Opinion No. 33-639

August 16, 1933

BY: E. K. NEUMANN, Attorney General

TO: Honorable Arsenio Velarde, State Auditor, Santa Fe, New Mexico.

*{*72}* By your letter of August the 14th, you desire this office to advise you as to the law with reference to the employment, by the State, of nonresidents and you desire to know the length of time a person must reside within this State before eligible to become a state employee.

Chapter 68 of the Session Laws of 1933 provides, in Section 1 thereof, that

"Hereafter all employees of the State of New Mexico * * * shall be residents of the State of New Mexico * * * at least one year prior to the commencement of their employment * * *."

Section 4 of the Act provides that violations shall constitute misdemeanors punishable by fines of not less than $ 100.00 nor more than $ 300.00, or by imprisonment in the county jail not to exceed 90 days, or both.

Section 6 of the Act provides that the provisions of the Act shall not affect or apply to the present employment or any person under any existing contract, and Section 7 repeals all acts or parts of acts in conflict with the new law.

In 1909 the Territorial Legislature placed in the appropriation bill, which appears as Chapter 127 of the Laws of 1909, the following provision:

"Sec. 11. Hereafter, whenever any subsequent legislature shall fail to pass an appropriation act, the same appropriations made for the 61st and 62nd fiscal years, are hereby extended for each and every fiscal year thereafter unless otherwise provided by law, and the Territorial Auditor is hereby directed to cause a levy to be made, sufficient to produce the revenue to meet such appropriations in the manner prescribed by law: Provided, That no clerk, territorial officer, clerk of the district courts, and other Territorial officials holding commissions under the Governor, stenographer, or employee, provided for in the act, shall be eligible to be appointed as such clerk, stenographer or employee, unless such person shall have been a bona fide resident of the Territory of New Mexico for two years prior to the date of such appointment."

That part of the foregoing provision with reference to the employment, and which appears in the proviso, was carried forward into the 1915 Code and appears as Section 3950 of the 1915 Code. The language, however, was changed and appears therein as follows:

"No clerk, stenographer or employee shall be eligible to be appointed as such clerk, stenographer or employee unless such person shall have been a bona fide resident of the State of New Mexico for two years prior to the date of such appointment."

This provision now appears as Section 96-101, New Mexico Statutes, Annotated, 1929 Compilation.

In view of the provision appearing in Section 6 of the said Chapter 68, above quoted, restrictions as to residence do not apply to present employment of persons under contract at the time of the effective date of said Chapter 68, which was June 10, 1933, and, therefore, we must determine whether or not such employment, under existing contracts, falls within the restrictions of the provisions contained in said Section 96-101 of the 1929 Compilation.

This statute was construed in Opinion No. 3907, dated August 9, 1926 and written by Robert C. Dow, *{*73}* Assistant Attorney General, and we can do no better than to quote the language of that opinion, as we believe it correctly states the law. It is as follows:

"§ 2 of Article 7 of the Constitution of New Mexico, as amended, is, in part, as follows: 'Every citizen of the United States who is a legal resident of the State and is a qualified elector therein, shall be qualified to hold any public office in the State except as otherwise provided in this Constitution.'

"§ 3950 of the New Mexico Code is as follows: 'No clerk, stenographer, or employe shall be eligible to be appointed as such clerk, stenographer or employe, unless such person shall have been a bona fide resident of the State of New Mexico for two years prior to the date of such appointment.'

"If there is any prohibition against the employment of the services of such employe, it is contained in one of the two above provisions. Since such employe is not a deputy in your Office, or a public office holder in New Mexico, the above provision of the Constitution would not prohibit you from paying for such services, provided they are rendered in the necessary administration of the Comptroller Act of New Mexico.

"§ 3950, above referred to, is taken from the appropriation act of March 18, 1909, being § 11, Chapter 127, Laws 1909. Upon reading the original law, as enacted, it clearly appears that said § 11 was intended to apply only for the purposes of that particular appropriation act for the year 1909, and was only intended to require that clerks, stenographers and employes should reside in the state for a period of two years before being qualified to be employed under said appropriation act, and it was not intended that such clerks, stenographers and employes not employed under the appropriation act for that year should possess such qualifications. Said Act of 1909 did provide that the 1909 appropriation should be a continuing appropriation in case any succeeding legislature failed to pass an appropriation law. Our last session of the legislature passed an appropriation law, and, therefore, the Act of 1909 could have no effect in prescribing

the qualifications for employes under the appropriation act as passed by our last legislature.

"It might be argued that inasmuch as § 3950 was carried forward into the 1915 Code that such section was then enacted into law and would have application in this instance. A similar question was decided in the case of Ex Parte Bustillos, 26 N.M. 450, wherein Judge Parker used the following language:

"'So it appears the Legislature intended that old existing statutes taken or adopted and enacted into the Code should maintain the same relative status in the body of the law of the state as when originally enacted, and should acquire no new or controlling importance by reason of their present enactment into the section of the Code.'

"The question there presented was whether or not a statute was an 'existing statute,' or whether or not it was new matter included in the Code, and in answer to this the court said:

"'On the other hand, if it was not an existing statute by reason of its unconstitutionality, it was enacted into the Code as new matter which, as we have seen, was entirely allowable. In either event it became a component part of the laws of the state.'

"I am of the opinion, therefore, that § 3950 was an existing statute and was carried forward in the 1915 Code and became a component part of the laws of the state, but it must continue to maintain the same relative status in the body of the law of the state as when originally enacted and has acquired no new or controlling importance, and in view of this fact, I am, therefore, of the opinion that such *{*74}* section which prescribes the qualification of clerks, stenographers and employes must necessarily relate only to the appropriation act of 1909, either for that particular year or for such years as no appropriations are made, and that such provision of our statute would not preclude you from contracting the services of an employe who is a non-resident, and where a resident of the state could not legally perform such services. Upon the question as to whether or not a non-resident could be employed in a case where a resident could perform the services, I am passing no opinion. At least, I think the services of non-residents should be employed only in such specific cases where our own residents as a matter of legal restriction are not qualified to do the work."

From the foregoing, it will be seen that said Section 96-101 does not apply to employment in this state unless the employment is under the appropriation Act of 1909 or in cases where no appropriation for the classes named in the appropriation of 1909 was not made by subsequent legislatures.

Therefore, in view of the foregoing, we are compelled to hold that after June 10, 1933 employment must be within the terms of Chapter 68 of the Laws of 1933; that that act does not apply to present existing contracts of employment and that Section 96-101 does not apply unless within the exceptions mentioned.

Trusting the above fully answers your question, I am

By: FRANK H. PATTON,

Asst. Attorney General