Opinion No. 75-10

February 7, 1975

BY: OPINION OF TONEY ANAYA, Attorney General

TO: Richard Griscom General Counsel Health and Social Services Dept. P. O. Box 2348 Santa Fe, New Mexico 87501

QUESTIONS

FACTS

The Health and Social Services Department administers programs under Titles IV-A and VI of the Social Security Act, 42 U.S.C. § 601 **et seq.,** § 801 **et seq.** These programs are financed by the federal government and by municipalities, school boards, counties and private organizations. The state does not presently appropriate monies for these programs.

Pursuant to 45 C.F.R. § 226, **et seq.,** the Health and Social Services Department occasionally contracts with non - profit corporations -- called providers -- to operate Title IV-A and Title VI programs. The department's cost control procedures require that payments to the providers be made only on a reimbursement basis. Since the providers seldom have enough capital to begin operations, the department advances money to them by establishing a revolving fund. The contract provides:

"The department agrees to provide the provider the sum of ___ for the purpose of establishing a revolving fund from which routine payments authorized under this contract can be made on a timely basis. This amount is due and payable in full to the department upon termination of this agreement."

While the contracts are for one-year terms, they are frequently renewed; and the revolving funds are not payable until the contract is terminated. The department has in the past used monies from its general fund appropriation to establish the revolving funds.

A member of the Legislative Finance Committee's staff has questioned the legality of this practice under the following state constitutional and statutory provisions: Art. IX, Section 14; Art. IV, Sections 16, 30, 31, Sections 11-2-3, 40A-23-2 and 6-5-29, NMSA, 1953. Without conceding the illegality of the present practice, the department is considering alternative systems for operating the revolving funds, and it has requested the advice of this office on the legality of these alternatives.

QUESTIONS

1. Would the above-referenced constitutional and statutory provisions prohibit the department from establishing revolving funds with federal monies?

2. Would the above-referenced constitutional and statutory provisions prohibit the department from establishing revolving funds with monies from its general appropriations if the amount of the revolving fund is due and payable in full at the end of each fiscal year?

CONCLUSIONS

1. No.

2. No.

OPINION

*{*44}* **ANALYSIS**

1. Art. IX, Section 14 of the New Mexico Constitution prohibits the State from making a donation or loan, or pledging its credit to private entities. It is a restriction on the uses of state monies and credit. It has no application to the department's use of federal or non-state funds.

Art. IV, Sections 16, 30 and 31 are restrictions on the objects, forms and disbursements of legislative appropriations of State funds. These sections have no application to the department's administration of federal or nonstate monies. The legislature cannot appropriate federal or nonstate funds. The courts have rejected legislative attempts to do so as breaches of the separation of powers doctrine. See **State ex rel. Sego v. King,** 86 N.M. 359, 524 P.2d 975 (1974); **MacManus v. Love,** 499 P.2d 609 (Colo. 1972).

Section 11-2-3, **supra,** does not prohibit the use of revolving funds consisting of federal money. It is questionable whether the section applies at all to money which is not or will not become the property of the state. Even if it is, it does not prohibit the department's use of the money for any purpose; it only requires deposits of public money with the treasurer when it is not being used. It is our understanding that federal monies received under Titles IV-A and VI are currently deposited with the state treasurer when they are not used.

Sections 40A-23-2, **supra,** 6-5-29, **supra,** are inapplicable because *{*45}* they are restrictions on the payments of funds which are the property of the state. When it administers Title IV-A and VI programs, the department is acting as an agent of the federal government. The department serves as an administrative conduit for federal funds the title to which passes directly from federal government to the private corporations. The funds never become state property.

Neither Sections 11-2-3, nor 40A-23-2, nor 6-5-29 can be read as imposing limits on the department's use of federal funds in administering social service programs. The legislature is prevented by the separation of powers doctrine from imposing any conditions on the executive branch's use of federal or non-state money. **State ex rel. Sego v. King, supra; MacManus v. Love, supra.**

2. If the department uses monies from its general fund appropriations for the revolving fund, it is loaning money to private corporations. The department, however, receives valuable consideration for this loan: the private corporations operate programs for the department which the department itself by state statute conducts and which federal regulations order it to conduct. See Section 12-34-23 A and B, NMSA, 1953 (P.S.), 45 C.F.R. Sections 220, 222. As the loan is not "an appropriation . . . without consideration", it is not a donation within the meaning of Art. IX, Section 14. **Village of Deming v. Hosdreg Co.,** 62 N.M. 18, 303 P.2d 920 (1956). See also Opinion of the Attorney General No. 70-26.

Art. IV, Sections 16, 30 and 31 impose limits on the **legislature's** power to appropriate money and the treasurer's power to disburse it. They have nothing to do with an administrative agency's disposition of its appropriation. They do not prevent the department's use of revolving funds under alternative 2.

Section 11-2-3, **supra,** presents no obstacle to the use of revolving funds so long as the funds are replaced in the state treasury when they are repaid. It places no restrictions on an agency's use of monies appropriated to it, except to require their deposit in the state treasury when they are not being used.

Sections 40A-23-2, **supra,** 6-5-29, **supra,** are not applicable because the disbursements from the revolving funds are not "payments" or "purchases" but advances of money which the providers must return. The provider is paid from federal and local monies after it has completed the performance of its contract. To read Sections 40A-23-2 and 6-5-29 to prohibit these advances would unreasonably obstruct the department in the exercise of its statutory powers. The courts avoid such unreasonable constructions of statutes. See for example, **Sandoval v. Rodriguez,** 77 N.M. 160, 420 P.2d 308 (1966).

We conclude that either alternative use of revolving funds is a reasonable exercise of discretion in the administration of social programs which is not prohibited by any of the referenced state constitutional or statutory provisions.

By: Thomas Patrick Whelan, Jr.

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