubt that we could not sanction the use of the word "race" in an application for employment where it could serve no purpose other than to encourage prohibited acts of discrimination.

However, we believe that the situation with which we are now concerned is not of this type. The explanations contained in the letter referred to in Question No. 2 above, serve to dispel any suspicion, if any might arise, that wrongful use would be made of information obtained from asking questions regarding the race of an individual. It is stated therein that the Department of Defense has requested that reasonable checks be made of all new employees for security purposes; that the police will be greatly hampered in running these security checks if they do not know the race of an individual; and more important, that this Personnel Security Questionnaire will not be used with applicants for employment but only with employees once they have been put on the payroll.

*{*383}* For an indication of how another state (New York) has treated this problem we quote the following excerpt from 2 CCH Lab. Law Rep. State Laws N.Y. Para. 47,507 (1963):

"Contracts Affecting the National Security. -- In connection with contracts affecting the national security, the commission has ruled that where a Federal Agency, such as the United States Army, Navy, Air Force, or Atomic Energy Commission requires an employer holding a contract with it to obtain specified information from prospective employees, such as place of birth, the required inquiries will be deemed to be based upon a bona fide occupational qualification.

In other words, if an inquiry which ordinarily would be unlawful is made pursuant to the direction of a Federal Agency whose functions involve the national security, the employer does not violate the Law Against Discrimination. In this type of case, the Commission ordinarily suggests to the employer that he apply to the Commission for a ruling that the inquiry is made pursuant to such direction, and therefore based upon a bona fide occupational qualification.

Ordinarily the Commission asks the employer to submit a statement from the contracting government agency that the particular pre-employment information is required in connection with the performance of work on specified government contracts. The Commission has been informed by various Federal agencies that the required information is ordinarily to be obtained by the employer through the use of the official Personnel Security Questionnaire form and not by the insertion of such questions on the employer's own application form."

It is to be noted that our Section 59-4-4 supra, contains an exception to its sanctions where the action of the employer or employment agency is based upon a bona fide

occupational qualification. Certainly, such a qualification can be said to exist where security checks are required.

We are of the opinion, based upon the foregoing, that The Mountain States Telephone and Telegraph Company may, without committing a violation of the New Mexico Fair Employment Practice Act, ask for the "race" of an **employee** in their proposed Personnel Security Questionnaire. We reiterate, however, that use of the information acquired must be restricted to security investigations.

By: Frank Bachicha, Jr.

Assistant Attorney General