

Opinion No. 87-65

October 16, 1987

OPINION OF: HAL STRATTON, Attorney General

BY: Michael J. Vargon, Assistant Attorney General

TO: Honorable Harroll H. Adams, State Auditor, PERA Building, Room 302, Santa Fe, NM 87503

QUESTIONS

Is the New Mexico Municipal Self Insurers Fund subject to audit by the State Auditor in accordance with the Audit Act, Sections 12-6-1 et seq. NMSA 1978.

CONCLUSIONS

Yes.

ANALYSIS

INTRODUCTION

Section 12-6-3A of the Audit Act, Sections 12-6-1 to 12-6-14 NMSA 1978, provides that "[t]he financial affairs of every agency shall be thoroughly examined and audited each year by the state auditor, personnel of his office designated by him or by [sic] independent auditors approved by him." As used in the Audit Act, "agency" means:

any department, institution, board, bureau, court, commission, district or committee of the government of the state, including district courts, magistrate courts, district attorneys and charitable institutions for which appropriations are made by the legislature; every political subdivision of the state, created under either general or special act, which receives or expends public money from whatever source derived, including but not limited to counties, county institutions, boards, bureaus or commissions; municipalities; drainage, conservancy, irrigation or other special districts; school districts; and every office or officer of any of the above.

Id. § 12-6-2.

Section 11-1-3 of the Joint Powers Agreement Act, Sections 11-1-1 to 11-1-7 NMSA 1978, provides that, if authorized by their governing bodies, two or more public agencies, including counties and municipalities, jointly may exercise any power common to them pursuant to a joint powers agreement. Sections 11-1-4 and 11-1-5 contemplate that parties to a joint powers agreement may create a separate agency for the agreement's implementation. Section 11-1-4C states that funds may be paid to and

disbursed by the agency "agreed upon by the public agencies under the terms of the agreement." Section 11-1-5 provides:

A. The agency provided by the agreement to administer or execute the agreement may be one of the parties to the agreement or a commission or a board constituted pursuant to the agreement.

B. The administering agency under any such agreement shall be considered under the provisions of this Joint Powers Agreement Act [11-1-1 to 11-1-7 NMSA 1978] as an entity separate from the parties to such agreement.

C. The agency shall possess the common power specified in the agreement and may exercise it in the manner or according to the method provided in the agreement, subject to any of the restrictions imposed upon the manner of exercising such power of one of the contracting public agencies or such restrictions of any public agency participating which may be designated or incorporated in the agreement.

Additionally, Section 11-1-7 states that any agency, commission, or board created by a joint powers agreement may issue revenue bonds to pay the cost and expenses of acquiring or constructing any structures, facilities, or equipment necessary to effectuate the agreement's purposes.

According to its bylaws, the New Mexico Municipal Self Insurers Fund ("Fund") was organized to secure for municipalities, counties, political subdivisions, and other local public bodies within New Mexico, and for their employees, benefits, services, indemnification, or protection through insurance or self-insurance. The Fund was created pursuant to a joint powers agreement between these local public bodies. Sections 3-62-1 and 3-62-2 NMSA 1978 specifically establish the power to self-insure as a power common to all of these local public bodies as Section 11-1-3 of the Joint Powers Agreements Act requires. A Board of Trustees consisting of elected or appointed officials of the participating public bodies governs the Fund. According to the joint powers agreement's terms, the New Mexico Municipal League, under a service contract, provides various services to members participating in the Fund.

LEGISLATIVE HISTORY

The question presented requires a determination of the legislative intent underlying Section 12-6-2. The legislative history and prior condition of a law may be used as a guide in determining its meaning. *Munroe v. Wall*, 66 N.M. 15, 18, 340 P.2d 1069, 1070 (1959). The predecessor of the present Audit Act was 1957 N.M. Laws, ch. 248. This Act provided for annual audits by the State Auditor of every "state agency" and "local public body." *Id.* § 2. These entities were defined as follows:

"State agency" means any department, institution, board, bureau, commission, district or committee of the government of the state of New Mexico and means every office or officer of any of the above.

"Local public body" means every political subdivision of the state of New Mexico which expends public money from whatever source derived, including but not limited to counties, county institutions, boards, bureaus or commissions; incorporated cities, towns or villages; drainage, conservancy, irrigation or other districts; charitable institutions for which appropriations are made by the legislature; county, municipal, consolidated, union or rural school districts; and every office or officer of any of the above.

Id. § 1.

In 1965, the Legislature enacted the Legislative Audit Act, 1965 N.M. Laws, ch. 287. This Act transferred the duties that the State Auditor previously exercised to a legislative audit commission. The Legislative Audit Act also divided the subjects of audit into two categories: state agencies and local public bodies. The definitions were virtually identical to those found in the 1957 law.

A. "state agency" means any department, institution, board, bureau, court, commission, district or committee of the government of the state, and means every office or officer of any of the above;

B. "local public body" means justice of the peace courts, every political subdivision of the state, created under either general or special acts, which receives or expends public money from whatever source derived, including but not limited to counties, county institutions, boards, bureaus or commissions; incorporated cities, towns or villages; drainage, conservancy, irrigation or other districts; charitable institutions for which appropriations are made by the legislature; county municipal, consolidated, union or rural school districts, and every office or officer of any of the above;

Id. § 2. In 1968, the Supreme Court of New Mexico held the Legislative Audit Act unconstitutional because it removed all the State Auditor's powers and duties. *Thompson v. Legislative Audit Commission*, 79 N.M. 693, 697, 448 P.2d 799, 803 (1968).

The important point is that, in both the 1957 and the 1965 Acts, the legislature enumerated such diverse entities as charitable institutions, county institutions, and bureaus and commissions as being included within the term "political subdivision." This inclusive definition evinced a legislative intent that the term "political subdivision" was to be used in a very broad sense.

In response to *Thompson*, the legislature enacted in 1969 the Audit Act, Sections 12-6-1 to 12-6-14 NMSA 1978. The Audit Act restored the State Auditor's powers and duties. It no longer divides the agencies subject to audit into two categories and instead provides for the audit of the financial affairs of every "agency." Id. § 12-6-3. Section 12-6-2, quoted *supra*, defines "agency." The definition is almost identical to the definitions that the 1965 Legislative Audit Act provided. The draftsman of the 1969 Audit Act may have eliminated the distinction between "state agency" and "local public body," because

both entities were subject to the same audit requirements and thus there was no reason for distinguishing the two. Although the legislature shifted the reference to charitable institutions from the clause following the examples of political subdivisions to the clause following the examples of state institutions, we do not believe that this change indicates any intent to restrict the Act's application. "Political subdivisions" still encompasses county institutions, boards, bureaus, and commissions. It is our opinion that the Audit Act's language continues to evince an intent that the Act be construed liberally to apply to a wide range of public entities. Although Section 12-6-2 enumerates a series of public entities, the legislature used the language "including but not limited to" precisely to avoid any restrictive interpretation that might result from such an enumeration. Cf. *Bettini v. City of Las Cruces*, 82 N.M. 633, 635, 485 P.2d 967, 969 (1971) (inferring that, where statute authorized withholding utility service to a particular class of persons, it did not authorize the utility to take such action against other classes). Accordingly, after reviewing the Audit Act's legislative history and the language used in the Act, we conclude that the legislature intended the Act to apply to all local public bodies that handle public funds and that this term be given a very broad interpretation.

NEW MEXICO AUTHORITY

There are no reported New Mexico cases interpreting the term "agency" as used in the Audit Act. The Supreme Court has interpreted a similar provision of the predecessor of the Open Meetings Act, now codified at Sections 10-15-1 through 10-15-4 NMSA 1978. Section 1 of 1959 N.M. Laws, ch. 120, provided: "The governing bodies of all municipalities, boards of county commissioners, boards of public instruction and all other governmental boards and commissions of the state or its subdivisions, supported by public funds, shall make all final decisions at meetings open to the public...." In *Raton Public Service Company v. Hobbes*, 76 N.M. 535, 417 P.2d 32 (1966), the court considered whether a municipally owned electric utility corporation was, under this section, a "governing body" or a "governmental board or commission" of the State or its subdivisions. Three trustees held the utility company's entire stock for the sole benefit of the city of Raton. The court held that the company was such an entity:

The intention of the legislature comes clearly through to the reader from the language used. The purpose was to provide that governing bodies dealing with public funds be required to make decisions in the open where the interested public could observe the action. To conclude that the legislature was thinking specifically of bodies such as appellant when it used the language that it did would accord to them more reason and foresight than could be supported by the facts. However, the language used, being broad enough to include appellant, we perceive it as our duty to uphold the act and its application to appellant. The legislature, in its wisdom, having passed... [1959 N.M. Laws, ch. 120, sec. 1] and appellant being within its broad terms, we are impressed that there is no reason to attempt to excuse it from the operation of the act. Our duty is to enforce the act as intended.

76 N.M. at 543, 417 P.2d at 37. The language used in Section 12-6-2 is even more expansive than that used in 1959 N.M. Laws, ch. 120, sec. 1. Thus, the Court's reasoning would apply with even greater force to Section 12-6-2

A previous New Mexico Attorney General specifically concluded that a corporation formed pursuant to the Joint Powers Agreement Act was subject to audit by the State Auditor. In Attorney General's Opinion No. 66-7, the Attorney General was asked if EMW Gas Association, a gas utility company formed by the cities of Estancia, Moriarty, and Willard pursuant to a joint powers agreement, was subject to audit by the State Auditor. The Attorney General reasoned as follows:

It is apparent that the EMW Gas Association would not come within the definition of State agency as contained in that Section; however, the definition of "local public body" in that Section is more comprehensive and would seem to include the EMW Gas Association. Political subdivisions spending public monies from whatever source they are derived and incorporated cities, towns or villages are all included within the meaning of "local public bodies". The EMW Gas Association is not one municipality but is a corporation controlled by three separate municipalities. Its revenues are obtained in a manner similar to any other municipally owned utility system. As we indicated in answer to your first question the EMW Gas Association uses public monies the same as does a municipally owned utility. It is therefore, our conclusion that the affairs of the EMW Gas Association are subject to audit by the State Auditor under the Legislative Audit Act.

We note that some of the terms included within the definition of "agency" in Section 12-6-2 have been interpreted narrowly in other contexts. In the case of *Gibbany v. Ford*, 29 N.M. 621, 225 P. 577 (1924), the Supreme Court held that a ward of a municipality was not a political subdivision as that term was used in article V, section 13 of the New Mexico Constitution. At that time, article V, section 13 provided that "[a]ll district, county, precinct and municipal officers, shall be residents of the political subdivision for which they are elected or appointed." Article VII, section 2 provided, in pertinent part: "Every citizen of the United States who is a legal resident of the state and is a qualified elector therein, shall be qualified to hold any public office in the state except as otherwise provided in this constitution." The Court narrowly interpreted the restrictions on eligibility to hold public office imposed by article V, section 13: to be a "political subdivision," an entity must "be formed or maintained for the more effectual or convenient exercise of political power within certain boundaries or localities, to whom the electors residing therein are, to some extent, granted power to locally self-govern themselves." 29 N.M. at 626, 225 P. at 579.

Assuming, without deciding, that a joint powers agreement entity is not a political subdivision under *Gibbany*, it is clear that for purposes of Section 12-6-2 the Legislature intended "political subdivision" to have a broader scope than the narrow interpretation enunciated in *Gibbany*. In addition to the political subdivisions themselves, Section 12-6-2 includes agencies and instrumentalities of political subdivisions such as county commissions and county institutions. Moreover, when the legislature's intent is to establish a broad definition that results in a wide-ranging application of a statute, the

court will follow that definition within constitutional limitations. *Raton Public Service*, 76 N.M. at 453, 417 P.2d at 37. We believe this principle is especially true when the statute's purpose is to act as a restraint on the exercise of governmental power or the expenditure of public funds.

We also note that a previous New Mexico Attorney General concluded that statutory language similar to that found in Section 12-6-2 did not include an entity formed by a joint powers agreement. Attorney General Opinion No. 76-36 dealt with the question of whether a council of government was a "local public body" for purposes of laws regulating local government finances. Section 11-2-56 NMSA 1953 (now codified at Section 6-6-1 NMSA 1978) defined "local public body" as:

[E]very political subdivision of the state which expends public money from whatever source derived, including but not limited to counties, county institutions, boards, bureaus of commissions; incorporated cities, towns or villages; drainage, conservancy, irrigation or their [other] districts; charitable institutions for which an appropriation is made by the legislature and every office or officer of any of the above. "Local public body" does not include county, municipal, consolidated, union or rural school districts and their officers, or irrigation districts organized under sections 75-23-1 through 75-23-45, New Mexico Statutes Annotated, 1953 Compilation.

The opinion reasoned that, because no council of government was designated as a "local subdivision" under any enabling legislation and no legislation delegated any powers of a political subdivision to the council of government, it could not be a local public body.

We believe this reasoning was erroneous. The opinion states, "[u]nder the statutory definition, an entity must be a 'political subdivision of the state' for it to be considered a local public body." The definition of local public body expressly includes charitable institutions for which an appropriation is made by the legislature. Charitable institutions do not exercise powers of a political subdivision. If the term "local public body" meant only political subdivisions, there would be no point in using it. The legislature simply would have used the term "political subdivision of the state." To the extent that Opinion No. 76-36 conflicts with this opinion, it is hereby overruled.

OTHER AUTHORITY

Courts from other jurisdictions have not addressed the issue whether joint powers agreement entities are subject to state audits. A few jurisdictions have considered, however, whether a joint powers agreement entity will be considered a governmental agency or political subdivision for other purposes. The Oklahoma Supreme Court has held that a council of governments formed pursuant to the Oklahoma Interlocal Cooperation Act was an agency of the participating local governments and not a private organization. *Pease v. Board of County Commissioners*, 550 P.2d 565, 568 (Okla. 1976). The Oregon Court of Appeals held that a council of governments was not a "public employer" as the Oregon Public Employee Relations Act defined that term. *Lane*

Council of Governments v. Lane Council of Governments Employee Association, 26 Or. App. 119, 552 P.2d 600, 603 (1976). The Oregon Supreme Court reversed, however, because the court of appeals lacked jurisdiction. 277 Or. 631, 639, 561 P.2d 1012, 1016 (1977), aff'd on rehearing en banc, 278 Or. 335, 563 P.2d 729 (1977).

CONCLUSION

The New Mexico Self Insurer's Fund is created pursuant to a general act, the Joint Powers Agreement Act. It receives and expends public money derived from the payment of premiums or contributions from the participating municipalities and counties. A Board of Trustees, which consists of elected or appointed officials of the participating public agencies controls the Fund.

It is our opinion that the New Mexico Self Insurer's Fund is an "agency" as used in the Audit Act and is therefore subject to audit by the State Auditor. A contrary result would allow local public bodies to evade audit of any particular activity by executing a joint powers agreement. We do not believe that the legislature intended the Joint Powers Agreement Act to provide a mechanism for evading public accountability.

Respectfully submitted,

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