

## **Opinion No. 57-94**

May 13, 1957

**BY:** OPINION OF FRED M. STANDLEY, Attorney General Robert F. Pyatt, Assistant Attorney General

**TO:** Mrs. Georgia L. Lusk, Superintendent of Public Instruction and J. F. Anderson, Director, Surplus Property Agency, State of New Mexico, Santa Fe, New Mexico

### **QUESTIONS**

#### QUESTIONS

1. Is the Surplus Property Agency of New Mexico still in existence, and, if so, does it have its previous authority in cooperating with the Federal Government?
2. Can salary vouchers be legally approved by the Superintendent of Public Instruction when such vouchers are drawn against Department of Education funds to pay for services rendered by the Surplus Property Agency when the Director of the Surplus Property Agency is appointed by the Governor and when the subordinate employees of such agency are, in turn, appointed by the said Director?

#### CONCLUSIONS

1. Yes.
2. Not until the board of Finance approves, and then on a temporary basis only.

### **OPINION**

#### ANALYSIS

You will please find attached Opinion of the Attorney General No. 6556, dated December 4, 1956, which reached the first conclusion above. In the previous opinion, the Attorney General pointed out how recent sessions of the Legislature have continued to appropriate funds for the Agency, not by specific line item, but pursuant to budget requests submitted by the State Department of Education. The same thing occurred for the 46th and 47th fiscal years, i. e., there was no specific line item appropriation, but there was an appropriation pursuant to budget requests submitted by the State Department of Education. Accordingly, the conclusion reached in Opinion of the Attorney General No. 6556 is still applicable.

We recognize the right of the Governor to transfer employees from one office to another, Section 5-4-3, N.M.S.A., 1953 Comp., however, such can be done only upon approval of the State Board of Finance. To our knowledge such approval has not been

given in this matter. Furthermore, an additional restriction on the Governor's power in Section 5-4-3, supra, is that the transfer can only be temporary. The word "temporary" means that which is to last for a limited time only -- not of long duration but for a short time. **Shelton vs. Shelton**, 250 SW 2d 803 (Tenn.); **Young vs Povich**, 121 Me. 141, 116 A. 26. Such term has been further defined as meaning a period of time commensurate with the reasonable prosecution of a piece of work. **Lefkowitz vs. City of Chicago**, 238 Ill. 23, 87 N.E. 58.

"Temporary removal" means a removal for a fixed and temporary purpose or for a temporary reason. **Moore vs. Smead**, 89 Wisc. 558, 62 N.W. 426. The term "Temporarily" has been defined as meaning for a limited time only. **Worthington vs McDonald**, 246 Iowa 466, 68 N.W. 2d 89. It is obvious that the action sought to be effected by Section 1 of the Governor's Executive Order is the very opposite to that permitted by Section 5-4-3, supra. The entire order contemplates a continuous agency, presumably for as long as the Federal Government continues its surplus property program. Thus, the Governor's action insofar as the second question is concerned is invalid for the two foregoing reasons, based on Section 5-4-3, supra, alone.

Absent statutory authority, the Governor's action is equally ineffective. It must be remembered that when appropriations are made to a department, the Legislature necessarily vests a great amount of discretion in the particular department head over the expenditure of funds so appropriated. We think it follows that the power to employ and discharge is vested in the department head having the control of said appropriations. In respect to these matters of authority and discretion, created by legislative enactment, the Governor seeks to interfere. This he may not do. While our Constitution vests the "supreme executive power" in the Governor, this merely means that he has such power as will secure an efficient execution of the law, but it does not give him power to affect public money except as otherwise authorized in the Constitution or by statutory provision pursuant thereto. **24 Am. Jur.**, Governor Section 5; **State ex rel Bennett vs. Bonner** 214 P. 2d 747 (Mont.); **Royster vs. Brock** 258 Ky, 146, 79 S.W. 2d 707; **Terrell Wells Swimming Pool vs. Rodrigue**, 182 S.W. 2d 824 (Tex. Civ. App., Error refused by Tex. Sup. Ct.). The office of Governor lacks any inherent power. **Opinion of the Justices**, 85 N.E. 2d 238 (Mass.).

Accordingly, to the extent that the present Executive Order interferes with the statutory authority of the Superintendent of Public Instruction, the same is void, and the salary vouchers in question may be legally turned down by the Superintendent of Public Instruction.