

Opinion No. 83-03

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OPINION OF: Paul Bardacke, Attorney General

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TO: Leo Griego, Director, State Personnel Office, 130 South Capitol, Santa Fe, New Mexico 87501

FACTS

Chapter 297 of the Laws of New Mexico 1983 creates the Economic Development and Tourism Department and the Regulation and Licensing Department. This legislation transfers the functions and personnel of the New Mexico Commerce and Industry Department to either the Economic Development and Tourism Department or to the Regulation and Licensing Department. Chapter 297 provides that certain employees of the two departments are to be exempt from the provisions of the New Mexico Personnel Act, Section 10-9-1, NMSA 1978, **et. seq.** However, Chapter 297 also specifically provides that the personnel of the Commerce and Industry Department are transferred to the departments of Economic Development and Tourism and Regulation and Licensing. With few exceptions, the employees of the Commerce and Industry Department are classified employees covered by the Personnel Act and thus accorded certain rights pursuant to that Act. It is unclear if in enacting Chapter 297, the Legislature intended that certain of these employees lose their status as classified employees upon their transfer from the Commerce and Industry Department to the Economic Development and Tourism Department and the Regulation and Licensing Department.

QUESTIONS

A. Does Chapter 297, Laws of New Mexico 1983, take precedence over the Personnel Act. Section 10-9-1 NMSA **et. seq.**?

B. Does Chapter 297, Laws of New Mexico 1983, require both the referenced positions and the employees occupying those positions to be exempt? If it does, are the rights of the employees being affected unlawfully?

CONCLUSIONS

A. No; to the extent possible, Chapter 297, Laws of New Mexico, 1983 and the State Personnel Act, Section 10-9-1 NMSA 1978, **et. seq.**, must be read so as to give effect to both acts.

B. Those employees holding classified positions with the Commerce and Industry Department retain their classified status and continue to hold classified positions upon their transfer to either the Economic Development and Tourism Department or the Regulation and Licensing Department.

ANALYSIS

The Commerce and Industry Department consists of six statutorily created divisions; namely, the economic development division, the financial institutions division, the mobile housing division, the construction industries division, the administrative services division and the tourism and travel division. Pursuant to Section 31 of Chapter 297, all monies, personnel, equipment and other property of the economic development division, the motion picture bureau, the New Mexico Magazine division and the tourism and travel division of the Commerce and Industry Department are transferred to the Economic Development and Tourism Department and all monies, personnel, equipment and other property of the construction industries division, financial institutions division and the mobile housing division of the Commerce and Industry Department are transferred to the Regulation and Licensing Department. Sections 4 and 20 of Chapter 297 divide the Economic Development and Tourism Department and the Regulation and Licensing Department into essentially the same divisions currently found within the Commerce and Industry Department.

Section 31(A)(4) of Chapter 297 further provides that all references in law to the economic development division, the motion picture bureau, the New Mexico magazine division and the tourism and travel division of the Commerce and Industry Department are to be construed as referring to, respectively, the economic development division, the New Mexico film division, the New Mexico magazine divisions and the tourism and travel division of the Economic Development and Tourism Department. Section 31(A)(8) of Chapter 297 similarly provides that all references in law to the construction industries division, the financial institutions division, or the mobile housing division of the Commerce and Industry Department are to be construed as referring to, respectively, the construction industries division the financial institutions division and the mobile housing division of the Regulation and Licensing Department. Section 31(A)(7) of Chapter 297 provides that all existing contracts and agreements entered into by the divisions of the Commerce and Industry Department are binding upon the corresponding divisions of the Economic Development and Tourism Department and the Regulation and Licensing Department. Finally, Section 18 of Chapter 297 expressly provides that the purpose of the Regulation and Licensing Act is to create a single department to execute those functions formerly exercised by the financial institutions division, the construction industries division and the mobile housing division of the Commerce and Industry Department. Section 2(c) of Chapter 297 states that the purpose of the Economic Development and Tourism Department is to further development and diversification of the state's economy. As provided in Section 9-2-2, NMSA 1978, the purpose of the Commerce and Industry Department was, similarly, to promote the economic development of the state. Therefore, even though Chapter 297

may have abolished the Commerce and Industry Department, it did not eliminate any of its functions or its personnel.

The intent of the Legislature in enacting a bill is to be ascertained first from the statutory language. **Arnold v. State**, 94 N.M. 381, 610 P.2d 1210 (1980). However, if the statutory language is ambiguous, then, the rules of statutory construction may be called upon to assist those interpreting the statute. **New Mexico State Board of Education v. Board of Education of Alamogordo Public School District No. 1**, 95 N.M. 588, 624 P.2d 530 (1981). According to these rules, statutes should be construed in such a manner as to promote and not defeat the policies underlying the act. **Martinez v. Research Park Inc.**, 75 N.M. 672, 410 P.2d 200 (1965). Statutes should be construed consistently with other laws relating to the same subject matter. **EG&G Inc. v. Director, Revenue Division Taxation and Revenue Dept.**, 94 N.M. 143, 607 P.2d 1161 (1979). Statutes should also be construed in such a manner as to uphold their constitutionality. **New Mexico State Board of Education v. Board of Education of Alamogordo Public School District No. 1**, *supra*.

Unless expressly exempted by Section 10-9-4, NMSA 1978, personnel employed by the Commerce and Industry Department are subject to the provisions of the Personnel Act. Pursuant to this act, any person employed by the Department who has completed the requisite probationary period is a classified employee and holds a classified position. That is, his or her employment by the Commerce and Industry Department is subject to the provisions of the Personnel Act and the rules and regulations promulgated by the State Personnel Board.

The Personnel Act gives classified employees certain rights. Pursuant to Section 10-9-18, NMSA 1978, an employee who has been dismissed, demoted or suspended may appeal the disciplinary action to the State Personnel Board. If the Board finds that the disciplinary action taken by the agency was without just cause, it may order the employee reinstated.

Section 10-9-19, NMSA 1978, provides that whenever an employee is terminated because of a reduction in force, he or she must be rehired if a same or similar position becomes available in that agency within six months of the termination. Pursuant to Section 10-9-19, NMSA 1978, Section 14 of the Rules of the State Personnel Board further provides that although an employee may be laid off due to lack of funds or curtailment of work, the reduction in force will be made according to Personnel Board rules and to an approved lay off plan designating specific organizational units for lay off and providing for displacement or "bumping" of incumbents into other classified positions. Pursuant to Rule 6.2 of the State Personnel Rules, employees who have been laid off must be offered reemployment in the agency when positions become vacant before other candidates are considered.

Based on the provisions of the Personnel Act and the Rules of the State Personnel Board, a person employed by the Commerce and Industry Department who has successfully completed his or her probationary period has a reasonable expectation of

continued employment with the agency so long as the employee performs the tasks required adequately and his or her job is not abolished because of lack of funds or curtailment of work. This expectation of continued employment is sufficient to give rise to a property interest or vested right subject to the protection of the United States and the New Mexico constitutions. **The Board of Regents of State Colleges v. Roth**, U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).

Article 11, Section 19 of the New Mexico Constitution provides that the legislature shall not enact any legislation which impairs the obligation of contracts. Article 1, Section 10, Clause 1 of the United States Constitution prohibits any state from passing any law impairing the obligations of contracts. These constitutional provisions prohibit the state legislature from enacting legislation which purports to alter terms and conditions of contractual agreements entered into before the passage of the legislation. **Sturges v. Crowninshield**, 4 Wheat 122 (1816). The legislature, then, may not substantially change vested rights granted by earlier laws. **Rubalcava v. Garst**, 53 N.M. 295, 206 P.2d 1154 (1949). Furthermore, legislation in effect at the time the contract is entered into is deemed to be part of that contract. **Rubalcava v. Garst, supra**. Subsequent statutes which change such laws will generally be interpreted as affecting only those contracts entered into after the passage of the legislation.

There are instances in which the alteration of contracts by legislation has not been considered an unconstitutional impairment of contractual obligations. Thus, the prohibition against the impairment of contracts has not been construed as absolute. **Home Building and Loan Ass'n v. Blaisdell**, 290 U.S. 398, 54 S. Ct. 231, 78 L. Ed. 413 (1934). Legislation may modify interests which do not rise to the level of "vested" or property rights and legislation may also make reasonable modifications in existing contracts. **Koch v. Yunich**, 533 F.2d 80 (2nd Circ., 1975). However, legislation may only substantially change vested rights under certain exceptional circumstances. These circumstances have been formulated as the following: 1) the legislation is necessary to protect vital public interests; 2) the legislation is enacted to meet an emergency and is appropriate for the demands of the emergency; 3) the legislation is a temporary measure and vested rights are not lost, but merely deferred for a short period. **Home Building and Loan Ass'n v. Blaisdell, supra; City of El Paso v. Greenberry Simmons**, 379 U.S. 497, 85 S. Ct. 577, 13 L. Ed. 2d 446 (1965). **United States Trust Co. v. New Jersey**, 431 U.S. 1, 97 S. Ct. 1505, 51 L. Ed. 2d 92 (1977).

The Personnel Act and the Rules of the State Personnel Office establish a continuing employment relationship with those state employees covered by the Personnel Act. Such a continuing relationship has been deemed a sufficient interest to be protected by the constitution. An employee occupying a position exempt from the Personnel Act may be dismissed without cause or terminated without the right of re-hire. Such an employee, therefore, does not have the same reasonable expectation of continued employment as does an employee in a classified position; nor does an exempt employee have the same property interest in his or her job as does a classified employee. If Chapter 297 were construed as changing classified employees to exempt employees, it would therefore, deprive the classified employees of certain vested and

substantial property interests. To do this constitutionally, the state must show that such a change was in the vital public interest, necessary to meet an emergency, or only a temporary measure.

Section 2 of Chapter 297 states that the purpose of creating the Economic Development and Tourism Department is to promote economic diversification and development within the state. In passing Chapter 297, the legislature was aware of the Personnel Act, specifically referring to the Personnel Act in the legislation. The Personnel Act states that its purpose is to establish a personnel system based on qualifications and ability and to provide greater economy and efficiency in the management of state affairs. Section 10-9-2, NMSA 1978. The legislature has not repealed the Personnel Act, therefore indicating its continued belief that the classified system serves the public interest. The classified employees in the Commerce and Industry Department were employed pursuant to the Personnel Act and they have not been dismissed for cause. They are, therefore, presumably qualified and able employees.

Absent a showing that the Personnel Act has failed in its purpose or that the individual employee have not been performing adequately, it is difficult to show that upon transfer to the Economic Development and Tourism Department or the Regulation and Licensing Department, the public's interest is so vital as to deprive any particular employee of the interests he or she has as a classified employee. Furthermore, no emergency is evident from the legislation and the change from classified to exempt positions is not a temporary measure. Thus, Chapter 297 does not present the exceptional circumstances necessary to allow an existing contract between the employee and the state is to be changed in a constitutional manner. Thus, for Chapter 297 to be constitutional, it must be construed as intended to act prospectively only.

When classified personnel of the current Commerce and Industry Department are transferred to their respective departments as provided in Section 31 of Chapter 297, they retain the same classified status and position as held in the Commerce and Industry Department. If a classified position is to become exempt from the Personnel Act pursuant to Chapter 297, it may only become exempt if a vacancy occurs in that position.

An employee in the classified service may, of course, voluntarily resign his or her position. A voluntary resignation would, however, be one made at the initiative of the employee or as the result of a lawful and arms length agreement reached between the employer and the employee. Therefore, if employees of the Commerce and Industry have not voluntarily resigned they continue as classified employees and retain the classified positions they held in the Commerce and Industry Department. As such they may only be dismissed or terminated pursuant to the provisions of the Personnel Act and the State Personnel Board Rules.

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