

## Opinion No. 70-11

January 30, 1970

**BY:** OPINION OF JAMES A. MALONEY, Attorney General

**TO:** Mr. Dave Sperry Deputy Director State Personnel Office 130 S. Capitol Place  
Santa Fe, N.M. 87501

### QUESTIONS

#### QUESTIONS

Is it lawful for an agency of the state government to employ a non-U.S. citizen, i.e., an alien, in a position covered by the State Personnel Act?

#### CONCLUSION

Yes.

### OPINION

#### {\*17} ANALYSIS

Article II, Section 4 of the New Mexico Constitution provides:

"All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness."

The word "person" includes citizens and non-citizens of the United States. **Yick Wo v. Hopkins**, 118 U.S. 356 (1886).

No provision of the Constitution requires that those employed in state government must be citizens of the United States. Cf. Article VII, Section 2, subsection A requiring **elected** officers to be U.S. citizens, and Article V, Section 13 concerning residence of public officials. We note particularly that subsection B of Section 2, Article VII, as amended, makes no requirement that **appointed** officers be U.S. citizens.

No provision of the State Personnel Act ( § 5-1-1 et seq., N.M.S.A., 1953 Comp.) requires that public employees be citizens of the United States. The only related requirement is that employees, with certain exceptions, be residents ( § 5-1-5, supra).

Did the Legislature intend that residence for purposes of public employment mean U.S. citizenship?

This question was discussed in a former opinion of this office (Opinion of the Attorney General, No. 6161, dated May 12, 1955). The opinion concluded that Section 5-1-5 prohibits the employment of aliens. We now believe that both the reasoning and conclusion of that opinion were erroneous.

It is true that in some cases the words "resident" and "citizen" have been held for some purposes to have substantially the same meaning. 37 Words and Phrases, **Residence**, p. 335. By far the majority of cases, however, hold the contrary, that citizenship implies more than residence. **Secretary of State v. McGucken**, 244 Md. 70, 222 A.2d 693 (1966); **State ex rel. Duckworth v. District Court**, 107 Mont. 367, 80 P.2d 367 (1938). And, as our Supreme Court has pointed out, such words "have no fixed meaning applicable to all cases, but are used in different and various senses, depending upon the subject matter." **Gallup Amer. Coal Co. v. Lira**, 39 N.M. 496, 50 P.2d 430 (1935).

We find no case authority in this or any other jurisdiction holding that a simple residence requirement for public employment includes that of citizenship. If the Legislature had intended such a requirement, it would have been quite easy for it to so state. Cf. Section 53-3-1.3, *supra*, defining "resident" for purposes of hunting and fishing; **State Public Utility Comm'n v. Early**, 285 Ill. 469, 121 N.E. 63 (1918).

Such an intention on the part of the Legislature to legislate concerning rights recognized by Article II, Sec. 4 of our Constitution is not to be supplied by implication. **McMillan v. Spider Lake Saw Mill & Lumber Co.**, 115 Wis. 332, 91 N.W. 979 (1902); **Laconte v. City of Kenosha**, 135 N.W. 843 (Wis. 1912). We do not mean by this to express an {\*18} opinion on whether the Legislature has the power to do so. See **Hein v. McCall**, 239 U.S. 175 (1915); **State Public Utility Comm'n v. Early**, *supra*.

For the reasons stated, it is our opinion, and we so advise, that it is lawful for an agency of the state government to employ a non-U.S. citizen, i.e., an alien, in a position covered by the State Personnel Act, so long as other requirements of the law are met.

Opinion No. 6161, 1955, and that part of Opinion No. 6189, 1955, relating to public school teacher employment, are overruled.

By: Justin Reid

Assistant Attorney General