



August 14, 2024

OPINION
OF
RAÚL TORREZ
Attorney General

Opinion No. 2024-08

To: The Honorable D. Wonda Johnson, New Mexico State Representative

Re: Attorney General Opinion – County Treasurer’s Authority to Hire a Deputy and Invest County Funds

Questions

1. Who is responsible for the hiring and supervision of the deputy and other employees of the county treasurer’s office?
2. Who has control over the investment of county funds?

Answers

1. The county treasurer and other elected county officers have exclusive statutory authority to hire and supervise deputies and other employees of their offices. A merit system or similar personnel policy adopted by the county commission governing the hours, leave time and other working conditions for county employees may be applied to the county treasurer’s office, as long as it does not improperly infringe upon the treasurer’s ability to perform the duties of the office.
2. Neither the county commission nor the county treasurer has sole control over the investment of county funds. State law confers upon the county treasurer the power to make investment decisions, but only with the advice and consent of the county commission, acting in its capacity as the county board of finance.

Background

It is our understanding that the questions posed in this request arise from allegations made by the McKinley County Treasurer. According to the County Treasurer, he and other elected county officials in McKinley County are not permitted to hire their respective chief deputies. He alleges that all County employees, including those of elected County officials, are under the control of the County Manager’s office. With regard to his office specifically, the McKinley County Treasurer alleges that investments in the County’s name have been made without consulting his Office and the County Commission has interfered with his responsibilities to make investments and manage the County’s investment portfolio.

Our Opinion herein is not intended—and should not be read as—an adjudication of the allegations regarding the McKinley County Treasurer’s office and the McKinley County Commission. Instead, our analysis is limited to providing our opinion upon the questions of law posed in this request. *See* NMSA 1978, § 8-5-2(D) (1975) (“[T]he attorney general shall . . . give his opinion in writing upon any question of law submitted to him by the legislature or any branch thereof, any state official, elective or appointive, or any district attorney on any subject pending before them or under their control with which they have to deal officially or with reference to their duty in office” (emphasis added)). Our conclusions are intended to provide only a framework of the controlling law; they are not intended to resolve or comment upon the underlying controversy in McKinley County. *See id.*

Analysis

The County Treasurer and Other Elected County Officers Have Exclusive Statutory Authority to Hire and Supervise Deputies and Other Employees of Their Offices.

State law expressly provides elected county officers, including the county treasurer, with authority to hire a deputy and employees to perform the duties of their offices. While a “board of county commissioners may set the salaries of such employees and deputies as it feels necessary to discharge the functions of the county, . . . elected county officials have the authority to hire and recommend the salaries of persons employed by them to carry out the duties and responsibilities of the offices to which they are elected.” NMSA 1978, § 4-38-19(A) (1973). With respect to deputies in particular, state law provides:

Each county officer shall appoint a deputy or clerk, as allowed by law, who shall take the oath of office required of the appointing county officer and shall receive [a] salary as provided by law. In case of the death of the appointing county officer, the deputy shall continue in office and perform the duties of the county officer until a new county officer is appointed and qualified as required by law.

NMSA 1978, § 10-1-13(C) (2011).

Based, in part, on a county commission’s authority to set the salaries of county employees, previous opinions of this Office have concluded that a county commission has authority to control the working conditions of county employees, including those of elected county officers. That authority includes the adoption of a merit system or similar personnel policy governing matters such as classification of employees, pay scales and ranges, working hours, and methods of employment, promotion, demotion, suspension and discharge. *See* N.M. Att’y Gen., No. 90-05 (Mar. 12, 1990); N.M. Att’y Gen., No. 81-29 (Nov. 10, 1981); *see also Board of Cnty. Comm’rs v. Padilla*, 1990-NMCA-125, ¶ 21, 111 N.M. 278 (holding that there was “no statutory impediment *in general*” to a county commission’s adoption of a merit system that “includes at least some employees of the” county treasurer).

Any merit system or similar policy regulating the working conditions of county employees must operate consistently with the statutory authority of elected county officers to hire, recommend salaries, and perform their official duties. The provisions of a merit system may not “infringe upon . . . the ability of the [t]reasurer to perform the duties of the office[.]” *Padilla*, 1990-NMCA-125,

¶ 19, or provide someone other than the county treasurer with supervisory or other authority to control the duties and responsibilities of persons employed by the treasurer. *See* N.M. Att’y Gen., No. 90-05 (Mar. 12, 1990) (concluding that “a county commission may not supervise, dictate or otherwise interfere with the substantive duties of employees hired by other elected officials”); N.M. Att’y Gen., No. 81-29 (Nov. 10, 1981) (provisions of county’s merit system cannot “operate to impair” elected county officers’ performance of their statutory duties).

In summary, state law provides the county treasurer with exclusive authority to hire and recommend the salaries of a deputy and employees to carry out the duties and responsibilities of the treasurer’s office. The county commission is authorized to set the salaries of the treasurer’s deputy and employees and may apply a merit system or other personnel policy governing the working conditions for county employees to the county treasurer’s office. A merit system may be applied to the treasurer’s office only to the extent it does not improperly infringe upon the county treasurer’s authority to hire and supervise employees or interfere with the county treasurer’s ability to perform the duties of the treasurer’s office.

The County Treasurer Is Empowered to Make Investment Decisions, but Only with the Advice and Consent of the County Commission, Acting in its Capacity as the County Board of Finance.

The county commission and county treasurer each have a statutorily defined role with respect to deposits and investments of county funds. The board of county commissioners “constitute[s] a county board of finance[.]” NMSA 1978, § 6-10-8 (1987). The board of finance supervises “the determination of the qualifications and selection” of federally insured banks and other depository institutions “to receive the public money” of the county. *Id.* The county treasurer has “supervision of the deposit and safekeeping of the public money of his county . . . and with the advice and consent” of the county board of finance, designates the depository institutions “to receive on deposit all moneys entrusted in [the treasurer’s] care.” *Id.* Public money the county treasurer has “on hand” must be deposited in a designated depository institution. NMSA 1978, § 6-10-10(A) (2021).

Similarly, the county treasurer, “with the advice and consent” of the board of finance, is authorized to invest money remaining unspent from the issue of bonds, other securities and “all money not immediately necessary for . . . public uses” and not invested in banks or other federally chartered depository institutions. Section 6-10-10(F). The permissible investments for county treasurers are specified in the statute, and include government bonds and securities, securities issued and backed by the U.S. government, and federally insured obligations. Section 6-10-10(F), (G), (H).

In *Padilla*, the Court of Appeals relied on Sections 6-10-8 and 6-10-10 to determine the roles of the county board of finance and county treasurer with respect to the investment of county funds. The decision includes a thorough analysis of those provisions and other statutes related to the deposit and investment of public funds, including their legislative history. The court gave particular weight to language in those provisions allowing the county treasurer to act only “with the advice and consent” of the county commission. *See Padilla*, 1990-NMCA-125, ¶¶ 26-33. Based on that language, the court determined that neither the county commission nor the county treasurer possessed sole policy-making authority over county investments and held that

the county treasurer determines how to deposit and invest county funds. That decision must then be approved by the board of county commissioners, sitting as the county board of finance. The board of finance has no power to modify the county treasurer's decision without the treasurer's concurrence. On the other hand, the county treasurer cannot impose a unilateral decision upon the board of finance.

Id. ¶ 34; *see also id.* ¶ 29 (“advice and consent” relationship between the county treasurer and county board of finance means that “decisions concerning the placement of county funds in depository institutions and the investment of county funds in government securities are, in the first instance, a matter for the county treasurer; the board of finance has a veto power over every such decision, but it does not have the power of choice itself”).

The statutes governing the investment of county funds, as interpreted in *Padilla*, require a cooperative relationship between the county board of finance and the county treasurer. The power to decide how and where to deposit or invest county funds rests with the county treasurer, but the county treasurer's decisions cannot be executed without the board's “advice and consent.”

Conclusion

It is the opinion of this Office that the county treasurer and other elected county officers have exclusive statutory authority to hire and supervise deputies and other employees of their offices. A merit system or similar personnel policy adopted by the county commission governing the hours, leave time and other working conditions for county employees may be applied to the county treasurer's office, as long as it does not improperly infringe upon the treasurer's ability to perform the duties of the office.

Further, neither the county commission nor the county treasurer has sole control over the investment of county funds. State law confers upon the county treasurer the power to make investment decisions, but only with the advice and consent of the county commission, acting in its capacity as the county board of finance.

We reiterate that our conclusions herein are intended to provide only a framework of the controlling law; they are not intended to resolve or comment upon the underlying controversy in McKinley County.

Please note that this opinion is a public document and is not protected by the attorney-client privilege. It will be published on our website and made available to the general public.

RAÚL TORREZ
ATTORNEY GENERAL

/s/ Seth C. McMillan
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Deputy Solicitor General