December 15, 2006 Attorney General Madrid Issues Advisory Letter on Governor's Hiring Practices

Senator Kent Cravens
10717 Richfield Avenue NE
Albuquerque, NM 87122

Dear Senator Cravens:

You have requested, on behalf of yourself and other State Senators and State Representatives, that the Attorney General launch an investigation into Governor Richardson's allegedly unauthorized staff hirings. For the following reasons, we do not believe that such an investigation, based on the allegations asserted, is warranted.

First, the request does not allege or present any evidence that any public servant is being paid for services not rendered. Cf. NMSA 1978, § 30-23-2 (1963) (prohibiting payment of public funds for services not rendered). Second, it is not alleged and no evidence is presented that payments exceed legislative appropriations. Third, it is not alleged that the Governor or the executive department generally lacks the requisite statutory authority to make "exempt" appointments; indeed, to the contrary, sufficient authority seems to be provided. Fourth, undertaking a general inquiry into the hiring authority of the Governor and the manner in which the Governor has exercised the state's supreme executive power in that respect is not consistent with applicable law that protects the executive branch from unwarranted intrusion with respect to the exercise of its executive managerial functions. Fifth, constitutionally and statutorily, "checks and balances" exist that enable the Legislature to control the expenditure of public funds associated with the executive branch's hiring of personnel.

The executive branch makes the personnel decisions associated with selecting individuals to assist and to enable the executive branch to discharge its duties. Hiring employees is a necessary ancillary power to the discharge of duties by the executive branch. The Legislature, through its laws, recognizes and permits the hiring by the executive branch of "exempt" employees. The hiring of "exempt employees," sometimes termed "political appointees,"1 is recognized at NMSA 1978, § 10-9-4 (1961, as amended through 1990) (excluding from Personnel Act coverage several categories of state positions; excluding, for example, positions that are policy-making or of a professional or scientific nature) and NMSA 1978, § 10-9-5 (1978, as amended through 1989) (providing for an "exempt salaries plan," prepared by the Department of Finance and Administration, for "exempt employees" of the executive branch; listing many of those same categories of positions that are excluded from Personnel Act coverage).

The Executive Reorganization Act, NMSA 1978, §§ 9-1-1 to 9-1-10 (1977), provides for the executive branch's hiring of "exempt" officers and employees. The Act provides for "departments" within the executive branch and "secretaries" of departments who are appointed by the Governor with the consent of the Senate and who serve at the pleasure of the Governor. § 9-1-4. The Act provides that the secretary of the department

manages all operations of the department, exercises appointing authority over all department employees, subject to applicable laws, and employs and fixes the compensation of all persons necessary to discharge the secretary's duties within the limitations of available appropriations and applicable laws. § 9-1-5. These provisions are reiterated in the various statutes of executive departments. See, e.g., NMSA 1978, § 9-2A-7 (1993) (Children, Youth and Families Department); NMSA 1978, § 9-3-5 (2004) (Corrections Department); NMSA 1978, § 9-4A-6 (2004) (Cultural Affairs Department); NMSA 1978, 9-6-5 (1983) (Department of Finance and Administration); 9-7-6 (2001) (Department of Health); NMSA 1978, § 9-15A-6 (1993) (Tourism). Many other statutes, pertaining to specific executive departments, also contain these same provisions.2

The Governor of New Mexico is the state's chief executive officer, who has powers conferred upon the Governor by the Constitution of New Mexico. See N.M. Const. art. V, § 4: "The supreme executive power of the state shall be vested in the governor, who shall take care that the laws be faithfully executed…". As such, the duty to execute the laws rests with the Governor, and it includes the authority to administer the budget that has been approved by the Legislature.

Unwarranted legislative intrusion into that authority of the executive branch to administer appropriated monies has encountered resistance from New Mexico courts when construing New Mexico's constitution and the balance of power provided for therein under the separation of powers provision. In State ex rel. Coll v. Carruthers, 107 N.M. 439, 759 P.2d 1380 (1988), the New Mexico Supreme Court clearly proscribed efforts by the Legislature to restrict, through its appropriations measures, the Governor's constitutional exercise of his executive managerial power. This intrusion or "trespass into the executive domain," in the form of restrictions that curtail or impede the executive's discharge of "executive management functions," are, according to Coll,3 outside the proper domain of the Legislature under the separation of powers provision of the New Mexico Constitution, Article III, Section 1. "[C]onditions and restrictions on appropriations which reserve to the legislature 'powers of close supervision' over the executive function are not looked upon with favor." Coll at 446, 759 P.2d at 1387 (quoting Anderson v. Lamm, 195 Colo. 437, 579 P.2d 620, 624 (1978)).

Article III, Section 1 of the New Mexico Constitution provides:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in the constitution otherwise expressly directed or permitted….

Under this provision, unless otherwise expressly provided in the constitution, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; and the judiciary cannot exercise either executive or legislative power. "[T]he real thrust of the separation of powers philosophy is that each department of government must be kept free from the control or coercive

influence of the other departments." Bd. of Educ. v. Harrell, 118 N.M. 470, 483-84, 882 P.2d 511, 524-25 (1994) (quoting 1 Frank E. Cooper, State Administrative Law 16 (1965)).

Concluding that a city personnel ordinance that applied to court employees exhibited this sort of "coercive influence" and thus infringed upon the inherent powers of the judiciary, the New Mexico Supreme Court, in Mowrer v. Rusk, 95 N.M. 48, 618 P.2d 886 (1980), struck down the ordinance as contrary to the constitutional separation of powers provision. "The power to control the personnel in functions of the court to the extent authorized by the ordinance, as amended, is the power to coerce the judiciary into compliance with the wishes or whims of the executive." Id. at 55, 618 P.2d 893.

Inherent, then, in the exercise of its "executive managerial functions," is the executive branch's authority to make personnel decisions consistent with the discharge of its constitutional and statutory duties as prescribed by law. Coll counsels against unwarranted intrusion in such matters by the legislative branch.4 Specifically, Coll upheld a number of vetoes by the governor of legislative restrictions contained in an appropriations measure where those restrictions amounted to a legislative attempt to make inappropriately detailed "executive management decisions."

The Court in Coll cited, as persuasive authority, Anderson v. Lamm, 195 Colo. 437, 579 P.2d 620 (1978), which disallowed legislative conditions to an appropriation bill that purported to reserve to the legislature "powers of close supervision that are essentially executive in nature." Lamm held invalid provisions in an appropriations bill that attached conditions on the number of full-time employees in each county, because these conditions interfered with the executive authority to allocate staff and resources in administering the funds. The Lamm court also held invalid another provision that attempted to allocate the number of full-time employees to be hired in certain job categories. These provisions, the court held, were "clearly in violation of the separation of powers doctrine." Id. at 445, 579 P.2d at 626.

The decision in Coll recognizes the unquestioned constitutional authority of the Legislature to appropriate money. Article IV, Section 30 of the New Mexico Constitution provides: "Except interest or other payments on the public debt, money shall be paid out of the treasury only upon appropriations made by the legislature…".5 The executive is, therefore, confined by the appropriations made by the Legislature with respect to expenditures. However, "[s]pending money appropriated by the legislature is essentially an executive task…. Allocation of resources and establishment of priorities are the essence of management." 63C Am. Jur.2d Public Funds § 45. A proper balance requires that the "basic legislative oversight and appropriation function" be maintained, while, at the same time, "assuring the executive a reasonable degree of freedom and discretion over the expenditure of appropriated funds." Coll at 446, 759 P.2d at 1387.

The legislative branch exercises its "power of the purse" not only by appropriating money but also by reviewing and approving budgets of state agencies. The executive branch agencies must act within those budget limitations when making hiring decisions.

The agencies may also make essential managerial decisions such as budget transfers and adjustments in accordance with law if necessary to cover the costs of personnel. NMSA 1978, § 6-3-24 (1992). Those adjustments are subject to legislative review. NMSA 1978, § 6-3-25 (2000).

There is, therefore, a system of "checks and balances" with respect to the executive branch's hiring of personnel, which is in keeping with the New Mexico Supreme Court's observation in Bd. of Educ. v. Harrell, 118 N.M. at 484, 882 P.2d at 525: "The interests protected by maintaining separation of powers can best be furthered, we believe, not by requiring a total separation of functions among the branches but by ensuring that adequate checks exist to keep each branch free from the control or coercive influence of the other branches." See also David v. Vesta Co., 45 N.J. 301, 212 A.2d 345, 358-59 (1965), quoted in Harrell:

> The doctrine of separation of powers must therefore be viewed not as an end in itself, but as a general principle intended to be applied so as to maintain the balance between the three branches of government, preserve their respective independence and integrity, and prevent the concentration of unchecked power in the hands of any one branch. (Emphasis in original).

Although the request submitted asks this office to make general inquiry into the executive branch's staff hirings, the job descriptions, creation, qualifications, etc. of the individuals hired, controlling jurisprudence indicates it is more appropriate to refrain from trespass into the Governor’s executive domain with respect to the executive's exercise of its executive managerial functions. Instead, it appears best to rely upon our constitutional and statutory system of "checks and balances" to provide the necessary fiscal oversight and, as well, to maintain harmony among our sister branches of government. As the New Mexico Supreme Court has held, “government functions at its best when the three branches of government, while not in any way abrogating their constitutional prerogatives, operate on the basis of mutual respect and self-imposed restraint." State ex rel. Chavez v. Vigil-Giron, 108 N.M. 45, 50, 766 P.2d 305, 310 (1988) (Galvan, J., specially concurring).

We hope you find this review of the relevant governing law helpful and instructive.

Sincerely,

PATRICIA A. MADRID
Attorney General

[1] See AGO No. 91-03 (1991) fn. 3.

[2] The fact that the reorganization act exempts the secretary and division directors does not limit the agency to only those "exempt" positions, because the Personnel Act authorizes more exempt positions. AGO No. 80-38 (1980).

[3] The Coll case involved these legislative restrictions, which the court found unconstitutional: (1) prohibition against spending money for rental of parking space; (2) prohibiting use of money from the equipment replacement fund for information system capital outlay; (3) limiting expenditure of appropriated monies for data processing to a specific system and specific contractor; (4) prohibiting the executive from contracting with a nongovernmental contractor for storage and delivery of food commodities; (5) mandating cost-of-living increases for private sector employees of private providers of mental health services; (6) prohibiting intradepartmental transfers of funds within the Corrections Department; and (7) restricting the use of funds for training programs for female inmates to only restaurant and hotel/motel management programs.

[4] Nevertheless, the Legislature does clearly possess the power to affix reasonable conditions or limitations upon appropriations and upon the expenditure of funds appropriated. State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 366, 524 P.2d 975, 982 (1974). Moreover, the legislative power of the state is vested in the State Legislature, which possesses, therefore, the power to enact laws. N.M. Const. art. IV, § 1.

[5] Our courts counsel not only deference to the executive with respect to the performance of its executive managerial functions but also deference to the Legislature:

> The Legislature is a co-ordinate branch of our state government. Its prerogative in the matter of legislation is to be questioned solely from the standpoint of our federal or state constitutional limitations. The function of the courts in scrutinizing acts of the Legislature is not to raise possible doubt nor to listen to captious criticism. The Legislature, possessing the sole power of enacting law, it will not be presumed that the people have intended to limit its power or practice by unreasonable or arbitrary restrictions. Every presumption is ordinarily to be indulged in favor of the validity and regularity of legislative acts and procedure.

State v. Armstrong, 31 N.M. 220, 255, 243 P. 333,347 (1942) (rule recognized and re-affirmed in Fellows v. Shultz, 81 N.M. 496, 499, 469 P.2d 141, 144 (1970)).