

## **Opinion No. 58-135**

June 23, 1958

**BY:** OPINION OF FRED M. STANDLEY, Attorney General Fred M. Calkins, Jr.,  
Assistant Attorney General

**TO:** Mr. Paul W. Masters, Administrative Officer, Department of Public Health, P. O.  
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### **QUESTION**

#### QUESTIONS

1. May the Department of Public Health use its monies to provide drugs to persons who are diagnosed as being ill with tuberculosis?
- 2 May the Department of Public Health use its monies to provide drugs to persons who are ill with tuberculosis but not indigent?
3. May the Department of Public Health use its monies to provide drugs for preventing the development or the re-establishment of a disease in a person presumed well at the time the drug is administered?

#### CONCLUSIONS

1. Yes.
2. Yes.
3. Yes.

### **OPINION**

#### ANALYSIS

The facts, as recited to us by the New Mexico Department of Public Health, regarding the above questions, are as follows:

"Recently a group of interested agencies joined in asking the State Board of Finance to grant a restoration to the Department of Public Health of \$ 60,000 from that money withheld under the appropriation act which allows withholding up to 15 per cent of a legislative appropriation.

The purpose of the restoration was to permit the purchase of various drugs used in treating and controlling tuberculosis. The drugs were to be given to those persons in our

State diagnosed as having tuberculosis but who either did not need hospitalization or because of lack of bed space could not be admitted to our State Tuberculosis Hospital.

In response to the plea the Finance Board directed that Mr. Hartman and his staff scrutinize the Health Department's proposed budget for the 47th fiscal year and, if the money could not readily be provided for in such a budget, that the Finance Board be polled by mail to determine the desirability of restoring the money from that withheld from the 46th fiscal year's budget.

A member of Mr. Hartman's staff now questions the legality of using any state money to provide drugs to the public, pointing out that Article 9, Section 14 of our State Constitution forbids aid to any person 'provided, nothing herein shall be construed to prohibit the State or any county or municipality from making provision for the care and maintenance of sick and indigent persons.' They further point out that all recipients of the drugs will not be indigent and some might not be sick at the time (some of the drugs are to prevent the person from relapsing into a state of sickness)."

Based upon the above facts in regard to questions 1 and 2, we are called upon to decide whether supplying drugs to people who are diagnosed as being ill with tuberculosis when such persons are not indigent is prohibited by Article IX, § 14. The section is stated in our Constitution as follows:

"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, or in aid of any private enterprise for the construction of any railroad; provided, nothing herein shall be construed to prohibit the state or any county or municipality from making provision for the care and maintenance of sick and indigent persons."

The prohibition of Article IX, § 14, the proviso excepted, is complete. Donations to or in aid of persons are not allowed. The proviso, however, states that care and maintenance may be provided to "sick and indigent" persons. In Opinion No. 57-26, this office held that aid to the sick could be made, irregardless of financial need, stating:

"It is our view that such care and maintenance may be extended to those who are either sick **or** indigent. It would not seem necessary that a person, in order to secure such assistance, be both sick **and** indigent. Thus, it may be that the state could constitutionally provide assistance to sick persons without reference to financial ability to pay for medical care."

It is our opinion that such is the common sense view. To hold that a person must be both sick and indigent, rather than sick or indigent, would disqualify the large amount of recipients now obtaining welfare aid and old age assistance who are in financial need but are not sick. Accordingly, we are of the opinion that questions 1 and 2 must be answered in the affirmative.

Question 3 raises the question as to whether moneys may be used to provide drugs to prevent the development or the reestablishment of the disease in a person presumed well at the time the drug is administered.

As indicated in our conclusion, we believe that the drugs can be supplied. Granted that these people are presumed well, the question which is then raised is whether there is in fact a donation or grant of aid to a particular recipient, or whether this is an expenditure for a public purpose.

In 81 C.J.S., § 134, it is stated generally that a constitutional limitation, expressed or implied, on gifts of public money does not generally apply to a disbursement for a public purpose even though private persons may be benefited therefrom. We quote from such section at page 1161 of the text:

"As a general rule, in determining whether a proposed application of public funds is a 'gift' within the constitutional prohibition, the primary question is whether the funds are to be used for a public or private purpose. A constitutional limitation, express or implied, on gifts of public money does not generally apply to a disbursement, appropriation, or other fiscal statute for a public purpose, or to carry out a function of the government, even though private persons may be benefited therefrom. The burden is primarily on the legislature to determine whether or not the purpose served by an expenditure is a public purpose, not within the constitutional prohibition on gifts of public funds; and the legislature will be presumed to have investigated the facts warranting an appropriation."

Reciting from the same text at page 1163, we find:

"The constitutional prohibition against gifts does not render invalid disbursements, appropriations, or other fiscal measures in the exercise of the state's police power for the protection of the public, . . ."

In the instant case, we assume that there is some medical purpose served in providing drugs to prevent the development or reestablishment of tuberculosis in a person presumed well at the time the drug is administered. Such a program would certainly primarily benefit the public as a whole in this State and should the facts warrant, we feel that the administration of drugs could be given to prevent an epidemic of the disease or wide spread illness as a police power measurement.

We have carefully reviewed our Supreme Court cases which upheld that certain contemplated actions were, in fact, donations, aid or gifts to persons. The latest decision handed down by our Supreme Court is *State of New Mexico ex rel. Edwin L. Mechem v. J. D. Hannah, State Auditor, and Joseph B. Grant, State Treasurer*. This is the so-called "hay case". In this case the parties stipulated that the recipients under the roughage program were not limited to persons who were sick and indigent within the meaning of the provisions contained in Article IX, § 14 of our Constitution. Accordingly, Justice McGhee held that money could not be given under the program to ranchers because they were not indigent or paupers. The additional disability of sickness was

never considered. To have required that ranchers who participated in the program be not only indigent but ill would be ridiculous.

The only case that our research has turned up which may have a bearing on the questions presented, particularly the third, is that of *Hutcheson v. Atherton*, 44 N.M. 144, 99 P. 2d 462. In that case a county bond issue to construct a public auditorium for the Coronado Corporation to be used in the "New Mexico Fourth Centennial Coronado Corporation Exposition" was held to violate constitutional Article IX, § 14. In this case the Court stated that they were not unmindful of the fact that the celebration would serve a highly commendable public purpose. The Court pointed out this distinction, however, that the money would be tendered to a private corporation rather than being administered by a State agency as in the instant case. Here the money is being appropriated to a State agency for the prevention and control of tuberculosis. Such purpose has as its primary aim the promotion of the public welfare. Benefit to private individuals is incidental. As the Court said in the *Hutcheson* case, *supra*, the Coronado Corporation. was not a subordinate government agency. Its sole objective was to promote the Coronado Fourth Centennial celebration.

By way of conclusion, we are of the opinion that medicine or drugs may be supplied persons ill with tuberculosis inasmuch as the sick are specifically mentioned in the proviso contained in Article IX, § 14.

Lastly, we are of the opinion that the Public Health Department may provide drugs for people presumed well at the time of the administration because such treatment serves a public purpose and is, therefore, not a donation or gift even though the recipients may be incidentally benefited.