Opinion No. 68-96

September 19, 1968

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Mr. Ricardo M. Montoya State Labor Commissioner State Labor & Industrial Commission 137 East DeVargas Street Santa Fe, N. M. 87501

QUESTION

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Does the State Labor Commissioner acting pursuant to Section 59-3-24.1 have the authority to promulgate rules and regulations pertaining to the prosecution of claims arising between those seeking employment and employment agencies as contained in Section 59-1-9.

CONCLUSION

See analysis.

OPINION

*{*150}* **ANALYSIS.**

Section 59-3-24.1, N.M.S.A., 1953 Comp. (P.S.) authorizes the State Labor Commissioner to promulgate and issue rules and regulations necessary to administer the Minimum Wage Act (§§ 59-3-20 through 59-3-26.1, N.M.S.A., 1953 Comp., as amended). Your question, however, pertains to the promulgation of rules and regulations relating to your authority to prosecute claims arising between employment agencies and prospective employees as contained in Section 59-1-9. N.M.S.A., 1953 Compilation. This latter provision outlines the powers and duties of the labor commissioner and the last sentence thereof provides:

". . . Said labor commissioner shall also prosecute claims arising as between employment agencies and those seeking employment when in his judgment they are valid and enforceable in the courts."

This provision is not a part of the Minimum Wage Act. Therefore, as you recognized in your letter, the specific authority to issue rules and regulations pursuant to Section 59-3-24.1, supra, is not applicable to Section 59-1-9, supra. We do not stop with this conclusion, however.

The tenor of your letter indicates a concern over the fact that New Mexico has no act or statutory provision regulating employment agency services. The question actually is

whether the labor commission may issue rules and regulations pursuant to the power contained in the above cited provision of Section 59-1-9, supra. We are of the opinion that the labor commissioner may promulgate such rules and regulations even though no specific rule-making provision is contained in the statutes pertaining to Section 59-1-9, supra.

Our conclusion is not without authority. Fundamentally, the office of labor commissioner is an administrative one being charged, **inter alia,** with the duty to enforce all labor laws of the state and to pursue and investigate the just claims of employees, Section 59-1-9, supra.

Administrative officers have no common law powers. An administrative body has such authority and only such authority as it is given by law. **Vermejo Club v. French,** 43 N.M. 45, 85 P.2d 90 (1938). The powers they do possess are limited by the statutes creating them whether conferred expressly or by necessary or fair implication. **Coffman v. State Board of Examiners in Optometry,** 331 Mich. 582, 50 N.W. 2d 322 (1951). Further explanation of this principle is found in **California Drive-In Restaurant Association v. Clark,** 22 Cal. 2d 287, 302, 140 P.2d 657, 665 (1943) wherein it is stated:

"It is true that an administrative agency may not, under the guise of its rule making power, abridge or enlarge its authority or exceed the powers given to it by the statute, the source of its power. * * * However, **'the authority of an administrative board or officer,** * * * **to adopt reasonable rules and regulations, which are deemed necessary to the due and efficient exercise of the powers expressly granted, cannot be questioned. This authority is implied from the power granted.'"** (Emphasis added.)

The import of these principles, as they apply to your question, is that the legislature need not specifically empower the administrative agency to make rules and regulations, but this power arises from the very fact of delegating some duty or general power to the agency. Therefore, the mere fact that the legislature has empowered the labor commissioner to prosecute claims between employment agencies and prospective employees creates the implied authority to *{*151}* promulgate rules and regulations for the orderly and efficient pursuance of this duty.

What is the extent of the power allowed to be invoked through rules and regulations pursuant to this implied authority? The character of a rule or regulation may be one of two types -- **legislative** or **interpretive.** A legislative regulation actually makes law or prescribes what the law will be within the context of the legislative enactment. An interpretive regulation, on the other hand, attempts to interpret what the legislature meant by its statutory language, it is merely an administrative opinion as to what the statute means or "an administrative guess at a judicial question." **Utah Hotel Co. v. Industrial Commission,** 107 Utah 24, 151 P.2d 467 (1944).

A legislative regulation purports to prescribe for the future a rule of general application and once adopted has the force and effect of law. Alvord, "Treasury Regulations and the Wilshire Oil Case" 1940. 40 Cal. L. Rev. 252. A familiar example of this would be your regulations adopted pursuant to the Public Works Minimum Wage Act (§§ 6-6-6 to 6-6-10, N.M.S.A. 1953 Comp.). Section 6-6-6, supra, directs the labor commissioner to conduct a continuing program for the compilation of data on wage rates throughout the state. This data is then to be used by the commissioner for determining what the prevailing public works minimum wages are within the state and issue such a determination. By complying with this directive from the legislature, the labor commissioner is in effect doing that which the legislature could have done itself. The wages, once determined, have the force and effect of law and must be complied with.

An interpretive regulation merely expresses the views of the administrative officer or agency as to the meaning and application of general requirements of a regulatory act, the construction that will be followed in administering the act. Lee, "Legislative and Interpretive Regulation" 1940, 29 Ga. L. Journal 1. If the regulations or actions of an official or board authorized by statute do not in effect determine what the law shall be, or do not involve the exercise of primary and independent discretion, but only determine within defined limits and subject to review, some fact upon which the law by its own term operates, such regulation or action is **administrative** and not legislative, in its nature and effect. **State v. Spears,** 57 N.M. 400, 259 P.2d 356 (1953). Interpretive regulations will be given legal effect only to the extent that they correctly construe the statute.

The question now arises as to what extent power may be invoked through rules and regulations promulgated pursuant to Section 5-1-9, supra. The only reference to employment agencies in this section is as cited, supra, to wit: prosecute claims arising between employment agencies and prospective employees when such claims are valid and enforceable in court. The legislature gives no indication of what procedures are to be followed nor establishes any standards for guidance other than the claims must be enforceable in court. Furthermore it is not clear as to the kinds or types of claims which can be prosecuted under this section. Therefore, it is quite apparent that interpretive rules or regulations are in order to help clarify the terms "claims", "employment agencies" and "those seeking employment." Rules may be adopted to attempt to delineate those claims which are "valid and enforceable in the courts."

We suggest that the rules stay within this prescribed area. Legislative rules would be most hazardous under this situation since no standards are established in the enactment and regulation of employment agency activity is obviously not contemplated by the legislature. One further note, any rules which are promulgated must be tested in light of what is contained within all of Section 5-1-9, supra.

By: David R. Sierra

Assistant Attorney General