

Opinion No. 63-99

August 13, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Mr. Manuel Armijo Chairman Girls' Welfare Board P. O. Box 6038, Station B
Albuquerque, New Mexico

QUESTION

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May the positions of superintendent and assistant superintendent of the Girls' Welfare Home be included under Personnel Act coverage by Board action?

CONCLUSION

The position of assistant superintendent, yes; the position of superintendent, no.

OPINION

{*215} ANALYSIS

As amended in 1963, the State Personnel Act provides in pertinent part as follows (Laws 1963, Chapter 200, Section 2):

"The Personnel Act and the service cover all state positions except: . . . heads of agencies appointed by boards or commissions. . . ."

The superintendent appointed by the Girls' Welfare Board falls in this exempt category.

When the provisions in the Personnel Act relative to coverage and exceptions to coverage are considered, the legislative intention becomes quite clear. The purpose was to establish a system of personnel administration based on qualification and ability which in turn is designed to provide greater economy and efficiency in the management of state affairs. Going hand-in-hand with this admirable purpose was the recognition that by the very nature of our governmental system there had to be, of necessity, certain positions which would not be covered. For example, the first exception in the Act is for elective positions. Since the terms of office for such positions are fixed by the constitution, the reason for this exception is obvious.

The next exception listed in the Act is for members of boards and commissions and heads of agencies appointed by the governor. Each governor naturally has various plans, programs and policies which he desires to see carried out. In large measure the actual implementing of such policies is accomplished by the appointed boards and

commissions. This exception then is simply a legislation realization that each successive governor will have particular people in mind whom he feels can and will carry out his programs and policies. Were there not such an exception, a governor would be limited in his use of the very necessary and legitimate power of naming his key policy-making and policy-implementing personnel. This residual power must rest with the chief executive.

The next exception listed in the Act is the one with which we are here dealing, namely, heads of agencies appointed by boards or commissions. Everything said above is equally applicable, perhaps even more so, to these particular positions. The governor and his boards and commissions do establish {²¹⁶} general policies, programs, and guidelines. But most boards and commissions are able to meet relatively infrequently, usually once a month. It is the agency head who is responsible for the day-to-day operations. In the final analysis it is to him that the governor and the board look for the carrying out of their policies. If a particular board were able to place the head of the agency under Personnel Act coverage, then that board, and particularly subsequent boards, would be limited in their supervisory control over the agency, and their power to see that the board's policies were being carried out would be severely curtailed. Our conclusion then is that the head of the agency, the superintendent, cannot be placed under Personnel act coverage, since the logical legislative mandate is otherwise.

However, it seems to us that you can achieve what you hope to accomplish in any event. While the superintendent is not under Personnel Act coverage, you can use the various rules and regulations of the Personnel Board in regard to this position. If you wish, you can also use the Personnel Board's salary schedules and qualification provisions. A number of state agencies use the rules and regulations of the Personnel Board on such matters as vacation time, leave of absence, sick leave, salaries, etc., as to their exempt employees.

What we have said in regard to the position of superintendent is not applicable to the assistant superintendent. As to assistants to agency heads, the legislature left the discretion in the board and agency head. Paragraph I of the Personnel Act exempts from coverage "**not more** than two assistants in the office of each head of an agency." (Emphasis added). As we stated in Opinion No. 63-50, dated May 7, 1963, this particular paragraph is permissive rather than mandatory. Thus if the Board wishes to place the position of assistant superintendent under Personnel Act coverage, it may do so.

By: Oliver E. Payne

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