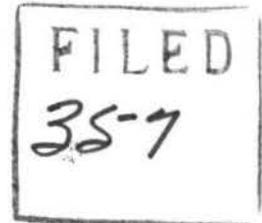


LABOR:  
DIVISION OF MENTAL HEALTH:

The Division of Mental Health cannot agree with representatives of the employees to make promotions or transfers based upon seniority.

OPINION NO. 357

July 22, 1971



George A. Ulett, M.D.  
Director  
Division of Mental Health  
Post Office Box 687  
Jefferson City, Missouri 65101

Dear Dr. Ulett:

This opinion is in answer to your request in which you ask two questions. The first question asks whether the Division of Mental Health may agree with representatives of the employees to make promotions of employees "from the list of qualified employees, according to the rules and regulations of the Personnel Advisory Board, by seniority."

The second question asks whether by such agreements transfers within the division of qualified personnel may be based on "the requirements and needs of the Division of Mental Health according to seniority."

With respect to your first question, we note that Section 36.030, RSMo 1969, subsection 2 states:

"The system of personnel administration governs the appointment, promotion, transfer, layoff, removal and discipline of employees and officers and other incidents of employment in divisions of service subject hereto and all appointments and promotions to positions subject to this law shall be made on the basis of merit and fitness to be ascertained by competitive examinations."

The corresponding rule of the Personnel Advisory Board, Rule 1.1, states the purposes of the "State Merit System Law" to be "to establish for certain employees of the state, a system of personnel administration based on merit principles and designed to secure efficient administration" and "to govern the appointment, promotion,

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transfer, layoff, removal, and discipline of certain employees and other incidents of state employment on the basis of merit and fitness."

Under subsection 1 of Section 36.150, RSMo 1969, "[e]very appointment or promotion to a position covered by this law shall be made on the basis of merit determined by such person's eligibility rating established by competitive examinations. . . . No appointment, promotion, demotion or dismissal shall be made because of favoritism, prejudice or discrimination." Under subsection 7 of this section, any officer or employee in a position subject to this law who violates any of the provisions of this section shall forfeit his office or position. (See also Personnel Advisory Board Rule 15.4.)

The rules of the Personnel Advisory Board also set up a comprehensive system for promotional examinations, Rule 7.3(b), promotional registers, Rule 8.2(b), methods of filling vacancies, Rule 9.2, and selection by the appointing authority for the purpose of filling vacancies from the list of eligibles maintained by the Personnel Advisory Board, Rule 9.3. These rules, of course, largely reflect the language of the Merit System statutes, Chapter 36.

Under Section 36.240, RSMo 1969, in filling a vacancy in a permanent position subject to this law the appointing authority shall be entitled to choose from among the three highest ranking available eligibles certified to him by the director of the personnel division of the department of business and administration and if more than one position in a class is to be filled at a time, the appointing authority shall be entitled to choose from among at least two more eligibles than the number of positions to be filled.

In addition, Section 19 of Article IV of the Missouri Constitution provides:

"The head of each department may select and remove all appointees in the department except as otherwise provided in this Constitution, or by law. All employees in the state eleemosynary and penal institutions, and other state employees as provided by law, shall be selected on the basis of merit, ascertained as nearly as practicable by competitive examinations; provided that any honorable discharged member of the armed services of the United States who is a citizen of this state and was such on entering the service, shall have preference in examination and appointment as prescribed by law."

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We note the following statement of the Court of Appeals of New York in People ex rel. Balcom v. Mosher, 163 NY 32, 57 NE 88 (1900) at l.c. 90:

" . . . The decisions of this and other courts, state and federal, as to the meaning of the word 'appointment,' and what constitutes an appointment under the law, are to the effect that the choice of a person to fill an office constitutes the essence of the appointment; that the selection must be the discretionary act of the officer or board clothed with the power of appointment; that, while he or it may listen to the recommendation or advice of others, yet the selection must finally be his or its act, which has never been regarded or held to be ministerial. . . ."

An act which an officer may do or may not do in the exercise of his official discretion cannot be considered a ministerial act. State ex inf. Gentry v. Toliver, 315 Mo. 737, 287 SW 312 (1926). A public officer cannot delegate his power or duties. Henschel v. Fidelity & Deposit Co. of Maryland, 87 F.2d 833 (8th Cir. 1937); State ex rel. Skrainka Const. Co. v. Reber, 226 Mo. 229, 126 SW 397 (1910).

Further, as stated by the Supreme Court of Missouri in City of Springfield v. Clouse, 356 Mo. 1239, 206 S.W.2d 539 (1947) at l.c. 545:

" . . . If such [legislative] powers cannot be delegated, they surely cannot be bargained or contracted away; and certainly not by any administrative or executive officers who cannot have any legislative powers. Although executive and administrative officers may be vested with a certain amount of discretion and may be authorized to act or make regulations in accordance with certain fixed standards, nevertheless the matter of making such standards involves the exercise of legislative powers. Thus qualifications, tenure, compensation and working conditions of public officers and employees are wholly matters of lawmaking and cannot be the subject of bargaining or contract. . . ."

The question next arises as to whether under Sections 105.500, RSMo 1969, et seq., of the labor organization statutes the director

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of the Division of Mental Health may waive the exercise of his discretion or of the discretion of any appointing authority within his administrative control. Our answer to that question is that the discretionary authority of such state officers is founded upon statutory authority and is not subject to delegation or waiver by agreement or resolution. We believe that this is especially clear in the areas in question which involve the fundamental rights of all individuals under a merit system founded upon the clear requirement of the Missouri Constitution that employees "shall be selected on the basis of merit." Section 19, Article IV, Missouri Constitution.

Thus in our view, it would be contrary to the purposes of the merit system, in violation of the statutes and in derogation of the powers of the appointing authority under Chapter 202, relating to the administration of the state mental institutions and Chapter 36, the merit system statutes for promotions to be determined on the basis of seniority.

Under Section 36.280, RSMo 1969, an appointing authority may "at any time assign an employee from one position to another position in the same class in his division." (See companion Rule 9.5.)

In our view, a predetermination by an appointing authority on the basis of seniority in effecting such a transfer is in derogation of the power and duty of the appointing authority to effect such transfers based upon other considerations.

In reflecting generally upon the consideration to be given to seniority, we note that the legislature expressly provided with respect to layoffs that "seniority and service ratings of employees shall be considered, in such manner as the regulations shall provide, among the factors in determining the order of layoffs." Section 36.360, RSMo 1969. (See also Rule 12.1 of the Personnel Advisory Board Rules and Regulations.)

Neither the Constitution nor the statutes permit selection for promotion or transfers based on seniority.

#### CONCLUSION

It is the opinion of this office that the Division of Mental Health cannot agree with representatives of the employees to make promotions or transfers based upon seniority.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Very truly yours,



JOHN C. DANFORTH  
Attorney General