

## **Opinion No. 63-109**

August 23, 1963

**BY:** OPINION of EARL E. HARTLEY, Attorney General

**TO:** Colonel Harold S. Bibo Director of Personnel State Capitol Building Santa Fe, New Mexico

### **QUESTION**

#### QUESTIONS

1. What relationship does the Fish and Wildlife Service have to the State of New Mexico, and what duties or obligations does the New Mexico State Personnel Board have in connection with such agency?
2. At New Mexico State University under the Department of Vocational Education are two sections -- the Agricultural Section and Home Economics Section. Are these two sections to be considered under the control of the Personnel Act?
3. Also at New Mexico State University is the State Soil Conservation Committee. Does this Committee fall under the control of the Personnel Act?

#### CONCLUSIONS

1. See Analysis.
2. See Analysis.
3. See Analysis.

### **OPINION**

#### **{\*239} ANALYSIS**

A brief review of the factual and historical background pertaining to the Fish and Wildlife Service is essential in order to properly consider your first question.

The State of New Mexico, pursuant to § 47-16-1, N.M.S.A., 1953 Compilation, was authorized by the legislature to cooperate with the Bureau of Biological Survey of the United States Department of Agriculture in destroying predatory wild animals and rodent pests in the interest of the protection of crops, livestock and the improvement of range conditions. Under such Statute it is prescribed that the work of destroying such predatory wild animals and rodent pests was to be carried on under the direction of the United States Bureau of Biological Survey.

Subsequent to the enactment of this legislation, the Federal Bureau of Biological Survey was transferred from the Department of Agriculture to the Department of the Interior by a federal reorganization program in 1939, and later, in 1940, the Bureau of Biological Survey was consolidated with the Bureau of Fisheries in the Department of the Interior, and the newly combined agency was designated as the United States Fish and Wildlife Service.

By virtue of Section 47-16-2, N.M.S.A., 1953 Compilation, the President of New Mexico College of Agriculture and Mechanics Arts (now designated New Mexico State University) is authorized to execute a cooperative agreement with the Federal government for carrying on such cooperative work in controlling predatory wild animals and rodents.

Since the passage of such state legislation, the New Mexico legislature has periodically authorized appropriations in order to carry out the state's share of such project costs. The 1963 state legislature appropriated the sum of \$ 75,000.00 directly to the United States Fish and Wildlife Service for furtherance of such program during the ensuing biennium.

Under authority of § 47-16-2, N.M.S.A., 1953 Compilation, we are advised that the State of New Mexico, through the President of New Mexico State University has consummated a new contractual agreement with the United States Fish and Wildlife Services which became effective July 1, 1963. Under this agreement the United States Fish and Wildlife Service is authorized to hire and dismiss employees engaged in such joint state - federal predatory animal and rodent control projects and to exercise general supervisory control over such personnel so employed.

By advisory letter of this office dated December 4, 1961, directed to Mr. Warren D. Bloys, District Agent, United States Fish and Wildlife Service, it was the interpretation of the Attorney General that employees participating in the joint state and federal predatory animal and rodent control program were not subject to the provisions of the State Personnel Act. We have reviewed this interpretation in light of subsequent legislative amendments to the Personnel Act and the newly consummated contract between the state and federal government. Consideration has also been given to our former Attorney General's Opinions No. 57-231, dated September 13, 1957, and No. 58-100, dated May 17, 1958, which dealt with the question of whether such employees were eligible for state retirement benefits. From careful examination of the functions {\*240} performed by the various employees engaged in such program it is our opinion that such employees are not subject to the provisions of the Personnel Act since it is apparent that the primary right to employ and to dismiss individuals working under the program rests mainly in representatives of the federal government. Employees hired in conjunction with such programs are not in our opinion in "state positions" within the meaning of the Personnel Act. Since the Fish and Wildlife Service is in fact a federal agency and employees working in the joint programs are subject to hiring and dismissal by federal officers, the State Personnel Board has no duties or control over such program or its employees.

Turning now to your second question, we find that the Board for Vocational Education was created by the state legislature as a state board and, pursuant to §§ 73-6-1, 73-6-15, 73-6-18 and 73-6-27, N.M.S.A., 1953 Compilation, such board and the state treasurer have been authorized to receive funds from the federal government and to utilize such moneys in this state for vocational rehabilitation purposes. In carrying out these functions the State Board of Vocational Education has entered into an agreement with New Mexico State University to apply a portion of the monies received by the Board from federal grant - in - aid sources (George-Barden Act), etc., to the payment of some of the salaries of individuals at the State University engaged in teaching programs of home economics and agricultural education. The State Board of Vocational Education sets the qualification for such personnel and reserves the right to approve the specific individuals hired by the University; however, the actual hiring, supervision and dismissal of the employees at the State University engaged in this work is vested in the State University. In addition, the State University itself pays the remaining portion of such employees' salaries.

Under these facts it is evident that the employees referred to are in actuality employees of the State University and who derive a part of their salary from funds handled by the State Board of Vocational Education. Thus, such employees are not subject to the provisions of the Personnel Act, since § 5-4-31, N.M.S.A., 1953 Compilation excepts from such coverage employees in educational institutions. Such section of the Personnel Act sets out in applicable part:

"Coverage of Service. -- The Personnel Act and the service cover all state positions except:

**"D. those in educational institutions and in public schools; . . ."** (Emphasis supplied).

We have been advised that the State Board of Vocational Education also employs several individuals who are hired and supervised as to the manner and performance of their duties by the Board and that such employees receive their salary from funds controlled by the board. As to such employees it is our opinion that they are subject to the Personnel Act and fall within covered positions -- unless they qualify specifically for an exemption under § 5-4-3, supra.

The third question posed above pertains to the State Soil Conservation Committee. This Committee was created pursuant to § 45-5-4, N.M.S.A., 1953 Compilation. As stated in this Section, in part:

"(a) There is hereby established, {\*241} to serve as an agency of the state and to perform the functions conferred upon it in this act, the state soil conservation committee. The committee shall consist of the chairman and six other members to be appointed by the governor. . .

(b) The state soil conservation committee may employ an administrative officer and such technical experts and other agents, employees, permanent and temporary, as it may require, and shall determine their qualifications, duties and compensation; . . . It shall be supplied with suitable office accommodations at the seat of the State Agricultural College. . ."

According to information furnished this office by the business manager, New Mexico State University, August 13, 1963, several employees of the State Soil Conservation Committee are working jointly for the State University and the committee, and these employees are paid from New Mexico State University payrolls under an arrangement whereby the State Soil Conservation Committee contributes a portion of such salaries.

Under the provisions of § 5-4-31, supra, "all state positions" are declared to be subject to the Personnel Act except those specifically stated to be exempted. Members of boards and commissions and heads of agencies are by this Section declared excepted from the Act as well as those positions in educational institutions.

Dependent upon the precise factual situation applicable to the various employees of the committee such personnel may or may not be subject to the Personnel Act. If the Committee merely contributes to the State University a portion of the funds necessary to employ individuals engaged in carrying out certain activities which the committee is interested in, but the Committee does not actually have the right to hire or control the manner or details of the work, or to dismiss such persons, then, in our opinion, such individuals are not in fact employees of the Committee or subject to the Personnel Act but would be employees of the University. However, if the Committee exercises or **has the right to exercise** a control over the hiring, supervision or dismissal of employees engaged in performing work for the Committee, then such employees would be subject to the Personnel Act, if not exempted under § 5-4-31, N.M.S.A., as a head of an agency, head of a division of an agency, an exempted assistant to an agency or division head, or a professional employee.

As stated in Attorney General's Opinion No. 63-105, dated August 19, 1963, the Personnel Act has application only to those positions which are in the "service", and if a legal question involving statutory interpretation, and its application to a specific exemption arises, consultation with the office of The Attorney General should be had in order to resolve the matter.

By: Thomas A. Donnelly

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