

## Opinion No. 65-117

June 30, 1965

**BY:** OPINION OF BOSTON E. WITT, Attorney General Frank Bachicha, Jr., Assistant Attorney General

**TO:** John W. Flynn, State Planning Officer, New Mexico State Planning Office, Santa Fe, New Mexico

### QUESTION

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1. Is it legal for the state or its agencies to pay rent under a lease in advance, either monthly, semi-annually or annually?
2. Is leased property for State Offices considered service; if not, is certification such as the following needed: "I certify that the service has been rendered but payment has not been received?"
3. Can State agencies replace equipment, alter and repair their offices in behalf of Lessors and deduct this expense from the annual rent, if such rent can be legally advanced?

#### CONCLUSIONS

1. Yes, but see analysis.
2. No, and see analysis.
3. Yes, but see analysis.

### OPINION

#### {\*200} ANALYSIS

Your first question relates to possible restriction upon expenditure of public funds. Our review of the New Mexico statutes has revealed that there is no direct prohibition for the advance payment of lease rental by State agencies. Attorney General Opinion No. 4421, dated December 6, 1943, considered the same question. After recognizing the absence of any statutory prohibition, the writer thereof concluded as follows:

"Section 7-107 of the 1941 Compilation in referring to supplies furnished or services rendered infers that payment shall not be made for such supplies or services until they have been furnished or the services rendered. **However, a lease contract does not**

**fall within the designation of supplies or services.** If the contract is executed in my opinion the rental may be paid quarterly in advance if the terms of the contract so provide." (Emphasis supplied)

The counterpart to the above mentioned Section 7-107, in our 1953 Compilation of the New Mexico Statutes Annotated is Section 11-2-70, which reads in pertinent part as follows:

"11-2-70. Vouchers. -- Every claim for payments of public money shall be made upon a public voucher. . . . All purchase vouchers for goods and services, other than personal, shall be accompanied by supporting invoices. The payee shall certify either on the voucher or on the supporting invoice the claim as true and correct. . . ."

A clear inference prohibiting payment for supplies or services until furnished or rendered can as well be deduced from the above quoted section as it was from Section 7-107,, supra. It therefore appears that the primary question to be determined is whether rental of office space is a service.

A general definition of "rent" is set form in 32 Am., Jur. 347, Sec. 428 as: ". . . The compensation {\*201} in money, provisions, chattles, or services, paid or given **in exchange for the use and occupation of real estate . . .**" (Emphasis supplied)

Further, a "lease" has been defined as: "A contract **for the possession and profits of lands and tenements on the one side**, and a recompense of rent or other income on the other." See 32 Am. Jur. 28, Sec. 2. (Emphasis supplied) The relation of landlord and tenant or lessor and lessee is created by contract, either express or implied.

In our general review of the definition advanced for the words "services" or "service", we have not encountered a single instance where the consideration rendered by a landlord or lessor in return for the payment or rent by the tenant or lessee was classified under either of these two terms. In fact, it is our opinion that the meanings generally attributed to the rendering of services or service and a granting of "the use or occupation of real estate" are mutually exclusive.

We therefore conclude that the leasing of office space to State agencies does not constitute the rendering of a service within the contemplation of Section 11-2-70, supra. Consequently, no prohibition exists to prevent the advance payment of lease rental; provided however, that the contract between the parties stipulates such payment of rent in advance; that State laws relating to budgetary restrictions and authorized term of leases are heeded; and, that no right of termination is given to the lessor to terminate the lease at any time prior to use of the premises for which rent has been advanced.

The first part of your second question has been answered in the negative by the above analysis. In view of such conclusion, it is our opinion that the "certification" set forth in question 2. above is unnecessary.

We might suggest however that the voucher, to be presented to the Department of Finance and Administration, should contain a reference to the particular lease agreement along with all pertinent information required by such Department to confirm authorization for effecting payment.

Your third question relates in fact to the legality of payment of lease rental in a manner other than by the direct transmittal of money from the lessee to the lessor. As we stated before the relationship between lessor and lessee is based entirely upon contract. Such contracts should contain the entire agreement between the parties thereto.

We are not aware of any prohibition either directly in the law or implied by rule of public policy which would prevent a state agency from entering into the an agreement with its lessor as suggested in Question 3. above. It must be noted, however, that in no event would it be permissible to advance rentals, in the form of equipment replacement, alteration or repair of offices, in an amount greater than that which is legally payable under the lease contract. Further, any such arrangement would necessarily have to be set forth specifically in the contract.