

Opinion No. 64-67

May 22, 1964

BY: OPINION OF EARL E. HARTLEY, Attorney General Jerry Wertheim, Assistant Attorney General

TO: Mr. Joseph O. Walton, Assistant District Attorney, County Court House, Lovington, New Mexico

QUESTION

QUESTIONS

1. Can a municipality use its juvenile recreational fund derived from a tax on cigarettes authorized by Chapter 72, Article 14, N.M.S.A., 1953 Compilation (P.S.) for a summer program of music instruction to the regular junior and senior high school band?
2. If the answer to the above question is no, can the municipality's juvenile recreational fund be used for a summer program of music instruction open to any boy or girl desiring music instructions?

CONCLUSIONS

1. No.
2. Yes, as explained in analysis.

OPINION

ANALYSIS

The first problem which must be resolved is whether a summer program of music instruction comes within the statutory language of "recreational facilities" found in Section 72-14-14, N.M.S.A., 1953 Compilation (P.S.). "Recreation" denotes refreshment of body or mind which may come from any pleasant and diverting exercise, see generally 36A Words and Phrases, Recreation. Clearly Music instruction would fall within this definition of recreation. Moreover this conclusion appears consistent with our previous opinions on the subject wherein library service was considered recreational. Attorney General's Opinion No. 6173 dated May 31, 1955, and Attorney General's Opinion No. 57-285 dated November 6, 1957.

The second problem is whether the program of music instruction might be limited exclusively to the regular junior and senior high school band. One must recognize that any exclusion of juveniles within the municipality from a program supported by juvenile recreational funds in preference of a selected group of juveniles raises a constitutional

problem under Article IX, Section 14 of the New Mexico Constitution. In light of this problem this office has consistently decided that discrimination among juveniles in a municipality is outside the legislative intent of Section 72-14-14, N.M.S.A., 1953 Compilation (P.S.) unless it also conforms with the proviso in Article IX, Section 14 of the New Mexico Constitution. Attorney General's Opinion No. 6253 dated August 15, 1955, Attorney General's Opinion No. 60-208 dated October 28, 1960 and No. 62-123 dated October 2, 1962. Since "Juvenile" is defined in Section 72-14-14 (D) as every person under the age of twenty-one years, the program outlined by the City of Lovington for the regular junior and senior high school band would be quite discriminatory. Therefore this office concludes that one could not limit the summer program of music instruction to regular members of the junior and senior high school band.

From the reason given above it is apparent that a program of music instruction open to any boy or girl desiring such instruction comes clearly within the bounds of Section 72-14-14, supra. However in formulating this program, one must make certain that the governing body of the municipality retains control over the specific uses to which the recreational funds are put. Attorney General's Opinion No. 59-202 dated December 14, 1959 and Attorney General's Opinion No. 60-191 dated October 13, 1960. Moreover it is also necessary to comply with the proviso in Section 72-14-14 (C) which states that adults may not be excluded from the use of any recreational facility which is suitable for use by both juveniles and adults. This office concludes that a summer program of music instruction open to any boy or girl desiring this instruction with the qualifications noted above is proper.