Opinion No. 59-152

September 29, 1959

BY: HILTON A. DICKSON, JR., Attorney General

TO: Honorable James T. Martin, Jr. State Representative Dona Ana County 201 East Griggs Las Cruces, New Mexico

*{*234}* This is written in reply to your recent request for an opinion on the following question:

"Whether Mr. L. L. Hughes was legally hired to serve as Executive Secretary of State Highway Commission".

In answer to your question, it is our opinion that No, Mr. Hughes was not legally hired to serve in that position.

The section to which you refer (§ 5-1-5) reads in relevant part as follows:

"Hereafter all employees of the state of New Mexico, including all political subdivisions thereof and including all of the departments, bureaus, boards, commissions and institutions in said state, and all of its political subdivisions, shall be residents of the state of New Mexico, having resided in this state for a period of at least one (1) year prior to the commencement of their employment . . ."

It will be noted that there is no exception whatsoever in this part of the statute which would allow nonresidents to be hired. The portion of the statute which provides for allowance of hiring out-of-state personnel deals only with the hiring of labor by any department, etc., which is engaged in the construction, etc., of any public work. This latter portion sets forth a percentage of laborers who must be residents. It seems clear that the position of Executive Secretary does not fall under the second portion of this section since from the wording that portion applies only to laborers not to executive positions such as an executive secretary of the highway commission. The second portion of this section was designed for public works projects as is evident from the title of the section.

Unless an exception of this section can be found, Mr. Hughes was not legally hired to serve in the position he now holds. Two provisions must be considered. Section 9 (c), Chapter 235, Laws of 1957 reads in part as follows:

"Such restrictions as to residence provided for in any law shall not apply to . . . state departments for positions in which professional or technical training is required for which qualified prospective employees, who are bona fide residents of the state of New Mexico are not available, all or part of whose salary is paid from appropriations made herein; **provided, however that prior to such employment by any state officer or**

department whose salary payments are made through the office of the department of finance and administration, a statement be submitted to the department of finance and administration setting forth fully the facts justifying such employment of a nonresident. . . ." (Emphasis Supplied)

Section 20, Chapter 288, Laws of 1959 being the General Appropriations Act, provides for the hiring of nonresidents under the same conditions except that no requirements for filing a statement is provided. The problem then resolves into which appropriations act provision applies to Mr. Hughes' hiring.

While it is true that Article IV, Section 23 of the New Mexico Constitution provides that general appropriation laws go into effect immediately after passage and approval -- which in this case would put the 1959 Appropriations *{*235}* Act in effect at the time of Mr. Hughes' hiring -- the 1957 Appropriations Act was also in effect at the time of Mr. Hughes' hiring.

Mr. Hughes' salary was paid out of appropriations made by the 1957 Act until July 1, 1959 at which time his salary was paid out of moneys appropriated by the 1959 Act. If Mr. Hughes' employment was not legal in the first instance then the passage of time with operation of the 1959 Appropriation Act does not make his employment subsequently legal.

Since the 1957 Act provision makes it a condition precedent to employment of a person whose salary or part thereof will be paid out of funds appropriated by the 1957 Act, it is our opinion that Mr. Hughes' employment at that time was not proper, the operation of the General Appropriations Act of 1959, to the contrary notwithstanding.

It is our view that while the 1959 Act was in effect at the time of the hiring, the provision contained in that act could only be effective to prospective employees whose salary was to be paid out of the 1959 Appropriations Act at the beginning of their employment. Mr. Hughes' salary from the beginning of his employment was to be paid out of moneys appropriated by the 1957 Act and the provisions in that Act would of necessity control his hiring. To hold otherwise would allow a later Legislature to change the conditions imposed upon moneys appropriated by a prior Legislature.

Since Mr. Hughes was hired during the period that the above quoted chapter was in effect, as to him, the requirement that a statement be filed with the Department of Finance and Administration was a condition precedent to his employment. As far as this office has been able to determine such a statement was never filed by the Highway Commission when Mr. Hughes was hired and, under such circumstances, there is no other course open but to hold that Mr. Hughes was not legally hired as Executive Secretary of the State Highway Commission.

Another problem must be resolved. If Mr. Hughes was not legally hired, as we so hold, then the question of repayment by him of all compensation he has received presents itself. This area of the law is not completely clear but there appears to be two positions

taken by the courts of the several states. The so-called majority rule holds that a de facto officer, i.e., a person serving under color of authority but not legally appointed, may not recover nor retain compensation paid to him for service as a de facto officer. See **Hulbert vs. Craig, City Comptroller,** 124 Misc. Rep. 273, 207 N.Y. Supp. 710 affirmed without opinion 213 App. Div. 865 affirmed without opinion 241 N.Y. 525, 150 N.E. 539 (1925); **Nash v. City of Los Angeles, et al,** 78 Cal. App. 516, 248 Pac. 689 (1926) and generally 93 A.L.R. 258 and 151 A.L.R. 950. This position is adhered to by at least California, New York, Illinois, Arkansas Missouri, Pennsylvania.

The so-called minority position holds that a de facto officer who acted in this field may retain compensation paid to him when a de jure officer is not contesting his position. This position is taken by the courts in at least Colorado, Oklahoma, Arizona, New Jersey, Ohio and apparently New Mexico. See **Roberts, et al., vs. People ex rel., Duncan** 81 Colo. 388, 255 Pac. 461 (1927); **Franks vs. Ponca City,** 170 Oklahoma 134, 38 P. 2d 912 and the same A.L.R. citations above.

The case of **State ex rel Baca v. Otero, State Auditor,** 33 N.M. 310, 267 Pac. 68 (1928) indicates that the Supreme Court of this state subscribes to this minority position. That was the case where Mr. Baca was holding the office of Assistant Superintendent of Public Instruction under appointment by the Superintendent of *{*236}* Public Instruction and there was at that time no such position. He was paid expenses during that period. The Court, speaking through Mr. Chief Justice Parker said:

"It may be stated as a general concensus of judicial opinion that a de facto officer may not recover the fees, emoluments, and expenses of the office. The conclusion is based upon the consideration that the right to the fees and emoluments arises out of the title to the office, which is directly put in issue in an action for such fees and emoluments, and, unless such title can be shown, no recovery can be had. (Authorities cited)"

"There is a departure from this general doctrine in a few of the states. Thus in Alabama, Missouri, New Jersey, Colorado, and Idaho, and perhaps some other states, it is held that a de facto officer, having prima facie title to an office, is entitled to its emoluments and may enforce the payment thereof by legal proceedings. (Authorities cited)"

"It is unnecessary, however, in this case to take the advanced ground assumed in the foregoing cases, which we take to lay down the doctrine that a de facto officer may recover for the services rendered by him regardless of whether there is a contesting de jure officer or not. In this case there is no de jure officer, none having been appointed. In such case there is a line of well considered cases holding that a de facto officer is entitled to recovery. (Authorities cited)."

From the above quoted it is evident that New Mexico has aligned itself with the minority view on this question and holds where no de jure officer is challenging the de facto officer, the de facto officer may retain or recover the emoluments of the office he occupies. The answer to the question of the return of compensation by Mr. Hughes is furnished by the **Otero case** above. Mr. Hughes does not have to return the

emoluments of the office of Executive Secretary of the State Highway Commission since, from the information available to this office, there is no evidence of bad faith on the part of Mr. Hughes and apparently no de jure officer is challenging his position.

One further instance must be considered. If the hiring of Mr. Hughes was in contravention of Section 5-5-5, N.M.S.A., 1953 Compilation and the relating exceptions to that section found in the 1957 General Appropriations Act, the question arises as to whether the members of the Highway Commission are guilty of a misdemeanor under Section 5-1-8, N.M.S.A., which reads as follows:

"Any person, firm, corporation or association having charge of or control over the employment of persons mentioned in section 1 (5-1-5) of this act, who shall wilfully refuse to comply with the provisions of said section 1 (5-1-5), shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than $ 100 nor more than $ 300 or by imprisonment in the county jail not to exceed ninety (90) days or both such fine and imprisonment, in the discretion of the court."

It should be noted that the above quoted statute only makes a **wilful** violation of the residency requirement actionable. This office has in its possession an affidavit signed and sworn to by Mr. George Lavender on May 25, 1959, three days after the employment of Mr.

Hughes. This affidavit indicates that a search was caused to be made of the applications on file at the Highway Personnel Office and of the personnel then employed by the Highway Department to ascertain if a qualified resident *{*237}* was available from these two groups for the position. While we express no opinion on whether this in and of itself, is sufficient to meet the requirements of the employment statutes in issue, we feel that this may be sufficient evidence of good faith on the part of the Highway Commission to enable a court to hold that the violation of the employment requirements was not wilful.

While it is not within the province of this office to establish rules and procedures for employment by the various state agencies and departments, it is well within the province of this office to point out a circumvention of established hiring procedures which is apparently the case in the hiring of Mr. Hughes. From our investigation it is apparent that the Highway Commission took it upon itself to obtain an executive secretary and thereby completely circumventing the established procedure of hiring employees for the highway department through its personnel office. While, as noted above, these actions may not be criminal in their nature they are certainly to be condemned and it is the suggestion of this office that future employment by the Highway Commission be through the normal employment procedure and with the guidance of the legal section of the Highway Department.

Boston E. Witt

Assistant Attorney General