

June 22, 2015 Advisory Letter — Opinion Request – Recruitment and Retention of Health Care Professionals

Shawn Lerch
Chief Executive Officer
Miners' Colfax Medical Center
203 Hospital Drive
Raton, NM 87740

Re: Opinion Request – Recruitment and Retention of Health Care Professionals

Dear Mr. Lerch:

You requested our advice regarding the use of funds held by the Miners' Colfax Medical Center ("MCMC") for the recruitment and retention of health care professionals. Specifically, you stated that "MCMC would like to be able to pay for travel expenses, hotel expenses and meals for doctors' on site recruitment visits as well as for retention bonuses to keep the doctors for extended periods of time." You reference an advisory letter from Attorney General Patricia Madrid in 2001 where MCMC posed a question on the same issues. See letter to Gary Gabriele, Budget Director, Miners' Colfax Medical Center from Zachary Shandler, Assistant Attorney General (Feb. 12, 2001). Our review of the 2001 letter, the New Mexico Constitution, statutory authority, and recent case law leads us to the same conclusions reached in the letter. MCMC may pay for recruitment of health care professionals and retention bonuses, so long as MCMC receives consideration for those payments.

The Anti-Donation Clause of the New Mexico Constitution provides in part that, "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. The New Mexico Supreme Court in Village of Deming v. Hosdreg Co., 1956-NMSC-111, 62 N.M. 18, determined that "donation" under the Anti-Donation Clause "has been applied its ordinary sense and meaning, as a 'gift,' an allocation or appropriation of something of value, without consideration to a person...." Id. ¶ 36. The courts are still using this definition of a donation. See, e.g., Moses v. Skandera, 2015-NMCA-036, ¶ 42, cert. granted, 2015-NMCERT-001 (No. 34,974, Jan. 26, 2015), State ex rel. Office of State Eng'r v. Lewis, 2007-NMCA-008, ¶ 49, 141 N.M. 1.

The crucial issue in this situation is whether MCMC is providing an allocation or appropriation to physicians *without consideration*. The New Mexico courts have held that the state does not violate the Anti-Donation Clause where the state receives consideration in return for the allocation or appropriation of something of value. For example, in Treloar v. County of Chaves, 2001-NMCA-074, 130 N.M. 794, the New Mexico Court of Appeals addressed an Anti-Donation Clause claim in the context of a county contract that provided for severance benefits after involuntary termination. The court held that the Clause was not violated, reasoning that "severance pay is deemed to

be in the nature of wages that have been earned. Thus, consideration had been given for the severance obligation, and there was no gift.” 2001-NMCA-074, ¶ 32. See also State ex rel. Office of State Eng’r v. Lewis, 2007-NMCA-008, ¶ 49, 141 N.M. 1 (“Consideration for the allocation can be a defining element.”). In contrast, in a subsequent, unreported case, the Court of Appeals found a violation of the Anti-Donation Clause where a “bonus did not represent compensation for any past or expected work, for any enhanced job qualification, or for any quality or longevity standard, and it therefore constituted forbidden extra and retroactive pay in violation of the public policy behind the constitutional provisions.” Nat’l Union of Hosp. Employees v. Bd. of Regents, No. 28,960, mem. op. at 1 (N.M. Ct. App. Aug. 10, 2010).

We reiterate our advice from 2001 that MCMC can provide for reimbursement of physician travel for purposes of recruitment or for retention bonuses only so long as it receives adequate consideration in return. Our previous decisions have differentiated between permissible and impermissible reimbursement of funds. In N.M. Att’y Gen. Op. 81-5 (1981), we found that the state would be permitted to reimburse a prospective employee for travel expenses, so long as it was not an “outright gift to the state” because “[t]his ‘public benefit’ to the department constitutes consideration for whatever payment the applicant may receive for his own travel expenses.” Id. at 2. However, in N.M. Att’y Gen. Op. 89-22 (1989), we determined that a county could not pay a physician’s relocation costs because “the county must receive some benefit or consideration in exchange” and in that case the physicians did not “assume any obligation in exchange for relocation payments.” Id. at 1.

For recruitment, MCMC would not be violating the Anti-Donation Clause if it could demonstrate that MCMC was receiving adequate consideration for travel reimbursements. Your request explained that “payment of this type [of recruitment reimbursement] of expenses is a common recruitment practice, to refuse to make such payments would reduce the likelihood that physicians would consider MCMC.” Additionally, you stated that “[a]s to the payment of retention bonuses, MCMC receives an agreement that the doctor will remain in the community providing services at MCMC.” From the information provided in your letter, we find the analysis in N.M. Att’y Gen. Op. 81-5 that “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” would appear to apply equally in this case. Additionally, if MCMC contracts with a physician and a longevity bonus is included in the contract, this would likely be sufficient consideration and, consequently, would not violate the Anti-Donation Clause.

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General’s Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General’s Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

CAROLINE MANIERRE
Assistant Attorney General