

Opinion No. 76-08

March 4, 1976

BY: OPINION OF TONEY ANAYA, Attorney General Thomas L. Dunigan, Deputy Attorney General

TO: Representative Alvino E. Castillo, State Capitol Building, Santa Fe, New Mexico 87503

QUESTIONS

QUESTION

May a member of the state legislature enter into audit contracts with municipalities, counties, and school districts?

CONCLUSION

Yes.

OPINION

{*56} ANALYSIS

The audit contract procedure for a municipality, county or local school district is found in the Audit Act, Sections 4-31-1 to 4-31-14, NMSA, 1953 Comp. Section 4-31-3, **supra**, requires that each agency be audited yearly by the State Auditor, personnel of his office designated by him, or an independent auditor approved by him. Section 4-31-2, **supra**, defines "agency" to include counties, municipalities, and school districts. With respect to audits to be performed by an independent auditor, Section 4-31-14B, **supra**, provides:

The state auditor shall notify each agency designated for audit {*57} by an independent auditor, **and the agency shall enter into a contract with an independent auditor of its choice** in accordance with procedures prescribed by regulations of the state auditor. **Each contract for auditing entered into between an agency and an independent auditor shall be approved in writing by the state auditor.** No payment of public funds may be made to an independent auditor unless a contract is entered into and approved as provided in this section. (Emphasis Added).

The essential point of Section 4-31-14B, **supra**, is that the agency and not the State Auditor is the contracting party. In the situation presented, the contracting party would be the municipality, the county, or the school district. While we recognize that a contract with an independent auditor must be approved in writing by the State Auditor, the State Auditor does not thereby become a party to the contract. This fact is relevant due to the

limitation placed upon the employment of legislators by Section 2-1-4, NMSA, 1953 Comp., which provides:

"From and after January 1, 1945, it shall be unlawful for any member of the legislature, during the term for which he is elected to contract for or receive any compensation for services performed as an officer or employee **of the state**, except such compensation and expense money as he is entitled to receive as a member of the legislature."
(Emphasis added).

For purposes of this inquiry, we assume, without deciding, that the contemplated contractual arrangement would create an employment relationship between the parties. Nevertheless, Section 2-1-4, **supra**, does not prohibit such a contract between a state legislator and municipalities, counties or school districts because the resulting "employment" would not involve the State of New Mexico. See, for example, Opinions of that Attorney General No. 4645 dated January 24, 1945 (employment as school teachers); No. 57-93, dated May 8, 1957 (employment as county or municipal employees); and No. 72-60, dated October 24, 1974, reaffirming Opinion No. 57-93, **supra**. Accordingly, it is our judgment that a state legislator may enter into an audit contract with a municipality, a county or a school district without violating Section 2-1-4, **supra**.

Article IV, Section 28 of the New Mexico Constitution contains an additional restriction on contracts involving state legislators. It provides:

No member of the legislature shall, during the term for which he was elected, be appointed to any civil office in the state, nor shall he within one year thereafter be appointed to any civil office created, or the emoluments of which were increased during such term; nor shall any member of the legislature during the term for which he was elected nor within one year thereafter, **be interested directly or indirectly in any contract with the state or any municipality thereof, which was authorized by any law passed during such term.** (Emphasis Added)

In Opinion of the Attorney General No. 65-208, dated October 20, 1965, the implications of the contract restriction contained in Article IV, Section 28, **supra**, were considered. That opinion concluded, based upon **State v. Highway Commission**, 38 N.M. 482, 35 P.2d 308 (1934), and **State ex rel Baca v. Otero**, 33 N.M. 310, 267 P. 68 {*58} (1928), that Article IV, Section 28 does not prohibit a state legislator from having an interest in a contract that was originally authorized by a law passed by the legislature prior to his term of office even though such authority had been broadened or funds had been appropriated to implement it during his term of office.

The Audit Act, **supra**, was enacted by Chapter 68, Laws of 1969, and it is basically the successor to the Legislative Audit Act, enacted by Chapter 287, Laws of 1965, (Sections 4-24-1 to 4-24-25, NMSA, 1953 Comp. Repealed). The Legislative Audit Act had in turn repealed the predecessor Audit Act. Indeed, statutes providing for annual audits have existed since territorial days.

Therefore, it is our opinion that the contract restriction of Article IV, Section 28, **supra**, does not prohibit the contemplated audit contract.