

**Opinion No. 64-15**

February 17, 1964

**BY:** OPINION OF EARL E. HEARTLEY, Attorney General Thomas A Donnelly,  
Assistant Attorney General

**TO:** Col. Harold S. Bibo, State Personnel Director, Santa Fe, New Mexico

**QUESTION**

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Under what conditions, if any, may an individual who is not a citizen of the United States be considered eligible for public employment by the state of New Mexico?

CONCLUSION

See analysis.

**OPINION**

ANALYSIS

Section 5-1-5, N.M.S.A., 1953 Compilation, as recently amended by Laws 1963, Chapter 46, Section 1, deals in part with the question submitted. Under the provisions of such statute, all employees of the state, unless specifically exempted by statute, are required to be residents of the state of New Mexico. This section requires all individuals seeking state employment, to have resided in the state for a period of at least one year prior to the commencement of their employment.

This statute specifically excludes from the residence requirement of the law, certain classes of employees:

- "(1) Teaching and professional employees of state educational institutions;
- (2) Professional or supervisory employees of all state institutions, departments, agencies, bureaus, boards, commissions and political subdivisions; and
- (3) Certified employees of the public schools."

Article VII, Section 2 of the New Mexico State Constitution as recently amended September 19, 1961, provides in part as follows:

"A. Every **citizen of the United States** who is a **legal resident of the state** and is a qualified elector therein, shall be qualified to hold any elective public office except as otherwise provided in this constitution.

B. The legislature may provide by law for such qualifications and standards as may be necessary for holding an appointive position by any public officer or employee. . ." (Emphasis added).

The above quoted constitutional provision empowers the legislature with the authority to impose statutory restrictions and qualifications upon the right of individuals to hold any **appointive** state office or employment. Such constitutional provision specifically requires all persons seeking to hold **elective** state office to be both a **citizen** and a **resident** of the state of New Mexico. Since the state constitution provides in the case of elective state officers that both requisites be complied with, and states that the legislature may prescribe qualifications for holding appointive positions of state employment it is apparent that no constitutional requirement exists making it mandatory that state appointive employees be citizens of the United States.

The legislature following the adoption of the 1961 Constitutional amendment to Article VII, Section 2, *supra*, amended Section 5-1-5, *supra*. This section as it now reads, provides that except in certain instances, all state employees must have "resided" in this state for a period of at least one year prior to the commencement of their employment. Former Attorney General's Opinion No. 6161, dated May 12, 1955, interpreted this Section as it read prior to the amendment. However, the wording of the statute is now changed.

The New Mexico Supreme Court has in several different cases interpreted the term "resident." **Wilson v. Wilson**, (1954) 58 N.M. 411, 272 P.2d 319; **Chaney v. Chaney** (1949) 53 N.M. 66, 201 P.2d 782; **Allen v. Allen**, (1948), 52 N.M. 174, 194 P.2d 270; **Tenorio v. Tenorio**, 44 N.M. 89, 89 P.2d 838; and **Arledge v. Mabry**, 52 N.M. 303, 197 P.2d 884.

The word "resident" as employed in Section 5-1-5, N.M.S.A., 1953 Compilation, *supra*, in our opinion means a person who has acquired a settled and fixed place of dwelling in a particular locality and lives in such place with the intention of remaining there permanently. The term "citizen" as used in the state constitution we think has a broader definition than the word "resident."

As pointed out in **Jeffcott v. Donovan**, (Ariz.) 135 F.2d 213, the term "citizen" and "citizenship" are distinguishable from "resident" or "inhabitant."

Based upon a careful reading of the above cases and from a study of the above authorities, it is our opinion that an individual who is a resident or who is exempted from residence requisites, and who is **otherwise qualified** for state employment is legally eligible to be employed by the state of New Mexico, although not a citizen of the United

States, and such employment is subject only to the administrative discretion and policy approval of the hiring public agency.