Opinion No. 70-23

February 17, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: The Honorable John J. Mershon Chairman, Appropriations & Finance Committee New Mexico House of Representatives Legislative-Executive Building Santa Fe, N. M. 87501

QUESTIONS

FACTS

The 29th Legislature of the State of New Mexico, Second Session, 1970 is currently considering House Bill No. 126 which creates a plan whereby the State of New Mexico could loan money to resident students who are enrolled in an institution of higher learning in the state and who otherwise qualify under the federal guaranteed loan program under the Higher Education Act of 1965. See 20 U.S.C. **§§** 1071-1087. The loans are repaid by the students in accordance with the federal law and regulations. The bill proposes a student loan fund in the state treasury from which the payments may be made to eligible borrowers and, if necessary, revenue bonds may be issued to provide a source of funds for the loans.

QUESTIONS

Is the student loan proposal of H.B. 126 inconsistent with the provisions of the New Mexico Constitution?

CONCLUSION

No.

OPINION

*{*37}* **ANALYSIS**

The proposed bill would appear to raise questions under the two following constitutional provisions:

"Any public officer making any profit out of public moneys or using the same for any purpose not authorized by law, shall be deemed guilty of a felony and shall be punished as provided by law and shall be disqualified to hold public office. **All public moneys not invested in interest-bearing securities** shall be deposited in national banks in this state, in banks or trust companies incorporated under the laws of the state, or in federal savings and loan associations in this state, or in savings and loan associations

incorporated under the laws of this state whose deposits are insured by an agency of the United States, and the interest derived therefrom shall be applied in the manner prescribed by law. The conditions of such deposits shall be provided by law." (Emphasis added.)

N.M. Const. Art. 8, **§** 4.

"Neither the state, nor any county, school district, or municipality, except as otherwise provided in this Constitution, shall directly or indirectly lend or pledge its credit, or make any donation to or in aid of any person, association or public or private corporation, or in aid of any private enterprise for the construction of any railroad; provided, nothing herein shall be construed to prohibit the state or any county or municipality from making provision for the care and maintenance of sick and indigent persons."

N.M. Const. Art. 9, **§** 14.

Assuming that the treasurer initially releases funds for this loan program without revenue bonds being issued, there seems little doubt that the treasurer has in fact invested public moneys. See e.g., **State ex rel. Attorney General v. Marron,** 18 N.M. 426, 137 P. 845 (1913). Under the provisions of the federal law the student executes a note which is by its terms interest-bearing. 20 U.S.C. **§** 1077. Although there is no unanimity of opinion, we feel confident that the courts would recognize a note as a security as that term is used in Article Eight, Section Four. **Parkland Place Co. v. United States,** 248 F. Supp. 974 (N.D. Tex. 1964); **FEC v. Addison,** 194 F. Supp. 709, 721 (N.D. Tex. 1961); **Wagner v. Sherer,** 89 App. Div. 202, 85 N.Y. Supp. 894 (1903); **Chapin v. Austin,** 165 Misc. 414, 300 N.Y. Supp. 932 (1937). See also, Opinion of the Attorney General, No. 57-279, dated October 29, 1957. The fact that principal and interest is guaranteed by the federal government would seem to add weight to the argument that these loans are a sound investment. See Opinion of the Attorney General, No. 69-115, dated September 30, 1969.

Assuming that revenue bonds are eventually issued to provide the funds for these loans, would the proposed law be unconstitutional under Article Nine, Section Fourteen? We know, of course, that the loans are not being made to sick and indigent persons. See 20 U.S.C., **§** 1077. Nor does there appear to be any other constitutional provision which would remove any question of the applicability of Article Nine, Section Fourteen. See, **State ex rel. Interstate Streams Comm'n v. Reynolds,** 71 N.M. 389, 378 P.2d 622 (1963), approving, Opinion of the Attorney General No. 59-46, dated May 5, 1959.

Is the granting of a loan to a student in return for a note executed by the student the making of any donation to or in aid of any person? We believe not. In the case of **Village of Deming v. Hosdreg Co.,** 62 N.M. 18, 303 P.2d 920 (1956) the New Mexico Supreme Court, reviewed its previous cases interpreting Article Nine, Section Fourteen and arrived at a definition of the term "donation."

"We think it fair to say from a *{*38}* review of the cases cited dealing with the term 'donation,' as found in this proviso of the Constitution, that the word has been applied in its ordinary sense and meaning, as a 'gift,' an allocation or appropriation of something of value, without consideration to a 'person, association or public or private corporation.'"

In this instance we clearly have the delivery of a principal sum and the repayment of said sum with interest. As such the transaction is clearly a loan and not a gift. See **Batchelor v. Mandigo,** 95 Cal. App. 2d 816, 213 P.2d 762 (1950); **McClendon v. Johnson,** 71 Ga. App. 424, 31 S.E.2d 89 (1944); **Hester & Wise v. Chinn,** 162 S.W.2d 450 (Tex. Civ. App. 1942); **United States ex rel. First Nat'l Bank v. U.S.F. & G. Co.,** 240 F. Supp. 316, 322 (D. Okla. 1966). Compare, **State ex rel. Mechem v. Hannah,** 63 N.M. 110, 314 P.2d 714 (1957); Opinion of the Attorney General, No. 67-29, dated February 16, 1967.

Is the loaning of money to the student, to be repaid over a certain number of years with interest, the lending or pledging of credit? This question appears to be answered in the negative under the holding of **City of Clovis v. Southwestern Public Service Co.,** 49 N.M. 270, 161 P.2d 878 (1945). In that case the City sold its utilities company to the New Mexico Utilities Co. in consideration of the company assuming $ 240,000.00 in payments on general obligation bonds and the payment of cash, $ 130,000.00 of which was to be paid in twenty-four annual installments.

The court held that City of Clovis did not lend or pledge its credit by allowing the purchaser to pay off the amount of the obligation in time payments. "This is an entirely different matter from the City of Clovis 'lending or pledging' **its** credit. This, for the obvious reason that giving time for the repayment of part of the purchase price created no liability whereby the City was liable to be called upon to discharge any direct, indirect or contingent liability whatsoever . . ." **City of Clovis v. Southwestern Public Service Co.,** 49 N.M. at 276. We can see little commercial or conceptual distinction between the loaning of money to be repaid on time payments with interest and the selling of property to be paid for in time payments with interest. Therefore, we do not believe that the state is lending or pledging its credit in loaning money to students.

Will the issuance of revenue bonds constitute the lending or pledging of credit?

The answer to this question is certainly implied in several New Mexico Supreme Court cases, but does not appear to be clearly answered. We believe the answer is no.

In the case of **Village of Deming v. Hosdreg Co., supra,** the court clearly held that the issuance of revenue bonds did not create debt as that term is used in Article Nine, Sections Twelve and Thirteen. To the same effect is **State ex rel. State Park & Recreation Comm'n v. New Mexico State Authority,** 76 N.M. 1, 411 P.2d 894 (1966), which held that the issuance of revenue bonds did not create debt under Article Nine, Sections Seven, Eight and Nine.

Although Article Nine, Section Fourteen was construed in both **Hosdreg** and **New Mexico State Authority,** neither case seems to clearly hold that "debt" and "lending or pledging credit" are synonymous. Both cases appear to treat the problem of donations under Article Nine, Section Fourteen rather than the problem of lending and pledging credit. The **New Mexico State Authority** case does quote from **State ex rel. Capitol Addition Bldg. Comm'n v. Connelly,** 39 N.M. 312, 46 P.2d 1097 (1935), which, though not interpreting Article Nine, Section Fourteen concluded that:

"'debt' as found in article 9, **§** 12, while here it is its meaning as employed in section 8 of the same article, we are convinced that the term is used in the same sense in each section, viz., as comprehending a debt pledging for its repayment the general faith and credit of the state or municipality, as the case may be, and contemplating the levy of a general property tax as the source of funds with which to retire the same."

State ex rel. Capitol Addition Bldg. ***{*39}*** **Comm'n v. Connelly, supra,** 39 N.M. at 318.

There does appear to be authority for the proposition that loaning or pledging credit or faith of the state is synonymous with the creation of debt, and such authority was available at the time of the writing of the Constitution of the State of New Mexico. See **Battle v. Lacy,** 150 N.C. 573, 64 S.E. 505 (1909). The analysis of the North Carolina Court and our Court in **State ex rel. Capitol Addition Bldg. Comm'n v. Connelly, supra,** appears to be supported by an analysis of the historical definitions of the terms "pledge" and "debt." See, 3 Oxford English Dictionary 82-83 (1933) and 7 Oxford English Dictionary 989-90 (1933). In any event, there is also direct authority for the proposition that the issuance of revenue bonds does not constitute the lending or pledging of credit. **City of Gaylord v. Becket,** 378 Mich. 273, 144 N.W.2d 460 (1966); **County Drain Comm'rs v. City of Royal Oak,** 306 Mich. 124, 10 N.W.2d 435 (1943); **Kasch v. Miller,** 104 Ohio St. 281, 135 N.E. 813 (1922).

Finally, we note that the courts have been willing to give weight to a legislative statement that the revenue bonds do not create debt or pledge the faith and credit of the state. In **State ex rel. State Park & Recreation Comm'n v. New Mexico State Authority, supra,** the court considered and gave great weight to that section of the State Revenue Bond Act which provided that "revenue bonds issued under the State Revenue Bond Act shall not be deemed to constitute a debt or a liability of the state or of any political subdivision thereof or a pledge of the faith and credit of the state or of any such political subdivision, but shall be payable solely from the funds herein provided therefor from revenues . . . ." N.M. Laws 1963, ch. 271, **§** 4. (Codified as **§** 11-10-4, N.M.S.A., 1953 Comp., repealed by N.M. Laws 1968, ch 9, **§** 1.) See also, **Kasch v. Miller, supra.** Section Eight of the bill under consideration, states that "the bonds shall be executed on behalf of the state as special obligations of the state payable only from funds specified in the Student Loan Act, and shall not be payable from funds received or to be received from taxation."

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