

Opinion No. 64-07

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BY: OPINION OF EARL E. HARTLEY, Attorney General James E. Snead, Assistant Attorney General

TO: Mr. Ruben Miera, Director, Department of Courtesy and Information, Santa Fe, New Mexico

QUESTION

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Since the Personnel Act exempts from its coverage those state positions of an emergency nature, who has the responsibility for determining when a position is of an emergency nature?

CONCLUSION

The determination of the nature of a position within an agency is the responsibility of the head of the particular agency in which the job arises.

OPINION

ANALYSIS

The purpose of the Personnel Act, being Sections 5-4-28 through 5-4-46 N.M.S.A., 1953 Compilation (P.S.), is stated in § 5-4-29, supra, to be "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."

It has been said that it was the desire of the Legislature to insulate in some manner the paid state employee from the whims and caprice of the political election so as to provide continuity of government in a changing environment. At the same time the aim of the Legislature was to enhance the ability of government by insuring that the "sifting system" of the public election be replaced by objective examinations to assure that competent citizens are initially selected for the "insulated" positions.

There can be no doubt that it is impossible to maintain continuity of government in an executive branch which changes personnel every time its leader is changed. At the same time, it would not do credit to a progressive Legislature to attribute to it a system making impossible the operation of particular agencies within the government because the machinery set up to insulate personnel was not capable of adapting to rapidly changing conditions or emergency situation. Such situations arise within the organs of the executive branch of government. Therefore, in setting into effect our Personnel Act

the Legislature saw fit to provide certain exemptions from the Act to enable the executive, who is ultimately responsible to the electorate, to adjust to changing conditions or emergency situations.

Section 5-4-31, supra, exempts from coverage of the Personnel Act to certain positions, such as:

". . . K. Those of an emergency nature, where the term of employment does not exceed ninety (90) days; . . ."

Thus it can be seen that at least one escape mechanism from the strict control over state personnel operates when an emergency arises creating a need for temporary employment of personnel within an administrative agency. The Legislature, however, did not open the gates to unlimited employment under the guise of the emergency position, but did strictly limit the term of employment in such position to ninety days. Such a position is to be entirely exempt from the Personnel Act.

Thus the question is posed: Who is responsible for the determination that an emergency has arisen within a particular agency necessitating the creation of an emergency position? The answer is, and must be, the one responsible for administering such agency. He is the only one capable of making such a determination. It is the agency head, departmental head or other official in charge of the particular administrative office who has the day by day responsibility for providing the public with the service expected of his agency. He is the one who must have room to adapt to emergency situations, and no single rule, no matter how broad, can possibly dispose of the myriad different emergency situations which daily arise in government. It logically follows that the one responsible for the job is the one to determine when an emergency exists.

If the Legislature did not intend for the emergency position to be completely without the operation of the Personnel Act, including the determination of such emergency it would have said so by leaving the exemption out and providing for the Personnel Board to relieve the situation by regulation.

It cannot be assumed that one vested with the responsibility of administering a particular office within the executive branch of government will act irresponsibly and deliberately evade the thrust of the Act through misuse of a particular exemption. The opposite must be assumed. If such is demonstrated not to be the case, then it devolves upon the Legislature to take action to remedy the situation.