

Opinion No. 65-207

October 20, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General Roy G. Hill, Assistant Attorney General

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

QUESTION

QUESTIONS

1. The firm of John Quinn & Company Albuquerque, New Mexico, acted as financial advisors on the issuance, sale and delivery of \$ 686,000.00 general obligation schools bonds for which the company was paid \$ 2,287.10. Quinn & Company together with Commercial Trust Company and Zahner and Company were the successful bidders and purchased the bonds. Was this an illegal fee for Quinn & Company to have received
2. Twenty-five (25) acres of land for a new High School site were purchased from two owners. There was no record of an independent appraisal of this property. The amount paid for this property was \$ 15,000.00 One of the owners is a member of the State Board of Education. Was this sale in violation of any law?

CONCLUSIONS

1. No.
2. No.

OPINION

{*338} ANALYSIS

In two previous Attorney General opinions numbers 62-150 and 63-32, the problem of payments of fees or commissions to bond purchasers was thoroughly examined. Both of these opinions dealt with bonds issued under Article 39 of Chapter 14 N.M.S.A., 1953 Compilation. The issue in both of these opinions was whether or not certain payments to bond purchasers by the municipality would result in a sale at less than par which is prohibited by Chapter 14, Article 39, supra. The rulings in opinions 62-150 and 63-32 can be summarized as holding that no commission for the sale of the bonds may be allowed to anyone and no fee of any kind may be allowed to the purchaser of the bonds. However, both opinions recognized that reasonable expenses for a fiscal agent may be incurred.

The bond issue about which you have asked is governed by Section 11-6-17, N.M.S.A., 1953 Compilation, which provides that "none of such bonds shall be sold at less than par and accrued interest to the date of delivery to the purchaser, nor shall any discount or {*339} commission be allowed or paid on the sale of such bonds." The question in the present situation, therefore, becomes "Was the payment of \$ 2,287.10 to the financial advisors on the bond issue a discount or commission allowed or paid on the sale since the financial advisors became purchasers?" In our opinion the answer is no. We feel the controlling fact in the present situation to be that the school bonds must be, and these were, offered for public sale and sold on the basis of sealed bids. We assume that the purchaser's service as fiscal agent gave it no undue advantage in the purchase. The only exception is a private sale to the state of New Mexico. As noted above, we have previously ruled that expenses incidental to the bond issue are valid if they are reasonable in amount, made entirely in good faith and without intention to circumvent the statutory prohibition against a sale below par. It, therefore, appears that it was proper for the Truth or Consequences Municipal Schools to incur a reasonable expense in the form of a fiscal agent for the bond issue. Further, if the work done by the fiscal agent was compensated by a reasonable fee, we do not believe that because the fiscal agent then became one of the purchasers, by a sealed bid on a sale open to the public, that the result was a discount or commission to the purchaser. It must, therefore, follow that the transaction described in your first question was not in violation of Section 11-6-17, supra.

It is also our opinion, that the transaction you have described in your second question is not illegal per se. We have found no statutes or constitutional provisions which prescribe a procedure for schools to purchase real property. Therefore, the fact that there is no record of an appraisal does not mean the purchase was illegal.

We have also found no statutes or constitutional provisions which would prevent a member of the State Board of Education from selling land to a public school. We do have, of course, Section 40A-23-6 N.M.S.A., 1953 Compilation entitled "Unlawful interest in a public contract". Section A provides that it is unlawful for any public officer to receive anything of value from a seller or a seller's agent or a purchaser or purchaser's agent in connection with the sale or purchase of, among other things, land by the state or any of its political subdivisions unless certain conditions are met. This is basically the same law considered in Attorney General Opinion No. 61-92 dated September 28, 1961. That opinion was concerned with the sale of voting machines to the state by Johnny Walker Enterprises. Such sales were held legal. The present situation, is the same as the one there in the respect that the public officer here was not acting for a seller or a seller's agent. His only action was for himself as a seller. Since there is no prohibition of the sale described we must conclude it was legal.