

## **Opinion No. 89-22**

August 7, 1989

**OPINION OF:** HAL STRATTON, Attorney General

**BY:** Kathrine Kinzer-Ellington, Assistant Attorney General

**TO:** Michael J. Lewis, District Attorney, Sixth Judicial District, Grant County Courthouse, P. O. Box 1025, Silver City, New Mexico 88062-1025

### **QUESTIONS**

May Luna County use taxpayer funds to pay relocation costs of physicians opening a practice in the county?

### **CONCLUSIONS**

No.

### **ANALYSIS**

This opinion addresses whether Luna County may legally pay the relocation costs of physicians who intend to practice in the county. Luna County proposes to reimburse physicians for relocation costs such as moving expenses, housing costs and office costs for at least one year. Luna County views payment of these costs as necessary to attract physicians to the county for the purpose of benefitting the health of the community. Physicians who receive payment of relocation costs apparently assume no obligation to repay the county for the amounts received and apparently incur no other obligation in exchange for the payments.

The anti-donation clause, article IX, Section 14 of the New Mexico Constitution provides, in pertinent part:

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....<sup>1</sup>

According to judicial construction, the word "donation" as used in this provision is to be applied "in its ordinary sense and meaning, as a 'gift,' an allocation or appropriation of something of value, without consideration." Village of Deming v. Hosdreg Co., 62 N.M. 18, 28, 303 P.2d 920, 926-27 (1956).

The purpose of the anti-donation clause is to prevent investment of public funds in private enterprises. City of Clovis v. Southwestern Public Service Co., 49 N.M. 270, 283, 161 P.2d 878, 886 (1945). See also Hotels of Distinction West, Inc. v. City of

Albuquerque, 107 N.M. 257, 259, 755 P.2d 595, 597 (1988) (anti-donation clause prohibits a municipality from aiding non-governmental enterprises). The prohibition includes outright gifts to private individuals. *State ex rel. Mechem v. Hannah*, 63 N.M. 110, 116, 120, 314 P.2d 714, 718, 721 (1957). For purposes of the anti-donation clause, it is immaterial that the donation is made to an individual or corporation serving a public purpose. See *State ex rel Sena v. Trujillo*, 46 N.M. 361, 369, 129 P.2d 329, 333 (1942); *Harrington v. Atteberry*, 21 N.M. 50, 54, 153 P. 1041, 1042 (1915).<sup>2</sup>

Based on these well established principles, a county cannot justify paying relocation costs for physicians solely on the grounds that the payments will encourage physicians to practice in the county. For relocation costs paid by Luna County to be valid under the anti-donation clause, the county must receive some benefit or consideration in exchange, such as an agreement by the physician to practice in the county for a period of years.<sup>3</sup> Cf. *Op. Att'y Gen. No. 79-7* (tuition equalization grants to students attending private colleges in the state were not permissible where there was no consideration accruing to the state in exchange for the grants nor any provision that the grant be repaid). Absent such legally enforceable consideration, the payment amounts to an impermissible subsidy of the physician's private business. See 1955-56 *Op. Att'y Gen. No. 6426* (county could not pay cost of operation and maintenance of privately owned and operated hospital). Accordingly, because the facts do not show that physicians setting up practice in Luna County assume any obligation in exchange for relocation payments, the payments are outright gifts to individuals prohibited under N.M. Const. Art IX, Section 14.

## **ATTORNEY GENERAL**

HAL STRATTON Attorney General

## **GENERAL FOOTNOTES**

[n1](#) The anti-donation clause contains an exception allowing public funds to be used for the care and maintenance of sick and indigent persons. However, this exception does not justify payments which directly benefit physicians and only incidentally benefit the poor and sick. See 1955-56 *Op. Att'y Gen. No. 6426* (distinguishing between impermissible expenditures of public funds for operation of private hospital and permissible payments to reimburse hospital for care of sick and indigent persons). No other provision of the state constitution permits payments of physician relocation costs by a county.

[n2](#) In *Op. Att'y Gen. No. 81-5*, this office concluded that it was not a violation of the anti-donation clause for the State Highway Department to reimburse prospective employees for costs incurred in traveling to Santa Fe for interviews. The opinion contains language suggesting that there may be a "public benefit" exception to N.M. Const. Art. IX, § 14, but the opinion is unclear about how this exception differs from the "public purpose" exception rejected by New Mexico courts. In any event, the opinion essentially finds that sufficient consideration for reimbursement for travel expenses exists because job

applicants travel to Santa Fe for the benefit and convenience of the Highway Department. Otherwise, presumably, Department employees would have to travel to the location of the applicants. Because consideration for the travel expense payments was found, the facts are distinguishable from those involved in this opinion.

[n3](#) The anti-donation clause, N.M. Const. Art IX, § 14, expressly provides that:

The state may ... establish by law a program of loans to students of the healing arts as defined by law, for residents of the state who, in return for the payment of educational expenses, contract with the state to practice their profession for a period of years after graduation within areas of the state designated by law.