Opinion No. 90-13

May 8, 1990

OPINION OF: HAL STRATTON, Attorney General

BY: Elizabeth A. Glenn, Assistant Attorney General

TO: Kenneth J. Iskow, Director, Training and Recruiting Division, Department of Public Safety, 4491 Cerrillos Road, Santa Fe, New Mexico 87504

QUESTIONS

1. May the Department of Public Safety ("DPS") provide use of its dormitory and meals to a Boy Scouts of America troop at a substantially reduced cost?

2. Can DPS be held liable if any of the minor-age scouts is injured while using its facilities? If so, what steps should DPS take to insure against liability in the event of an injury?

CONCLUSIONS

1. No.

2. Yes, absent a contractual provision precluding liability. DPS should consult with the Risk Management Division about the adequacy of DPS' liability insurance coverage.

ANALYSIS

The usual rate charged by DPS for use of its dormitories and the provision of three meals per day is $25.00 per day. DPS proposes to allow a Boy Scouts of America troop to use its dormitories at a reduced daily rate of $3.00 per room plus the actual cost of meals. The first question is whether this proposal is permissible. We conclude that it is not, because the proposed reduction in rental fee for Boy Scouts of America, a non-profit corporation, is not consistent with Article IX, Section 14 of the New Mexico Constitution, which prohibits donations to "any person, association or public or private corporation." The prohibition contained in the anti-donation clause extends to both for-profit and non-profit corporations.

In **Harrington v. Atteberry,** 21 N.M. 50, 153 P. 1041 (1916), the New Mexico Supreme Court held unconstitutional legislation that authorized counties to appropriate county funds to an incorporated fair association to conduct county fairs. The court stated:

Within the state we have many private corporations engaged in educational work and a still greater number serve some other useful public purpose. Private individuals are likewise engaged in pursuits of a similar nature. If all these individuals and corporations

could be given public money to aid them in carrying on the work in which they are engaged, there would practically be no limit upon the various agencies of government in the expenditure or donation of public funds, and the constitutional provision in question [art. IX, § 14] would be a vain, useless, absurd, and meaningless aggregation of words and sentences.

Id. at 54, 153 P. at 1042. In **Hutcheson v. Atherton,** 44 N.M. 144, 99 P.2d 462 (1940), the New Mexico Supreme Court held unconstitutional legislation that authorized counties and municipalities to provide financial aid to a non-profit corporation formed to promote a statewide celebration. That the corporation served a highly commendable public purpose did not warrant the state or any county or city making a donation to it or pledging its credit in aid of it. See also **Hotels of Distinction v. Albuquerque,** 107 N.M. 257, 755 P.2d 595 (1988) (anti-donation clause prohibits a city from aiding non-governmental enterprises; clause does not apply to channeling of federal funds).

This office has concluded that the state must receive adequate consideration from private organizations which enjoy use of the state's property and facilities. In AG Op. No. 87-33 (1987), for example, the Attorney General advised that the New Mexico Film Commission had to receive reasonable rent and expense reimbursement if it allowed the Santa Fe Film Festival to use the Commission's office space, equipment and telephones. See also AG Op. No. 67-29 (1967) (Article IX, Section 14 prohibits a city or county from appropriating public funds to a non-profit corporation for economic development); AG Op. No. 6253 (1955) (Article IX, Section 14 prohibits a city from contributing city funds to the Girl Scouts and Boy Scouts); AG Op. No. 6279 (1955) (state fair may not donate proceeds from horse races to community chest); AG Op. No. 4368 (1943) (city may not donate money to the chamber of commerce). Even though the proposed donees involved in these opinions rendered worthwhile services to the community, the state was obliged nonetheless to avoid making donations to them.

DPS has set a price for use of its facilities by private parties, which presumably reflects reasonable rent and reimbursement of actual expenses. See AG Op. No. 64-92 (1964) (State Fair Commission must receive reimbursement for actual expenses from private parties using fair grounds and facilities during off-season periods); AG Op. No. 88-79 (1988) (consideration received for sale of public property must bear a reasonable relationship to the actual value of the property). If the Boy Scout troop was allowed to pay less than the set fee for the same services and use of facilities, the rental reduction would constitute a gift or donation in violation of Article IX, Section 14. Cf. **City of Tempe v. Pilot Properties, Inc.,** 527 P.2d 515, 521-22 (Ariz. Ct. App. 1974) (if a city leased its property for less than fair market value, the transaction would constitute an impermissible donation in the form of a subsidy to a private corporation). Therefore, DPS may not legally charge the Boy Scouts an amount less than the fee normally charged for use of DPS' facilities.

Your second question concerns the liability of DPS should any of the minor age scouts using the facilities be injured. Under the Tort Claims Act ("Act"), NMSA 1978, §§ 41-4-1 to -27 (Repl. Pamp. 1989), the state is immune from tort liability except as waived by the

Act. Id. § 41-4-4(A). Section 41-4-6 of the Act waives immunity from liability "for damages resulting from bodily injury ... caused by the negligence of public employees while acting within the scope of their duties in the operation or maintenance of any building." In **Castillo v. County of Santa Fe,** 107 N.M. 204, 205, 755 P.2d 48, 49 (1988), the New Mexico Supreme Court concluded that "building maintenance" as used in Section 41-4-6 included keeping the grounds of a housing project safe from unreasonable risk of harm to residents and invites. Thus, Section 41-4-6 probably waives immunity where, due to public employee negligence, an injury arises from an unsafe, dangerous or defective condition on governmental property. DPS, therefore, could be held liable, based on traditional tort concepts, for injury arising out of negligent maintenance of public buildings, absent a contractual provision precluding liability.[1]

The Risk Management Division insures state agencies against liability for which immunity has been waived. NMSA 1978, §§ 41-4-20, 41-4-23 (Repl. Pamp. 1989). DPS, therefore, may wish to consult the Risk Management Division about the adequacy of its insurance coverage.

ATTORNEY GENERAL

HAL STRATTON Attorney General

GENERAL FOOTNOTES

n1 Certain indemnification agreements, however, are void. NMSA 1978, § 56-7-1 (Repl. Pamp. 1986) provides:

Any provision contained in any agreement relating to the... maintenance... of any real property... by which any party to the agreement agrees to indemnify the indemnitee... against liability... arising out of bodily injury... caused by... the negligence... of the indemnitee... is against public policy and is void and unenforceable, unless such provision shall provide that the agreement to indemnify shall not extend to liability... arising out of [the preparation of or failure to give directions by the indemnitee].

See **Sierra v. Garcia,** 106 N.M. 573, 746 P.2d 1105 (1987) (indemnity agreement void under Section 56-7-1). Courts also refuse to enforce exculpatory provisions which attempt to relieve parties from liability for their own negligence if a public duty is owed or if the public interest is involved, **Southwestern Pub. Serv. Co. v. Artesia Alfalfa Growers' Ass'n,** 67 N.M. 108, 118, 353 P.2d 62, 69 (1960) (electrical utility could not validly contract against liability for negligence) or if one of the parties has no alternative to dealing with the other or the agreement violates a statute. **Lynch v. Santa Fe Nat'l Bank,** 97 N.M. 554, 557, 558, 627 P.2d 1247, 1250, 1251 (Ct. App. 1981) (upholding exculpatory clause in escrow agreement). Depending on the circumstances, therefore, use of exculpatory clauses may not preclude a lawsuit against a negligent state agency.