

## **December 1, 2010 Advisory Letter---County Contracts for Professional Services**

December 1, 2010

District Attorney Mary Lynne Newell  
Sixth Judicial District  
Grant County Courthouse  
P.O. Box 1025  
Silver City, New Mexico 88062-1025

**Re:** Opinion Request – County Contracts for Professional Services

Dear District Attorney Newell:

You have requested our opinion on the following matters:

- (1) May a County enter into a contract for professional services which provides for a multi year term with automatic renewal?
- (2) May a County enter into a contract for professional services where, if the contractor terminates or is terminated for any reason (except a felony), or the contract is not renewed, the contractor will receive the balance of the pay for the contract term and/or further severance pay to the equivalent of an additional 6, 12, or 18 months' worth of pay?
- (3) May a County enter into a contract for professional services where the contractor is provided full time use of a county vehicle, office facilities, supplies, services and administrative report?
- (4) May a County enter into a contract for professional services where the County pays the employer's portion of health insurance premiums, allows for paid personal time off, and commits the County to pay its share of an additional 12 months of health insurance after termination?
- (5) If the County through its Commission, or through another contracted employee with similar terms as the contract of the employee in question makes such contracts and they are improper, what are the remedies and time limits appropriate for this, whether or not the contract is still in place?

Based upon our examination of the relevant New Mexico statutes, opinions and case law authorities, and on the information available to us at this time, we make the conclusions discussed below

### **Introduction**

As a preliminary matter, after reviewing the contracts you sent to our office on September 7, 2010, we believe the contracts you have referenced are employment contracts rather than professional services contracts.

The contracts you sent to our office are titled “Professional Services and Employment Agreement,” or “Professional Services Employment Agreement,” or simply “Employment Agreement.” Some of the contracts refer to the contractor as an “employee.” In fact, one contract states: “Employee shall be deemed a FLSA exempt term professional level employee of the County with regular County benefits.” Under New Mexico Supreme Court precedent, it appears that such a contract would likely be an employment contract. See Roybal v. Bates Lumber Co., 76 N.M. 127, 129, 412 P.2d 555, 556 (1966) (In determining whether one is an independent contractor or an employee the principal consideration is the degree of control the employer exercises).

In addition, it appears that the services being rendered in the various contracts are not “professional services” under the Procurement Code.[1] Were the services contracted actually “professional services” totaling over \$50,000, they would have been procured through a competitive sealed proposal process. See NMSA 1978, §§ 13-1-102 and 13-1-125. Failure to have undergone this process would be illegal.

County employment contracts are subject to the New Mexico Constitution and statutes. Under New Mexico law, the county commission has the power to set the salaries of its employees. See NMSA 1978, § 4-38-19. It also has the authority to delegate its responsibilities to the county manager, including responsibility for entering into employment contracts. See id.

Under NMSA 1978, Section 6-6-3, all local governments, including counties, are responsible for keeping all books, records and accounts in a form prescribed by the Local Government Division (“Division”) of the Department of Finance Administration (“DFA”). The Division, pursuant to Section 6-6-2, has the power to require a county to furnish and file with the Division a proposed budget for the next fiscal year, to examine the proposed budget, make corrections and amendments to meet the requirements of law and to approve and certify the budget. The Division can also require periodic financial reports and assure that expenditures do not exceed revenues. If you have questions regarding accounting and budgeting matters, you may wish to contact the Division.

### **Question 1**

A multi-term employment contract with automatic renewals may constitute a debt, which implicates various constitutional and statutory issues. First, under the New Mexico Constitution, a county is prohibited from borrowing money except for certain enumerated purposes. N.M. Const., art. IX, § 10. Employment of personnel generally is not an authorized exception to the debt restriction. Even if the debt was contracted for an authorized exception, it must be approved by the voters of the County. Id. Second, a

county must abide by the terms of the Bateman Act, NMSA 1978, Sections 6-6-11 to -18, which limits debts to those that can be paid from the current fiscal year's funds.

### **A. Constitutionality**

The New Mexico Supreme Court has defined a constitutional "debt" as "an obligation [that] has arisen out of contract, express or implied, which entitles the creditor unconditionally to receive from the debtor a sum of money, which the debtor is under legal, equitable, or moral duty to pay without regard to any future contingency." State ex rel. Capitol Add. Bldg. Comm'n v. Connelly, 39 N.M. 312, 318, 46 P.2d 1097, 1100 (1935) (internal citation omitted). While this issue has not been addressed with regard to counties, it has been addressed in the context of a municipality. Municipalities are subject to a separate but similar constitutional limitation. See N.M. Const. art. IX, § 12. In Hamilton Test Sys., Inc. v. City of Albuquerque, 103 N.M. 226, 704 P.2d 1102 (1984), the New Mexico Supreme Court stated that "any agreement by which a municipality obligates itself to pay out of tax revenues, and commits itself beyond revenues for the current fiscal year, falls within the terms of the constitutional debt restriction." In that case, the City was obligated to pay a business at the end of each year for services performed, if the amount retained by the business as "base fees" during that year fell short of the contract price for the year. The Court found that this arrangement constituted a debt within the constitution.

Depending on the circumstances, an automatic renewal of an employment contract could commit a County beyond revenues of the current fiscal year. If that is the case, there must be another provision which would allow the County to terminate the contract for lack of appropriations. There are provisions in the employment contracts provided to this office that argue against the automatic renewal being a debt including a non-appropriations clause. First, a few of the contracts have provisions in which either party can terminate upon 90 days prior written notice.[2] Second, almost every contract provided contains an appropriation clause mandating that the money be budgeted to cover every year of the employee's contract.[3]

### **B. Bateman Act**

The Bateman Act, NMSA 1978, Sections 6-6-11 to -18, prohibits a board of county commissioners from contracting any debt during any current year which, at the end of such current year, is not and cannot then be paid out of the money actually collected and belonging to that current year. NMSA 1978, § 6-6-11. According to this office, "[c]ourts have held that a debt ... does not violate the Bateman Act if funds are allocated to pay the debt when it was occurred." N.M. Op. Att'y Gen. No. 88-67 (internal citations omitted). It follows that a multi-term contract with automatic renewals would be valid under the Bateman Act only if there were funds allocated to pay for the contract at the time it was entered into. In N.M. Op. Att'y Gen No 88-67, this Office found that than employment agreement which turned into a month-to-month contract following the natural expiration of the contract did not violate the Bateman Act because sufficient

funds were available and allocated when the county commission approved the agreement.

Turning to the Gilmore contract, Paragraph 10 specifically addresses the Bateman Act. It reads:

Appropriation of Funds: In accordance with Section 6-6-11 NMSA 1978, the County shall, in the current fiscal year, budget funds to pay for all subsequent years of the contract term. If the contract is renewed for an additional three (3) year term as specified in paragraph 1 hereof, the County shall budget funds to pay for all years of the contract in the then current fiscal year. Any increase in the severance amount arising from cost of living or other changes shall be budgeted and allocated in the same year of any such pay increase.

This provision ensures that the County abides by the Bateman Act as it requires the County to budget for all three years of the contract in the current fiscal year.

## **Question 2**

Whether an employee is entitled to the balance of the pay for the contract term and/or further severance pay to the equivalent of an additional 6, 12, or 18 months' worth of pay after termination largely depends on the terms of the specific contract. As with automatic renewal, there are both constitutional and statutory concerns.

### **A. Constitutionality**

Article IV, Section 27 of the New Mexico Constitution states, "No law shall be enacted giving any extra compensation to any public officer, servant, agent or contractor after services are rendered or contract made; nor shall the compensation of any officer be increased or diminished during his term of office, except as otherwise provided in this constitution." Severance pay raises a question under this clause.

This office has consistently taken the position that retroactive salary increases and bonuses to public employees for services already performed are prohibited by Article IV, Section 27. See, e.g., N.M. Op. Att'y Gen. No 7107 (1971); No. 62-28 (1962); No. 57-17 (1957); No. 4440 (1944). The constitution focuses on retroactive salary increases or cuts. See State ex rel. Sedillo v. Sargent, 24 N.M. 333, 336, 171 P. 790 (1918).

Because the constitution prohibits retroactive salary increases, this office has taken the position that bonuses and one time salary increases are permissible if the criteria for receiving them are included in the employees' compensation plans or agreements before services are rendered. See N.M. Att'y Gen. Advisory Letter dated June 4, 2004. The same reasoning has been applied by courts and other legal authorities from other states that have evaluated the permissibility of severance pay under provisions similar to Article IV, Section 27. For example, the Montana Attorney General concluded that a contractual provision for severance pay did not amount to prohibited extra

compensation or a gift or gratuity to a public officer or employee. See Mont. Op. Att’y Gen. No. 113 (1978). See also S.C. Att’y Gen. Op. (April 3, 1989) (concluding that severance pay was unconstitutional “extra compensation” where not specified by law or contract before services were rendered). The Montana Attorney General opinion relied on an opinion of the New Jersey Supreme Court, which characterized severance pay as “terminal compensation measured by the service given during the subsistence of the contract.... In a real sense it is remuneration for the service rendered during the period covered by the agreement.” Owens v. Press Publ’g Co., 120 A.2d 442, 446 (N.J. 1956). In light of this authority, we believe that, like a bonus, severance pay in an employment contract is valid as long as it is agreed to at the beginning of the contract term, before services are rendered.

## **B. Bateman Act**

New Mexico courts have not directly dealt with the issue of whether severance pay would violate the Bateman Act. However, in *Treloar v. County of Chaves*, 2001-NMCA-074, ¶¶ 18-19, 130 N.M. 794, 801, the New Mexico Court of Appeals, in dicta, appeared not to have a problem with severance pay and the Bateman Act as long as sufficient funds existed within the fiscal year. Therefore, the severance provisions in the county contracts provided to us would be valid as long as sufficient funds for severance pay existed within the fiscal year at the time the contracts were entered into.

### **Question 3**

In the absence of a contrary statute or regulation, contract employees should be entitled to the use of county vehicles, office facilities and supplies, services and administrative support to the same extent as other county employees.

### **Question 4**

A contract in which the County pays the employer’s portion of health insurance premiums and allows for paid personal time off after termination raises questions under the extra compensation clause discussed in Question 2.

As a preliminary matter, health benefits may not be “compensation,” but paid time off appears to be. In dicta, the New Mexico Supreme Court has said that it views compensation as “a fixed salary, payable from the public treasury.” State ex rel. Gilbert v. Board of Comm'rs, 29 N.M. 209, 215, 222 P. 654, 656 (1924). A number of New Mexico cases and Attorney General Opinions have dealt with the subject of pension benefits in reference to the extra compensation clause. While, your request specifically asks about health insurance, the following cases and opinions may be instructive. In State Ex Rel. Sena v. Trujillo, 46 N.M. 361, 129 P.2d 329 (1942), the Supreme Court rule that a statutory pension plan could not apply retroactively to an employee who retired before the law’s passage because services had already been rendered and therefore was prohibited under the extra compensation clause. Similarly, retired municipal employees cannot take advantage of an ordinance that allows employees to

convert sick leave to vacation leave. N.M. Op. Att'y Gen. No. 88-40. Judges who retired before a law authorizing cost of living increases to their retirement annuities became effective were also not entitled to such increases. N.M. Op. Att'y Gen. No. 88-66. On the other hand, the New Mexico school for the deaf could apply a sick leave buyback policy that permits retiring employees to receive compensation for accrued sick leave so long as the policy applied to hours of sick leave accrued prior to the implementation of the policy. N.M. Op. Att'y Gen. No. 88-73. Finally, the responsibility for an employee's share of his contribution to a retirement benefit plan must ultimately remain with the employee, whether he pays in one lump sum or reimburses the employer who advances the contribution on the employee's behalf. An employee may not be relieved of the obligation to pay that which should have been paid for pension benefits he will receive. N.M. Op. Atty. Gen. No. 81-16.

It appears that a contract in which the County pays the employer's portion of health insurance premiums and allows for paid time off does not violate art. IV, Section 27 of the Constitution because the benefits are agreed to under the terms of the contract, not after the services are rendered or the contract is made.

### **Question 5**

If a county through its commission, or contracted employee makes improper contracts they may be subject to penalties under the New Mexico Constitution, the Procurement Code, the Governmental Conduct Act and the Criminal Code. It is unclear from your letter what are the exact fact situations surrounding the contracts made by Luna County. Therefore, we will provide a summary of relevant statutes that may be implicated in the types of circumstances you mention.

The New Mexico Constitution provides that "Any public officer making any profit out of public money or using the same for any purpose not authorized by law, shall be deemed guilty of a felony and shall be punished as provided by law and shall be disqualified to hold public office." N.M. Const. art. VIII, § 4. If a County of County official is using public money for a purpose not authorized by law, it may incur criminal liability.

Under NMSA 1978, Section 37-1-23, governmental entities are granted immunity from actions based on contract, except actions based on a valid written contract and a claim must be "brought within two years from the time of accrual." If the charge is not against a governmental entity, the statute is 6 years. See NMSA 1978, Section 37-1-3(A).

Under NMSA 1978, Section 10-5-2, the Secretary of Finance and Administration may summarily suspend any official of any local public body where an audit conducted by the state auditor's office or an independent auditor approved by the state auditor reveals any fraudulent misappropriation of public money or fiscal management resulting in violation of law. Upon such suspension, the secretary of finance and administration may take charge of the office of the persons suspended.

The New Mexico Criminal Code forbids a person from knowingly soliciting or receiving any kickback, bribe, or rebate in return for referring an individual to that person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part with public money; or in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any goods, facilities, services, or items for which payment may be made in whole or in part with public money, shall be guilty of a fourth degree felony. NMSA 1978, § 30-41-1. Also, "Whoever commits paying or receiving public money for services not rendered is guilty of a fourth degree felony." NMSA 1978, § 30-23-2.

You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Although we are providing you with our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Very truly yours,

Stephen A. Vigil  
Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General

[1] Under the Procurement Code, "professional services" are defined as "the services of architects, archeologists, engineers, surveyors, landscape architects, medical arts practitioners, scientists, management and systems analysts, certified public accountants, registered public accountants, lawyers, psychologists, planners, researchers, construction managers and other persons or businesses providing similar professional services ... ." NMSA 1978, § 13-1-76.

[2] Forest Bostick (February 2008); Paul Borde (February 2008); Ed Gilmore (March 2003, May 2004, February 2008 and March 2009)

[3] The September 2000 contract with Ed Gilmore does not contain an appropriations provision because he was classified as at-will.