Opinion No. 82-20

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OPINION OF: Jeff Bingaman, Attorney General

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TO: Kathleen R. Marr, Secretary, Department of Finance and Administration, 405 State Capitol, Santa Fe, New Mexico 87503

PUBLIC FINANCES

The delay-of-drawdown procedure which requires the state to issue warrants in anticipation of funds not received and deposited in the state treasury would violate Section 8-6-7 NMSA 1978.

QUESTIONS

1. Do the state law provisions regulating the disbursement of public funds from the state treasury require that funds be on deposit in the treasury in the specific fund upon which a state warrant is drawn before the warrant may be issued?

2. Is an irrevocable letter-of-credit with delay-of-drawdown provisions the equivalent of cash in the state treasury for the purpose of issuing warrants on the state treasury?

CONCLUSIONS

1. Yes.

2. No.

ANALYSIS

In 1900 the Supreme Court of New Mexico issued its opinion in **Garcia v. Territory ex rel. Bursum,** 10 N.M. 43, 61 P.#207, holding that Comp. Laws 1897, Section 2610 prohibited the auditor of the territory from drawing any warrant on the treasurer of the territory when there was no money in the treasury in the particular fund from which the warrant was to be drawn. The Court further held that upon violation of this provision, the auditor would be liable for a fine of not less than $1,000 and imprisonment for not less than one year and summary removal from office by the governor. Comp. Laws 1897, Section 2610 provided that

". . . if the auditor of the territory shall draw any warrant on the treasurer of the territory, when there is no money in the treasury in the particular fund for which the warrant is drawn, he shall be liable to a fine of not less than one thousand dollars, and

imprisonment for not less than one year, and shall be summarily removed from office by the governor."

OPINION

The **Garcia** case was an action in mandamus to compel the auditor to draw his warrant for payment of services rendered to the state, and while it was not disputed that the payment was due and owing, the particular fund against which the warrant was to be drawn was deficient.

Although the subject of various amendments over the last eighty-five years the prohibition contained in Comp. Laws 1897, Section 2610 remains essentially unchanged. Its predecessor, now codified at Section 8-6-7 NMSA 1978 provides

"8-6-7. Wrongful drawing or payment of warrant by secretary or treasurer.

If the secretary of finance and administration shall draw any warrant on the treasurer of the state, or if the treasurer of the state shall pay any warrant when there is no money in the *{*316}* treasury in the particular fund for which the warrant is drawn, he shall be liable to a fine of not less than one thousand dollars ($1,000) and imprisoned for not less than one year. Laws 1977, Ch. 247, Section 15."

Section 8-6-7 NMSA 1978 must be read in conjunction with Section 6-10-3 NMSA 1978 which mandates the deposit of all receipts of any state official or agency, other than a county treasurer, into the state treasury within twenty-four (24) hours after receipt of funds for or on behalf of the state. The federal matching share of public assistance payments is received by the state pursuant to the Federal Reserve Bank System Letter-of-Credit, and it is deposited into the state treasury when the bank credit, a book entry, is effected by the federal reserve bank. The federal reserve credits the state's fiscal agent's account at the federal reserve bank on the date the payment is due, and the fiscal agent bank in turn credits the state's account. The fiscal agent bank then notifies the state treasurer that the deposit has been received, and the treasurer completes a deposit ticket. After the deposit has been made, the state has funds when can be spent (encumbered), invested or used as a compensating balance at the fiscal agent bank.

Section 8-6-7 NMSA 1978 must also be read in conjunction with Section 6-5-6 NMSA 1978 which prescribes the determinations that must be made prior to the issuance of a state warrant. It provides:

"6-5-6. Determinations to be made prior to issuance of warrants.

No warrant upon the state treasury for disbursement of funds shall be issued except upon the determination . . . that the amount of the expenditure:

A. does not exceed the appropriation made to the agency;

B. does not exceed the periodic allotment made to the agency or the **unencumbered balance of funds** at its disposal; and

C. is for a purpose included within the appropriation or otherwise authorized by law." (emphasis added.)

This provision requires the existence of an unencumbered fund **balance** in the treasury in an amount equal to the proposed expenditure prior to the issuance of the warrant. An unencumbered fund balance is a sum of money representing the excess of credits or deposits over debits. The unencumbered fund balance is at the disposal of the agency for purposes of issuing warrants if the balance exists in the particular fund within the treasury from which the warrant is drawn. See Section 6-5-7 NMSA 1978 Comp. which requires that "Every warrant issued shall contain therein the particular fund appropriated by law out of which the same is to be paid."

In view of the foregoing, we conclude that state law mandates that there be money in the treasury in the particular fund from which the warrant is drawn; i.e., on deposit at the time the warrant is issued by the secretary of finance and administration and at the time it is presented to the treasurer for payment. These provisions do not permit the issuance of a warrant or payment of money from the state treasury in anticipation of funds not received or deposited therein.

With respect to your second question concerning an irrevocable letter-of-credit with delay-of-drawdown provisions, we understand that the United States Department of Health and Human Services (HHS) plans to implement a change in the procedure used to drawdown federal funds for Medicaid and Aid to Families with Dependent Children. The current procedure for the drawdown of these federal funds constitutes an *{*317}* advanced payment to the state by way of the Federal Reserve Bank System Letter-of-Credit before program costs are paid by the state. Under the current procedure the state draws upon its share of the federal funds immediately prior to the issuance of state warrants to the program beneficiaries or service providers. The new procedure, called delay-of-drawdown, would allow the state to drawdown funds after the issuance of the state warrants. It would also limit the state's ability to draw upon the federal funds to meet the federal share of the payment to specified percentages of the total federal share each work day after the release of the warrants. The predetermined percentages for a given day are to be based on historical warrant clearing patterns, and federal funds could not be drawn in excess of the previously determined percentage for any given day even if warrants were presented for payment in excess of the predetermined percentage.

It has been suggested that federal regulations which provide that "a letter of credit is irrevocable (the equivalent of cash available to the recipient organization) to the extent that the recipient organization has obligated funds in good faith thereunder in executing the authorized Federal program" (31 C.F.R. Section 205.5) constitute a guarantee that funds disbursed by letter-of-credit are available and would be "in the treasury" for purposes of Sections 8-6-7 and 6-5-6 NMSA 1978. This analysis confuses the

distinction that must be made between program funds (i.e., grant authority) and cash. Under the irrevocable letter-of-credit procedure the state clearly has grant authority (i.e., program funds) to cover its warrants before they are issued. It does not, however, have the cash on hand from which to draw as required by state law. The problem is not with the guaranteed right to draw the funds; rather it is with the delay in the timing of receipt of the funds. The new delay-of-drawdown procedure would require the state to issue warrants in anticipation of funds not received and deposited in the state treasury. We conclude that this procedure would violate Sections 6-5-6 and 8-6-7 NMSA 1978.

ATTORNEY GENERAL

Jeff Bingaman, Attorney General