

Opinion No. 31-272

September 12, 1931

BY: E. K. Neumann, Attorney General

TO: Hon. J. M. Lujan, State Comptroller, Santa Fe, New Mexico. Attention: Mr. Gould.

{*104} You yesterday requested this office to bring mandamus against the State Tax Commission to compel the payment of your bill for auditing the accounts of H. W. Yersin, Delinquent Tax Collector, McKinley County, in the sum of \$ 984.27. The payment of this bill was refused by the Commission on several grounds as shown by the attached file.

It is the opinion of this office that mandamus will not lie against the Commission in this instance, for reason that there is no law directing the commission, or any other state officer, office, board, bureau, commission or institution to pay for an audit of the books thereof or department thereof, when such audit is made by the State Comptroller.

Section 134-507, 1929 Code, in part, is as follows, showing clearly that it was the intention of the Legislature that the State Comptroller, at all times, shall audit state offices, departments, etc., without cost thereto:

". . . Whenever any county, incorporated city, town, or village, school district, drainage district, irrigation district or other official, institution, governing board or corporation of a public nature **shall cause** an audit to be made as hereinbefore provided, such audit shall be paid for upon a basis of payment to be determined by the Comptroller. The cost of such audit to be borne by the state and political subdivision audited in direct proportion to the amount of state funds involved in said audit, it being the intention of this provision that the costs accruing to the state shall not exceed the proportionate amount in which the state may be involved. In the event that the audit shall relate to funds wherein the State of New Mexico has no financial interest, then the entire costs of such audit shall be borne by the political subdivision or other body causing the same to be made. It shall be the duty of the comptroller to file immediately upon completion of any audit work a correct statement of the costs of the same, and which such account shall become immediately payable, **provided, however, that the amount of the account accruing to the state shall be credited thereon and the statement disclose the amount to be paid otherwise than by the state. . . .**"

A careful reading of other parts of the same section discloses that nowhere is any charge made to any state department for an audit of such department made by the State Comptroller. Even in such cases where the audit is **caused** by the department itself the department's proportionate share of the cost is to be **credited** upon the bill itself.

You call attention to Subsection 7 of Section 1 under State Comptroller of Chapter 162 of the Session Laws of 1931, which is as follows:

"(7) For Contingent office and traveling expenses -- \$ 12,500.00. Provided, that the cost of auditing all State offices, officers, or departments, boards, commissions, institutions shall be paid in full from the above appropriations for State Comptroller (items 1 to {*105} 7 inclusive), except as otherwise directed by the State Board of Finance.

Provided, further, that the State Comptroller shall use for auditing purposes all the monies collected by his department as authorized by Section 7, Chapter 48 of the Laws of 1923."

Our attention is specifically directed to the words "except as otherwise directed by the State Board of Finance." Reading all of said section reaffirms our opinion that the Legislature intended always to have all state offices, etc., audited by the State Comptroller, the cost thereof to be paid out of the appropriations for the State Comptroller's office. The words added to the provisions of said Sub-section 7, above quoted, "except as otherwise directed by the State Board of Finance," are meaningless except as to the powers of the Board of Finance granted that Board by law. Nowhere, by law, is the Board of Finance given power to legislate, make an appropriation or compel a department to make an expenditure against its will, and; especially in the face of other direct provisions of law relieving such department from such expenditures.

We can conceive that the meaning of the words quoted (and such words appear in the 1931 act only) are broad enough to give the Board of Finance power to approve the expenditure, by an officer, department, etc., of funds sufficient to pay for an audit by the Comptroller, in case there are insufficient funds in the hands of the Comptroller to make or complete an audit caused to be made by such officer, department, etc. In any other sense, in our opinion, such phrase, as quoted, is meaningless.

For the above reasons, in our opinion, a mandamus action against the State Tax Commission, in this instance, cannot be sustained.

Frank H. Patton,

Asst. Attorney General