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OPINION
OF
HAL STRATTON

Opinion No. 87-54

By: Scott D. Spencer
Assistant Attorney General

To: Honorable Gary D. Robbins
State Representative
P.O. Box 882
Portales, New Mexico 88130

QUESTIONS PRESENTED:

1. Once the State Auditor notifies a state agency that it is designated for audit by an independent auditor in accordance with Section 12-6-3 NMSA 1978, can the State Auditor refuse to approve the choice of the agency without stating reasons therefor such as those outlined in Regulation SA Rule 86-1, page 25?
2. Are there grounds other than those provided in SA Rule 86-1, page 25, upon which the State Auditor may not approve the choice of auditor made by a state agency, or is the State Auditor required to approve the state agency's choice absent the existence of the grounds stated in the regulation?
3. Can the State Auditor revoke his designation of a state agency to be audited by an independent public accountant and, if so, are any grounds required?
4. If the State Auditor can revoke his designation of an agency to choose its own auditor, must the office of the State Auditor conduct the audit or can the State Auditor then choose an independent auditor to conduct the audit?

CONCLUSIONS:

1. Yes. State Auditor Rules 87-1 and 87-2 now supersede Rule 86-1. The State Auditor's reasons for refusing to approve the choice of independent auditor are limited to those listed in SA Rule 87-2, but he is not required to identify which reason or reasons form the basis for his decision.
2. State law provides no grounds, other than those listed in SA Rules 87-1 and 87-2, upon which the State Auditor may refuse to approve an agency's choice of auditor. He must, however, approve the state agency's choice absent the existence of the grounds stated in the regulation.
3. Pursuant to SA Rule 87-2, the State Auditor may revoke his designation of a state agency for independent audit. He may do so for any reason. He loses the power to revoke the designation, however, after he gives written approval to the contract between the agency and a particular independent auditor and such a contract is executed.
4. The State Auditor may conduct the audit himself, through personnel of his office, or with the assistance of independent auditors on contract with his office.

ANALYSIS:

Article V, section 1 of the New Mexico Constitution creates the office of the State Auditor to provide an independent representative of the people, "accountable to no one else," with the power, duty, and authority to examine and pass upon the activities of state officers and agencies who by law receive and expend public monies. Thompson v. Legislative Audit Commission, 79 N.M. 693, 448 P.2d 799 (1968). The Audit Act, Sections 12-6-1 to 12-6-14 NMSA 1978, defines the State Auditor's responsibilities. Section 12-6-3 provides in part that "the financial affairs of every agency shall be thoroughly examined and audited by the state auditor, personnel of his office designated by him or by independent auditors approved by him...." (emphasis added).

Section 12-6-14 NMSA 1978 specifically provides for independent audits of state agencies:

- B. The state auditor shall notify each agency designated for audit by an independent auditor, and the agency shall enter into a contract with an independent auditor of its choice in accordance with procedures prescribed by regulations of the state auditor. Each contract for auditing entered into

between an agency and an independent auditor shall be approved in writing by the state auditor. No payment of public funds may be made to an independent auditor unless a contract is entered into and approved as provided in this section.

- D. The state auditor or personnel of his office designated by him shall examine all reports of audits of agencies made pursuant to contract. Based upon demonstration of work in progress, the state auditor may authorize progress payments to the independent auditor by the agency being audited under contract. No final payment for services rendered by an independent auditor shall be made until a determination and written finding that the audit has been made in a competent manner in accordance with the provisions of the contract and applicable regulations by the state auditor.

These provisions indicate that the State Auditor has authority to audit the financial affairs of state agencies. He has the discretion to designate agencies of his choosing for audit by independent auditors. He has discretion to approve their choice of auditor. He also has discretion to withhold payment from those independent auditors until he is satisfied (that the audit has been made in a competent manner.) Finally, Section 12-6-12 NMSA 1978 provides that the State Auditor has the authority to promulgate reasonable regulations to carry out his office's duties.

In answer to your first question, SA Rule Nos. 87-1 and 87-2 supersede former SA Rule No. 86-1. Rule 87-2 provides as follows:

This regulation is promulgated pursuant to Sections 12-6-6 and 12-6-12, NMSA, 1978 as amended.

The State Auditor will use his discretion and may not approve:

A. Audit contracts that in his opinion do not serve the best interest of the agency because of any one or more of the following:

1. The lack of experience of the audit firm,
2. The number of times the firm has audited the agency,

3. The lack of competence or number of personnel employed by the audit firm,
4. Possibility of untimely delivery of the audit report,
5. Cost to the Agency, or
6. Terms contained in the proposed contract which the State Auditor considers to be unfavorable, unfair, unreasonable or unnecessary.

B. Audit contracts with any audit firm which has:

1. Breached a prior years contract,
2. Failed to deliver a report on time,
3. Failed to comply with state law and all regulations of the State Auditor,
4. Performed management services for an agency without prior notification to the Office of the State Auditor,
5. Indicated a lack of independence or had the appearance thereof, or
6. Otherwise, in the opinion of the State Auditor, shown itself to be unfit to be awarded a contract.

C. Any audit contract if he decides to perform the audit himself or through personnel of his office designated by him pursuant to Section 12-6-3, NMSA, 1978, even if he has previously designated an agency for audit by an independent auditor.

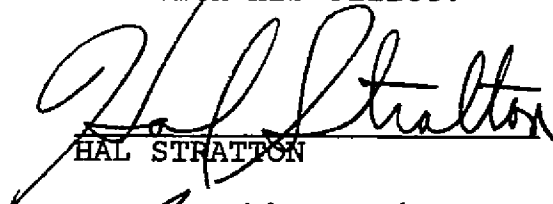
SA Rule 87-2 does not appear to exceed the scope of any statute and therefore is presumed to be a valid, lawful regulation. See Rivera v. Board of Cosmetologists, 101 N.M. 592, 593, 686 P.2d 934, 935 (1984).

The State Auditor may refuse to approve the choice of an independent auditor by an agency for any of the reasons provided in SA Rule 87-2. He is limited to those reasons, because he has, by adopting that rule, committed himself to comply with it until it is changed. See State ex rel. Nevada Tax Commission v. Safeway Super Stations Inc., 99 Nev. 626, 668 P.2d 291, (Nev. 1983). The State Auditor is not, however, required to disclose which reason or reasons formed the basis for his decision. Agencies generally must state the reasons for their actions only if they are acting

in an adjudicative capacity and hold a formal hearing. See B. Schwartz, Administrative Law §4.2, at 146 (2d. ed. 194). See also Transport Oil, Inc. v. Cummings, 195 N.W.2d. 649 (Wis. 1972); Katz v. Florida State Board of Medical Examiners, 405 So.2d 465 (Fla. App. 1981). It is our opinion that the decisions of the State Auditor, a constitutional officer, if within his statutory discretion, need not be stated.

In answer to your second question, it is our opinion that the State Auditor must approve an agency's choice of auditor unless, it is his judgment that, grounds exist as set forth in SA Rule 87-2 to reject such choice.

In answer to your third question, SA Rule 87-2 provides that the State Auditor may revoke his designation of an agency for independent audit. State law does not require that he have any specific grounds for his decision to perform the audit. It is our opinion that the decision whether his office will perform the audit or whether the agency may contract out also rests within the State Auditor's discretion. Once he has given his written approval to the agency's contract with an independent auditor and said contract has been enacted, however, he may not thereafter revoke the designation. A contrary construction of Sections 12-6-3 and 12-6-14 could expose the agency to potential liability to the independent auditor for breach of contract. Finally, in answer to your fourth question, if the State Auditor revokes his designation of an agency to choose its own auditor, he may conduct the audit himself, through personnel of his office, or with the assistance of independent auditors under contract with his office.


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