Opinion No. 58-242

December 29, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Alfred P Whittaker, Assistant Attorney General

TO: Mr. Robert E. Pritchett, Director, Department of Public Welfare, P. O. Box 1391, Santa Fe, New Mexico

QUESTION

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1. May the Department of Public Welfare properly execute releases as to specific property of the lien created by Chapter 5, Laws of 1955 Special Session, in view of the amendment of Article IV, Section 32 of the Constitution at the 1958 general election?

2. May the Department properly return to the payor moneys paid to release such a lien, but held by the Department pending processing, appraisal, or for other reasons?

3. May the Department properly return to the payor moneys paid as installment payments toward the satisfaction of such a lien?

CONCLUSIONS

1. Yes.

2. See Analysis.

3. No.

OPINION

ANALYSIS

Chapter 5, Laws of 1955 Special Session, provided in part as follows:

"Section 1. PUBLIC ASSISTANCE CREATES REAL PROPERTY LIEN AND CLAIM AGAINST ESTATE. -- The granting of all public assistance by the department of public welfare, except aid to dependent children, creates a preferred claim in favor of the state of New Mexico to the extent hereinafter provided against the estate of the recipient and a lien against all real property or interest in real property vested in or later acquired by the recipient or his spouse for the amount of public assistance payments received by the recipient or his spouse after January 1, 1956, without interest.

* * *

Section 4. FILING LIENS. -- The department of public welfare shall file a certificate of granting of public assistance, in all cases covered by this act. This certificate shall constitute notice to the public that the lien created by this act has attached, and shall upon filing, take precedence over all prior unrecorded liens, and over all subsequent liens and encumbrances. **County clerks shall receive, index and file certificates of granting of public assistance and releases of the liens created by the certificate, free of charge** (Emphasis added)."

We are advised that certificates of granting of public assistance have in fact been filed by the department pursuant to the quoted statute, in the offices of various of the county clerks, and that each such certificate relates to the property described therein belonging to the person or persons named in such certificate.

In 1957, the Legislature adopted House Joint Resolution No. 1, proposing constitutional amendment No. 4, that Article 4, Section 32 of the Constitution be amended to read:

"Section 32. No obligation or liability of any person, association or corporation held or owned by or owing to the state, or any municipal corporation therein, shall ever be exchanged, transferred, remitted, released, postponed, or in any way diminished by the legislature, nor shall any such obligation or liability be extinguished except by the payment thereof into the proper treasury, or by proper proceeding in court. **Provided that the obligations created by Special Session Laws 1955, Chapter 5 running to the state or any of its agencies, remaining unpaid on the effective date of this amendment are void.** (Emphasis added)"

This amendment was subsequently adopted at the general election of 1958, and so became effective upon its certification on November 20, 1958. Meanwhile, the 1957 Legislature had also enacted Chapter 56, Laws of 1957, which became effective June 7, 1957, repealing Chapter 5, Special Session Laws 1955 **in toto.**

Clearly, the 1957 legislation destroyed all claims of the State which otherwise would have arisen by operation of the 1955 statute, from and after June 7, 1957. It did not have the effect of destroying existing obligations which had previously arisen under the 1955 law, however -- this, of course, it could not do, under the language of Article IV, Section 32 as it then read. The 1958 constitutional amendment, did undertake to nullify such existing obligations which remained unpaid upon November 20, 1958 the effective date of that amendment.

If the constitutional amendment should be viewed as self-executing, the department is clearly authorized to execute releases of the liens in question, to the extent that such liens secure obligations for assistance which were unpaid as of November 20, 1958. If legislation should be required to implement the constitutional amendment, then the department could only be authorized to execute releases of such liens as provided by statute.

After careful consideration of this question, this office concludes that the constitutional amendment is self-executing, and that the department may, without awaiting legislative authorization, properly execute releases of these liens as to specific property. The test generally accepted as to whether or not a constitutional provision is self-executing is stated at 16 C.J.S., Constitutional Law, Section 48, as follows:

"A provision is self-executing when it can be given effect without the aid of legislation and there is nothing to indicate that legislation is contemplated in order to render it operative; as stated in Corpus Juris, constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed.

* * *

Constitutional provisions are not self-executing if they merely indicate a line of policy or principles, without supplying the means by which such policy or principles are to be carried into effect, or if the language of the constitution is directed to the legislature, or if it appears from the language used and the circumstances of its adoption that subsequent legislation was contemplated to carry it into effect."

This test of the nature of a constitutional provision has been adopted by the Supreme Court of New Mexico. See **Lanigan v. Gallup,** 17 N.M. 627 (1913); **State v. Rogers,** 31 N.M. 485 (1926); **In re Southern Pacific Company,** 37 N.M. 11 (1932). And the Court has in effect applied the rule in cases in which it has determined that particular constitutional provisions are not self-executing. See **Jordan v. Jordan,** 29 N.M. 95 (1923); **Jaramillo et al. v. City of Albuquerque,** No. 6414, September 5, 1958.

If this standard is applied to the 1958 constitutional amendment quoted above, it seems clear that no further action by the legislature was contemplated. The obligations in question are flatly declared to be void. Authority is not conferred upon the legislature to declare them void, as might have been done. No further procedures are necessary to the enjoyment of the privilege conferred. The obligation is flatly and directly destroyed.

Since the underlying obligation, in our view, has been destroyed, the department may properly execute releases of these liens without further statutory authorization. A lien of course is merely a charge on property as security for the payment of an obligation (see 53 C.J.S., Liens, Sec. 1); and the rule is that a lien is discharged by satisfaction of the underlying obligation, whether or not the lien is formally released in writing. 53 C.J.S., Liens, Sec. 17 (d) (7), p. 866. Upon payment of the underlying obligation, the lienholder has a duty to execute and deliver to the obligor a release of lien. 53 C.J.S., Liens, Sec. 17 (e), p. 867. We see no difference in the situation under review. Here, the constitutional amendment actually operates to destroy the underlying obligation and, we think, to release the lien which secures payment thereof, without more. However, the department certainly is authorized to execute and deliver appropriate releases if requested to do so to complete the record.

In your second question, you ask whether or not the Department may properly return moneys heretofore paid to release such a lien but held by the department pending processing appraisal or for other reasons. The answer hinges upon whether such moneys are to be regarded as "remaining unpaid" on the effective date of the constitutional amendment. Under general rules of law, a check constitutes conditional payment only, but if paid in due course, constitutes payment at the time of the delivery of the check. **Franciscan Hotel Co. v. Albuquerque Hotel Co.,** 37 N.M. 456 at 471-472 (1933); and see 70 C.J.S., Payment, Sections 12, 24. Accordingly, to the extent that the department holds funds which, upon receipt, were subject to the requirement that they be deposited directly and unconditionally into the state treasury pursuant to Section 11-2-3 N.M.S.A., 1953, such amounts cannot be regarded as remaining unpaid and cannot be returned to the payor. To the extent that the department holds funds which upon receipt were subject to the requirement of Section 11-2-3 that they be deposited in a suspense account in the state treasury, pending determination as to whether or not such funds will become the absolute property of the state, it is our view that such moneys may properly be returned to the payor, in accordance with Section 11-2-39, so long as it had not been determined, prior to November 20, 1958, that such funds were the absolute property of the state.

It follows from the analysis of your second question that installment payments received prior to November 20, 1958 were subject to the requirement of Section 11-2-3 that they be deposited directly and unconditionally into the state treasury; and such amounts may not lawfully be returned to the payor.