

## Opinion No. 67-72

May 29, 1967

**BY:** OPINION OF BOSTON E. WITT, Attorney General

**TO:** Col. Joseph A. Black, Chief New Mexico State Police Cerrillos Road Santa Fe, New Mexico

### QUESTION

#### FACTS

By recent action of the New Mexico State Police Board a "rule" was adopted or action taken which would require the retirement of any State Police Officer upon attaining 30 years service with the New Mexico State Police.

#### QUESTION

Does the State Police Board have the legislative authority to adopt this particular rule or take such action?

#### CONCLUSION

No.

### OPINION

#### {\*107} ANALYSIS

We must first look to the original statutes dealing with the New Mexico State Police. Police Board composition is provided for in Section 39-2-2, N.M.S.A., 1953 Compilation. Section 39-2-4 provides as follows:

"The chief of the state police and all patrolmen and other officers, and all clerical employees shall be appointed by the New Mexico state police board, and with the exception of clerical employees **shall hold their offices during good behavior**, subject to removal as hereinafter provided." (Emphasis added).

Section 39-2-21, N.M.S.A., 1953 Compilation is the statute granting to the State Police Board the authority to promulgate rules and regulations for the purpose of carrying out the provisions of the State Police Board Act. This Section further provides:

"Said board shall establish by rules, from time to time, **standards of conduct for members** of the New Mexico state police and a copy thereof shall be delivered to each such member and displayed at each station of said department. Such rules shall be filed

with the librarian of the Supreme Court library pursuant to New Mexico Statutes." (Emphasis added).

During the last session of the New Mexico Legislature House Bill No. 139, Chapter 64, Laws 1967 was passed and signed by the Governor. The crucial portion of that bill, which becomes effective on June 16, provides that:

"Members of the New Mexico State Police, including the Chief, shall not be over sixty-one years of age."

This, it seems to us, is a clear legislative declaration and mandate as to when a state policeman must retire. There is nothing in this act that speaks in terms of mandatory retirement after 30 years total service with the State Police force. Had the legislature so intended presumably it would have so stated.

We have numerous cases in New Mexico which hold that the Legislature may not vest unbridled or arbitrary power in administrative agencies, but must furnish reasonable and adequate standards to guide the department. **City of Santa Fe v. Gamble-Skogmo, Inc.**, 73 N.M. 410, 389 P.2d 13; **State, ex rel., Holmes v. State Board of Finance**, 69 N.M. 430, 367 P.2d 925.

In the case at hand the Legislature **did** provide adequate standards for the mandatory retirement of State Police Officers. The provision is neither vague nor ambiguous. We think, therefore, that this provision is to be followed in regard to mandatory retirement of State Police Officers and not a Board rule which is not necessarily harmonious with the legislative provision. For example, a person might work 7 years for a municipal police department and he might then go to work for the New Mexico State Police; such a person then would have a total of 37 years as a law enforcement officer before he had to retire. On the other hand under the Board's rule a person might join the State Police Force when he was 23 and he would have to retire at the age of 53. Thus, we see no correlation between the Board's rule and standards of efficiency and good health.

A case very closely in point which cites numerous other decisions is the 1955 decision in **Wilson v. Department of West Haven**, 42 Conn. 646, 116 A.2d 420. In the **West Haven** case an action was brought by town policemen to prevent the town and others from carrying *{\*108}* into effect a decision of the Town Board of Police Commissioners to involuntarily retire policemen who had 25 years of service.

The Court pointed out that the Town Board of Police Commissioners was a creature of statute and had neither inherent or common law power, and whatever functions it was to perform were to be those which the legislature expressly or by necessary implication had conferred.

It was noted in the decision that these policemen were not being retired for cause, either disability or malfeasance in office. The Court stated that under the statute there involved

"The conditions which must exist are that the member, while engaged in performing his police duties, has become disabled, through no misconduct of his own. . . ."

We could also point out that the statute which the Connecticut Court was construing was not as plain or unambiguous as is House Bill 139 passed by the last session of the Legislature.

In conclusion then, it is our opinion that the State Police Board has not been delegated the authority to adopt this particular rule or take such action and that further, the rule could work in a discriminatory fashion since it would not work uniformly on all officers insofar as age is concerned.

By: Oliver E. Payne

Deputy Attorney General