

Opinion No. 52-5615

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BY: JOE L. MARTINEZ, Attorney General

TO: Mr. Edward M. Hartman State Comptroller Santa Fe, New Mexico

{*326} Recently you requested an opinion of this office as to whether the State Board of Finance may make an emergency transfer to the Public Auditing Fund of the State Comptroller to provide payments for audits caused to be made by the State Comptroller, to be paid out of that fund.

Section 7-109 NMSA, empowers the State Comptroller to audit governmental units named therein. It further provides that whenever such audit is deemed necessary by the State Comptroller the cost thereof shall be borne by the political unit involved upon a basis to be agreed upon by the governing board of that unit and the State Comptroller.

That statute further provides that the amount due for the work shall become payable immediately after the work is done and that such payment when received shall be deposited with the State Treasurer and credited to the Public Auditing Fund. It further provides that such funds may be drawn upon by the {*327} State Comptroller but only for the purpose of the Act.

The Act further provides that whenever the governmental unit does not have funds available to pay the cost of the audit, the account shall be held by the Comptroller and any unit becoming indebted to the state in this fashion by virtue of the Act is required to include in its next annual tax levy or budget, or both, a special levy or budget item to meet and to pay the charge. The Act further provides that when the amount needed to meet the latter obligation is available it shall be remitted to the State Comptroller, the latter to deposit it to the credit of the Public Auditing Fund.

It thus appears that this particular portion of the statute contemplates a minimum of four things: 1. Auditing; 2. Payment for such audit by the unit involved; 3. The creation of a Public Auditing Fund, and 4. The creation of debtor-creditor relationship between the State Comptroller in behalf of the State and the unit involved when such payment can not be immediately made by the unit.

It appears to be self evident therefore that the Legislature intended to provide for the creation of a Public Auditing Fund, to be used by the State Comptroller to make the audits contemplated therein. It is further self evident that the Legislature provided an appropriation for this purpose. The Legislature could not foresee how many audits would be required but it provided a means of establishing or replenishing the Public Auditing Fund to meet the obligations payable out of that fund, either by immediate payment or by deferred payment. In effect the Legislature thus made a continuing appropriation to

the Public Auditing Fund so that either immediately or ultimately it would be sufficient to defray the expenses of any audit chargeable to such fund.

The Legislation clearly indicates that the Legislature foresaw that the Public Auditing Fund might not be large enough to defray the immediate payment of necessary audits. The question to be resolved, therefore, is whether any means exist whereby the Public Auditing Fund may be replenished, from time to time, to enable the State Comptroller to cause necessary audits to be made.

It is my opinion that Section 7-237 NMSA covers the situation. That section permits the State Board of Finance in case of emergency, whenever there is a shortage of money in the current funds appropriated by the Legislature for any State Institution, or purpose, due to delay in the collection of revenues provided therefor, to direct the transfer from any current fund in the State Treasury in which there may be a surplus of current requirements of a sufficient sum to meet such emergency, the same to be replaced as soon as possible from receipts or revenues for such institution or purpose. If funds are not thus available, the State Board of Finance is authorized to borrow money, until funds are available for transfer or until the funds borrowed can be repaid out of receipts of revenues for such institution or purpose.

There is a restriction against transfer or borrowing in excess of 90% of appropriation for any institution, the 90% being the aggregate of transfer or borrowed funds, and whatever taxes may have been collected. This latter restriction has no application to the question of transfer of funds to the Public Auditing Funds for the reason that the Legislature has not limited the appropriation for this purpose.

The State Comptroller is required to make audits when deemed necessary. The Legislature has provided a continuing appropriation to defray the costs of such audits, either by immediate payment or by deferred payment out of ensuing budgets or taxes. The moneys received by the State Comptroller for such audits are to be transferred into the Public Auditing Fund. The purposes of the appropriation is clear.

Of necessity, a shortage is bound to exist in the Public Auditing Fund {^{*}328} when payments for such audits to the State Comptroller must be deferred since the Comptroller is required to pay for auditing services when the services are performed and auditors may not reasonably be expected to defer the receipt of their compensation for their work to sometime in the indefinite and distant future.

Since the State Comptroller does not cause audits of governmental units to be made unless funds are immediately available for payment, except in cases of emergency, it is my opinion that whenever the State Comptroller is required to make an audit to determine whether there are irregularities in the account of any governmental unit, it is of necessity an emergency situation. The very purpose of such audits is to determine the true state of accounts and this determination must be made then and there. When the situation arises and there is insufficient money in the Public Auditing Fund, thus appropriated by the Legislature for Public Auditing purposes it is my opinion that the

State Board of Finance may legally transfer needed funds to the Public Auditing Fund, or borrow money to be placed in this fund, the transfer or borrowing to be repaid out of further receipts by the State Comptroller of funds to be deposited in the special auditing fund.

It will be seen that the re-transfer of any such transferred funds, or re-payment of any such re-payment of money is provided for by law.

Therefore, it is my opinion that when an audit must be performed by the State Comptroller and funds are not available in the Public Auditing Fund to pay the cost thereof an emergency exists and any shortage in that fund, due to insufficient receipts or revenues to be credited to such funds, may be alleviated by the State Board of Finance by transferring or borrowing, as in the statute provided.

It is to be observed that the word "emergency" contemplates an emergency of the type upon which reasonable minds would agree. If an audit must be immediately performed to ascertain a true state of accounts to protect the interests of the State and the people, an emergency situation could be said to be present. It goes without saying that every situation must be judged accordingly to the particular facts involved and the matter of the determination as to whether or not an emergency in fact exists seemingly rests with the State Board of Finance. Thus, nothing in the foregoing opinion is to be construed as authorizing audits under the guise of emergency if in fact no such emergency exists.

I trust that this fully answers your inquiry.