

Opinion No. 63-50

May 7, 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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Are the following, in accordance with the provisions of the Personnel Act, as amended, compelled to exempt two assistants:

- (1) The head of an agency?
- (2) The head of a division?

CONCLUSION

- (1) No.
- (2) No.

OPINION

{*104} **ANALYSIS**

The statutory provision governing the questions above presented provides in applicable part as follows:

"5-4-31. 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 division, and one secretary in the office of each gubernatorial appointee who serves in a fulltime capacity;

* * *

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

The provisions of Section 5-4-11, N.M.S.A., 1953 Compilation quoted above were construed in our prior Attorney General's Opinion No. 63-27, dated March 29, 1963, and wherein we held that heads of an agency and heads of divisions of state agencies were exempted from coverage under the State Personnel Act and that such heads of an agency or heads of a division of a state agency could each exempt from the coverage of the act two assistants. In Attorney General's Opinion No. 63-33, April 17, 1963, it was recognized that divisions of state agencies could be created by either legislative enactment or by executive order, but that when created by the latter method, after the effective date of the 1963 amendment to the Personnel Act, the State Personnel Board possesses the authority to determine whether the administratively organized division of the state agency should have such division head approved for exemption from the application of the State Personnel Act.

Considering the two questions presented, together, we do not believe that the intent of the Personnel Act was to compel heads of state agencies or heads of divisions of state agencies to exempt two assistants each. Our reading of the above statutory provisions, together with the statement of purpose of the Personnel Act indicates ^{*105} that the language of the act is permissive in nature in this respect, rather than mandatory. The purpose of the Personnel Act as stated in Section 5-4-29, N.M.S.A., 1953 Compilation, recites that the act is intended 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." Our Opinion No. 62-79, June 27, 1962, recognized the right of a state agency to come under the Personnel Act even if not expressly subject to the law. Similarly, an election may be made to have assistants subject to the act rather than have such personnel exempted.

As stated in **Ross v. State Racing Commission** (1958), 64 N.M. 478, 330 P.2d 701, "Whether the words of a statute are mandatory or discretionary is a matter of legislative intention to be determined by a consideration of the purpose sought to be accomplished." Viewing the language of Section 5-4-31, supra, in light of the statement of purpose of the act, we believe it is clearly indicative that such portions of the act are not mandatory.

By: Thomas A. Donnelly

Assistant Attorney General