

Opinion 14-05

OPINION OF GARY K. KING, Attorney General

May 12, 2014

BY: Charles B. Kraft, Assistant Attorney General

TO: The Honorable James B. Lewis, New Mexico State Treasurer, P.O. Box 5135, Santa Fe, NM 87505

QUESTIONS:

1. What is meant by “advice and consent” as used in NMSA 1978, Section 6-10-10 (1933, as amended through 2013)? 1 How does “advice and consent” affect the state treasurer’s ability to invest public monies pursuant to statute?
2. If “advice and consent” equates to oversight, is there a separation of powers issue that would render that language of the statute unconstitutional?
3. Does a governor, by way of executive order, have the authority to order oversight over any or all aspects of running the State Treasurer’s Office? If a governor has the authority to order oversight, who assumes the liability?

CONCLUSIONS:

1. “Advice and consent” denotes a deliberative process and vote akin to the relationship between the President of the United States and U.S. Senate. In Section 6-10-10, “advice and consent” constricts the state treasurer’s ability to invest public monies to the extent that the state treasurer must first obtain consent to do so by the state board of finance.
2. There is not a separation of powers issue concerning the “advice and consent” demand in Section 6-10-10 which would render the provisions unconstitutional.
3. The governor does not have the authority to expand the power of the board of finance beyond that conferred by law through the use of an executive order.

BACKGROUND:

Following the criminal indictments of former state treasurers for racketeering, former Governor Bill Richardson signed Executive Order No. 2006-006 (“EO No. 2006-006”), which established “safeguards, policies, and procedures governing and overseeing investments and conduct of the office of the State Treasurer.” EO No. 2006-006 states that the executive order was issued because “recent events have revealed the need for greater oversight over the Office of the State Treasurer with regard to investments,

relationships with investment advisors and broker-dealers, and general conduct and activities of that office[,]” and that greater oversight will “ensure that public confidence and trust in the state operation of the Office of the State Treasurer is restored and the State of New Mexico will retain its high bond rating.” Included as authority for the executive order was the state treasurer’s obligation to “obtain the advice and consent of the State Board of Finance before he may invest public funds in designated investments as provided in New Mexico state law Sections 6-10-10 and 6-10-10.1.” Id. at 2 (last “whereas” clause).

In EO No. 2006-006, Governor Richardson ordered a number of measures. At issue in this opinion is the third directive, which states:

The State Board of Finance Division shall produce a policy for review and adoption by the State Board of Finance establishing procedures and conditions for giving its advice and consent to the State Treasurer with regard to his investments and shall make a recommendation to the Board regarding the adoption of the State Treasurer’s Investment Policy in a rule or regulation.

Id. at 3. Pursuant to the Executive Order, the Board of Finance adopted the “State Treasurer’s Investment Policy,” which contains rules and regulations with which the state treasurer must comply in exchange for the Board of Finance’s “advice and consent” under Section 6-10-10.

ANALYSIS:

1. Meaning and Effect of “Advice and Consent” in Section 6-10-10

Found in the United States Constitution, the term “advice and consent” is one that transcends American government and constitutional history. During the federal Constitutional Convention of 1787, “advice and consent” was used synonymously with the terms “approval,” “approbation,” and “concurrence.” See Board of Comm’rs v. Padilla, 1990-NMCA-125, 111 N.M. 278, 287 (citing J. Harris, The Advice and Consent of the Senate at 34 (1953)). While courts have not been presented with much opportunity to articulate the meaning of “advice and consent,” the Third Circuit Court of Appeals has stated that “the provision of advice and consent cannot be perfunctory. It is only reasonable that there must be a deliberative process (‘advice’), a vote (‘consent’), and a quorum of Senators present....” See NLRB v. New Vista Nursing and Rehabilitation, 719 F.3d 203, 248 (3rd Cir. 2013).

Significantly, the New Mexico Court of Appeals has addressed the meaning of the term “advice and consent” as used in NMSA 1978, Section 6-10-8, which is similar to Section 6-10-10 and governs deposits and investments of county funds. See Board of County Comm’rs v. Padilla, 1990-NMCA-125, 111 N.M. 278. According to the court:

The relationship between the county treasurer and the county board of finance was undoubtedly intended to be the same as that between the President of the

United States and the Senate when the former can act only with the “advice and consent” of the Senate. We are aware of no other usage of the phrase “advice and consent,” and we can assume that the elected officials who enacted the ... legislation were thoroughly familiar with the meaning of that language in the United States Constitution. Thus, 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.

111 N.M. at 286 (citations omitted).

Certainly there are differences in the statutory duties and obligations of the state treasurer and the county treasurers, but the meaning of “advice and consent” is the same. Both sets of statutes governing the treasurers and their boards of finance contain the same “advice and consent” language. Compare NMSA 1978, § 6-10-8 with § 6-10-10. Like the county board of finance in Padilla, the Board of Finance has only the power of approval or denial over the state treasurer’s investments, rather than the power of investment.

Based on the usual and accepted use of the term “advice and consent,” we conclude that the “advice and consent” requirement found in Section 6-10-10 constricts the state 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.

2. Separation of Powers

As discussed above, the Board of Finance’s statutory authority under Section 6-10-10 to provide advice and consent regarding the investment of state monies is limited and we do not believe it creates a constitutional separation of powers issue. The New Mexico Constitution provides that:

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.

N.M. Const. art. III, § 1. This provision reflects a governmental doctrine that concentrated power in one branch of government is a threat to liberty. See State ex rel. Clark v. Johnson, 1995-NMSC-048, 120 N.M. 562, 573 (citing Gregory v. Ashcroft, 501 U.S. 452, 459 (1991)). At issue here is whether the legislature’s requirement that the Board of Finance give its “advice and consent” on certain matters pertaining to the duties of the state treasurer disrupts the proper balance between the legislative and executive branches. See generally State ex rel. Clark, 1995-NMSC-048, 120 N.M. at 573–574.

While our state constitution created the Office of the State Treasurer, the constitution did not afford the state treasurer any specific powers. N.M. Const. art. V, § 1. All powers of the state treasurer are statutorily assigned. See NMSA 1978, §§ 8-6-1 through -7. See also State v. Davidson, 1929-NMSC-016, 275 P. 373, 375 (the New Mexico Constitution created the Attorney General's Office but did not prescribe its powers and duties; the powers of the attorney general are defined by statute). The legislatively assigned functions of the treasurer include receiving, keeping, and disbursing public money, keeping comprehensive accounts of all public money, and providing reports and statements on the status and condition of the treasury. See NMSA 1978, § 8-6-3 (1851–52, as amended through 2011).

The Board of Finance, a statutorily-created entity, is comprised of seven members: the governor, lieutenant governor, state treasurer, and four governor-appointed members. See NMSA 1978, § 6-1-1(A), (G). The Board of Finance is charged with the duty to supervise the fiscal affairs of the state including the safekeeping and depositing of all money and securities that are owned or are in the custody of the state. Id. at § 6-1-1(E). As discussed above, with respect to the state treasurer, the Board of Finance is authorized to approve or reject proposed investments of public funds. See § 6-10-10.

Because the legislature is responsible for defining the power and scope of power for both the state treasurer and Board of Finance, there is no separation of powers issue when the legislature further defines the scope of either entity's power. Furthermore, the state treasurer and the Board of Finance are both entities existing in the executive branch of government and their respective statutory powers do not intrude into the business of the legislative and judicial branches. Thus, the requirement that the Board of Finance give its "advice and consent" over investment decisions falling into Section 6-10-10 does not raise a constitutional separation of powers issue.

3. Governor's Authority to Order Oversight over the State Treasurer's Office

The New Mexico Constitution "vests the governor with the supreme power of the state and directs the governor to take care that the laws be faithfully executed." See N.M. Att'y Gen. Op. 13-03 (2013) (citing N.M. Const. art. V, § 4) (internal quotations omitted). As the head of the executive branch, the governor is limited by having only those powers granted by the constitution or statute. See N.M. Const. art. III, § 1; State v. Fifth Judicial Dist. Court, 1932-NMSC-023, 36 N.M. 151. See also State ex rel. Segó v. Kirkpatrick, 86 N.M. 359, 362, 524 P.2d 975, 978 (1974) (stating that "[t]he power of veto, like all powers constitutionally conferred upon a government officer or agency, is not absolute and may not be exercised without any restraint or limitation whatsoever") (emphasis in original). Thus, while the governor may issue orders to executive agencies in an effort to better execute existing law, the governor's executive order will be invalid if it is outside the governor's constitutional or statutory authority.

The Board of Finance and State Treasurer's Office complied with EO No. 2006-006, creating the "State Treasurer's Investment Policy," which provides that "[t]he state board of finance exercises its statutory 'advice and consent' function with respect to the state

treasurer's investments primarily through approval of this policy and review of monthly reports...." State Treasurer's Inv. Policy, 2 (2013). The policy delineates the procedure by which that policy is approved, modified, and adopted, and provides that:

This investment policy will be effective upon approval by the state board of finance, in the exercise of its advice and consent, and may be revised from time to time upon recommendation of the state treasurer and approval by the state board of finance. A comprehensive review and approval process should be undertaken periodically at the discretion of the state treasurer or upon the recommendation of the state board of finance. This process should be undertaken at least every two (2) years and any proposed changes to the policy shall be submitted for public comment.

State Treasurer's Inv. Policy, app. 18 (2013). The state treasurer follows the policy because it is the agreed-upon (as between the state treasurer and Board of Finance) and established way the Board of Finance issues its "advice and consent." The investment policy is consistent with the statutory authority governing both the state treasurer and Board of Finance insofar as it requires Board of Finance approval over investments where the Board of Finance's "advice and consent" is otherwise required by law.

Because it is authorized by statute, the governor has authority to direct the Board of Finance to oversee investment decisions by the state treasurer falling under the authority of Section 6-10-10(I)–(K), (M), (N) with regard to "advice and consent." Absent additional authority from the legislature, the governor cannot compel oversight by the Board of Finance over any other duties belonging to the state treasurer or other aspects of running the State Treasurer's Office.

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