

Opinion No. 80-38

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OPINION OF: Jeff Bingaman, Attorney General

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TO: Dr. George Goldstein, Secretary, Department of Health and Environment, P.O. Box 968, Santa Fe, New Mexico 87503

PUBLIC OFFICERS AND EMPLOYEES

The number of exempt positions authorized for the Health and Environment Department under the Personnel Act are not limited by the Executive Reorganization Act and the Health and Environment Department Act.

QUESTIONS

Is the number of exempt positions authorized for the Health and Environment Department under the Personnel Act limited by the Executive Reorganization Act and the Health and Environment Department Act?

CONCLUSIONS

No.

ANALYSIS

The Personnel Act provides at Section 10-9-4 NMSA 1978 that the state personnel service shall cover all state positions except:

". . . C. heads of agencies appointed by boards or commissions;

D. directors of department divisions;

. . . K. not more than two assistants and one secretary in the office of each official listed in Subsections . . . B and C of this section, . . .;

L. those of a professional or scientific nature which are temporary in nature;

. . . N. state employees, if the personnel board, in its discretion, decides the position is one of policy making."

OPINION

Similarly, Section 10-9-5(A) NMSA 1978 of the Personnel Act provides that the positions covered by the exempt salaries plan shall include:

- ". . . (2) heads of agencies or departments appointed by the governor;
- . . . (4) directors of department divisions;
- . . . (7) assistants and secretaries in the offices of each official covered by Paragraphs (2), (3) and (10) of Subsection A of this section;
- (8) positions of professional or scientific nature which are temporary in nature;
- (9) state employees whose positions the personnel board has classified as policy-making positions and exempt employees of elected public officials;
- (10) secretaries-of-departments appointed by the governor."

Thus, under the Personnel Act, the following exempt positions would be authorized for the Department of Health and Environment (DHE):

1. the department secretary,
2. the director of each division, and
3. two assistants and a secretary appointed by each of the above.

{*196} In addition, temporary professional or scientific positions are exempt and exemptions may be granted by the state personnel board for department employees who are in positions which are classified as policy-making.

The exempt status of the positions of department secretary and division director is also defined in the reorganization laws enacted in 1977. The Executive Reorganization Act provides at Section 9-1-4 NMSA 1978 that these officers be appointed by the governor or with the approval of the governor, to serve at the pleasure of the appointing authority, but that bureau chiefs and section supervisors shall be covered by and subject to the Personnel Act. The Health and Environment Department Act provides at Section 9-7-6(B)(9) NMSA 1978 that the secretary shall appoint division directors who "are exempt from the provisions of the Personnel Act."

In defining exempt positions only for the secretary and division heads of DHE, these reorganization laws are not in conflict with the Personnel Act nor are they controlling with respect to the number of exempt positions authorized for DHE.

Any apparent conflict between the reorganization laws and the Personnel Act may be resolved by the fact that they may practically be read as consistent and harmonious. See **State ex rel. Clinton Realty Co. v. Scarborough**, 78 N.M. 132, 429 P.2d 330

(1967). The Executive Reorganization Act and the Health and Environment Department Act were intended to establish the efficient management of the executive branch. See, e.g., Sections 9-1-2 and 9-7-3 NMSA 1978. To accomplish this end, the legislature provided that at least certain key positions be under the control of the governor and exempt from the procedures covering positions in the state personnel service. The existence of other exempt positions in DHE does not frustrate this intent.

Moreover, neither of the reorganization laws specifically states that there may be no other exempt positions in DHE. Such language cannot be read into these laws when they make sense as written. **Burroughs v. Board of County Commissioners of Bernalillo County**, 88 N.M. 303, 540 P.2d 233 (1975). It is not necessary to the meaning of the reorganization acts to incorporate a prohibition against other exempt positions.

Finally, to conclude that the only exempt positions at DHE are those of secretary and division director would require a finding that the legislature intended to repeal, by implication, those provisions of the Personnel Act which relate to exempt positions. As a rule, repeals by implication are not favored unless necessary to give effect to obvious legislative intent. **Buresh v. City of Las Cruces**, 81 N.M. 89, 463 P.2d 513 (1969). There must be a clear indication that the reorganization acts were intended to cover the whole question of exempt positions for executive departments and to displace the applicable portions of the Personnel Act. **Matter of Childers' Estate**, 89 N.M. 334, 552 P.2d 465 (1976). No such intent can reasonably be inferred from the Executive Reorganization Act or the Health and Environment Department Act.

It therefore follows that the provisions of the Personnel Act authorizing exempt positions other than secretary and division director are applicable to DHE and may be given effect as written.

ATTORNEY GENERAL

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