

Opinion No. 64-49

April 10, 1964

BY: OPINION OF EARL E. HARTLEY, Attorney General Frank Bachicha, Jr., Assistant Attorney General

TO: Honorable Alex J. Armijo, State Auditor, State Capitol Building, Santa Fe, New Mexico

QUESTION

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1. What is the effect of Section 4-4-2.18, N.M.S.A., 1953 Compilation (PS) on the auditing responsibilities of the State Auditor?

CONCLUSION

1. See Analysis.

OPINION

ANALYSIS

Section 4-4-2.18, *supra*, was enacted by Laws 1963, Ch. 300, Section 2 and reads as follows:

"4-4-2.18. Audits of justice of the peace. -- Annual audits of justices of peace **shall be conducted by independent auditors designated by the director of the administrative office of the courts**, or at his request, by the state auditor or personnel of his office." (Emphasis supplied).

There is much authority for the proposition that the word "shall" when used in a statute is not merely permissive but is mandatory and ordinarily means "must." In re **Armijo's Will**, 57 N.M. 469, 261 P.2d 833: 39 Words and Phrases 123 et seq. Such construction of the above statute would require that audits of justices of the peace be conducted by none other than independent auditors, unless the Court Administrator requests the State Auditor to act. Thus, we are not concerned with any possible usurpation of the State Auditor's duties regarding audits of the offices of justices of the peace since that office may not conduct such audits, unless so requested by the Court Administrator. We are concerned, however, with the extent of the supervisory powers, if any, which the State Auditor has over the designation of such independent auditors by the Director of the Administrative Office of the Courts and over the actual audits conducted by such independent auditors. We are limiting our inquiry herein to that particular question.

The general provisions (pertinent to this inquiry) with respect to Annual Audits and the duties of the State Auditor relating thereto are contained in the following New Mexico Statutes annotated:

"4-4-2.2. Annual audits. -- The financial affairs of every state agency and every public body shall be thoroughly examined and audited annually."

"4-4-2.3. State auditor in charge of audits. -- Annual audits shall be conducted by the state auditor, personnel of his office designated by him or by independent auditors approved by the state auditor."

"4-4-2.7. Approval of contracts for auditing by state auditor. -- **The state auditor shall have the power to approve or disapprove any and all contracts for auditing entered into between any officer of any state agency or local public body**, and any private accountant or auditor or firm of accountants or auditors. No such contract shall be binding or of any effect whatever unless and until it shall have been approved in writing by the state auditor. It shall further be the duty of the state auditor, or personnel of his office designated by him, to examine all audits made pursuant to such contracts, and payment for services rendered by any accountant or auditor or firm of accountants or auditors pursuant to any such contract shall not be made unless and until such examination has first been made and the state auditor shall have determined and made a written finding that such audit has been made in a competent manner, in accordance with the rules and regulations of the state auditor, and in accordance with the terms of the state auditor, and in accordance with the terms of such contract." (Emphasis added).

It appears relatively clear from the above that **audits of state agencies and local public bodies** alone are contemplated in giving the State Auditor the power to approve or disapprove all contracts for auditing entered into between any officer of any state agency or local public body and, in effect, an independent auditor. Whether or not this same power would extend to contracts entered into between the Director of the Administrative Office of the Courts and independent auditors is the prime subject of our present inquiry.

It is our opinion that it is not necessary or proper for the State Auditor to exercise any supervision over either the designation of independent auditors, who will audit the offices of the justices of the peace, or the final work product of such auditors. This conclusion is reached for the following reasons: To begin with, it must be kept in mind that Section 4-4-2.18, supra was enacted in 1963 very nearly at the time when extremely significant changes were effected with regard to justice of the peace courts. Perhaps the most significant of these changes was the central control system established which placed the responsibility for the operation and control of such courts in the Administrative Office of the Courts. Up until that time there was no direct provision relating to audits of justice of the peace courts. In keeping with such revision of the law and by placing the responsibility in the Director of the Administrative Office of the Courts to designate or request the designation of independent auditors, the legislature, we

believe, has expressed its intent to make the direction and control of justice of the peace courts autonomous. We do not wish to be understood as saying that there has been a repeal of any of the provisions relating to Annual Audits quoted above, wherein the state auditor is directly concerned. It is true that a subsequent enactment may operate to repeal by implication an earlier enactment. However, it is well settled that repeals by implication are not favored. **Rives v. Herring**, 57 N.M. 600, 261 P.2d 442; **State v. Valdez**, 59 N.M. 112, 279, P.2d 868. It is equally true that the legislature is presumed to know the existing law and if, in order to achieve a consistent body of law, through any reasonable construction the statutes can be permitted to exist and operate harmoniously, there will be no repeal by implication. **Bartlett v. United States**, 166 F.2d 920 (C.A. 10th Cir. 1948). We believe then that 4-4-2.18, supra has effected no repeal of previously existing statutes but that it may exist and operate harmoniously, though independently, with Sections 4-4-2.2, 4-4-2.3 and 4-4-2.7 supra. We believe that the annual audits of "every state agency and every public body" called for in Section 4-4-2.2 and those annual audits of justices of the peace called for in Section 4-4-2.18, supra, are separate and distinct; and further, that Sections 4-4-2.3 and 4-4-2.7, supra, refer and are applicable only to the former, viz, annual audits of "every state agency and every public body."

It is our opinion, based upon the foregoing, that Section 4-4-2.18, supra, effectively takes **all** responsibility for auditing the justice of the peace courts in this state out of the hands of the State Auditor and places such responsibility upon the Director of the Administrative Office of the Courts, beginning with the designation of independent auditors and following through to review of and payment for the audits.