

Opinion No. 94-05

August 22, 1994

OPINION OF: TOM UDALL, Attorney General

BY: Elizabeth A. Glenn, Assistant Attorney General

TO: The Honorable Kip Nicely, State Representative, 1190 Laurel Loop; N.E.
Albuquerque, NM 87122

QUESTIONS

1. Are the fees assessed against New Mexico employers and employees and paid into the workers' compensation administration fund constitutional?
2. May the legislature constitutionally "divert" these funds to another fund or for purposes other than those specified in statute creating the workers' compensation administration fund?

CONCLUSIONS

1. Yes. The fees assessed against employees and employers under the Workers' Compensation Act are constitutional.
2. Yes. The legislature may constitutionally direct money in the workers' compensation administration fund to another fund or for other purposes.¹

FACTS

In 1993, the legislature directed that money in the statutorily-created workers' compensation fund be transferred to the computer systems enhancement fund. 1993 N.M. Laws, Ch. 366, § 1 (A). This raised questions regarding the proper use of money paid by employers and employees into the workers' compensation administration fund, and the legislature's authority to direct that money in the fund be used for purposes other than those specified in the legislation creating the fund.

ANALYSIS

1. Workers' Compensation Administration Fees.

By statute, each calendar quarter, employers covered by the Workers' Compensation Act are assessed a fee of \$2.00 multiplied by the number of their covered employees. NMSA 1978, § 52-5-19 (Cum. Supp. 1993). Employees covered by the Act also are assessed a quarterly fee \$2.00. The fees are collected by the taxation and revenue department which, after deducting an amount of not more than five percent to cover its

administrative costs, pays the fees to the state treasurer. The state treasurer deposits the money into the workers' compensation administration fund to be expended "for the necessary expenses of the workers' compensation administration." **Id.** § 52-5-19(C).

The constitutionality of the fees is almost beyond doubt. The applicable provision of the state constitution provides that "taxes shall be equal and uniform upon subjects of taxation of the same class." N.M. Const. art. VIII, § 1.² The New Mexico Supreme Court has held that under this provision the legislature has "almost unlimited" power to lay an excise tax, "[g]iven a reasonable classification of subjects, ... at least so long as it does not go to the extent of extortion or confiscation." **George E. Breece Lumber Co. v. Mirabal**, 34 N.M. 643, 287 P. 699 (1930), **aff'd without Revenue**, 283 U.S. 788 (1931). **See also Gruschus v. Bureau of Revenue**, 74 N.M. 775, 399 P.2d 105 (1965) (so long as the tax is equal and uniform on all subjects of a class and the classifications for taxation are reasonable, it will not offend either Article VIII, § 1 or the equal protection clause of Article II, § 18 of the New Mexico Constitution). There need be no relationship between the subjects of a tax and the use specified for the proceeds of the tax. **See, e.g., Beatty v. City of Santa Fe**, 57 N.M. 759, 765-66, 263 P.2d 697 (1953) (proceeds of cigarette tax imposed on wholesalers and certain retailers used for playgrounds and similar recreational facilities for juveniles).

Given the broad latitude courts have accorded the legislature in making classifications, **see Beatty**, 57 N.M. at 766-68 (the state may constitutionally tax one class and exempt another if the classification reasonably tends to facilitate the raising of revenue), the class of employers and employees covered by the Workers' Compensation Act (and for whose benefit the Act is administered) would be viewed as a reasonable classification for purposes of the fee. The fact that the fees (taxes) are imposed equally and uniformly on the members of the class bolsters their constitutionality. **See also Department of Labor & Indus. v. Jacobs**, 510 P.2d 818 (Wash. 1973) (special fund created under Washington's Workmen's Compensation Act to accomplish the objectives of the legislation and consisting of contributions by employers and employees was not unconstitutional as a restorative tax or a deprivation of property without due process of law).

Transfer of Workers' Compensation Fee Proceeds.

In 1993, the legislature provided that five million dollars in the workers' compensation administration fund be transferred to the "computer systems enhancement fund." 1993 N.M. Laws, ch. 366, § 1 (A). The computer systems enhancement fund was created in 1992 for the purpose of "enhancing computer programs and systems and providing personnel support for those systems." NMSA 1978, § 6-4-7 (Repl. Pamp. 1992). The fund is administered by the department of finance administration.

New Mexico case law supports the legislature's general authority to appropriate money earmarked for one purpose to a different purpose. The leading case, **State ex rel. Prater v. State Bd. of Finance**, 59 N.M. 121, 279 P.2d 1042 (1955), involved the State Board of Barber Examiners' Fund which was created by statute and consisted of fees

collected by the Board. The Fund was described in the legislation creating it as "a separate and permanent fund for the maintenance of the Board." **Id.** at 124. the Board objected to language in the 1953 Appropriations Act which required that balances remaining in the Fund at the end of the fiscal year revert to the general fund. The Court ruled that the reversion provision was permissible. It observed that the legislature could have ordered fees collected for administering the Board paid to the general fund in the first place and appropriated from there sufficient amounts to administer the Board. Based on this, and quoting extensively from a Texas Supreme Court case, the Court held that it was proper for the legislature to use excess balances in the Barber Examiners' Fund for general purposes: "[t]he propriety and fairness of an enactment authorizing the use of the unexpended balances in these special funds for general purposes present legislative rather than judicial considerations." **Id.** at 1128-29 (quoting **Gulf. Ins. Co. v. James**, 185 S.W.2d 966, 971 (Tex.)) **Grant**, 61 N.M. 287, 299 P.2d 464 (1956) (provision of appropriations act requiring that balances remaining to the credit of the State Board of Accountancy revert to the general fund was constitutional and did not amount to double taxation).

The cases from other states are in accord with the general rule, which permits the legislature to direct money from one special fund to another and different fund or purpose as long as it remains subject to legislative control. **See, e.g. Department of Pub. Welfare v. Haas**, 154 N.E.2d 265, 272 (Ill. 1958) ("[t]he fact that the legislature may provide that amounts, when collected, shall be placed in a certain fund does not ordinarily preclude a later General Assembly from ordering it paid into another fund or from abolishing the fund altogether"). **See general** 81A C.J.S. States § 228. Limits on this authority generally recognized are where a diversion of funds would conflict with a constitutional provision,³ impair the obligation of a contract or constitute a breach of trust. **See, e.g., Michigan Sheriffs' Ass'n v. Michigan Dep't of Treasury**, 255 N.W.2d 666, 672 (Mich. Ct. App. 1977).⁴ In addition, some courts have looked to statutory language limiting the use of funds to an exclusive purpose. **E.G., City of Shelbyville v. Commonwealth**, 706 S.W.2d 426 (Ky. Ct. App. 1986) (holding that the legislature improperly appropriated money to reconstruct a dam from fish and wildlife agency funds which, by statute, could "only be used" for regulation or protection of fish, birds or wild animals).⁵

Based on the above principles, it appears that the legislature had sufficient authority to transfer money from the workers' compensation administration fund to the computer systems enhancement fund. First, nothing suggests that the transfer violates any contractual or trust obligation represented by the workers' compensation administration fund. Second, as with the fund administered by the Barbers' Examiners' Board in **Prater**, the legislature could have provided that the workers' compensation administration fees be paid directly into and appropriated from the general fund instead of establishing a separate workers' compensation administration fund. Third, we are not aware of any evidence that amounts appropriated to the workers' compensation administration from the workers' compensation administration fund have been insufficient and hindered its ability to function.⁶ Finally, although Section 52-5-19 specifies that the workers' compensation administration fund is to be used for necessary

expenses of the workers' compensation administration, it does not provide that the funds will be used for no other purposes or otherwise indicate that the specified use is exclusive.

ATTORNEY GENERAL

Tom Udall, Attorney General

GENERAL FOOTNOTES

[n1](#) You also requested information about the Employers Mutual Company and its constitutionality. We refer you to the Employers Mutual Company Act and opinions issued by this office which interpret the Act. Ag Op. No. 90-25 (1990); advisory letter to the Honorable Martin J. Chavez, State Senator from Marian Matthews Deputy Attorney General (Feb. 11, 1991). You will note that amendments to the statute enacted in 1991 addressed the special laws problem raised in our February 11, 1991 advisory letter. Otherwise, the gist of the opinion issued during the previous administration and the more recent letter is that the legislation creating the Employers Mutual Company is constitutional.

[n2](#) For purposes of this opinion, we assume that the payments in question are imposed for revenue-gathering purposes, and thus would be characterized as "taxes" subject to the applicable requirements of the constitution's tax provisions. In contrast, **see, e.g., Apodaca v. Wilson**, 86 N.M. 516, 525, 525 P.2d 876 (1974) (holding that water and sewer charges constituted payment for services rendered by a municipality and thus were not subject to the constitutional and statutory restrictions applicable to municipal taxes).

[n3](#) For example, Article XI, Section 8 of the South Dakota Constitution provides that the proceeds from most gasoline excise taxes "shall be used exclusively for the maintenance, construction and supervision of highways and bridges of this state."

[n4](#) As examples of funds constituting a contractual obligation or trust, the Michigan Court of Appeals mentioned retirement funds and funds obtained to repay a specific indebtedness. **Michigan Sheriffs' Ass'n**, 255 N.W.2d at 672.

[n5](#) **But see Michigan Sheriffs' Ass'n**, 255 N.W.2d at 671, n. 11 (observing that even where the legislature has imposed restrictions on the types of appropriations or expenditures mad form certain funds, "absent an element of contract or trust accompanying the collection of such funds, they remain subject to transfer by a subsequent legislature").

[n6](#) If the workers' compensation administration did not receive sufficient appropriations from the workers' compensation administration fund to perform its functions, the appropriation to the computer systems enhancement fund might be open to challenge on the grounds that the transfer did not properly consist of excess or surplus funds not

needed for the workers' compensation administration. **See Prater**, 59 N.M. at 127-28; **Grant**, 61 N.M at 289-90.