

Opinion No. 63-05

January 29, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Mr. Roy J. Lofton Superintendent of Schools Fort Sumner, New Mexico

QUESTION

QUESTIONS

1. May a public school system properly expend public moneys for the purpose of paying membership dues to the New Mexico Activities Association, and if so, may a portion of such moneys be properly expended to establish and maintain a retirement program for staff employees of the Association?
2. Are members of the staff of the New Mexico Activities Association eligible for retirement benefits under New Mexico state law?

CONCLUSIONS

1. See Analysis.
2. No.

OPINION

{*10} ANALYSIS

The questions above are as stated in your letter requesting an opinion thereon and as further posed by your phone conversations with this office.

In resolving the answer to your first question, initial consideration must first be given to determining the legal status of the New Mexico Activities Association and the organization's relationship to the public schools of this state.

{*11} As indicated by the constitution and by-laws of the association, the organization is a voluntary, nonprofit-unincorporated association, having legal recognition and authority pursuant to Section 51-18-1, N.M.S.A., et seq., and drawing its membership from public, private and parochial high schools and junior high schools of this state.

According to the association's constitution, each individual member school is required to pay annual dues to the association based on the average daily attendance of the children attending such school. Individual schools also may be subject to the payment of assessments by the organization under a provision of the association's constitution.

Sources of funds received by the association as shown by its official handbook published by the organization are derived from (1) the annual dues paid by each member school; (2) fines assessed for the submission of delinquent reports; (3) from interest obtained from investments; (4) collection of twenty-five percent of the net gate receipts from basketball tournaments and football playoff games sponsored by the association; and (5) miscellaneous sources such as sale of rule books, etc.

By statute the State Board of Education is invested with supervisory authority over "all rules and regulations promulgated by any association or organization attempting to regulate athletic or other elementary or high school activities."

Sections 73-12-11, N.M. S. A., 1953 Compilation, et seq. empowers the State Department of Education to determine whether rules and regulations of private associations are in conflict with rules or regulations of the State Department of Education, and such statutes invest the State Board of Education with the power of administrative review over decisions made by governing boards or officials of any organization regulating athletic or other activities.

The legal consequence of such statutes is to invest the State Department of Education with supervisory authority over the rules or regulations of private organizations which affect public schools in New Mexico. This statute expressly contemplates private organizations or associations may be created and organized for the purpose of regulating some aspects of school administration. However, such statute does not make such organization a subdivision of the State Department of Education, and expressly states that:

". . . Provided, however, the State Board of Education shall have no power or control over the rules and regulations or by-laws governing the administration of the internal organization of any such association or organization."

Article 9, Section 14, of the Constitution of New Mexico provides in part as follows:

"Neither the state, nor any county, **school district or municipality, 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. . ." (Emphasis supplied).

A number of states have litigated the question of whether under constitutional restrictions such as that specified above, public bodies and municipalities may properly expend public funds for the purpose of maintaining membership in certain types of organizations. As stated in 64 C. J. S., "Municipal Corporations", Section 1845, at page 348:

{*12} "Membership in municipal association or league. Although it has been held that it is beyond the power of a municipality to appropriate funds or incur indebtedness for the purpose of paying dues to, or contributing to the maintenance of, an organization of the municipalities of the state, **it has been stated that the trend of modern judicial**

opinion is to the contrary, and the expenditure of municipal funds for the payment of its dues as a member of a municipal league has been held to be permissible as expenditure for a public purpose, and not to be prohibited by constitutional prohibitions against giving or loaning credit or making donations to any private individual or association. Of course, if a municipal league fails to adhere to the purposes for which it purportedly exists and which justify the expenditure of municipal funds for membership therein, continued membership therein would no longer be for a public purpose and the expenditure would be unlawful." (Emphasis Supplied).

In McQuillin, "**Municipal Corporations**", Volume 15, Sec. 39.22, at page 61, it is stated:

"While the expenditure of public funds for membership in a municipal league or to defray expenses of municipal officers appointed to attend a convention or conference of a municipal league has been recognized as public or municipal purposes, the opposite view has been taken in many jurisdictions, both as to such dues and expenses."

In reviewing the authorities as to whether under constitutional restrictions similar to Article 9, Section 14 of the New Mexico State Constitution the expenditure of public funds is permissible for membership dues to a private organization, it should be noted that a decided split of authority exists between the various state courts which have considered this problem. **See Glendale v. White**, 194 P. 2d. 435, 67 Ariz. 231, **State v. Hagerman**, 98 N. E. 2d. 835, 155 Ohio St. 320; **Hayes v. City of Kalamazoo**, 25 N. W. 2d, 787, 316 Mich. 443; **People ex rel. Schlaeger v. Bunge Bros. Coal Co.**, 64 N. E. 2d. 365, 392 Ill. 153.

Although the question here presented has not been expressly the subject of any Supreme Court decision in this state, the court has in several cases interpreted Article 9, Section 14 of the State Constitution, **Hutcheson v. Atherton**, 44 N.M. 144, 99 P. 2d. 462; **Harrington v. Atteberry**, 21 N.M. 50, 153 P. 1041; **State ex rel. Mechem v. Hannah**, 63 N.M., 110, 314 P. 2d. 714; **State Highway Comm. v. Southern Union Gas Co.**, 65 N.M. 84, 332 P. 2d. 1007, holding that public moneys in certain instances could not be properly expended for private purposes.

In 79 C.J.S. "**Schools**", Section 324, at page 10, it is recognized that:

". . . indebtedness or expenditures for paying membership dues in an association organized to promote the educational institutions of this state . . . have been held proper."

In **Schuerman v. State Board of Education** (1940) 145 W. W. 2d. 42, 284 Ky. 556, the Court of Appeals of Kentucky was called upon to decide a question analogous to that here presented. In that case a declaratory judgment action was initiated to determine whether public schools could lawfully pay annual membership dues to an educational association. In this case the Court ruled:

"Thus, stated in its broadest terms, the question presented for our determination on this appeal is, whether the maintenance of the Kentucky School Board Association for the purposes set forth in the {*13} petition is beneficial to public education in Kentucky. This question, it seems to us, must be answered in the affirmative unless we are to shut our eyes to the advantages of modern educational methods, and if so answered, it necessarily follows that the maintenance of the association is beneficial to the schools of each district, particularly to the schools of those districts whose boards of education avail themselves of the opportunities offered by membership.

To be compelled to denominate as "membership dues" the contributions necessary for the support of an institution of this kind is, perhaps, unfortunate, as this term usually denotes monies expended for individual, rather than public purposes. But, by whatever name they may be designated, expenditures of reasonable amounts for the attainment of the objects set forth in the constitution of this organization are expenditures in the interest of the public schools, and hence not in contravention of the constitution of the state."

In accordance with the modern trend of the above authorities we conclude that a public school of this state may lawfully expend public monies in a reasonable amount for the purpose of **the payment of membership dues** to an association or organization having for its stated and actual purposes the providing of direct assistance and aid to effect the betterment of local education and the rendering of service and actual benefits to such schools in the advancement of public education and as long as such expenditures are in the best interest of the individual school concerned.

Next, we turn our attention to a determination of whether such monies once received by the association from public schools may properly be expended by the association for the purpose of establishing and maintaining a retirement program for staff employees of the association.

Obviously, if the nature of such retirement program is such that it necessitates the utilization of such portion of the funds obtained by the association to the degree that the benefits rendered by the association to the member public schools are minor or insignificant in nature, then the original expenditure by such schools in such event would be of questionable validity. Conversely, however, if the expenditure by the association for the establishment or maintenance of an employee retirement program does not materially detract from the direct benefits or aid bestowed by the association upon the member schools participating, then such expenditure would be proper and would not render the payment of public moneys to such association invalid. The establishment of a retirement system by the association may serve to further assist the public school members in increased educational benefits by allowing the association to attract and maintain able and experienced staff personnel in the association which without a retirement program would not be possible.

Therefore, it is our opinion that the association may properly expend for a retirement program a portion of the moneys received from membership dues contributed by the

various member public schools, as long as such utilization of moneys does not negate or make insignificant the amount or type of actual direct assistance or benefits bestowed by the association to the public schools participating.

Replying to your second question as to whether members of the staff of the New Mexico Activities Association are eligible for retirement benefits under New Mexico State Law, it is our opinion that such individuals because of their employment by a private {^{*14}} nongovernmental association are not eligible for retirement benefits from state funds.

Under Article 9, Section 14 of the state Constitution, supra, the payment of public moneys to private associations or organizations for such purposes by legislation or otherwise, would be clearly prohibited. **Hutcheson v. Atherton**, supra; **Harrington v. Atteberry**, supra; and **State ex rel. Mechem v. Hannah**, supra. The association could however, establish from funds available to the organization its own retirement program for its employees as long as such use of moneys of the organization does not materially interfere with the services and purposes of the association rendered to the public school members.

By: Thomas A. Donnelly

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