

Opinion No. 57-205

August 15, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Santiago E. Campos,
Assistant Attorney General

TO: Mr. Murray E. Morgan, Commissioner of Public, Lands, Santa Fe, New Mexico

QUESTION

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May the State Disbursing Officer refuse to honor payroll vouchers until the Governor and Budget Director have approved salary increases for State Land Office personnel?

CONCLUSION

No.

OPINION

ANALYSIS

Recently the Chief of the State Budget Division promulgated a directive which in words and figures reads:

"To: Departments, Agencies, Boards, Institutions, and Educational Institutions

From: Frederic G. Comstock, Chief, State Budget Division Subject: Salary increases for heads of agencies, and personnel making over \$ 600 per month.

You are hereby notified that **effective JULY 1, 1957 NO SALARY INCREASES** for: (1) Heads of Agencies; (2) those not classified under the State Personnel System; (3) those making (or will make) over \$ 600 per month, as proposed in your OPERATING BUDGET for 1957-1958 may be paid UNTIL A REVIEW of these proposed increases has been APPROVED BY THE BUDGET DIVISION and the GOVERNOR (this, of course, does not apply to those salaries set by statute). A statement showing the various State positions held by the employee along with related dates and salary should accompany the requested increase. These requests should be submitted in triplicate.

"In preparing the PAYROLLS for the FIFTEENTH of July, ALL AGENCIES will have their choice of TWO alternatives:

(1) To put through no salary payment for the 15th for those concerned, and put through the PAYROLL for a FULL MONTH'S SALARY at the end of the month based upon the salary approved by the Governor.

OR

(2) Put the PAYROLL through at the PREVIOUS RATE on the 15th and any increase approved by the Governor would be EFFECTIVE ONLY for the LAST HALF OF the month.

(This action is necessary in view of a conversation with the ATTORNEY GENERAL, in which he held that RETROACTIVE PAY INCREASE COULD NOT BE MADE.)

"Heads of Departments, and those making over \$ 600 per month, not receiving any pay increases, may submit their payroll vouchers in the usual manner.

"NOTE: This directive DOES NOT APPLY to members of TEACHING STAFFS of EDUCATIONAL INSTITUTIONS under the BOARD OF EDUCATIONAL FINANCE."

Article 13, Section 2 of the New Mexico State Constitution prescribing the authority and duties of the State Land Commissioner, prescribes:

"The commissioner of public lands shall select, locate, classify, and have the direction, control, care and disposition of all public lands, under the provisions of the acts of congress relating thereto and such regulations as may be provided by law."

Without too much discussion it is apparent that "direction, control, care, and disposition of public lands" necessarily implies control of those aides and employees who will help him discharge the duties and exercise the powers reposed in him by the Constitution. And common experience indicates that the power to raise or to lower an employee's salary is an essential feature of control over an employee.

Now the power is one to be exercised under "such regulations as may be provided by law." It is therefore, obvious that the Legislature may prescribe the manner, the means or the methods by, or under, which the power shall be discharged. Extended, this means that the Legislature may set the salaries of State Land Office employees or direct the manner in which they may be set. This legislative power, however, may have certain constitutional limitations.

Firstly, we unhesitatingly rule that the Budget Division does not have the authority purported to be exercised under the directive above. And this applies to the salaries of the employees of the Land Office or any other Department or Agency of the State. Nowhere in the Act creating the Budget Division is the power to pass upon or to approve or disapprove salaries of State employees to be found. It does not exist in terms. It cannot be implied from the language used.

This brings us to the inquiries: Firstly, has the Legislature empowered the Governor to exercise a function which, at first blush, seems a natural and necessary adjunct of the Land Commissioner's power. And, secondly, if the Legislature has so empowered the Governor, has this power been properly exercised?

Regarding the first, our search indicates that the only law which can be relied upon to sustain the Governor's power to set salaries in Departments not under his direct supervision is that commonly called the "Personnel Act", Chapter 70, Laws 1935, as amended, (Section 5-4-1 through 5-4-4, N.M.S.A., 1953).

This office has previously ruled that the Land Office does not come within the provisions of the Personnel Act. Attorney General's Opinions 5781 dated July 15, 1953 and 5781-A dated November 23, 1953, respectively. These opinions have been re-examined and we feel that the results in each are correct. Other authorities and arguments might have been cited in each of these to sustain the results reached for such authorities and arguments exist. But being satisfied that the results in these are sound, we rely upon them without further comment.

Assuming, but only for the the purpose of argument, that the Land Office does come under the provisions of the Personnel Act still the answer to your question must be a negative. Under the Personnel Act the Governor is empowered to set a classification system for employees and to fix the salaries within each classification. But all of this must be done with the approval of the State Board of Finance and after such approval the classification schedule must be filed with the Secretary of State and a copy thereof furnished the Department heads. Section 5-4-1, N.M.S.A., 1953. It is my understanding that none of the above provisions of the Personnel Act have been complied with. Thus the effect of this directive if it were sought to be authorized under the Personnel Act, would, for the reasons noted, still fall short of validity.

One thing more should be noted. It seems that you authorized a pay increase for an employee recently and the Disbursing Officer, apparently on the strength of the directive above, has refused to honor the increase and no payment of the increase or any part of the former salary has been paid. The question now arises whether this employee may now be paid the increase as of the date when you authorized it. We rule that such payment can be made. The directive above mentions that this office advised the Budget Division that pay increases may not be made retroactively. This is true and we adhere to this position. However in the instance here there is in effect no payment of an increase retroactively. The increase became effective upon the date you authorized it and the fact that the Disbursing Officer has refused to honor it does not distract from its validity or effect as of that date. The constitutional provision prohibiting payment for services already rendered therefore does not come into play.