

Opinion No. 66-114

October 13, 1966

BY: OPINION OF BOSTON E. WITT, Attorney General By Joel M. Carson, Deputy Attorney General (Acting) Myles E. Flint, Assistant Attorney General

TO: Mr. Murray E. Morgan, Chairman, State Corporation Commission, Santa Fe, New Mexico

QUESTION

FACTS

On August 1, 1964, the Corporation Commission employed a person who now serves as an administrative officer to a director of a division of the Corporation Commission. This employee, in his application for employment, failed to state that he had been convicted of felonies in both New Mexico and California.

This employee is now on parole and his record, both as to the New Mexico conviction and the California conviction have been supplied to the Commission by the New Mexico Parole Board.

QUESTION

Do the above mentioned conditions constitute a deterrent to the continued employment of this person by the Commission?

CONCLUSION

See Analysis.

OPINION

{*154} ANALYSIS

Both the Personnel Department application form and the regulations of the State Personnel Board as they existed in 1964 and at the present time, have provisions concerning failure to disclose information on the personnel application.

State Personnel Board Rule III(c), as it existed in 1964 provided that the director could refuse to examine an applicant, or that he could, after examination remove the applicant's name from the list of employees eligible to hold state employment if the applicant had:

(1) been found guilty of a notorious or infamous crime or notoriously disgraceful conduct or if he

(2) made a false representation of a material fact in his application.

Rule VI(J)(1)(f) states that making a false statement on an application for employment is grounds for dismissal.

The Personnel Department application form also contains a certification by the applicant which is in the following form:

I HEREBY CERTIFY that this application contains no wilful misrepresentations or falsifications and that the information given by me is true and complete to the best of my knowledge and belief. I am aware that should investigation at any time disclose any such misrepresentation or falsification as to a material fact, I will forfeit all rights to employment.

The front of the application contains a question which asks whether the applicant has ever been convicted of a violation of any law, excepting minor traffic violations.

From the facts outlined above we must determine whether the applicant made a false statement of a material fact in his application.

A fact is said to be material if its existence or non-existence is a matter to which a reasonable man would attach importance in determining his choice of action in the transaction in question, or that the maker of the representation knows that the recipient {^{*155}} is likely to regard the fact as important although a reasonable man would not so regard it. 26A **Words and Phrases** 248. Since it is the duty of the Personnel Board to examine into the education and moral fitness of applicants for public employment, Section 5-4-36, N.M.S.A., 1953 Compilation, and since Personnel Board Rule No. III(c) provides that conviction of a crime may be grounds for rejection of an application for public employment, and grounds for dismissal from the service, it is apparent that the information requested by the board concerning convictions for violations of the law related to a material fact within the meaning of Rule No. III(c) and Rule No. VI(J), supra.

Information which has been wilfully withheld as well as information which has been given, but which constitutes a falsehood may be considered to be a false statement or false representation. See Blacks Law Dictionary, "False Statement", "False Representation". The person here in question did then make a false statement of a material fact in his application within the meaning of the Personnel Board application form and Personnel Board Rule No. III.

Neither the rules of the Personnel Board, the Personnel Act, nor the Personnel Board application form require that a person be dismissed from state employment because he made a false representation of a material fact on a personnel board application. The regulations and the form merely provide that the person's application **may** be rejected

and that he forfeits any **right** to state employment. Therefore, under the Personnel Act and the regulations and rules of the Personnel Board you have the authority to dismiss the person here in question for making a false statement of a material fact in his personnel application, but you are not required by law to dismiss the person.

Sections 5-1-2 and 5-1-3, N.M.S.A., 1953 Compilation provide as follows:

5-1-2. Persons convicted of crime -- Ineligibility for office -- Exception. -- No person convicted of a felonious or infamous crime, unless such person has been pardoned or restored to political rights, shall be qualified to be elected or appointed to any public office in this state.

5-1-3. Deputies and assistants convicted of crimes -- Penalty for appointment or retention. -- It shall be unlawful for any state, county, district, or municipal officer to appoint, employ, or retain as a deputy or assistant any person convicted of a felonious or infamous crime, unless such person has been pardoned or restored to political rights; and any public officer who shall knowingly violate the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction shall be punished by fine of not less than one hundred [\$ 100] nor more than five hundred dollars [\$ 500] and, in addition to such punishment, shall be removed from office in accordance with the provisions of this chapter.

The first question to be answered under these sections is whether an "administrative officer" assigned to a director of a division of the Commission is a holder of a public office as that term is used in Section 5-1-2, supra. It is our opinion that a person employed in such a position is not a public officer.

There is ample case law in New Mexico dealing with the meaning of "public officer". **Pollack v. Montoya**, 55 N.M. 288, 58 P.2d 336 (1951); **State v. Fernandez**, 40 N.M. 288, 58 P.2d 1197 (1936). In **Pollack vs. Montoya**, supra, the issue raised was whether the Chief of Division of Liquor Control was a state or public officer. In determining that a person holding that position was a public officer the court stated the following elements were necessary for a person to be an officer rather than an employee.

The specific position must be created by law; there must be certain definite duties imposed by law on the incumbent, and they must involve the exercise of some portion of the government power. A position which has these three elements is presumably an "office" while one which lacks {*156} any of them is a mere "employment."

This definition was further expanded and made more definite by citation of a definition used in the prior **Fernandez** case, supra. That definition provided that the elements necessary in order for a person to be a public officer were as follows:

(1) It must be created by the Constitution or by the Legislature or created by a municipality or other body through authority conferred by the Legislature; (2) it must

possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined directly or impliedly, by the Legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the Legislature, and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity, and not be only temporary or occasional. In addition, in this state, an officer must take and file an official oath, hold a commission or other written authority, and give an official bond, if the latter be required by proper authority.

Applying the above tests, as they were applied in **Pollack v. Montoya**, supra, and **State v. Fernandez**, supra, it is clear that an administrative officer of the class under consideration here is not a public officer. The position being filled is not created by law and does not possess a delegation of the sovereign powers of government which are exercised independently and without control of a superior power other than the law. The person filling the position has only those powers and duties delegated to the position by the immediate supervisor and the Commission. As was stated in **Pollack v. Montoya**, supra, absent the necessary elements, a person filling such a position is only an employee. This opinion is consistent with Opinion of the Attorney General, No. 5813-53-220. The administrative officer here involved is not holding a position from which he is barred under Section 5-1-3, supra.

Is the administrative officer here in question a deputy or assistant to any state officer as that phrase is used in Section 5-1-3, N.M.S.A., 1953 Compilation which is quoted above. We think that he is not.

As used in Section 5-1-3, N.M.S.A., 1953 Compilation the terms "public officer" and "state officer" are used as synonyms. Opinion of the Attorney General No. 5952, dated May 20, 1954, Chapter 44, New Mexico Laws 1912. The question of whether this person is a deputy or assistant need not be reached in as much as the division director who is his supervisor is not a state officer. **State v. Fernandez**, supra, **Pollack v. Montoya**, supra. See the above decisions.

The question may arise as to whether the administrative officer could be construed to be a deputy or assistant to the Commissioners. This question was answered in the negative in Opinion of the Attorney General No. 5952, decided May 20, 1954.

In summary Section 5-1-2, N.M.S.A., 1953 Compilation does not prevent the person here in question from holding state employment, nor does Section 5-1-3, N.M.S.A., 1953 Compilation make it unlawful for the Commission to employ him. Under the Personnel Act and the rules and regulations of the Personnel Board grounds do exist for the dismissal of the employee. However, as we have pointed out above dismissal of the employee is not mandatory, but is a matter which rests within the sound discretion of the Corporation Commission.