

Opinion No. 70-33

March 31, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: Mr. Paul J. Cruz Chairman-Executive Director Employment Security Commission
P.O. Box 1928 Albuquerque, New Mexico 87103

QUESTIONS

FACTS

There are three separate Employment Security Commission "funds": a benefit fund and two administration funds. None of these funds include appropriations from state general funds.

The Unemployment Compensation Fund, established and administered pursuant to Section 59-9-9, N.M.S.A., 1953 Comp., is made up of Unemployment Compensation taxes collected from New Mexico employers. This money is used exclusively for the payment of benefits.

The UC Administration Fund, administered pursuant to Section 59-9-13(a), supra, is made up of federal grants made to the State of New Mexico under Title III of the Social Security Act, and the Federal Unemployment Tax Act. This money is used to cover the administrative costs of operating the ESC.

The Employment Security Fund, administered pursuant to Section 59-9-13(b), supra, consists of money collected from New Mexico employers as penalty and interest on delinquent tax accounts and it is earmarked for use by the Commission for the purposes and in the amounts found necessary by the Commission for the payment of costs of administration.

Annual audits of the financial affairs of state agencies are provided for in § 4-31-3, supra, as follows:

Annual and special audits. -- A. The financial affairs of every agency shall be thoroughly examined and audited each year by the state auditor, personnel of his office designated by him or by independent auditors approved by him. The audits shall be conducted in accordance with generally accepted auditing standards.

B. In addition to the annual audit, the state auditor may cause the financial affairs and transactions of an agency to be audited in whole or in part.

"Agency" is defined under § 4-31-2, supra, which provides in part:

Definition. -- As used in the Audit Act . . . "agency" means any department, institution, board, bureau, court, commission, district or committee of the government of the state . . .

The cost of such audits are to be borne by the agency, with certain exceptions not here relevant. § 4-31-4, supra.

Section 1100 of the Federal **Employment Security Manual**, Part IV, deals with the use of granted funds for conducting state audits of state employment security agencies. It provides in part:

. . . it is assumed that a relationship between the State agency and the State auditing department is established which satisfies the State auditor that the internal controls of the State agency insure proper handling of the funds. The Bureau conducts audits of the Administration fund accounts and makes a summary review of unemployment insurance fund accounts. Therefore, expenditures for financing any independent or separate audits are not considered necessary for proper and efficient administration, and grants will not include amounts to defray the costs of conducting such audits of either the administration or unemployment insurance fund accounts of a State agency.

In the past, there has been no systematic auditing of Employment Security Commission funds by any state auditing authority.

QUESTIONS

1. What, if any, funds of the ESC are subject to audit by the state auditor?
2. From what, if any, fund may the ESC lawfully pay the cost of any such audit?
3. May the state auditor lawfully accept the annual audit of federal authorities as an approved independent audit?

CONCLUSIONS

1. All funds.
2. The penalty and interest fund.
3. Yes.

OPINION

{*55} ANALYSIS

That the Employment Security Commission is a state "agency" for purposes of various state laws, including the Audit Act (§§ 4-31-1, et seq., supra) has been the long-

standing opinion of this office. Opinions of the Attorney General, No. 59-15, dated 20 February 1959, No. 59-19, dated 3 March 1959, No. 59-134, dated 2 September 1959, and No. 67-79, dated 12 June 1967.

No provision in the Audit Act exempts this agency from state audit, nor is there any provision exempting any agency receiving and expending federal funds from audit on those grounds. The legislature is presumed to know of the source of funds administered over the years by the Employment Security Commission and, had it desired to exempt this agency from audit by the state auditor, it presumably would have expressly done so.

We might add that an exhaustive nationwide survey by this office reveals that three-fourths of the states audit the operations and funds of their employment security agencies in some degree.

It seems clear that payment of the cost of a state audit cannot be made from the benefit fund. It is for benefits and refunds only. So, also, it appears that the federally granted funds for administration are presumably not available for state audits, although our information from other states is conflicting on this. However, there appears to be no reason why the penalty and interest fund, on which there are no federal limitations and which are intended for administration purposes, cannot be used to pay for state audits.

In answer to question (3), it our opinion that the state auditor is fully authorized by the express terms of § 4-31-3A to accept the annual federal audit of ESC funds as an approved independent audit should he find it adequate. He is not, however, required to do so and may insist on an audit by personnel designated by him.

We do not mean to suggest by anything said that the state auditor may arbitrarily ignore the federal audit. Under the particular circumstances surrounding this agency, we feel it is the auditor's duty to carefully examine this "independent" audit and not to duplicate it unnecessarily and thus cause unwarranted charges to agency funds. On the other hand, the fact that there has not been a systematic state audit of ESC funds over the years and the fact that the penalty and interest fund may not be so closely supervised by federal authorities as other ESC funds may indicate the need for a current audit by state auditing personnel.

By: Justin Reid

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