

Opinion No. 66-109

September 23, 1966

BY: OPINION OF BOSTON E. WITT, Attorney General Joel M. Carson, Acting Deputy Attorney General

TO: Mr. C. R. Sebastian, Director, Department of Finance and Administration, State Capitol Building, Santa Fe, New Mexico

QUESTION

FACTS

The Secretary of State has two employees who have been exempted from the operation of the Personnel Act by the Secretary of State through the Personnel Department pursuant to the provision of Section 5-4-31 (I), N.M.S.A., 1953 Compilation. The Secretary of State has now appointed a Chief Clerk and Deputy Secretary of State, as she is authorized to do by Section 4-2-2, N.M.S.A., 1953 Compilation. This person has also been certified to the Personnel Department and the Department of Finance and Administration as an exempt employee.

QUESTION

On the facts presented does Section 4-2-2 et seq., N.M.S.A., 1953 Compilation, allow the Secretary of State to have more than two assistants who are not classified under the Personnel Act?

CONCLUSION

No.

OPINION

{*148} ANALYSIS

Section 4-2-2, supra, provides in part: "The secretary of state is hereby authorized to appoint his chief clerk to be assistant secretary. . . ."

Section 4-2-3, N.M.S.A., 1953 Compilation describes the duties of the assistant secretary of state:

"The assistant secretary shall have power, in the absence of the secretary, to file all instruments required by the laws of New Mexico to be filed in the office of the secretary of state, and to certify to copies thereof, under his hand and the great seal of the state,

with the same force and effect as if the same had been filed or certified by the secretary of state."

Section 5-4-31 (I) and (M), N.M.S.A., 1953 Compilation, provides:

"The Personnel Act and the service cover all state positions except:

* * *

"I. Not more than two [2] assistants in the office of each elective official and in the office of each head of an agency, head of division . . . ;

* * *

"M. Heads of divisions of agencies and such other employees serving in policy making capacities as may be determined by the personnel board."

The office of Secretary of State is not divided into divisions approved by the Personnel Board. Therefore, there are no division heads within the organizational structure of the office. Unless Section 4-2-2, supra, creates an additional exempt position within the office of Secretary of State, the exempt status of any employee must be determined by reference to Section 5-4-31 (I), supra.

This office has on a number of occasions considered the authority of agencies to create divisions within agencies and the authority of the Personnel Board to recognize or refuse to recognize these divisions within agencies. We have uniformly held that if a division of an agency is created by statute, the head of that division must necessarily be excluded from the Personnel Act. See Opinion of the Attorney General No. 63-33. These rules relating to statutorily created divisions within agencies of government have no applicability to many other positions within government which have been created by statute. It does not follow that, merely because a position within a department has been created by statute, it is excluded from the coverage of the Personnel Act.

There is, in our opinion, no conflict between Sections 5-4-31 and 4-2-2, supra. When the two statutes are construed together full effect can be given to both statutes. The Secretary of State has full authority to appoint an Assistant Secretary of State. However, unless the Secretary of State designates the appointee as one of the two assistants which she is entitled to exempt from the coverage of the personnel scheme under Section 5-4-31 (I), that person must occupy a classified position.

It is, therefore, our conclusion that the Secretary of State may, under the current personnel system in effect for her office, exempt only two assistants. {*149} Unless she designates the Assistant Secretary of State as an exempt employee under Section 5-4-31 (I), supra, the Assistant Secretary of State must be a classified employee.