

Opinion No. 64-22

March 5, 1964

BY: OPINION OF EARL E. HARTLEY, Attorney General Frank Bachicha, Jr., Assistant Attorney General

TO: Mr. Harold S. Bibo, State Personnel Director, State Personnel Office, Santa Fe, New Mexico

QUESTION

QUESTION

Does the State Personnel Board possess the authority to require a physical examination of new employees (applicants for employment) under Paragraph 1 of Section 5-4-36, N.M.S.A., 1953 Compilation (P.S.)?

CONCLUSION

Yes.

OPINION

ANALYSIS

The part of Section 5-4-36, supra, to which you refer, reads as follows:

"5-4-36. Rules -- Adoption -- Coverage. -- Rules promulgated by the board shall be effective when filed as required by law. The rules **shall** provide, among other things, for:

...

I. The rejection of applicants who fail to meet reasonable requirements as to age, **physical condition**, training, experience or moral conduct." (Emphasis added).

The authority for the promulgation of rules and regulations is granted to the Personnel Board by Section 5-4-34, N.M.S.A., 1953 Compilation (P.S.) as follows:

"5-4-34. Board duties. -- The board **shall**: A. Promulgate regulations to effectuate the Personnel Act (5-4-28 to 5-4-46), . . ." (Emphasis added).

The word "shall", which we have underlined in the above statute, appears to place a mandatory duty upon the Board to promulgate rules and regulations to effectuate the Act, and in particular (for our purposes) one which would provide for the rejection of applicants who fail to meet the requirements established by the Board so long as these

requirements are reasonable. It has been said that: "Whether words of a statute are mandatory or discretionary is a matter of legislative intent to be determined by consideration of the purpose sought to be accomplished." **Ross v. State Racing Commission**, 64 N.M. 478, 330 P. 2d. 701. The purpose of the Personnel Act is set forth in Section 5-4-29, N.M.S.A., 1953 Compilation as follows:

"5-4-29. Purpose of act -- Enactment under constitution. -- The purpose of the Personnel Act (5-4-28 to 5-4-46) 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**. The Personnel Act is enacted under and pursuant to the provisions of article 7, section 2 of the Constitution of New Mexico, as amended." (Emphasis added).

Our determination that the word "shall" used in the Act appears to be mandatory, seems consistent with the purpose stated in Section 5-4-29, supra, "to provide greater economy and efficiency in the management of state affairs", especially in view of the language contained in Article 7, Section 2 of the New Mexico Constitution, to the effect that: "B. The legislature may provide by law for such qualifications and standards as may be necessary for holding an appointive position by any public officer or employee."

The requirement then to adopt a rule for the rejection of applicants who fail to meet reasonable requirements as to physical condition, would appear to necessitate a physical examination or test to determine which of the applicants met these "reasonable requirements." Probably with this in mind the legislature has provided a definition of a "test" in Section 5-4-30, N.M.S.A., 1953 Compilation (P.S.) as follows:

"5-4-30. Definitions. -- As used in the Personnel Act (5-4-28 to 5-4-47):

...

H. 'Test' means a test of the qualifications, fitness and ability, and includes tests that are written, oral, **physical** or in the form of a demonstration of skill or any combination thereof;

... ." (Emphasis added).

Further, in Section 5-4-35, N.M.S.A., 1953 Compilation the duty is placed upon the Personnel Director to "Supervise all tests and prepare lists of persons passing them to submit to prospective employers."

Based upon the foregoing analysis we are of the opinion that the State Personnel Board does have the authority to require a physical examination of all applicants for employment in order to comply with the mandate of the legislature and effectuate the Personnel Act (5-4-28 to 5-4-46). New employees, if still classified as Probationers, **may** we believe be treated as applicants for employment at least for purposes of the physical examination.

Please note the phrase "when filed as required by law" in the first paragraph of Section 5-4-36, supra. In this connection, we refer you to Section 4-10-13 and 4-10-14, N.M.S.A., 1953 Compilation (P.S.), regarding the duty to file publications, rules and regulations with the librarian of the Supreme Court Law Library.