

Opinion No. 68-109

October 29, 1968

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Mr. R. F. Apodaca Superintendent of Insurance Department of Insurance P.E.R.A.
Building Santa Fe, N. M. 87501

QUESTION

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Are appointed members of New Mexico State Boards and Commissions classified as "employees" for the purpose of the New Mexico Workmen's Compensation Act?

CONCLUSION

No.

OPINION

{*176} ANALYSIS

The New Mexico Workmen's Compensation Act is compiled as Sections 59-10-1 through 59-10-37, N.M.S.A., 1953 Comp., as amended. This act applies to certain employers including the State and its political subdivisions which employ "workmen" in certain extra hazardous occupations or pursuits, Section 59-10-2, supra.

The term "workman" is defined in Section 59-10-12.9, supra, as:

". . . any person who has entered into the employment of or works under contract of service or apprenticeship, with an employer, except a person whose employment is purely casual and not for the purpose of the employer's trade or business. The term 'workman' shall include 'employee' and shall include the singular and plural of both sex."

The question is whether appointed members of the various New Mexico State Boards and Commissions are "employees" within the definition of workmen and thus within the purview of the Workmen's Compensation Act. Those persons performing duties for the state are classified, in the main, as either public employees or public officers. Our Supreme Court has had occasion to differentiate between the two titles.

In **Candelaria v. Board of County Commissioners**, 77 N.M. 458, 423 P.2d 982 (1967) one of the plaintiffs was an election judge who was injured in an automobile while assisting in delivering ballot boxes to the county clerk. Her contention was that she was a workman within the provisions of the Workmen's Compensation Act and therefore

entitled to compensation. The court held that the election judge was a public officer and set out the requirements necessary for making such a determination. They are:

1. The specific position must be created by law.
2. There must be certain definite duties imposed by law on the incumbent.
3. The duties must involve the exercise of some portion of government power.

Citing from **Pollack v. Montoya**, 55 N.M. 390, 234 P.2d 336 (1951), it was further stated:

". . . A position which has these three elements is presumably an 'office' while one which lacks any of them is a mere 'employment' . . ."

The court further held that the statutory definition of workman does not include a public officer or official. Therefore in the situation which you have posed if the appointed members of our state boards and commissions are public officers they would not be eligible for compensation under the Workmen's Compensation Act.

Since your question does not specify any particular board or commission we will refer to a few typical boards and commissions to determine whether the members thereof are public officers or employees. If these appointees meet the three requirements as stated in **Candelaria**, supra, then they are public officers.

1. Is the specific position held created by law? The New Mexico State Labor and Industrial Commission, the New Mexico State Fair Commission, the New Mexico Racing Commission and the New Mexico Livestock Board are all agencies created pursuant to statutory authority. See Sections 59-1-1; 45-20-1; 60-6-2; 47-23-2, 47-23-3 (P.S.) N.M.S.A., 1953 Compilation.
2. Are there certain definite duties imposed by law on the incumbent? As to each of the above cited commissions and boards the statutes define and outline the duties to be performed by each. See **inter alia** Sections 59-1-6, 6-6-8.1; 45-20-4; 60-6-2; 47-23-5 and 47-23-6 (P.S.), supra.
3. Do these duties involve the exercise of some portion of government power? Each of the above named commissions and boards were created for the purpose of administering and/or enforcing certain legislative enactments. Each is within the executive branch of our government and assist the executive in administering the laws. See **inter alia** Sections 59-1-6, 6-6-8.1; 45-20-13, 45-20-14; 60-6-2, 60-6-5; 47-20-6 (P.S.), supra.

Since all three requirements of being classified as a public officer as enunciated by **Candelaria**, supra, are met by the above selected commissions and boards we must therefore conclude that the appointed members thereof are not entitled to compensation

under the Workmen's Compensation Act. Likewise the appointed members of the several other state boards and commissions not mentioned in this opinion which also meet with the above requirements would also be public officers and therefore not employees within the purview of the Workmen's Compensation Act.

We conclude therefore that an appointed member of a state board or commission whose position is created by law, whose duties are defined and imposed by law and whose duties involve the exercise of some portion of governmental power is not entitled to compensation as a "workman" pursuant to the Workmen's Compensation Act.

By: David R. Sierra

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