

Opinion No. [20-106]

August 13, 1920

TO: Office of the Attorney General of New Mexico

COUNTY COMMISSIONERS -- Contracts with contrary to Bateman Act and budget law are void.

OPINION

Reference is made to yours of the 12th inst. in re a situation in San Miguel County and in which you say:

"For the year of 1928-1929 the County Commissioners of San Miguel County issued warrants on the General County fund of that year in excess of the appropriation for that fund; the amount of overexpenditure being \$ 9,156.79. In other words, the Board of County Commissioners incurred indebtedness for the year of 1928-1929 in excess both of the appropriation for the General County Fund and of the money available in that fund for that year."

You ask for an opinion as to the proper procedure in the circumstances set forth and ask also whether it is possible for a creditor to proceed in court against a board of county commissioners on their bonds.

You, I know, are familiar with the budget law as applicable to counties and the procedure by which budgets are made up, certified, transmitted to county clerks and the requirements as to recording. It is provided in section 33-5904, Codification of 1929, in connection with county budgets, that:

"When so received and recorded, as aforesaid, said approved and certified budgets shall be binding upon all county officials and the several boards of county commissioners and on other officials having the right to allow and pay claims from the revenues to be so provided shall not allow nor approve claims in excess thereof, nor shall the county treasurers pay any county or other warrants in excess thereof, and such allowances or claims or warrants so allowed or paid shall be a liability against the officials so allowing or paying such claims or warrants, and recovery for such excess amounts so allowed or paid may be had against the bondsmen of such officials."

Section 33-5907 is as follows:

"Penalty for violations. Any official or employee violating the provisions of this act shall, upon conviction thereof in a court of competent jurisdiction, be deemed guilty of a misdemeanor and punished by a fine not less than one hundred dollars nor more than five hundred dollars, or by imprisonment, in the discretion of the court. Any county commissioner, or any other official whose duty it is to allow claims and issue warrants

therefor, who issues warrants or evidences of indebtedness contrary to the provisions of this act shall be liable to the county for such violations, and recovery may be had against his bondsmen."

It would seem, from the language of the section last quoted and which may be used as an aid in interpreting the previous section, that the liability for the issuing or paying of warrants in excess of the budget allowance is a liability to the county and in cases in which warrants have been paid in excess of the budget allowance the county might recover from the offending official and his bond and such official also is made liable criminally.

You are also familiar with the provisions of the Bateman Act. The portion of that act which appears to be applicable is set forth in the 1929 Codification as section 33-4241, which need not here be quoted in full. You will, however, from an examination of that section note that not only is it made a misdemeanor for a board of county commissioners to become indebted or contract any debts of any kind or nature 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 but also any and all kinds of indebtedness for any current year which is not paid and cannot be paid out of the money actually collected and belonging to that year is declared to be null and void. This section has been a number of times before the Supreme Court of this state. See annotations following the section in the Codification of 1929 from which it would appear that a creditor of the county under the circumstances set forth in your letter is left without remedy.

As to your powers and duties under the circumstances and concerning which you ask, I can but refer you to sections 12 and 14 of the Comptroller Act, such sections appearing as 134-512 and 134-514, Codification of 1929, the first section having to do with your dealing with the officials themselves in cases in which there appears to be a shortage. I do not understand, however, that there is any actual shortage of funds shown here but a violation of duty which should be fully reported to the district attorney for that district under the requirements of section 134-514.

I am disappointed somewhat in that I am forced to the conclusion that the statute makes void contracts so illegally entered into. It would appear that creditors should have some remedy and it may be that private attorneys may be able to find a way of making the delinquent officials personally responsible. However, I do not find that the Comptroller may do more than bring the matter to the attention of the district attorney for prosecution under the penal statutes provided.