

May 17, 2016 Advisory Letter – Opinion Request – Sandoval County Treasurer

The Honorable Benny Shendo, Jr.
New Mexico State Senator
New Mexico State Senate
PO Box 634
Jemez Pueblo, NM 87024

Re: Opinion Request – Sandoval County Treasurer

Dear Senator Shendo:

You requested our advice regarding the role, delegation of authority, and responsibility between the Sandoval County Treasurer and the Sandoval County Commissioners acting as the Board of Finance, as it relates to duties, contractors/agents, the investment policy, and investment committee. We have reviewed the request submitted on behalf of Sandoval County Treasurer, Laura Montoya. Based on our examination of the relevant New Mexico Constitutional, statutory and case law authorities, and on the information available to us at this time, we conclude that a county may not appoint a contractor to eliminate the authority or to perform the services of the County Treasurer or the Board of Finance regarding investments.

In her letter, Treasurer Montoya expresses concern that Sandoval County Commissioners, acting as the Board of Finance (“Board”), have hired a contractor to formulate an investment policy for the County. It is our understanding that in 2013, a contractor was hired by the Board to be the financial advisor to Treasurer Montoya. In June 2014, the same contractor was hired again by the County Commissioners to advise the Board of financial matters. As stated in the financial advisor’s contract, the contractor will:

“Conduct and complete an independent review and analysis of county investments, investment strategies . . . to include any recommended changes to the County’s investment policy; perform an independent review of statements received from the Treasurer’s Office on investment activities, earnings and the value of the investment portfolio and recommend investment opportunities in accordance to the county’s investment policy and submit monthly reports; on a quarterly basis submit a report to the Board of Finance on current county investment and deposit portfolio, performance, and provide advice on developing an investment approach that is consistent with county’s approved investment policy; provide the board of finance with recommendations for amendments and updates to the County Investment policy.”

Therefore, the primary issue is whether the duties contractually assigned to the financial advisor usurp those statutorily delegated to either the County Treasurer or the Board.

The County Treasurer is authorized with investment power, by and with the “advice and consent” of the County Board of Finance, NMSA 1978, §§ 6-10-8 and 6-10-10. In *Board of Cnty. Comm’rs of Bernalillo County v. Padilla*, 1990-NMCA-125, 111 N.M. 278, the New Mexico Court of Appeals analyzed a similar issue. In *Padilla*, the Court reviewed whether the County Commission, as the designated Board of Finance, could determine investment policy of the County and direct investment of County funds. The Court of Appeals held that while the County Treasurer determines how to deposit and invest county funds, such decision must be approved by the County Board of Finance. *Id.* ¶ 34. Thus, both the Treasurer and the Board of Finance must agree on any investment. *Id.* ¶ 35. The Court further found no statutory prohibition against delegation to the Treasurer by the Board of Finance of specific investment decision-making. *Id.* ¶ 36. Thus, the Board may adopt a policy and permit the Treasurer to make investment decisions that conform to the policy.

The Local Government Division of the Department of Finance and Administration promulgates the procedures for county treasurers, pursuant to the authority of NMSA 1978, Sections 6-6-2 and 6-6-3. Those procedures require a county board of finance to adopt an investment policy and permit the treasurer to make investment decisions that conform to the policy. 3.6.50.8(D) NMAC.

In a prior Attorney General’s Opinion, our office reviewed the authority of the state treasurer to make specified investments with the advice and consent of the state board of finance. See N.M. Att’y Gen. Op. 14-05 (2014). In that opinion, our office found that, like the county board of finance in *Padilla*, the state board of finance has only the power of approval or denial over the state treasurer’s investments, rather than the exclusive power of investment. We further concluded that the “advice and consent” requirement allows the board of finance to oversee investment decisions of the treasurer. Thus, neither entity has the sole policy-making authority over county investments. *Padilla*, 1990-NMCA-125, ¶ 35.

The Office of the Attorney General also previously determined that a county commission may not supervise, dictate, or otherwise interfere with the substantive duties of employees hired by the County Treasurer. See N.M. Att’y Gen. Op. 87-18 (1987). Further, a board of county commissioners does not unlawfully infringe upon a county treasurer’s prerogatives unless it undermines the treasurer’s ability to perform the duties of the office by means that are not granted to the board by statute. *Padilla*, 1990-NMCA-125, ¶ 17. A board of county commissioners is prohibited from employing and paying a person to perform services that the law requires be performed by other county officials. See e.g., *Fancher v. Board of Comm’rs*, 1921-NMSC-039, 28 N.M. 179, 210 P. 237 (1921) (county commission could not employ private persons to perform duties imposed by statute on county clerk and state tax commission); *State ex rel. Miera v. Field*, 24 N.M. 168, 172 P. 1136 (1918) (finding ultra vires a contract between county board and person employed to perform duties required of county assessor). A county commission may not use its authority to effectively control the tasks and responsibilities of their elected officials’ employees. See N.M. Att’y Gen. Op. 90-05 (1990).

Thus, the general rule is that county commissioners are without power to employ a person to perform acts that are part of the official duties imposed by statute on another county or state officer, or where the matter of employment of persons is expressly and fully covered by statute. New Mexico courts have confirmed that a board of county commissioners may delegate its “advice and consent” authority to the county treasurer through the adoption of a county investment policy. Yet, it may not delegate its statutory “advice and consent” authority to a contractor. As Discussed above, the “advice and consent” powers found in NMSA 1978, Section 6-10-8, require that the county treasurer determine how to deposit and invest county funds.

The Sandoval County Commission, acting as Board of Finance has no power to modify the county treasurer’s decision without the treasurer’s concurrence. The Board does not have the power to eliminate the authority of the County Treasurer in county investment decisions.[1] Therefore, the Board cannot contract a financial advisor to perform acts which are part of the official duties imposed by statute on the County Treasurer. However, the Board may contract with financial advisor to help discharge the functions of the county; thus, to aid in the “advice and consent” provided to the County Treasurer.

Regarding the composition of an investment committee, it has been established that the Board has the authority to set policy for managing all County investments and distribution of funds. The Sandoval County Investment committee was created with the adoption of the December 10, 2015, Investment Policy. The investment committee is comprised of the County Treasurer, County Manager, County Finance Director, a member of the County Commission, and a resident of the county chosen by the County Treasurer. The purpose of the investment committee is to “make recommendations regarding the investment policy and related matters.” As written, this body has no power to bind either the Board of Finance in managing county investments or the County Treasurer in investing county funds. This body is merely advisory.

The fact that the investment committee is advisory, it is our opinion that the composition of the investment committee can be selected at the discretion of the Board of Finance. This authority comes from the broad authority granted to the Board to set policy and manage all the county investments. Reiterating N.M. Att’y Gen. Op. 62-71 (1962), “Boards of county commissioners have exclusive authority and responsibility to act as county boards of finance, the only limitations upon their authority being imposed by statute.” Thus, the advisory investment committee is established to aid in the discharge of the Board of Finance’s statutory grant of authority. This being said, the investment committee can only recommend or advise the Board of Finance; the investment committee can in no way usurp the County Treasurer’s statutory authority in the deposit and investment of county funds.

In summary, and to specifically address the questions presented within your request, we conclude that a contractor may aid the County Commissioners, acting as the Board of Finance, in the formulation of an investment policy. While we conclude that the Board has the authority to hire a financial advisor, this contractor may not be delegated the statutory authority to supervise, demand or oversee the roles and responsibilities of the

Treasurer. The Board may also designate an investment committee under written investment policies established by the Board.

Promulgation of an investment policy must be made in compliance with the Open Meetings Act, NMSA 1978, Sections 10-15-1 to -4 (1978, as amended through 2013), upon the approval of a quorum of the County Commissioners, acting as the Board of Finance. Without such explicit approval, specific investment decision-making remains with the Board and is not delegated to the Treasurer. Therefore, unless a policy is in place, the statutory procedure found within Sections 6-10-8 and 6-10-10 regarding investment approval with the Board's "advice and consent" dictates.

Elected county officials and public bodies who fail to perform their office's duties are subject to removal, civil suit, or criminal prosecution if they violate the law. Aggrieved parties may also seek a declaratory judgment order from a district court.

You have also requested additional advice regarding permissible investments for Class A counties. These issues should be initially directed to your County Attorney. If after consultation with your legal counsel, you are still unable to reach a decision on these matters, please feel free to contact our office for guidance.

Your request was for a formal Attorney General's 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.

Sincerely,

Dylan K. Lange
Assistant Attorney General

cc: Laura Montoya, Sandoval County Treasurer

[1] Further clarifying the power, the NMAG stated, "the advice and consent requirement found in NMSA 1978, Section 6-10-10, constricts the treasurer's ability to invest public monies only to the extent that the state treasurer must first obtain the advice and consent of the Board of Finance." N.M. Att'y Gen. Op. 14-05 (2014).