

November 4, 1988

Subject:

State Departments; Institutions and Agencies; State Personnel Act; Agency Finding Employees To Fill Specific Positions Through Personnel Agencies Or Search Firms

Requested by:

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Question:

(1) Does G.S. 126-18 prohibit the State or one of its agencies from utilizing the services of a personnel agency or search firm to find candidates for a difficult to recruit position after other efforts to fill the position have failed?

(2) Does the statutorily mandated promotional priority for state employees under G.S. 126-7.1 restrict or limit the ability of state agencies to act in this situation?

Conclusion:

(1) No.

(2) Yes.

Under the State Personnel Act, individuals, corporations and other entities are prohibited from receiving or accepting any compensation or anything of value for obtaining employment with the State for any person, or assisting any other person in obtaining employment with the State, except under specified circumstances. The prohibition is found in G.S. 126-18, which reads as follows:

It shall be unlawful for any person, firm or corporation to collect, accept or receive any compensation, consideration or thing of value for obtaining on behalf of any other person, or aiding or assisting any other person in obtaining employment with the State of North Carolina; provided, however, any person, firm or corporation that is duly licensed and supervised by the North Carolina Department of Labor as a private employment service acting in the normal course of business, may collect such regular and customary fees for services rendered pursuant to a written contract when such fees are paid to someone other than the State of North Carolina; however, any person, firm or corporation collecting fees for this service must have been licensed by the North Carolina Department of Labor for a period of not less than one year.

Any person, firm or corporation collecting fees for this service must make a monthly report to the Department of Labor listing the name of the person, firm or corporation collecting fees and the person for whom a job was found, the nature and purpose of the job obtained, and the fee collected by the person, firm or corporation collecting the fee. Violation of this section shall constitute a misdemeanor punishable by fine or imprisonment, or both, in the discretion of the court. (1977, c. 397, s. 1)

The restrictions or limitations of G.S. 126-18, by the language of that section, are aimed at controlling the receipt of compensation or anything of value for finding or arranging employment on behalf of a person seeking employment, or the receipting of compensation or anything of value for helping someone who is seeking to, and does, obtain employment with the State. The exception is for a private employment service making monthly reports to the Department of Labor. Among the items which it must list is "the person for whom a job was found..." The listing of the item reflects the concern of the statute with inappropriate payments for finding employment with the State for a person seeking employment, not with the State finding

a person to fill a particular job. The prohibition on the State's paying the employment agency's fee must be read in context to apply to the kind of fee for the kind of services which the statute seeks to regulate--fees for obtaining employment for jobhunters, not fees for finding candidates or employees for agencies with vacant positions.

In some instances, state agencies are faced with the need to fill positions for which it is difficult to recruit persons with appropriate credentials. The question has thus arisen whether a state agency is prohibited by G.S. 126-18 from utilizing the services of a "search firm" to help find candidates for a position which is difficult to recruit and then from employing an individual located by the search firm. The question assumes that it is the State which initiates this process because it cannot fill a position and that the State is not paying a fee to the search firm for any services to the person who is eventually hired. Instead, it is paying a fee solely for the services provided to the State or state agency in helping to identify candidates or fill a position. A search firm would normally be retained only after exhaustion of other methods of locating a person for a specialized, highly responsible position. Search firms usually operate on a national basis, not locally, and seek persons who may not even be looking for new employment. Search firms do not normally have jobhunters signed up with them for the purpose of finding new jobs, in contrast to employment agencies. They do not undertake to find positions for individual jobhunters, and they do not charge fees to persons hired as a result of their search efforts. Instead, they recruit candidates under an arrangement by which the employer pays for their time and efforts in making the search, even if unsuccessful, plus an additional fee, based on the salary of the person employed, if they locate a candidate hired by the employer. Under these circumstances, G.S. 126-18 does not prohibit the State from utilizing such a firm. Nor does G.S. 126-18 prevent the State from paying fees for the services provided to the State in locating candidates or employees to fill such positions, provided that the fee is for services rendered by a search firm under the type of arrangement discussed above. A state agency could not simply ask an employment agency for help in finding a candidate for a job, hire someone listed with the employment agency, and then pay the agency's fee, no matter how much difficulty the State had experienced in recruiting for the position in question. Payment of the employment agency's fee would violate G.S. 126-18 regardless of how valuable the State considers the employment agency's services in referring the candidate eventually hired.

The question has further arisen whether the language of G. S. 126-7.1, mandating a promotional priority for state employees, restricts or limits the ability of state agencies to employ firms, corporations, or other entities to find candidates to fill positions which are difficult to recruit. This question assumes that the position is subject to G.S. 126-7.1. Under 126-7.1, any vacancy for which a state agency, department or institution openly recruits must be posted in the personnel office and in the particular work unit which has the vacancy in a place readily accessible and available to the employees. If applicants are to be received from outside the recruiting agency, department or institution, that agency must list the vacancy with the Office of State Personnel so that state employees will be informed of the vacancy. Employment of any individual to fill such a position cannot be approved by the Office of State Personnel unless the agency has complied with the posting requirements. In addition, under G.S. 126-7.1 (c), if a current state employee applies for a position and has qualifications substantially equal to those of a non-state employee applicant, the state employee is entitled to priority consideration over applicants who are not state employees. The Office of State Personnel has adopted policies to implement these provisions.

The effect of G.S. 126-7.1 is to prohibit a state agency, department or institution from recruiting unless it complies with the posting requirements within the agency and also notifies the Office of State Personnel of the vacancy in order to inform current state employees in other agencies of the vacancy. In addition, the agency seeking to fill the position cannot hire an outside candidate, whether identified by a personnel agency or search firm or located otherwise, if a current state employee with substantially equal qualifications, within the meaning of G.S. 126-7.1, also applies. If the state agency does comply with the posting requirement of G.S. 126-7.1 and if no state employee with substantially equal qualifications is a candidate, then the agency may hire an outside candidate, whether located by personnel agency or search firm or otherwise.

In sum, a state agency which openly recruits for a position must post the position as required by G.S. 126-7.1, both in the personnel office of the agency and in the work area of the unit which has the vacancy. In

addition, if the agency recruits candidates from outside the agency, the vacancy must be listed with the Office of State Personnel. If a position is particularly difficult to fill, G.S. 126-18 does not prohibit the agency from employing a search firm to help locate candidates for the position. The State may pay the search firm's fees for locating candidates as the result of a search for candidates, not based on persons signed up with the search firm for help in finding employment. The giving to or receipt of compensation by anyone, except for receipt by legitimate employment agencies, for assisting in obtaining employment with the State is prohibited. The State, however, may not make payments to these employment agencies for that assistance. In addition, if a current state employee with substantially equal qualifications applies, the agency is required to give priority consideration to the current employee under G.S. 126-7.1.

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