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October 4, 2012

OPINION NO. 2012-05

AUDIT; CONTROLLER; CLAIMS: The Controller has the authority to audit claims against the State in order to determine the legality and justness of such claims. The Controller is legally required to be both a member of the Board of Directors of NDOT and the auditor of claims against the State Highway Fund.

The Honorable Kim R. Wallin, State Controller
Office of the State Controller
101 North Carson Street, Suite 5
Carson City, Nevada 89701-4786

Dear Ms. Wallin:

You have requested an opinion from the Office of the Attorney General regarding two legal issues.

QUESTION ONE

What audit authority does the State Controller have under Nevada law?

ANALYSIS

The Nevada Constitution provides that there shall be certain State executive officers who will be elected, "A Secretary of State, a Treasurer, a *Controller*, and an Attorney General shall be elected at the same time and places, and in the same manner as the Governor. . . ." NEV. CONST. art. 5, § 19(1) (emphasis added).

The constitutional authority of the Controller is set out as follows, "The . . . State Controller . . . shall perform such other duties as may be prescribed by law." NEV. CONST. art. 5, § 22.

The Nevada Legislature has "prescribed by law" additional duties of the State Controller, some of which are codified in NRS Chapter 227. Specifically, the Controller's audit authority is set forth in NRS 227.160, reproduced in its entirety below:

NRS 227.160 Auditing and allowance of claims; examination of witnesses and documentary evidence.

1. The State Controller shall:

(a) *Audit all claims against the State*, for the payment of which an appropriation or authorization has been made but of which the amount has not been definitely fixed by law, which have been examined and passed upon by the State Board of Examiners, or which have been presented to the Board and not examined and passed upon by it within 30 days from their presentation.

(b) Allow of those claims mentioned in paragraph (a) as not having been passed upon by the State Board of Examiners within 30 days after presentation the whole, or such portion thereof as the State Controller deems *just and legal*, and of claims examined and passed upon by the State Board of Examiners, such an amount as the State Controller decrees *just and legal* not exceeding the amount allowed by the Board.

2. No claim for services rendered or advances made to the State or any officer thereof may be audited or allowed unless the services or advancement have been specially authorized by law and an appropriation or authorization made for its payment.

3. For the purpose of satisfying himself or herself of the *justness and legality of any claim*, the State Controller may *examine witnesses under oath and receive and consider documentary evidence* in addition to that furnished him or her by the State Board of Examiners. The State Controller shall draw warrants on the State Treasurer for such amounts as the State Controller allows of claims of the character described in this section, and also for all claims of which the amount has been definitely fixed by law and for the payment of which an appropriation or authorization has been made.

NRS 227.160 (emphasis added).

Pursuant to the requirements of NRS 227.160, before the Controller allows a claim and draws a warrant therefor, the Controller must find that the claim is just and legal. The Legislature has granted the Controller the authority to examine witnesses under oath as a method of determining the justness and legality of any claim and the authority to receive and consider documentary evidence in addition to that furnished by the Board of Examiners.

Implied in the authority to audit claims, including the authority to examine witnesses under oath and to receive and consider additional documentary evidence, are any incidental powers reasonably necessary to carry out that authority.¹ “It is absolutely necessary that every claim against the State . . . must be itemized or ‘show a detailed account’ of each item thereof, in order that the . . . State Controller . . . may properly and intelligently audit the same, and if found correct, lawfully allow and pay the same.” Op. Nev. Att’y Gen. No. 1941–330 (1941).

In a very old case, the Nevada Supreme Court considered whether the State Controller possesses audit authority by the creation of the office within the State Constitution. In *State ex rel. Lewis v. Doron*, 5 Nev. 399 (1870), the Nevada Supreme Court interpreted Article 5, Section 22 of the Nevada Constitution. The Court found that during Nevada’s period as a Territory, the office of State Controller had the title of Territorial Auditor as evidenced in Article 17, Section 14 of the Constitution. “[I]t was provided in the schedule that ‘[t]he Territorial Auditor shall continue to discharge the duties of his said office until the time appointed for the qualification of the State Controller.’ . . .” *Id.* at 409. The Court determined that the Controller is the, “supervising officer of revenue . . . among whose duties is the final auditing and settling of all claims against the State; . . .” *Id.* at 408. The Court held that “Auditor” and “Controller” are synonymous terms, and that, “the official designation of Controller, in the Constitution of the State of Nevada, of its own force, was a positive delegation of the powers usually incident to the office of Controller, . . .” *Id.* at 413.

Courts in other states have similarly found that “Auditor” and “Controller” are synonymous terms with generally understood powers and duties that can be implied from the creation of the office within a state’s constitution. See *Love v. Baehr*, 47 Cal. 364 (1874); *Tirapelle v. Davis*, 20 Cal.App.4th 1317, 26 Cal.Rptr.2d 666 (1993); *Wright v. Callahan*, 61 Idaho 167, 99 P.2d 961 (1940); *Yelle v. Bishop*, 55 Wash.2d 286, 347 P.2d 1081 (1959); and *Thompson v. Legislative Audit Comm’n*, 79 N.M. 693, 448 P.2d 799 (1969).

¹ *Checker, Inc. v. Public Serv. Comm’n*, 84 Nev. 623, 629–30, 446 P.2d 981, 985 (1968) (everything to carry out power implied; incidental reasonably necessary power attends). *State ex rel. Hinckley v. Sixth Jud. Dist. Ct.*, 53 Nev. 343, 352, 1 P.2d 105, 107 (1931) (everything lawful and necessary to execution of power given by statute implied by law).

CONCLUSION

The Controller has the authority to audit claims against the State in order to determine the legality and justness of such claims. Implied in that audit authority are any incidental powers reasonably necessary to carry out that authority.

QUESTION TWO

You asked whether a conflict of interest prevents the Controller from auditing the claims of the Nevada Department of Transportation (NDOT) when the Controller is a member of the Board of Directors of NDOT pursuant to NRS 408.106.

ANALYSIS

The Legislature created the Board of Directors of NDOT in 1989 and designated the Controller as a member of that Board.² Provisions regarding the State Highway Fund were enacted in 1957 and specified that bills and charges against the State Highway Fund must be audited by the State Controller.³ The plain language of these statutory provisions, read together, provide that the Controller must audit claims against the State Highway Fund while simultaneously serving as a member of the Board of Directors of NDOT.

In addition to the plain language of the statutes, it is presumed that the Legislature has knowledge of existing statutes relating to the same subject.⁴ Based on this presumption, we can conclude that the Legislature included the State Controller as a member of the Board of Directors, with full knowledge that the Controller audits the claims of NDOT.

We can further conclude that the Legislature properly designated the State Controller as a member of the Board pursuant to its broad lawmaking authority.⁵ "When in the exigencies of government it is necessary to create and define new duties, the legislative department has the discretion to determine whether additional offices will be

² NRS 408.106.

³ NRS 408.235(6).

⁴ *Ronnow v. City of Las Vegas*, 57 Nev. 332, 366, 65 P.2d 133, 146 (1937) (presumed that the Legislature, in enacting a statute, acted with full knowledge of existing statutes relating to same subject).

⁵ "Briefly stated, legislative power is the power of law-making representative bodies to frame and enact laws, and to amend or repeal them. This power is indeed very broad, and, except where limited by Federal or State Constitutional provisions, that power is practically absolute." *Galloway v. Truesdell*, 83 Nev. 13, 20, 422 P.2d 237, 242 (1967).

created, or whether these duties are to be attached to and become ex officio duties of existing officers.”⁶ See also *Ahto v. Weaver*, 39 N.J. 418, 423, 189 A.2d 27, 30 (1963). (“What the legislation does—and it is unquestionably within the power of the Legislature . . .—is to allow such dual office holding . . .”).

There are several legislatively created bodies that include constitutional officers, including the Board of Finance⁷ and the Executive Branch Audit Committee.⁸ Additionally, the Nevada Legislature statutorily prescribed the duties of and procedures for the Board of Examiners⁹ and the Board of State Prison Commissioners,¹⁰ bodies established by the Nevada Constitution.¹¹

CONCLUSION

The Controller is legally required to be both a member of the Board of Directors of NDOT and the auditor of claims against the State Highway Fund; therefore, we can conclude that no conflict of interest can be imputed to the Controller when carrying out her legal duties as prescribed by the State Legislature.

Sincerely,

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JMC:SMG

⁶ 63C AM. JUR. 2D *Public Officers and Employees* § 43 (2012).

⁷ NRS 355.010.

⁸ NRS 353A.038.

⁹ NRS 353.010.

¹⁰ NRS 209.101.

¹¹ NEV. CONST. art. 5, § 21.