

## Opinion No. 73-02

January 10, 1973

**BY:** OPINION OF DAVID L. NORVELL, Attorney General

**TO:** Mr. Charles E. Spath State Personnel Director 130 South Capitol Place Santa Fe, New Mexico 87501

### QUESTIONS

#### FACTS

Due to the rising number of employees who are appealing their demotion, dismissal or suspension from state service pursuant to Section 5-4-40, NMSA, 1953 Comp., the State Personnel Board has proposed, by regulation, that a hearing officer be appointed. His duties would include the hearing of evidence, rulings on the admissibility thereof, and the making of recommendations to the Board, which would retain full responsibility for making decisions after reviewing the evidence contained in written transcripts.

#### QUESTIONS

- 1) May the Personnel Board delegate the responsibility of hearing evidence in employee appeals to such a hearing officer?
- 2) May the Personnel Board issue a valid ruling on an appeal by an employee, when it relies only on a transcript of testimony and does not actually observe the testimony and the demeanor of witnesses?

#### CONCLUSIONS

See analysis.

### OPINION

#### {\*3} ANALYSIS

Section 5-4-40, **supra**, provides the right for appeals by employees. This section reads:

"Appeals by employees to the board. -- Any employee who is dismissed or demoted, or who is suspended, may, within thirty [30] days after such dismissal, demotion or suspension, appeal to the board. The appealing employee and the appointing authority whose action is reviewed have the right to be heard publicly and to present facts pertinent to the appeal. Any applicant denied permission to take an examination, or who is disqualified, may appeal to the board. Technical rules of evidence shall not apply. If the board finds the ground for the action is not substantiated, then it shall make written

findings and recommendations to the employer, who may, but is not required to, reinstate the employee, with pay, for the period of suspension, demotion or discharge, within thirty [30] days after notice. When an employee is not reinstated, his name shall be placed within the first five [5] positions on an appropriate employment list covering one or more positions of the same class as the position from which he was dismissed, demoted or suspended. Any decision made by the board is final."

This section, therefore, does not prohibit the use by the Board of a hearing {*\*4*} officer to take evidence. In addition, Section 5-4-36, NMSA, (1953 Comp.), provides:

"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:  
...

H. Dismissal or demotion procedure for employees in the service, including presentation of written notice stating specific reasons and time for the employee to reply thereto, in writing, and appeals to the board; . . ."

Without a prohibition in the act creating the Personnel Board, the applicable judicial decisions must be investigated to determine whether the duty to hear evidence may be delegated by the Board to a non-member, and whether the Board, without observing the testimony of witnesses may render a valid decision.

Generally speaking, a board may appoint a hearing officer, with limited powers of hearing and reporting testimony, as long as that officer acts in strict subordination to the board and is its alter ego only in a very limited sense. **State ex rel Rockwell v. State Board of Education**, 213 Minn. 184, 6 N.W.2d 251 (1942); **Western Airlines, Inc. v. Civil Aeronautics Board**, 194 F.2d 211 (9th Cir. 1952); **School District No. 3 of the Town of Adams v. Callahan**, 237 Wis. 560, 297 N.W. 407 (1941); **National Labor Relations Board v. Cherry Cotton Mills**, 98 F.2d 444 (CCA 5th 1938); **California Shipbuilding Corp. v. Industrial Accident Commission**, 64 Cal. App. 2d 622, 149 P.2d 432 (1944); **Knapp v. State Industrial Commission**, 195 Okla. 56, 154 P.2d 964 (1944).

Before considering fully the scope of this power to delegate, however, it is necessary to answer your second question, namely whether the Board may enter a valid decision after reviewing a transcript of testimony together with exhibits, if any. Once again, generally speaking, the courts have held that the Board may enter a valid order if it has merely reviewed the evidence. The first important decision, however, seemed to say something quite different. The Supreme Court of the United States in **Morgan v. United States**, 298 U.S. 468, 80 L. Ed. 1288, 56 S. Ct. 906 (1936) coined the phrase "he who decides must hear." However, a complete reading of that decision indicates that the true rule was that he who decides must have a knowledge of the facts gleaned from a public hearing whether he observed the hearing or reviewed the evidence from a transcript. See **National Labor Relations Board v. Botany Worsted Mills**, 106 F.2d 263 (3rd Cir. 1939); **Fifth Street Pier Corporation v. City of Hoboken**, 22 N.J. 326, 126 A.2d 6

(1956); **Knapp v. State Industrial Commission, supra**; **National Labor Relations v. Stocker, Manufacturing Co.**, 185 F.2d 451 (3rd Cir. 1950); **Varian's Estate v. Commissioner**, 396 F.2d 753 (9th Cir. 1968).

Nevertheless, these general statements of law should not yet be taken as entirely affirmative answers to both of your questions. The remainder of this opinion is designed to define the boundaries of these court decisions in reference to the questions you have submitted.

The first problem is that the courts in the earlier cases were somewhat hesitant to say that a hearing officer could make recommendations to the delegating authority. See for example, **State ex rel Rockwell v. State Board of Education, supra**. The later decisions have removed this impediment, as long as the Board retains full authority to make the decision and remains fully independent of the hearing officer. **National Labor Relations Board v. Jasper Chair Co.**, 138 F.2d 756 (7th Cir. 1943); **School District No. 3 of Town of Adams v. Callahan, supra**.

The possibility that a hearing officer might make recommendations to the Board brings up another problem. It has generally been held that the Board may **not** rule exclusively on the findings of fact and recommendations of the hearing officer. **Morgan v. United States, supra**.

It should additionally be made clear that the parties should have an opportunity to respond orally or in writing to the Board concerning any recommendations made by the hearing officer. **National Labor Relations Board v. Cherry Cotton Mills, supra**. A corollary is that the parties are entitled to be present at every consultation between a hearing officer and a member of the {5} Board, or have copies of any correspondence concerning the case between them. **Mazza v. v. Cavicchia**, 15 N.J. 498, 105 A.2d 545 (1954).

Within the limitations outlined in this Opinion, the State Personnel Board may, in the opinion of this office, appoint a hearing officer and resolve the appeals by reviewing the evidence, including testimony and the recommendations of the hearing officer.

By: Prentis Reid Griffith, Jr.

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