

Opinion No. 51-5354

April 18, 1951

BY: JOE L. MARTINEZ, Attorney General

TO: Honorable Robert D. Castner State Auditor Santa Fe, New Mexico

{*34} I have your request for an opinion as to whether or not you are legally able to approve vouchers and issue warrants in payment of purchases made by the Superintendent of the Penitentiary and the Deputy Superintendent for payment of groceries, in the amounts of approximately \$ 60.00 a month and \$ 40.00 a month, respectively. I understand further from your letter that this has been the practice for the last ten years, although a thorough study of the minutes of the meetings of the boards of the penitentiary do not disclose any authority for such practice.

In order to express an opinion on the above question, an interpretation of several statutes is necessary. Section 45-129 of the New Mexico 1941 Compilation states as follows:

"The superintendent shall reside upon the penitentiary grounds, and for that purpose shall have the use of the dwelling-house thereon, but in no case shall he or any other employee of the penitentiary be allowed to appropriate any goods, clothing, supplies or other articles whatsoever purchased and intended for the use of the penitentiary to their own use, except that they may have their rations at the penitentiary out of the penitentiary supplies, but not to be removed or taken therefrom."

Section 45-112 of the New Mexico 1941 Compilation pertains to purchase of supplies and states as follows:

"All purchase of supplies for the use of the penitentiary shall be made semi-annually and by contract, and estimates for that purpose shall be published for ten (10) days in some newspaper published in Santa Fe, in Las Vegas and in Albuquerque and the contract for the furnishing {*35} of such supplies shall be let to the lowest responsible bidder and accompanied by a certified check for ten (10) per cent of the amount of the bid:" * * *

Section 45-113 states as follows: "When semiannual estimates prove insufficient, the board of commissioners shall cause to be purchased sufficient supplies to make up the deficiency, the same to be purchased by contract as provided above, or in open market if the amount should be very small and not justify making the advertisement, and all contracts let or executed under this and the next two preceding sections shall be made by the board of penitentiary commissioners."

The two sections above quoted were enacted under the laws of 1889 -- Chapter 76, Section 45-112 being amended in 1939 and Section 45-113 having been amended in 1929.

The above two sections, however, have been superseded to a great extent by the State Purchasing Act, which is Chapter 124 of the Laws of 1943 (Secs. 6-701 through 6-713), in which act the State Purchasing Agent shall purchase for each Department all supplies. That act further makes a provision for emergency purchases by institutions when the amount does not exceed \$ 200.00, and included in those emergency purchases are perishable food products. On all such purchases regular requisitions shall be issued by the institutions so purchasing. A copy of such requisition, together with a copy of the invoice covering such purchase, shall be forthwith forwarded to the State Purchasing Agent.

Please note the contents of Section 6-710 which deals with improper purchases and contracts and the personal liability attached thereto. This section reads as follows:

"Whenever the head of any department shall purchase or contract for any supplies or make any construction contract contrary to the provisions of this act or the rules and regulations made hereunder, such purchase order or contract shall be void, and of no effect, and the person so purchasing or contracting shall be personally liable for the cost of such purchase or contract, and if already paid out of state funds, the amount thereof may be recovered by an action in the name of the state against the person so purchasing or contracting, and his official bond, if such official is under bond."

It is my opinion that you are legally justified in refusing to approve vouchers for the purchases made by the Superintendent and the Deputy Superintendent of the State Penitentiary as outlined in your request for this opinion.