

Opinion No. 97-02

January 7, 1997

OPINION OF: Tom Udall, Attorney General

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TO: Robert Matteucci, Chair, Governing Board, Albuquerque Technical-Vocational Institute, 525 Buena Vista SE, Albuquerque, New Mexico, 87106

QUESTIONS

May officials and employees of the Albuquerque Technical-Vocational Institute ("T-VI") spend public money¹ for (1) entertainment, meals, travel and organization memberships or (2) scholarships without violating the antidonation clause of Article IX, Section 14 of the New Mexico Constitution?

CONCLUSIONS

1. Within the limitations set forth below, T-VI may pay for certain entertainment, meals, travel and membership expenses without violating the antidonation clause if the expenditures are demonstrably related to T-VI's constitutionally or statutorily authorized functions and do not amount to a subsidy of private individuals or businesses.
2. Yes. Based on its authority to provide and charge tuition for educational services, T-VI may, consistently with the antidonation clause, use public money for scholarships in the form of tuition waivers or reductions if the criteria used to award them are education-related and applied in a reasonable and even-handed manner.

FACTS

The State Auditor and Legislative Finance Committee conducted audits of T-VI and reached different conclusions about the legality of certain "community relations expenses," such as refreshments and meals during business meetings and membership fees,² and expenditures for scholarships. While the State Auditor concluded that the expenditures violated the constitution and were impermissible, the Legislative Finance Committee determined that there was no authoritative guidance on the issue. As a result, T-VI requested an opinion from this office to obtain a consistent interpretation of the legality of the questioned expenses.

ANALYSIS

The expenditures posed by T-VI raise questions primarily because they confer some benefit upon private individuals. Accordingly, the most important legal hurdle to such expenditures is the antidonation clause of Article IX, Section 14 of the New Mexico

Constitution. However, even if an expenditure is found permissible under the clause, it also must be consistent with other state laws governing government spending. Thus, while this opinion primarily focuses on the permissibility of the expenditures at issue under the antidonation clause, the last part touches on some of those other constitutional provisions and statutes. We anticipate that T-VI and other public bodies affected by this opinion will establish and enforce policies for spending public money prudently and in accordance with the applicable laws and regulations. In addition, no expenditures by a public body are permitted unless made pursuant to a budget prepared and approved according to state law.³

A. The Antidonation Clause.

The antidonation clause 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. . . . N.M. Const. art. IX, § 14. A "donation" within the meaning of the provision is "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 (1956). Generally, New Mexico courts have found the clause violated whenever the state or local governments have made outright gifts of money or property, or have effectively relieved private persons and entities from obligations they would otherwise have to meet. **See, e.g., Chronis v. State ex rel. Rodriguez**, 100 N.M. 342, 670 P.2d 953 (1983) (tax credit to liquor licensees against taxes owed was an unconstitutional subsidy of the liquor industry); **State ex rel. Mechem v. Hannah**, 63 N.M. 110, 314 P.2d 714 (1957) (appropriation to pay state's share of emergency feed certificates issued to livestock owners for the purchase of hay was an unconstitutional subsidy of the livestock industry); **Hutcheson v. Atherton**, 44 N.M. 144, 99 P.2d 462 (1940) (finding unconstitutional a statute authorizing counties to issue bonds (repaid by taxes) to fund the building of public auditoriums to be used by a private corporation during a celebration of the 400th anniversary of Coronado's exploration).

In **City of Clovis v. Southwestern Pub. Serv. Co.**, 49 N.M. 270, 276, 161 P.2d 878 (1945), the New Mexico Supreme Court stated that to understand and interpret the antidonation clause, "it should be construed with reference to the evils it was intended to correct." According to the court, the need for a constitutional provision limiting the use of public monies to aid private businesses became apparent during the late nineteenth and early twentieth centuries when state and local governments became stockholders or bondholders, loaned their credit to or otherwise became interested in railroads, banks and other commercial institutions. Many of the businesses failed because of poor management, leaving state and local governments with responsibility for the businesses' debts and other obligations. The burden of paying these debts ultimately fell on the taxpayers. 49 N.M. at 276 (quoting **Murphy v. Dever**, 150 N.E. 663 (Ill. 1926) and **Bailey v. Tampa**, 111 So. 119 (Fla. 1926)).

Thus, the clause was intended to prevent the investment of public funds in private enterprises. It was not intended to affect governmental services to the public or the accomplishment of governmental functions:

[The clause] applies only to the union of public funds and private capital or credit in an enterprise, and will not prevent a city from establishing its own gas work to supply light and heat for its citizens, or providing its own water works, sewerage system, lighting system, airport, or maintaining a zoological park.

49 N.M. at 283 (quoting 1 McQuillan on Corporations, Section 206). **See also Harrington v. Atteberry**, 21 N.M. 50, 153 P. 1041 (1915) (distinguishing between a county's provision of funds to a private corporation serving a public purpose, which is unconstitutional, and the county's performance of the same function directly, which is permissible).

In New Mexico, as elsewhere, the provision of education is a well recognized and established governmental function. **See, e.g.**, N.M. Const. art. XII, § 1 (mandating a uniform system of free public schools); N.M. Const. art. XII, § 11 (confirming state educational institutions). **See also Washington Higher Educ. Facilities Auth. v. Gardner**, 699 P.2d 1240, 1244 (Wash. 1985) (higher education is a legitimate state function). By statute, T-VI is "a public educational institution which shall provide not to exceed two years of vocational and technical curricula and, in addition, some appropriate courses in the arts and sciences." NMSA 1978, § 21-16-2(A) (Repl. Pamp. 1996). Its governing board is authorized to, among other things, determine the financial and educational policies of the institute, employ a president and other personnel as needed for the operation, maintenance and administration of the institute, fix fee rates and tuition rates for students, and to "promote the general welfare of the technical and vocational institute for the best interest of educational service to the people of the technical and vocational institute district." **Id.** § 21-16-6(A), (B), (F).

Based on the intent underlying the antidonation clause, we believe that T-VI may constitutionally spend public money to achieve its educational purposes and perform its statutory functions, even when the expenditures provide an incidental benefit to private individuals or entities, as long as the benefit, based on the amount, duration, frequency or other characteristic, does not amount to an actual grant or subsidy condemned by the clause. **Cf. Nohl v. Board of Educ.**, 27 N.M. 232, 199 P. 373 (1921) (school board's provision of group insurance for teachers enabled the board to procure better teachers and prevented frequent changes in the teaching force; thus, the expense was consistent with the board's statutory authority to make expenditures "connected with the proper conduct of the public schools," and did not constitute a misappropriation of public funds). Under these circumstances, T-VI is not making any donation in the sense described in **City of Clovis**. There is no investment in private enterprise, assumption of any private obligations, gift or subsidy to an individual, and T-VI retains complete control over how its money is used.

1. Entertainment, Travel, and Meal Expenditures.

Applying the analysis discussed above, we believe the following entertainment and other expenses posed by T-VI would be permissible under the antidonation clause:

- reasonable expenditures for meals and refreshments during meetings when T-VI business is discussed or conducted.⁴

- reimbursement of travel, lodging and meal expenses of visiting officials, consultants and speakers, provided the purpose of the visits is demonstrably related to T-VI's statutory functions. **See also** AG Op. No. 81-05 (1981) (reimbursement of prospective state employee's travel expenses in connection with job interview was not a donation where travel was for the benefit and convenience of the interviewing agency).⁵

- reasonable expenditures for refreshments, decorations and entertainment in connection with graduation ceremonies and activities.

- reasonable expenditures for meals and refreshments for employee professional development activities.⁶ **See also** AG Op. No. 72-67 (1972) (educational leave with pay did not violate the antidonation clause where training related to and would improve the employee's service to the state).

- expenditures in connection with recognition activities, including awards to recognize retirement, service or meritorious performance by employees and students. Awards to students and employees should not consist of cash or other valuable property. Such awards would be more like subsidies of private persons rather than reasonable business expenditures, and would implicate the prohibitions of the antidonation clause. In addition, T-VI should be careful not to provide employees with cash or other valuable property that would amount to additional compensation covered by Article IV, Section 27 of the New Mexico Constitution, which prohibits "extra compensation to any public officer, servant, agent or contractor after services are rendered or contract made."

- memberships in professional and nonprofit organizations. To be permissible, T-VI would have to demonstrate that the memberships it pays for provide a benefit to T-VI which is related to its statutory functions. **Compare** AG Op. No. 76-27 (1976) (a school board could make membership dues payments on behalf of individual employees to various professional education associations, if the board determined that such payments would benefit the schools under their supervision and control) **with** AG Op. No. 88-47 (1988) (town could not pay annual dues on behalf of mayor for membership in a private business association where the town would accrue no discernible benefit as a result). Otherwise, such memberships would be permissible only if provided as compensation to T-VI employees in return for their services. **See** AG Op. No. 89-20 (1989) (a school district could provide employees with health club memberships as part of their compensation).

On the other hand, the following are not permissible expenditures of public money because they are not sufficiently related or necessary to the accomplishment of T-VI's

statutory duties and functions, or because they amount to a subsidy of private individuals:

- expenses for employee birthday parties and similar events.
- payment for entertainment such as plays, sporting events and concerts. These expenditures primarily benefit the recipient and do not have a sufficiently direct relationship to T-VI's authorized business.
- purchase of tickets or entry fees for public functions attended by T-VI representatives. T-VI maintains that expenditures for public functions "constitutes legal and appropriate community relations activity that promotes valuable information exchanges regarding the institution." However, the purchase of tickets or entry fees for public functions does not appear to be reasonably necessary to the conduct of T-VI's statutory educational functions. The primary beneficiaries of the purchases are not the institution but the sponsor of the event and those attending them. Thus, the expenditures are more like personal entertainment expenses (which cannot be reimbursed) than the permissible business expenditures described above.

2. Scholarships.

Past opinions issued by this office suggest that scholarship awards violate the antidonation clause unless funded by federal or private sources. **See, e.g.**, AG Op. No. 6039 (1954) (scholarships granted by state educational institutions in the form of tuition waivers must be paid solely from funds acquired from private endowments); AG Op. No. 1646 (1937) (scholarships probably would violate Art. IX, § 14 if paid from public monies). For the following reasons, we overrule those opinions to the extent they limit scholarships to those paid from private or federal sources, and conclude that regardless of the source of the funds,⁷ T-VI may provide scholarships which meet the requirements set forth below out of public funds consistently with the antidonation clause.

As noted, T-VI's board is empowered to fix fees and tuition paid by students in exchange for T-VI's education services. Nothing in the statute prevents T-VI from charging varying rates of tuition, including waiving it altogether, as long as it acts reasonably⁸ and in the interest of the institute. The antidonation clause is not implicated because, as discussed above, the resulting benefit to students consists of a recognized governmental service, **i.e.**, education. That is, to be permissible a scholarship must be for the purpose of obtaining public education provided by a government entity, awarded in accordance with a rational and even-handed policy, and within the granting agency's constitutional or statutory authority. **Cf.** AG Op. No. 79-7 (1979) (proposed legislation appropriating state money for tuition grants to students attending **private** colleges and universities appeared to be an outright gift to students in violation of Art. IX, § 14).

On the other hand, T-VI may not offer benefits other than tuition reductions or waivers, such as stipends, reimbursements for living expenses or cash support, if such expenditures are made with public money. These payments are distinguishable from

tuition waivers because T-VI has no statutory authority to pay its students' living expenses. Essentially, these payments would amount to the assumption of students' private obligations which the antidonation clause specifically proscribes.

B. Other State Laws Regulating Government Spending.

Expenditures connected with T-VI's statutory functions that do not raise questions under the antidonation clause are still subject to existing state laws regulating the use of public money. Among the laws that T-VI and other public bodies must bear in mind when authorizing or developing policies for entertainment and other expenses include the following:

NEW MEXICO CONSTITUTION

- N.M. Const. art. IV, § 27. Prohibits laws giving extra compensation to public employees and contractors after services are rendered or contract made.
- N.M. Const. art. IV, § 31. Prohibits appropriations for charitable, educational or other benevolent purposes to any person, corporation, association, institution or community not under the absolute control of the state.
- N.M. Const. art. VIII, § 4. Provides that any public officer making any profit out of public money or using public money for any purpose not authorized by law is guilty of a felony, shall be punished as provided by law and shall be disqualified from holding public office.
- N.M. Const. art. XII, § 3. Prohibits funds appropriated for educational purposes from being used to support sectarian, denominational or private schools.

NEW MEXICO STATUTES ANNOTATED (1978)

- NMSA 1978, § 6-10-40. Penalizes state officers who receive for themselves consideration in exchange for the deposit, loan or other agreement or arrangement involving the use of public money, who use public money for unauthorized purposes or fail to deposit public money as required by law.
- NMSA 1978, §§ 10-8-1 to -8. Per Diem and Mileage Act governing reimbursement of travel expenses for public officers and employees; moving expenses; professional dues or fees; and tuition and fees for attending educational programs, seminars and classes.
- NMSA 1978, § 13-1-158. Prohibits payment for goods and services before they are received unless prepayment is authorized by exclusion from the Procurement Code.
- NMSA 1978, § 30-23-2. Penalizes making or receiving payment from public funds for wages, salary or remuneration for personal services which have been rendered.

- NMSA 1978, § 30-23-3. Penalizes making or permitting false public voucher.

This list is illustrative only, and there may be other laws, statutes or regulations promulgated by state agencies which may apply depending on the particular expenditure or government body involved.

We expect that any public agency intending to expend public funds for the purposes approved in this opinion will not do so until it has in place detailed criteria governing the expenditures and review and approval procedures to ensure that state laws are followed and funds are expended prudently.

GENERAL FOOTNOTES

[n1](#) "Public money" for purposes of this opinion means **all** money available to T-VI, such as money appropriated by the legislature, vending machine receipts and donations. **Cf. State v. Hearne**, 112 N.M. 208, 212, 813 P.2d 485 (Ct. App.) ("in New Mexico, as a matter of law, funds made available to the University [of New Mexico] become public funds. . . ."), **cert. denied**, 112 N.M. 77, 811 P.2d 575 (1991). In general, the source of money in T-VI's custody is immaterial for purposes of laws which govern the use of public funds. **Id.**

[n2](#) Within the category of "community relations expenditures," T-VI includes meals and refreshments for meetings with advisory committees, business and industry and similar entities concerned with T-VI matters; meals and refreshments for legislators and representatives of other institutions, governmental agencies and educational institutions when T-VI business is discussed; meals and refreshments for meetings with board members, employees, invited guests and the public when the purpose is to conduct T-VI business; travel, lodging and meals of visiting officials, consultants and speakers; graduation activities, including refreshments and entertainment; recognition activities, including awards to recognize retirement, service or meritorious performance by employees and students; meals and refreshments for employee professional development activities; purchase of tickets or entry fees for public functions attended by T-VI representatives; and memberships in professional and nonprofit organizations.

[n3](#) **See, e.g.**, NMSA 1978, § 21-1-26 (Repl. Pamp. 1996) (authorizing the commission on higher education to receive, adjust and approve budgets submitted by state educational institutions designated in N.M. Const. art. XII, § 11 prior to submission of those budgets to the state budget division of the department of finance and administration).

[n4](#) This type of expenditure exemplifies the effect of laws or rules other than the antidonation clause. **See also** discussion **infra** pp. 9-10 (illustrative list of statutes governing expenditures of public money). For covered state employees and officials, the Per Diem and Mileage Act suggests that reimbursement for meal expenses may be obtained only when incurred during travel away from the usual place of business. NMSA 1978, §§ 10-8-1 to -8 (Repl. Pamp. 1995); DFA Rule 95-1 (Nov. 1995).

[n5](#) As applied to events such as conferences held or sponsored by T-VI, reimbursement would be permitted for speakers or consultants who facilitate the event, but would not be permitted for persons who merely attend the event.

[n6](#) See *supra* note 4.

[n7](#) While the source of funds belonging to an agency does not determine whether the funds are public, see *supra* note 1, the New Mexico Supreme Court has held that the antidonation clause does not apply to federal or private funds designated for particular purposes for which an agency acts merely as a conduit or in an administrative capacity. **Hotels of Distinction West, Inc. v. City of Albuquerque**, 107 N.M. 257, 259, 755 P.2d 595 (1988) (channeling federal funds expressly designated for housing and community development through a city does not violate the antidonation clause).

[n8](#) Legislation or regulations creating categories of students for tuition purposes must comport with principles of equal protection and due process. U.S. Const. amend XIV, § 1; N.M. Const. art. 11, § 18; **Richardson v. Carnegie Library Restaurant, Inc.**, 108 N.M. 688, 763 P.2d 1153 (1988). Compare **Robertson v. Regents of Univ. of New Mexico**, 350 F. Supp. 100 (D.N.M. 1972) (rejecting as an unreasonable and arbitrary classification in violation of federal and New Mexico constitutions a statute which required that students, in order to change from nonresident to resident status, be domiciled in the state for at least one year during which they could enroll for no more than 6 hours) with **West v. Bowers**, 502 P.2d 270, 274 (Or. App. Ct. 1972) (noting that residency was a proper distinction for tuition purposes because families of nonresident students generally have not paid taxes contributing to the operation of state educational institutions).