

Opinion No. 62-88

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BY: OPINION OF EARL E. HARTLEY, Attorney General Thomas A Donnelly, Assistant Attorney General

TO: Dr. Donald C. Moyer, Chairman, New Mexico College President's Association, Eastern New Mexico State University, Portales, New Mexico

QUESTION

QUESTIONS

1. Must out-of-state travel financed by non - budgeted funds of state educational institutions have the approval of the Board of Educational Finance and the Department of Finance and Administration and the Governor.
2. Must out - of - state travel made in connection with research contracts between the institution and private foundations, federal agencies, and other outside entities have the approval of the Board of Educational Finance, the Department of Finance, and the Governor?
3. Must approval be sought from the Board of Educational Finance, the Department of Finance, and the Governor for out - of - state travel when travel is financed by the individual traveler, and such individual does not seek state reimbursement?

CONCLUSIONS

1. Approval for such travel must be obtained only from the Governor and in accordance with the rules and regulations promulgated by the State Board of Finance.
2. See analysis.
3. No.

OPINION

ANALYSIS

An examination of the pertinent statutory provisions relating to the granting and authorization of out-of-state travel by personnel of state educational institutions indicates that several specific legislative enactments bear upon this subject.

Section 5 of the 1961 General Appropriation Act (Chapter 254, Laws 1961), sets out in part:

"OUT-OF-STATE TRAVEL. -- Requests for out-of-state travel by personnel of the above educational institutions shall be approved by the board of educational finance and the department of finance and administration prior to the start of the trip. The board of educational finance shall establish standards and regulations governing out-of-state travel to the end that expenditures for this purpose shall not exceed the 1959-60 level of out-of-state travel expenditures."

Section 19 of the 1961 General Appropriation Act, also relates to the authorization and approval for out - of - state travel. This section provides in applicable part as follows:

"Out-of-state travel of officers and employees of the state executive branch, including boards, offices, agencies, departments and institutions, must be authorized by the governor in writing before such travel is incurred, such approval to be on regular forms prescribed by the department of finance and administration. Out-of-state travel for all other public officers and employees, with the exceptions noted below, must be approved by the department of finance and administration before such travel is incurred, such approval to be on regular forms prescribed by the department; provided, however, that no approval for out-of-state; travel by pilots of state owned aircraft, when on officially approved trips, is required. **The rate of per diem or expense allowance and method of transportation for out-of-state travel shall be at the discretion of the governor, who may exempt specific agencies from the rates and transportation methods set by him in those cases where the funds for out - of - state travel are all provided by federal government or non-governmental sources. . . .**" (Emphasis supplied).

The rule has been stated in **State ex rel Lucero v. Marron**, 17 N.M. 304, 128 P. 485; **State ex rel Whittier v. Safford**, 28 N.M. 531, 214 P. 759; **State ex rel Peck v. Velarde**, 39 N.M. 179, 43 P. 2d 377; and **State ex rel Holmes v. State Board of Finance**, 70 N.M. , 367 P. 2d 925, that when an appropriation is made by the Legislature in a general appropriation act, there may be included with such appropriation all matters as are germane thereto and directly connected with it, such as provisions for the expenditure and accounting for the money, but such provisions are held to have application only to matters incident to the main fact of the appropriation, and may not be considered as general legislation having effect as to matters not necessarily or directly connected with the appropriation legally made.

Under the above authorities it is evident if the monies in question were not in fact appropriated under the terms of the 1961 General Appropriation Act, then out-of-state travel financed from such funds would not be subject to the restrictions cited above.

Sections 11-4-2.2, 11-4-7.4 and 11-4-1.8 N.M.S.A., 1953 Compilation, govern in part the procedures for the budgeting of monies received by state educational institutions, including monies received from private or federal sources. Under such statutes it is apparent that upon receipt of any unanticipated and unbudgeted funds by educational institutions, such monies should be reflected by the institutions in a revised budget, and in such case, these monies would become in fact budgeted funds.

Whether or not such funds are in fact budgeted, however, is not determinative of the problem presented. The general statutes relating to the budgetary procedure of public monies have application to state institutions, but do not govern out-of-state travel financed from funds obtained from private and federal sources and other than from the state general revenues.

Under the Appropriation Act, Chapter 254, Laws of 1961, Section 5, thereof contains a legislative declaration that there is appropriated to the use of such educational institutions certain other revenues received by the institutions during the fiscal biennium, and in addition to the appropriations derived from the state general fund which are specifically set out within the act. This provision of the Appropriations Act reads in applicable part as follows:

". . . In addition to the appropriations from the state general fund herein specified, **the institutional receipts, grants and unencumbered incomes from lands and permanent funds are hereby appropriated.** Expenditures of all appropriated funds shall be made in accordance with annual budgets approved by the board of educational finance and the department of finance and administration . . ." (Emphasis supplied).

State educational institutions by virtue of Section 11-2-54, N.M.S.A., 1953 Compilation, are exempted from the requirement imposed under Section 11-2-3, N.M.S.A., 1953 Compilation, directing that all public monies in the custody or control of a state official be paid into the State Treasury. Under Section 11-2-54, N.M.S.A., 1953 Compilation, state educational institutions may establish separate institutional accounts in approved banks and deposit monies received by the institutions in such accounts.

Since, with the exception of incomes from lands and permanent funds, the funds in question are not derived from the public treasury or the general revenues of the State nor are such monies required to be deposited into the State Treasury, the provision contained in Section 5 of the 1961 General Appropriation Act, above, declaring an appropriation of "institutional receipts, grants, and unencumbered incomes from lands and permanent funds" of the institutions is without effect insofar as it purports to constitute an appropriation of "grants" or "receipts" obtained from non-public revenues or which are not derived from the incomes from lands and permanent funds of the institution.

Article IV, Section 30 of the State Constitution sets out specific restrictions governing the requisites for all appropriations made from the State Treasury, these provisions however, are not applicable in instances where the funds are not paid out of the treasury by appropriation.

As generally recognized by the Courts, the term "appropriation" means:

". . . the setting aside from the public revenues of a certain sum of money for a specified object, in such manner that the executive offices of the government are authorized to use that money, and no more, for that object, and no other." See: **State v. Lee**, 163 So.

859, 121 Fla. 360; **State v. Moore**, 69 N.W. 373, 50 Neb. 88; **State v. Allen**, 91 So. 104, 83 Fla. 214.

It is also set out in **State ex rel Murray v. Carter**, 167 Okla. 473, 30 P 2d 700, and **Black and White Taxicab Co. v. Standard Oil Co.**, 25 Ariz. 381, 218 P 139, that an element in the definition of the word "appropriation" is that the money appropriated be out of the general revenues of the state. In **Commonwealth v. Perkins**, 21 A 2d 45, 342 Pa. 529, the Court held in dealing with a similar issue:

"As we understand the word 'appropriation', when used in the constitutional or legislative sense, it means a designation of money raised by taxation to be withdrawn from the public treasury for a specifically designated purpose. The money in question raised by taxation under this statute never gets into the state treasury."

Under the above authorities the "grants" and "receipts" collected and held separately in institutional depositories, are not subject to the restrictions contained in the appropriation act, since such funds are not appropriated out of the public revenues and State Treasury.

We therefore conclude that the "grants" and "receipts" specified in Section 5 of the current Appropriation Act, do not have application to monies which are not derived from state revenues or the State Treasury. It is therefore apparent that the above quoted provisions of the General Appropriation Act are without application to out-of-state travel financed from monies derived from the various private or federal sources and which are not derived from the public treasury.

Next, our analysis is drawn to a consideration of whether there are any other statutory provision bearing upon the approval of out-of-state travel by personnel of state educational institutions. A search of our statutes reveals that Section 11-1-9, N.M.S.A., 1953 Compilation, refers to out-of-state travel by employees of state educational institutions. This statute sets out in part:

". . . No allowance or payment for lodging and subsistence shall in any event exceed the sum of six (\$ 6.00) dollars per day **except in cases where public officials or employees are out of the state on necessary official business, and only then when such travel outside the state shall have been approved in writing by the governor of the state as being necessary and essential to the public service**, and all claims and vouchers for reimbursement for such lodging and subsistence when away from the state shall have the approval of the governor in writing attached thereto. **Provided, however, that in no event shall any public official or employee be allowed or paid any sum whatsoever, for transportation, lodging or subsistence for out-of-state travel on necessary public business except in such cases when such out-of-state travel has been first permitted and approved by the governor of New Mexico in writing.** No officer or employee of . . . any state . . . institution . . . shall advance to himself or to any other official or employee any public funds for travel expense, whether within or without the state, prior to the actual time such travel is

performed, but shall only receive payment therefor after such travel shall have been performed, and only then when vouchers are presented, with receipt attached, and duly signed and sworn to, as in this act provided. All claims for reimbursement by officials or employees receiving or claiming moneys from public funds shall be only incurred in accordance with law and paid in conformity with rules and regulations to be promulgated by the state board of finance which is hereby directed and authorized to promulgate such rules and regulations . . ." (Emphasis supplied).

The above statute would, in the case in question, govern the manner by which requests for out-of-state travel by employees of state educational institutions shall be approved and processed if such travel is financed from "public funds".

As stated above, educational institutions of the state are empowered to handle funds received by the institution from "grants" and "receipts" in separate agency accounts.

Under Section 11-2-43 N.M.S.A., 1953 Compilation, "all payments and disbursements of public funds" are required to be made upon warrants drawn by the director of the Department of Finance and Administration "upon the treasury of the State of New Mexico, based upon itemized vouchers as provided by law." As we construe the above, however, such statute has application only where the public funds sought to be paid out or disbursed are derived in source from the State Treasury.

Sections 11 - 2 - 6 and 73 - 30 - 15, N.M.S.A., 1953 Compilation, grant authority to state educational institutions to receive and handle institutional funds and to place such monies in separate institutional depositories. Such statutes empower educational institutions to make disbursements of funds deposited in the institutional depositories without vouchering directly through the State.

Once, however, private or federal monies are received by an educational institution, irrespective of whether they are budgeted or not, such sums become impressed with the public interest and constitute "public funds". In our prior Attorney General's Opinion No. 62-71, dated June 15, 1962, we held that even though certain monies may be derived from private sources, they nevertheless become "public monies" once received by public officers and where they are expended for a public use. See also Attorney General's Opinion No. 58-82, dated April 11, 1958.

These monies being "public funds" within the meaning of Section 11-1-9 N.M.S.A., 1953 Compilation, they are thus subject to the provisions contained therein governing the expenditures of public funds by state personnel of educational institutions for out-of-state travel.

Therefore, we hold in answer to your first question that as to out-of-state travel financed from such funds, approval must be obtained pursuant to Section 11-1-9 N.M.S.A., 1953 Compilation, only from the Governor. In addition, such request must be in conformity with the rules and regulations promulgated by the State Board of Finance.

The result reached in our answer to your first question would also govern your second inquiry, and out-of-state travel made in connection with research contracts between the institution and private or federal agencies would require only the approval of the Governor and compliance with the rules and regulations promulgated by the State Board of Finance in accordance with Section 11-1-9, N.M.S.A., 1953 Compilation, supra. It should be noted, however, that a situation may arise whereby the funds are disbursed pursuant to the contract directly from the Federal government or private foundation to the individual making the out-of-state travel, and in such instance, the funds concerned never in fact become public monies so as to necessitate approval by the Governor or executive agencies.

In current practice, research monies paid by private foundations or the Federal government, are handled in varying manners and in accordance with the provisions of the particular contract. Payment may be made by the private or Federal body to the institution before the program is initiated, payment may be received periodically during the various stages of the program performed by the institution, or complete payment may be made after the work has been finished. At whatever time such funds are received by the institution from such sources, however, they become public funds subject to disbursement for out-of-state travel in accordance with Section 11-1-9, supra.

In answer to your third question, no approval would be necessary from the Department of Finance and Administration, the Board of Educational Finance, the State Board of Finance, or the Governor where the out-of-state travel is financed entirely by the individual traveler and where the individual does not seek state reimbursement. In such instance, the funds utilized for such travel would not constitute "public monies" or funds appropriated under the provisions of the 1961 General Appropriation Act, but would be derived entirely from private sources.