

Opinion No. 88-61

October 14, 1988

OPINION OF: HAL STRATTON, Attorney General

BY: Henry M. Bohnhoff Deputy, Attorney General and David A. Garcia, Assistant Attorney General

TO: Honorable Mary L. Thompson, New Mexico House of Representatives, 1915 La Jolla, Las Cruces, New Mexico 88005 and Honorable Richard P. Cheney, New Mexico House of Representatives, P.O. Box 10311, Farmington, New Mexico 87499

QUESTIONS

May the Legislative Finance Committee pay legal fees on behalf of individual legislators for legal actions they initiate?

CONCLUSIONS

No.

FACTS

On March 2, 1988, two legislators, through counsel, filed a petition for a writ of mandamus in the New Mexico Supreme Court, asserting that the Governor improperly vetoed certain portions of the 1988 appropriations bill. The two legislators were members of the Legislative Finance Committee ("LFC") at the time the suit commenced. The legislators sued, however, as "citizens, electors, taxpayers and members of the Legislature." They did not allege that they were suing on behalf of the Legislature or any committee thereof.

On March 9, the Court heard oral argument and issued an alternative writ of mandamus that ordered the Governor to show cause why nine of the challenged vetoes were not unconstitutional. The legislators filed their brief-in-chief on March 25, the Governor filed his response brief on April 13, and the legislators filed a reply brief on April 19. On April 20, the court again heard oral argument, at the end of which it quashed the alternative writ except for one line-item veto, ruling that all the other vetoes were constitutional. The Court issued a written opinion on August 2 that explained its decision. *State ex rel. Coll v. Carruthers*, 107 N.M. 439, 759 P.2d 1380 (1988).

At a regularly scheduled meeting on April 6, 1988, the LFC voted to pay the two legislators' legal fees. The two legislators who filed the lawsuit and hired the attorneys voted in favor of payments. Had they not voted, the motion would have not have carried. By a "professional services agreement" that is dated April 6, 1988, but was signed on April 14 and 15, 1988, the LFC purported to contract with the legislators' attorneys to

have them, "on behalf of the petitioner [sic] file appropriate documentation and make appropriate appearances before the court and other officials to challenge certain gubernatorial vetoes in the enrolled and engrossed version of House Bill 2, Chapter 13, Laws of 1988." The LFC itself never sought to intervene in the lawsuit, nor did it vote to allow the two legislators to act on its behalf.

ANALYSIS

For several reasons, it is our opinion that the LFC has no authority to pay the petitioners' legal fees in State ex rel. Coll v. Carruthers, and the contract is invalid.

I. LFC Authority.

Section 2-5-1 NMSA 1978 creates the LFC: "There is hereby created a continuing joint interim committee of the legislature to be designated the 'legislative finance committee.' The committee shall be composed of eight members, four members from the house of representatives and four members from the senate." Sections 2-5-3, 2-5-4, 2-5-4.1 and 2-5-5 NMSA 1978 articulate the LFC's powers and duties. Section 2-5-3 provides:

The committee shall:

- A. direct the director of the legislative finance committee in his work;
- B. examine the laws governing the finances and operation of the departments, agencies and institutions of New Mexico and all of its political subdivisions, the effect of laws on the proper functioning of these governmental units, the policies and costs of governmental units as related to the laws;
- C. recommend changes in these laws if any are deemed desirable, and draft and present to the legislature any legislation necessary;
- D. make a full report of its findings and recommendations for the consideration of each successive legislature following its original establishment, the report and suggested legislation to be available to each member of the legislature on or before the first day of the regular session thereof.

Section 2-5-4 provides:

- A. The legislative finance committee, in addition to all other duties prescribed by law, shall annually review budgets and appropriations requests, and the operation and management of selected state agencies, departments and institutions and shall make recommendations with respect thereto to the legislature.
- B. To carry out the purposes of this section, the legislative finance committee shall establish a budget analysis division staffed with persons knowledgeable and proficient in budget analysis and budget preparation.

C. Each state agency, department and institution shall furnish to the legislative finance committee a copy of its appropriation request made to the department of finance and administration at the same time such request is made to such department. Each state agency, department or institution shall also furnish to the legislative finance committee and its staff any other supporting information or data deemed necessary to carry out the purposes of this section.

D. The legislative finance committee, or, when it deems necessary, its staff may hold such hearings and require such testimony from officers and employees of each state agency, department or institution as is necessary to carry out the purposes of this section.

E. Not later than the first week of any regular legislative session, the legislative finance committee shall furnish a document containing its budget recommendations to each member of the senate finance committee, the house appropriations and finance committee and to those other members of the legislature which may request it. A copy shall also be furnished to the governor and to the department of finance and administration.

Section 2-5-4.1 provides:

The legislative finance committee shall cooperate with the office of the governor, the department of finance and administration and the taxation and revenue department in designing a timely and accurate system of providing fiscal impact and other pertinent information to the legislature concerning pending legislation.

Section 2-5-5 provides:

The committee shall have the power to conduct hearings and to administer oaths. The committee or any subcommittee thereof consisting of three members or more shall have the power to subpoena, which may be enforced through any district court of the state. Process of such committee shall be served by any sheriff or any member of the New Mexico state police, and shall be served without cost to the committee.

These provisions endow the LFC with limited authority to gather information and make recommendations to the Legislature. The LFC has no express authority to sue or be sued, or to finance litigation that others, including individual legislators, initiate to challenge line-item vetoes.

Nor do we believe that by these statutes the legislature implicitly authorized the LFC to take such action. In *Kennecott Copper Corp. v. Employment Security Comm'n*, 78 N.M. 398, 402, 432 P.2d 109, 113 (1967), the New Mexico Supreme Court stated:

It is a fundamental rule of construction that when a power is conferred by statute everything necessary to carry out the power and make it effective and complete will be implied.... [citations omitted].

It likewise follows that a power not expressly granted is implied only where it is necessary to carry into effect powers expressly granted.

The LFC does not need to participate, either as a party or as a financier, in challenges to the Governor's line-item vetoes to carry out, effectively and completely, its powers of investigating state government operations and finances and recommending legislation.¹ Cf. id. (commission had no implicit authority to reconsider unemployment compensation decision); Att'y Gen. Op. 62-87 (1962) (agency had implicit authority to enter into lease to obtain office space).

The only other legislation that addresses the LFC is the annual legislative appropriation act, which establishes the LFC's budget. The budget for the seventy-sixth fiscal year, which ended June 30, 1988, was as follows:

There is appropriated from the general fund to the Legislature Finance Committee for the seventy-sixth fiscal year, to be disbursed on vouchers signed by the chairman of the committee or his designated representative, the following:

Personnel Services....	\$520,400
Employee Benefits.....	110,200
Travel.....	12,200
Maintenance & Repairs.	13,000
Supplies & Materials..	11,700
Contractual Services..	211,600
Other operating costs.	39,200
Capital Outlay.....	9,800
Out-of-state-travel...	17,200
Total.....	945,300

1987 N.M. Laws, ch. 2, § 8. The appropriation for the seventy-seventh fiscal year is identical except for the amounts. 1988 N.M. Laws, ch. 1, § 8.

Article IV, Section 16 of the New Mexico Constitution provides:

General appropriation bills shall embrace nothing but appropriations for the expense of the executive, legislative and judiciary departments, interest, sinking fund, payments on the public debt, public schools and other expenses required by existing laws; but if any such bill contain any other matter, only so much thereof as is hereby forbidden to be placed therein shall be void.

Article IV, Section 16 was "designed to prevent general legislation in ... [an appropriation] bill, in no way related to making provision for the expenses of the government." *State ex rel. Lucero v. Marron*, 17 N.M. 304, 314, 128 P. 485, 488 (1912). It permits language that addresses the details of spending and accounting for the money appropriated. *State ex rel. Whittier v. Stafford*, 28 N.M. 531, 534, 214 P. 759, 760 (1923) (quoted in *State ex rel. Holmes v. State Bd. of Finance*, 69 N.M. 430, 437,

367 P.2d 925, 930 (1961); *State ex rel. Lucero v. Marron*, 17 N.M. 304, 315-16, 128 P. 485, 489 (1912). However, appropriation bills may not articulate new, permanent policy, *State ex rel. Delgado v. Sargent*, 18 N.M. 131, 138, 134 P. 218, 220 (1913), or "nullify" existing general legislation. *State ex rel. Coll v. Carruthers*, 27 N.M. Bar Bull. 518, 521 (Sept. 1, 1988).

We see no basis for finding in the LFC's budget an implicit authorization to participate in litigation in any capacity. The appropriation of \$211,600 for "contractual services" is the amount the legislature concluded was necessary to allow the LFC to fulfill its research and advisory functions. However, assuming *arguendo* that this line item authorized the LFC to pay its members' legal fees, the provision would be unconstitutional. It would confer a completely new power on the LFC, which Article IV, Section 16 does not allow.

Finally, although its membership consists of legislators, the LFC could not, by its April 6 vote, change its statutory mandate and engage in otherwise unauthorized activities. Article IV, Section 1 of the New Mexico Constitution provides: "The legislative power shall be vested in a senate and house of representatives which shall be designated the legislature of the state of New Mexico...." "The power to make law is reserved exclusively to the Legislature...." *State v. Roy*, 40 N.M. 397, 418, 60 P.2d 646, 659 (1936). Article IV, Section 30 of the New Mexico Constitution provides, in part: "[M]oney shall be paid out of the treasury only upon appropriations made by the legislature." (Emphasis added.) These provisions authorize only the Legislature and not a committee thereof, to establish the LFC's powers. Language from *Legislative Research Comm'n v. Brown*, 664 S.W.2d 907 (1984), which considered a Kentucky interim legislative committee's powers, applies equally to the LFC:

[T]he primary role, if not the exclusive role, of the LRC has been historically that of a research, fact-finding, secretarial and general support agency for the General Assembly. Since the LRC's membership consists of a small percentage of the total membership of the two houses of the General Assembly, no one could argue that it has any powers not given to it by its parent, the General Assembly, and no one could argue that it can legislate. The legislative power lies solely within the province of the General Assembly and its entire, publicly elected membership. Our constitution makes that clear. Ky. Const. Sec. 29 states, "[T]he legislative power shall be vested in a House of Representatives and a Senate, which together shall be styled the 'General Assembly of the Commonwealth of Kentucky'" Whatever else the LRC may constitutionally do, it may not legislate.

Id. at 911 (emphasis original).² Similarly, the LFC cannot legislate. In absence of statutory authority to participate in litigation, the LFC may not grant itself the power to do so.³

II. Anti-Donation Clause.

Article IX, Section 14 of the New Mexico Constitution (the "anti-donation clause"), provides: "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...." This language is so clear that it requires no interpretation. *Harrington v. Atteberry*, 21 N.M. 50, 54, 153 P. 1041, 1047 (1915). It prohibits the state, or any of its municipalities, from making any donation to or in aid of any person, association or public or private corporation. Id. A state agency cannot give gifts, allocations or appropriations of any value without consideration, see *Village of Deming v. Hosdreg Co.*, 62 N.M. 18, 28, 303 P.2d 920, 927 (1956), and the consideration must consist of a tangible, material and economic benefit to the state agency.⁴ See *White v. Board of Educ.*, 42 N.M. 94, 105, 75 P.2d 712, 723 (1938). A donation will violate the anti-donation clause even if it has a public purpose. *Hutcheson v. Atherton*, 44 N.M. 144, 99 P.2d 462 (1940) (Legislature could not authorize county to construct an auditorium for use by the New Mexico Fourth Centennial Coronado Corporation); *Harrington v. Atteberry*, (county could not spend money to pay for exhibit prizes at private county fair).

Even if the LFC had express or implied statutory authority to participate in *State ex rel Coll v. Carruthers*, its decision to pay the plaintiff legislators' attorneys fees violated the anti-donation clause. The LFC was not a party in the litigation, and thus the attorneys rendered no services on its behalf. Rather, the services were rendered to the legislators who brought the action on their own initiative. The contract between the LFC and the attorneys gave the LFC no control over the litigation, or otherwise resulted in any direct benefit to it. For purposes of constitutional analysis, the fact that the lawyers' efforts may have had some incidental public benefit or may have paralleled the LFC's interests is irrelevant. Quite simply, the contract was a "donation" to the plaintiffs that squarely implicates⁵ the anti-donation clause. "[T]he use of public money to pay a claim predicated on facts which generate no state liability constitutes a gift or donation in violation of our constitution." *State ex rel. City of Albuquerque v. Lavender*, 69 N.M. 220, 228-29, 365 P.2d 652, 658 (1962) (quoting *State v. City of Austin*, 331 S.W.2d 737, 742 (Tex. 1960)). Accordingly, the contract is void.

Ritchey v. Gerard, 48 N.M. 452, 457, 152 P.2d 394, 398 (1944).⁶

III. Conclusion.

It is the conclusion of this office that the LFC may not pay the legal fees that two of its members incurred in bringing suit to challenge the Governor's line-item veto authority.

ATTORNEY GENERAL

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GENERAL FOOTNOTES

[n1](#) The minutes of the LFC's April 6, 1988 meeting reveal that one legislator sought to justify payment of the attorneys fees on the ground that "the issues deal with finances and House Bill 2 which are the purview of the LFC." The fact that the issues in the

lawsuit were related to issues that the LFC considers is irrelevant. The salient question is whether the LFC must involve itself in litigation to adequately consider those issues.

[n2](#) The two plaintiff legislators did not allege that they were acting on behalf of the LFC in bringing suit, and the LFC had never voted to authorize them to do so. However, even if they had purported to sue on the LFC's behalf, the LFC could not have ratified the action at the April 6, 1988 meeting. A person or entity may ratify only those unauthorized acts of its agents that it has power to undertake. *State ex rel. Comm'rs of Land Office v. Frame*, 199 P.2d 215, 217 (Okla. 1948). The LFC has no more power to sue to challenge line-item vetoes than it has authority to pay the legal fees of others who file such a challenge.

[n3](#) Because the Legislature has not attempted to delegate to the LFC any of its legislative power, we need not address the issue of the propriety of such delegation. See *Rivas v. Board of Cosmetologists*, 101 N.M. 592, 593, 686 P.2d 934, 935 (1984) (if Legislature delegates power to exercise legislative authority, "boundaries of authority must be defined and followed").

[n4](#) We do not question the value of the services that counsel provided to the legislators. Indeed, we have reviewed the pleadings filed and believe the representation was of the highest order. The problem is that the individual legislators, and not the LFC, received the benefit of, and controlled, that representation.

[n5](#) Although we see no basis for characterizing the LFC's actions in this manner, if the payment of the legislators' legal fees was not a gift then it necessarily would be compensation. Such compensation would violate Article IV, Section 10 of the New Mexico Constitution, which prohibits any "compensation, perquisite or allowance" for legislators' other than per diem and mileage payments. See *Att'y Gen. Op. 87-62* (1987).

[n6](#) Even if the LFC had authority to participate in litigation and had avoided the anti-donation clause problem by intervening in the lawsuit and contracting with counsel to represent the LFC instead of the legislators, the LFC still could not pay for services rendered to the legislators before the date LFC sought representation. Thus, assuming the LFC had voted on April 6, 1988 to retain the legislators' counsel to represent the LFC in the lawsuit, the LFC could not pay the counsel's fees for services rendered before that date on behalf of the two legislators. To do so would amount to assumption of a private debt, which Article IX, Section 14 prohibits.