

Opinion No. 81-05

April 9, 1981

OPINION OF: Jeff Bingaman, Attorney General

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TO: J. J. Hewett, Chief Highway Administrator, State Highway Department, P.O. Box 1149, Santa Fe, New Mexico 87501

PUBLIC FINANCES, COSTS, PUBLIC OFFICERS AND EMPLOYEES

Reimbursement for travel expenses to a prospective employee who agrees to travel to Santa Fe for an interview is not necessarily a "donation" for purposes of Article IX, Section 14, and is not prohibited by the constitution.

FACTS

In order to fill certain specialized positions at the State Highway Department with qualified personnel, it is sometimes necessary to recruit applicants who do not live in the Santa Fe area. The department's statutory authority under the Per Diem and Mileage Act to pay travel expenses extends only to officers and employees of the department.

In Opinion of the Attorney General No. 57-202, dated August 15, 1957, and Opinion of the Attorney General No. 64-101, this office has concluded that Article IX, Section 14 of the New Mexico Constitution prohibits the State from reimbursing a prospective employee for expenses incurred traveling to and from a job interview.

These restrictions on the department's authority to pay travel expenses have impaired the department's ability to recruit qualified applicants.

QUESTIONS

Does Article IX, Section 14 of the New Mexico Constitution prohibit the State Highway Department from reimbursing prospective employees for costs incurred in traveling to Santa Fe for interviews?

CONCLUSIONS

No.

OPINION

Opinion of the Attorney General No. 57-202 dated August 15, 1957 and Opinion of the Attorney General No. 64-101, dated August 4, 1964, are hereby expressly overruled insofar as they are inconsistent with this opinion.

ANALYSIS

Article IX, Section 14 of the New Mexico Constitution provides that

"Neither the state, nor any county, school district, or municipality, except as otherwise provided in this constitution, shall . . . make any donation to or in aid of any person, association, or public or private corporation . . ."

OPINION

In Opinions of the Attorney General Nos. 57-202 and 64-101, **supra**, this office found that reimbursements of travel expenses to prospective employees were "donations" prohibited by Article IX, Section 14. Although the New Mexico Supreme {214} Court has construed Article IX, Section 14, on several occasions, it has not done so in the specific context of this question and a review of the Court's decisions requires a different result.

In **Harrington v. Atteberry**, 21 N.M. 50, 153 P. 1041 (1915), Chief Justice Roberts, writing for the Court, concluded that a legislative appropriation to a private fair association, regardless of its public purpose, was an invalid "donation" to a private association under Article IX, Section 14. However, in a concurring opinion in which Justice Parker joined, Justice Hanna found the appropriation barred instead by the constitutional prohibition against legislative appropriations to entities not under the absolute control of the state. See, Article IV, Section 31, New Mexico Constitution. The significance of the concurring opinion was noted by the Court in **State ex rel. City of Albuquerque v. Lavender**, 69 N.M. 220, 235, 365 P.2d 652 (1961). With respect to Article IX, Section 14, Justice Hanna wrote that the appropriation was not "essentially a donation to the fair association" because it was "obviously for a public purpose and a public benefit." 21 N.M. at 75.

A "public purpose" exception to Article IX, Section 14, was specifically rejected in **State ex rel. Sena v. Trujillo**, 46 N.M. 361, 369, 129 P.2d 329 (1942), where the Court stated that "[t]he constitution makes no distinction as between 'donations,' whether they be for a good cause or a questionable one. It prohibits them all . . ." See also, **State ex rel. Mechem v. Hannah**, 63 N.M. 110, 120, 314 P.2d 714 (1957). A "public benefit" exception, however, has not been so specifically rejected.

In **Village of Deming v. Hosdreg Co.**, 62 N.M. 18, 28, 303 P.2d 920 (1956), the Court defined an Article IX, Section 14 "donation" as "a 'gift', an allocation or appropriation of something of value, without consideration." In **State ex rel. Mechem v. Hannah, supra**, the Court held that a cash grant made to an individual for the purpose of purchasing

feed for livestock was an "outright gift by the state," and was, therefore, prohibited by Article IX, Section 14. 63 N.M. at 116.

In the context of this case law, reimbursement of travel expenses to prospective highway department employees need not be prohibited by Article IX, Section 14. Such reimbursement is not an "outright gift by the state." Rather, if the department needs to fill a position for which there are no qualified applicants in Santa Fe, a prospective employee who agrees to travel to Santa Fe for an interview does so for the benefit and convenience of the department. This "public benefit" to the department constitutes consideration for whatever payment the applicant may receive for his own travel expenses. Where there is consideration, there is no "gift." Accordingly, reimbursement for travel expenses to a prospective employee who agrees to travel to Santa Fe for an interview is not necessarily a "donation" for purposes of Article IX, Section 14 and is not prohibited by the constitution.

ATTORNEY GENERAL

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