Opinion No. 55-6120

March 1, 1955

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. J. D. Hannah, State Auditor, State Capitol Building, Santa Fe, New Mexico

This office has received your request for an opinion upon three questions concerning Session Laws of 1935, Chapter 70, being §§ 5-4-1, 5-4-2, 5-4-3, and 5-4-4, N.M.S.A., 1953 Compilation, and action taken thereunder by the Chief Executive. You have summarized your questions as follows:

1. "The constitutionality of Chapter 70, Session Laws 1935."

2. "The legality of a so-called 'Personnel Board' and the authority of the acts of such Board."

3. "Does the action of a Governor, which is a discretionary authority, expire with his term of office?"

Directing ourselves to your first question, it may be stated that Laws of 1935, Chapter 70, contemplates the institution of a broad system of job and salary classification for employees of the Executive Department of the State. The reason for this being best stated in the words of the act itself, "to provide substantially equal salaries for services of equal value." This simple phrase is begotten in considerations of employee morale and efficiency and the consequent benefits to the State and public.

The act is not self executing. The framework and authority are created. The Governor in the exercise of his discretion and initiative must act to implement and put the program into effect.

The language in the act which gives rise to your concern is that part of § 5-4-1, N.M.S.A., 1953, reading as follows:

". . . and after the filing of any such classification it shall be unlawful to pay any employee any compensation in excess of that fixed for the classification within which said employee falls, **notwithstanding any appropriation providing a larger or greater compensation for such employee..** . ." (Emphasis ours)

It is to be noted that the phrase underlined purports to have general application. Once the classification is set, then regardless of salaries for particular positions which may have been previously set by the Legislature, the phrase would give the Governor authority to undo and reset any and all salaries. Applied retrospectively, i.e., to a prior appropriation authorizing a certain salary for a particular position, the phrase would

delegate to the Executive the power to repeal legislation in force. This cannot be done. Cary vs. State, 190 So., 49.

Applied prospectively, i.e., to a particular position and salary therefor, created by the Legislature after that position has been classified, the language underlined would seek to delegate to the Governor the power to bind subsequent legislatures. This also cannot be done. One Legislature is without power to bind subsequent legislatures if a subsequent Legislature desires otherwise. A fortiori, one Legislature cannot delegate authority to the Executive to bind subsequent legislatures. Concerning prospective application, the language is innocuous and may be treated as though it did not exist. That portion of the act above which I have underlined is clearly invalid and without force.

The next question is whether or not the language is such that it can be severed from the act so as to leave force in the balance. The following is the syllabus of what was held, among other things, in In Re Gibson, 35 N.M. 550.

"The invalidity of a portion of a legislative enactment will not annul other valid portions unless the valid and invalid portions are so interdependent that it can reasonably be said the Legislature would not have enacted the one without the other."

And previously in Schwartz et al., vs. Town of Gallup, et al., 22 N.M. 521, our Court stated:

"A part of a law may be unconstitutional and the remainder of it valid, where the objectionable part may be properly separated from the other without impairing the force and effect of the portion which remains, and where the legislative purpose, as expressed in such valid portion can be accomplished and given effect, independently of the void provision, and where if the entire act is taken into consideration it cannot be said that the enacting power would not have passed the portion retained had it known that the void provisions would fail."

It is our opinion that the objectionable part above is severable. Enough remains after this is deleted to give force and effect to the intention of the Legislature.

The answer to your first question is this: With the exception of the phrase above discussed, the act is constitutional and valid.

Your second question concerns the existence and authority of the Personnel Board.

The act in question gives the Governor the general authority and power, subject to the approval of the State Board of Finance, to institute the classification system. The approval by that Board has been given as you indicate in your letter. The general power thus given the Governor carries with it the power to select his advisor or advisors. The power to select a Board who will prepare the program for him, is implicit.

True enough, the act empowers the Governor to designate and employ a Personnel Director to assist him. This expressed power, however, is not deemed to rule out the selection of other advisors, if the Governor so desires. Concerning the power to select a Personnel Director, the intention of the Legislature is clear. If someone is to be paid for the advice and other services rendered in connection with the program, it is one person, the Personnel Director. This, however, does not limit the Governor to advice and services of that person. If others would help and advise him, the Governor is free to accept their services. Thus the acts of the Board selected by the Governor are the acts of the Governor, and not of the Board.

Your second question is therefore answered as follows: Any action by the Board which is approved by the Governor is the action of the Governor, and, thus, legally authorized since the act in question gives the Governor the power to install a job and salary classification system.

On your third question, it is the opinion of this office that, although, the institution of a classification system is a discretionary matter, once instituted the program or plan will remain in effect until affirmative action by the Governor instituting the program, or by a subsequent Governor, is taken to dissolve it. The present Governor must therefore take action, if he so desires, in order to dissolve the present classification plan. But until this is done, the action of the previous Governor is binding and in effect.

Trusting that this answers your questions, I am

By: Santiago E. Campos

Assistant Attorney General