

Opinion No. 53-5807

August 28, 1953

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. M. I. Tillery State Personnel Director P. O. Box 1359 Santa Fe, New Mexico

{*215} You have requested the opinion of this office as to whether or not the position of Assistant State Auditor is subject to classification under the provisions of § 10-401 of the 1941 Compilation, pocket supplement.

The above mentioned section authorizes the Governor, subject to the approval of the State Board of Finance, to classify all employees in the Executive Department of the State and sets forth certain standards for such classification. Two questions are raised by your inquiry. First, whether the Governor is empowered to classify public officers as distinguished from employees and second, whether the position of Assistant State Auditor constitutes a public office.

It is clear that there is a definite distinction between public office and public employment. In **42 Am. Jur., Public Officers, § 12**, it is stated:

"Public office, as hereinbefore defined and characterized, is in a sense an employment, and is very often referred to as such. But there is a distinction between a public office and a public employment which is not always clearly marked by judicial expression and is frequently shadowy and difficult to trace. The distinction, however, is one which in many instances becomes important and which the courts are called upon to observe. **Although every public office may be an employment, every public employment is not an office, and the word 'employee' as used in statutes has in many cases been construed as not including officers.**" (Emphasis ours).

The foregoing quotation, and the authorities cited in support thereof, leads to the conclusion that § 10-401, supra, is not applicable to public officers. It then become necessary to determine whether or not the Assistant State Auditor is a public officer or a public employee.

Although in other states the status of similar positions has been judicially determined the decisions are of little assistance in New Mexico, as in each case the particular statutory provisions involved are of prime consideration. The distinction between public office and public employment {*216} has been considered in **State v. Quinn, 35 N.M. 62, 290 P. 786** and at great length in **State ex rel Gibson v. Fernandez, 40 N.M. 288, 58 P. 2d 1197**. In the latter case the court, quoting with approval from **State ex rel Barney v. Hawkins, 79 Mont. 506, 257 P. 411, 53 ALR 583**, set forth certain requirements absolutely indispensable to make a position of public employment a public office, as follows:

"(1) It must be created by the Constitution or by the Legislature or created by a municipality or other body through authority conferred by the Legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the Legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the Legislature, and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity, and not be temporary or occasional. In addition, in this state, an officer must take and file an official oath, hold a commission or other written authority, and give an official bond, if the latter be required by proper authority."

Under the foregoing requirements we conclude that the position of Assistant State Auditor is subject to classification, inasmuch as it does not meet all requirements of public office as set down in the Fernandez case.

You will note that several of the above requirements require action by the Legislature. An examination of the New Mexico statutes shows that the position in question is not mentioned therein, and therefore could not meet requirements 1, 3 and 4 of the Fernandez case. The foregoing requirements are more stringent than those set up in many other jurisdictions. **42 Am. Jur., Public Officer, §§ 3 to 9, 53 ALR 595, and 93 ALR 333.** The net result is to restrict the class of personnel to be denominated as public officials to a much smaller group than might at first be thought. For example, the directors of several of the divisions of the State Bureau of Revenue fall into the same category as the Assistant State Auditor.

We suggest that in the future you refer to this office the various positions which you desire to exempt from classification upon the basis that they constitute public officers, so that a uniform interpretation and application of the provisions of the Fernandez case may be given.

By: W. R. Kegel

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