

Opinion No. 88-25

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OPINION OF: HAL STRATTON, Attorney General

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TO: Charles Bennett, Assistant Director, Museum of New Mexico, P.O. Box 2087, Santa Fe, New Mexico 87504

QUESTIONS

Can the Museum of New Mexico (hereinafter "the Museum") charge participants in the Palace of the Governors Portal Vendor Program (hereinafter "the Portal Program") an annual admission fee to help finance the costs of the program?

CONCLUSIONS

Yes.

ANALYSIS

The conclusion depends upon whether the state legislature authorized the Museum's Board of Regents to impose a fee. "An administrative agency has no power to create a rule or regulation that is not in harmony with its statutory authority." *Rivas v. Board of Cosmetologists*, 101 N.M. 592, 593, 686 P.2d 934, 935 (1984); accord *In re Matter of the Proposed Revocation of Food & Drink Surveyor's Permit for House of Pancakes*, 102 N.M. 63, 66, 691 P.2d 64, 67 (Ct.App. 1984) (administrative bodies, being creatures of statute, can only act within scope of their delegated authority). However, the Museum's enabling act, Sections 18-3-1 through 18-3-8 NMSA 1978 (Repl. 1987), need not authorize the Board of Regents to impose the specific fee if such authority can be fairly implied from the act. *Wimberly v. New Mexico State Police Bd.*, 83 N.M. 757, 758, 497 P.2d 968, 969 (1972). "The authority granted to an administrative agency should be construed so as to permit the fullest accomplishment of the legislative intent or policy." *Public Serv. Co. of N.M. v. New Mexico Envtl. Improvement Bd.*, 89 N.M. 223, 227, 549 P.2d 638, 642 (Ct.App. 1976).

The Board of Regents is authorized to "impose admission fees to museum facilities and programs." Section 18-3-3(L). The purpose of admission fees is to help maintain the Museum's facilities and programs. Cf. *Town of Cody v. Buffalo Bill Memorial Ass'n.*, 196 P.2d 369, 370 (Wyo. 1948) (admission fee to defray expenses of maintaining memorial museum); *DeGroot v. Edison Inst.*, 306 Mich. 339, 10 N.W.2d 907 (1943) (admission fees to assist maintenance do not affect institution's tax-exempt status); *In Re Mergentime's Estate*, 129 A.D. 367, 113 N.Y.S. 948 (N.Y. App. Div. 1908), *aff'd* 195 N.Y. 572, 88 N.E. 1125 (N.Y. 1909) (in addition to fees authorized by statute, private

contributions towards maintenance of Metropolitan Museum of Art held tax-exempt). Thus, the legislature intended that the Museum's programs be supported in part by those who benefit from them. Further, the Board of Regents is authorized to adopt "such rules and regulations and set such policy directives as may be necessary to carry out the provisions of this section." Section 18-3-3(N). *Id.* Consequently, a resolution adopted by the Board to set a fee to support a program would fall within the purview of Sections 18-3-3 (L) and (N).

The Portal Program is a Museum program that furthers the Board of Regent's duty to "acquire, preserve and exhibit objects of historical, archeological and ethnological interest." *Livingston v. Ewing*, 601 F.2d 1110, 1115 (10th Cir. 1979), cert. denied, 444 U.S. 870 (1979). Yet, the program is unique. In addition to educating the public in the history and traditions of the area, it economically benefits the participants by promoting the sale of their arts and crafts. The Indian participants in the Portal Program especially benefit from the program because it creates the opportunity for "a distinctive cultural community" to display and sell traditional food and wares in a historically Indian marketplace. *Id.* at 1112. The program thereby enhances the participants' ability to maintain their self-determination and life-style. *Id.* "The policy making department...determine[s] whether the activity shall be financed by funds raised by taxation on all, or whether those who are especially benefitted shall be required to pay all or a part." *McGuire v. City of Cincinnati*, 40 N.E.2d 435, 438 (Ohio Ct.App. 1941). The enabling act indicates that the state legislature intended for those who especially benefit from the Museum's programs to contribute to the costs. Because the Museum admits the Indians to participate in the Portal Program to their special benefit, the Board of Regent's statutory authority to impose admission fees can include the authority to impose an admission fee to the Portal Program. *Public Serv. Co. of N.M. v. New Mexico Env'tl. Improvement Bd.*, *supra*. As previously stated, such authority would be consistent with the Board's expansive, general grant of power in Section 18-3-3(N). The Museum should require all applicants for portal vendor permits to sign a statement that they have paid the admission fee to the Portal Program and that they agree to abide by the program's rules, regulations and procedures.

Section 9-6-11 requires, "unless otherwise provided by statute," that any regulation affecting any person outside of the Office of Cultural Affairs be subject to a public hearing before the proposed action is adopted. The Museum Division falls within the Office of Cultural Affairs. Section 18-3-4. Therefore, before the Board of Regents can adopt an amendment to the Portal rules and regulations to impose the fee, the Officer of Cultural Affairs or a hearing office appointed by him, must conduct a public hearing in accordance with the provisions of Section 9-6-11. The imposition of fees should not affect the constitutionality of the program which was upheld in *Livingston v. Ewing*, *supra*.

Finally, if the Museum imposes a fee on Portal Program participants, the Museum must deposit the funds so generated with the state treasurer because the money is "public money" within the meaning of Section 6-10-3 NMSA (Supp. 1987). Section 6-10-3 provides that:

. . . all public money in the custody or under the control of any state official or agency obtained or received by an official or agency from any source. . . shall be paid into the state treasury. It is the duty of every official or person in charge of any state agency receiving any money in cash or by check, draft or otherwise for or on behalf of the state or any agency thereof from any source,... to forthwith and before the close of the next succeeding business day after the receipt of the money to deliver or remit it to the state treasurer.

Thus, the Museum would handle the Portal Program fees according to the same procedures used for admission fees to the Museum. The fees would be among the revenue that Section 18-3-3 authorizes the Museum to collect. As such, if the Museum does not or cannot encumber the revenues to further the Portal Program during the seventy-sixth and seventy-seventh fiscal years, the amount shall not revert to the general fund even though the fees are deposited with the state treasurer. N.M. Laws 1988, ch. 13, § 4. Rather, the funds will "remain to the credit of the state agency for appropriation by the legislature." *Id.*

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