

Opinion No. 80-40

December 10, 1980

OPINION OF: Jeff Bingaman, Attorney General

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TO: Kathleen R. Marr, Secretary, Department of Finance and Administration, 421 State Capitol, Santa Fe, New Mexico 87503

AUDITS, PUBLIC FINANCES

The budget division may approve a budget increase to permit the state auditor to expend federal funds received from the United States Department of Labor for the purpose of conducting an audit of allocations previously made by the Department to a state agency if the federal funds provided for the audit have not been appropriated by the state legislature.

FACTS

The United States Department of Labor has entered into a cooperative agreement with the state auditor to conduct an audit of certain federal funds allocated to the New Mexico Employment Security Department. Under the agreement, the Department of Labor will pay the state auditor approximately \$250,000 for services rendered. The state auditor intends to contract with an independent public accountant for 90% of the work to be performed under the agreement but will be required to increase his staff by one or two employees to monitor and review the audit.

In order to accommodate the expenditure of the federal funds being provided for the audit, the state auditor has submitted to the budget division of the Department of Finance and Administration a budget adjustment request for a budget increase in the amount of \$256,700.

QUESTIONS

May the budget division approve a budget increase to permit the state auditor to expend federal funds received from the United States Department of Labor for the purpose of conducting an audit of allocations previously made by the Department to a state agency if the federal funds provided for the audit have not been appropriated by the state legislature?

CONCLUSIONS

Yes.

ANALYSIS

The General Appropriations Act of 1980 provided funding for the office of the state auditor by appropriating \$611,900 from the general fund and specifying that

"Notwithstanding any other provisions of this act, no budget increase shall be approved during the sixty-ninth fiscal year from any source for the operation of the state auditor's office. Income from other state funds and federal funds not appropriated above to the state auditor shall be deposited in the audit fund created by Section 12-6-13 NMSA 1978 and shall be retained in that fund pending appropriation by the state legislature." Laws 1980, Chapter 155, p. 698.

OPINION

The request for a budget increase to expend the federal funds intended for the audit must be considered in {*200} the light of this language.

1. Federal Funds

The legislative direction that federal funds "not appropriated above" be deposited in the audit fund and retained pending legislative appropriation would appear to prevent the state auditor from spending the federal funds which the United States Department of Labor has agreed to pay for the audit of the Employment Security Department. The effectiveness of this language is, however, limited by constitutional provisions governing the general appropriations act.

Article IV, Section 16 of the New Mexico Constitution provides, in relevant part, that

"General appropriations bills shall embrace nothing but appropriations for the expense of the executive, legislative and judiciary departments, . . .; but if any such bill contain any other matter, only so much thereof as is hereby forbidden to be placed therein shall be void."

This provision does not prohibit the legislature from imposing conditions upon appropriations and a general appropriations bill may contain language which is "germane to and naturally and logically connected with the expenditure of the moneys provided in the bill." **State ex rel. Whittier v. Safford**, 28 N.M. 531, 535, 214 P. 759 (1923). It is clear "that the legislature has the power to affix reasonable provisions, conditions or limitations upon appropriations and upon the expenditure of the funds appropriated." **State ex rel. Sego v. Kirkpatrick**, 86 N.M. 359, 366, 524 P.2d 975 (1974).

Nevertheless, it does not follow that the legislature has the power to impose conditions upon the expenditure of funds which it does not appropriate. The legislature does not appropriate federal funds. Even where the general appropriations act lists amounts under the heading "Federal Funds," the legislature has explained that such

enumerations "are provided for informational purposes only and are not appropriations." Laws 1980, Chapter 155, p. 690.

In Opinion of the Attorney General No. 67-49, dated March 17, 1967, this office concluded, with respect to a proposed general appropriations bill, that "any attempt to control funds not appropriated by the general appropriations act would be in violation of Article IV, Section 16." That opinion reasoned that provisions pertaining to funds which were not appropriated by the legislature would not be related to an appropriation contained in the act. Similarly, a provision of the General Appropriations Act of 1980 which refers to the disposition of federal funds received by the state auditor is a matter unrelated to an appropriation contained in the act. Pursuant to Article IV, Section 16, such a matter "shall be void."

In **State ex rel. Sego v. Kirkpatrick, supra**, the Supreme Court considered the validity of language in a general appropriations act which attempted to control the expenditure of federal funds to state universities and concluded:

"As to the authority of the Legislature to appropriate non-state funds available to the institutions of higher learning, we are of the opinion that the Legislature lacks authority to appropriate these funds or to control the use thereof through the power of appropriation." 86 N.M. at 370.

{*201} The Court agreed with a Colorado court which ruled that, under the doctrine of separation of powers, an attempt by a state legislature to appropriate federal funds was an infringement of the executive function. The **Sego** case holds that the legislature "clearly has the power, and perhaps the duty, in appropriating State monies to consider the availability of Federal funds for certain purposes, but it has no power to appropriate and thereby endeavor to control the manner and extent of the use or expenditure of Federal funds made available to our institutions of higher learning." 86 N.M. at 370. The office of the state auditor, like state educational institutions, is established and preserved by the constitution, see, e.g., **Thompson v. Legislative Audit Commission**, 79 N.M. 693, 448 P.2d 799 (1968); thus the decision of the Court in the **Sego** case would appear to apply with equal force to the question here.

Moreover, relying on the **Sego** case, this office concluded in Opinion of the Attorney General No. 75-10, dated February 7, 1975, that the "legislature is prevented by the separation of powers doctrine from imposing any conditions on the executive branch's use of federal or non-state money." Thus, insofar as the language in the General Appropriations Act of 1980 attempts to control the expenditure of federal funds received by the state auditor, it can be of no effect.

2. Audit Fund

In particular, the legislature has directed that federal funds received by the state auditor be deposited in the audit fund created pursuant to Section 12-6-13 NMSA 1978 and remain there until appropriated by the legislature. Section 12-6-13 provides

"A. There is created in the state treasury the "audit fund" into which the state auditor shall deposit all fees and costs received from agencies audited by him.

B. Payments for salaries and expenses of the state auditor shall be made from the audit fund, and the fund shall not revert at the end of any fiscal year."

As established by statute, the audit fund was not intended for the deposit and appropriation of federal funds. Accordingly, the language in the general appropriations act which requires such deposit and appropriation cannot be given effect as the legislature cannot control the expenditure of federal funds and such funds would not otherwise be part of the audit fund.

3. Budget Increase

With respect, therefore, to the legislative direction in the General Appropriations Act of 1980 prohibiting any budget increase for the operation of the state auditor's office, it follows from the foregoing that this prohibition cannot be applied to the federal funds to be paid over to the state auditor under the cooperative agreement with the United States Department of Labor.

If agency expenditures may only be made in accordance with an approved budget, see Sections 6-3-1 **et seq.**, NMSA 1978, then the state auditor must submit the budget adjustment request for a budget increase to accommodate the additional funds for the audit. The prohibitions stated in the General Appropriations Act of 1980 may not be used to preclude approving that request to the extent that it involves federal funds.

ATTORNEY GENERAL

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