

Opinion No. 64-115

September 3, 1964

BY: OPINION OF EARL E. HARTLEY, Attorney General James V. Noble, Assistant Attorney General

TO: Mr. Alex Armijo, State Auditor, State Capitol, Santa Fe, New Mexico

QUESTION

QUESTIONS

1. Under the provisions of the State Auditor's Act (Sections 67-23-2 through 67-23-30, N.M.S.A., 1953 Compilation) are the State Auditor and members of his auditing staff engaged in the practice of public accountancy?
2. If so, does the experience acquired as such help to satisfy the practical experience requirements of Section 67-23-29, N.M.S.A., 1953 Compilation?

CONCLUSIONS

1. Yes.
2. Yes.

OPINION

ANALYSIS

The definition of a person engaged in the practice of public accountancy insofar as the act is concerned is contained in Section 67-23-2, N.M.S.A., 1953 Compilation and reads as follows:

"A. Practice of Public Accountancy. A person engages in the 'Practice of Public Accountancy within the meaning of this act (67-23-1 to 67-23-30) who, holding himself out to the public as a public accountant, in consideration of compensation received or to be received by him, offers to perform or does perform, for other persons, services which involve the auditing or examination of financial transactions, books, accounts or records, or the preparation of, or the reporting over his signature on, financial, accounting, and related statements; subject, however, to the provisions of section 3 (67-23-3) hereof.

B. The term 'board' when used in this act means 'The New Mexico State Board of Public Accountancy' created by section 4 (67-23-4) hereof.

C. The term 'person' when used in this act shall, unless the context indicates otherwise, mean individuals, copartnerships and corporations.

D. The state comptroller **and his auditing staff** are hereby declared to be in the practice of public accountancy and are subject to the provisions of this act." (emphasis supplied).

Section 3 of the act, above mentioned, provides in substance that an employee under the direct control and supervision of a public accountant, certified under the act, may perform acts which would otherwise bring him under the provisions of the act without having to otherwise comply with the provisions of the act.

Since the passage of the act, the office of State Comptroller has been abolished and its functions transferred to the Office of the State Auditor. Among other duties the State Auditor is required to annually audit or cause to be audited by approved auditors the financial affairs of every state agency and public body. He shall conduct or cause to be conducted additional audits upon request or at such times as he deems advisable. Payment for such audits is billed to and to be paid by the state agency or public body audited. (Sections 4-4-2.1, et seq. N.M.S.A., 1953 Compilation -- Pocket Supplement).

Some doubt apparently existed in the minds of the legislators as to whether or not the definition in part "A" of Section 67-23-2, supra, covered the functions of the State Comptroller, and his office was specifically brought under the act by Section "D" thereof. If the office of State Auditor falls within the definition of practicing public accountancy set forth in Paragraph "A" of the Section or, if by reason of its taking over the duties and functions of the office of State Comptroller, it falls within the provisions of the act, then the answer to the first question must be in the affirmative.

However, in view of the result here reached, it is not necessary to determine whether the office of State Auditor comes within the definitions of Paragraph "A" in view of the specific declaration of Paragraph "D" of the definition section.

It is stated in Southerland, **Statutory Construction** (3rd Ed.), Vol. 3, Section 6004, page 140, as follows:

"Broadly speaking, the language of a statute will be extended to include situations which would reasonably have been contemplated by the legislature in light of the background and purposes giving impetus to the legislation."

Of particular interest is the case of **McMullen v. Shields** 29 P. 2d 652. (Mont.) This case involved an interpretation of an exemption statute which provided that a farmer could exempt from execution two oxen, or two horses or two mules, their harness and one cart or wagon. In liberally construing the statute the court held that a Ford automobile which took the place of the horses and wagon was also exempt from execution. The court there said:

"In making the exemption, the legislature had in mind the use or purpose to which the vehicle was put rather than the specific character of the vehicle named."

There are numerous other decisions to the same effect including that of **Cominetti v. United States**, 242 U.S. 470, 61 L. Ed. 442, 37 S. Ct. 192, which extended the letter of the statute by its spirit or policy, even where penal statutes are concerned.

By the specific inclusion within the terms of the statute of the Comptroller **and his auditing staff** the legislature clearly intended that **persons performing the duties** pertaining to that office were included within the requirements of the act. Those duties have now been given to the State Auditor **and his auditing staff**. Clearly the purpose of the part of the statute in point can only be construed as including the duties of State Auditor and his auditing staff and the language of the statute should be extended and interpreted so as to include the Auditor and his staff.

This opinion does not say that the legislature has the authority to change the qualifications for a constitutional office and such point is not here involved.

Secondly, you ask if the experience received by members of the auditing staff of the State Auditor can be counted toward the requirement of Section 24 of the statute. This Section provides in its applicable portion that an applicant for a license shall, among other things, have had three years of practical accounting experience, one of which must have been in New Mexico. Under certain stated conditions up to two years of this experience can be acquired by other methods.

The provision does not set forth any requirements as to how or for whom such practical experience must be gained. There is certainly no prohibition against gaining it on the accounting or auditing staff of the State Auditor. Therefore such experience may be counted towards the practical experience requirement.

In view of these conclusions your attention is called to the provisions of Section 67-23-3, N.M.S.A., 1953 Compilation, requiring that an unregistered employee or assistant must perform his accounting work under the control and supervision of a certified or registered public accountant.