

LETTER OPINION
2000-L-62

April 24, 2000

Honorable Robert R. Peterson
State Auditor
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Mr. Peterson:

Thank you for your letter asking whether North Dakota's institutions of higher education violate Article X, Section 18 of the North Dakota Constitution when they expend funds to pay contractors and a related nonprofit alumni association or foundation obtains unreimbursed benefits from the contract or when no-cost services for office space, utilities, telephone, janitorial, payroll, or accounting services are provided to a related nonprofit alumni association or foundation.

Public officials and state agencies have only such authority as expressly given them by the constitution and statutes, together with those powers and duties which are necessarily implied from an express grant of authority. American Federation of State, County, and Municipal Employees v. Olson, 338 N.W.2d 97 (N.D. 1983).

Article X, Section 18 of the North Dakota Constitution provides:

The state, any county or city may make internal improvements and may engage in any industry, enterprise or business, . . . but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation.

The North Dakota Supreme Court has construed the substantially equivalent predecessor to Article X, Section 18 as not prohibiting the state or a political subdivision from loaning or giving its credit or making donations in connection with the state or political subdivision's operation of any authorized industry, enterprise, or business. Rather, what the section does prohibit is for the state or a political subdivision to "otherwise" loan or give its credit or make donations. Gripentrog v. City of Wahpeton, 126 N.W.2d 230, 237-38 (N.D. 1964).

For purposes of the section, the term "public purpose" means a purpose that has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents within a given political subdivision. 126

Honorable Robert R. Peterson
April 24, 2000
Page 2

N.W.2d at 237. An enterprise means any activity which does not violate the North Dakota Constitution or statutes and which is of some scope, complication, or risk. 1993 N.D. Op. Att'y Gen. 40, 42.

A donation means the "act of giving something to a fund or cause." The American Heritage Dictionary 417 (2d coll. ed. 1991). The item given for purposes of a donation could include money, items of monetary value, time, the use of equipment and resources, or other contributions. 1996 N.D. Op. Att'y Gen. L-147 (August 30, 1996, letter to City Attorney Fitzner).

The uncompensated provision of services was discussed in an advisory letter from this office to the chairman of the North Dakota Administrative Committee on Veterans Affairs. The administrative committee chairman had asked whether the commissioner of the Department of Veterans Affairs could also serve as the executive director of the North Dakota Veterans Coordinating Council, which is a nonprofit private organization promoting veterans benefits. It was disclosed that the commissioner of the Department of Veterans Affairs would perform the functions as executive director of the Coordinating Council using state services and property in the form of secretarial services, copying, stationery, and miscellaneous supplies to carry out the functions as the director of the private organization. The letter from this office advised that the commissioner of the Department of Veterans Affairs could not lawfully serve as the executive director of the Veterans Coordinating Council during state duty hours and utilizing state services and supplies under Article X, Section 18 of the North Dakota Constitution. In that letter it was stated:

In discussing this matter with . . . the Office of Management and Budget, . . . indicated to me that OMB is very sensitive to situations where state employees, services, or supplies are used for the benefit of private individuals or associations. I wholeheartedly agree . . . on this and further add that we must be extremely careful in this regard.

Letter from Assistant Attorney General Robert J. Udland to Jack Hilleboe (July 30, 1984).

I recently summarized the requirements for making an authorized donation in an opinion relating to a proposed donation to a nonprofit women's military memorial foundation. After reviewing the constitution and its interpretation, I stated:

Although it could be argued that contributing funds to the Foundation constitutes a public purpose, it is not done for the reasonable support of the poor. Accordingly, it would be a violation of Article X, Section 18 of the North Dakota

Honorable Robert R. Peterson
April 24, 2000
Page 3

Constitution for the State of North Dakota, through its legislative or executive branch, to donate funds to the Women in Military Service for America Memorial Foundation, Inc., unless the donation was made in connection with an enterprise that is authorized by the Legislature and serves a "public purpose."

1998 Op. Att'y Gen. 116, 117-118. Thus, an enterprise must be authorized by the Legislature and serve a public purpose.

Statutorily authorized arrangements by universities with alumni organizations are rare. Such entities are mentioned in a note following N.D.C.C. § 15-10-17 and in N.D.C.C. §§ 15-11-22, 15-11-26, and 15-11-29. The State Board of Higher Education may receive gifts according to N.D.C.C. § 15-10-12, but that section doesn't describe a program or relationship with donors.

Therefore, the Legislature has not explicitly established an enterprise that allows North Dakota institutions of higher education to make donations of money or services to alumni associations or foundations.

However, relationships between higher education institutions and their respective alumni organizations may constitute exchanges for value, thus removing an institution's payment for or provision of services for the alumni organization from the category of a donation.

The North Dakota Supreme Court's interpretation of Article X, Section 18 has included review of circumstances that do not constitute a donation under that section. The court has stated:

When construing this provision [Article X, Section 18], this Court has distinguished between a "donation" and an exchange for value.

Adams County Record v. Greater North Dakota Ass'n, 529 N.W.2d 830, 835 (N.D. 1995).

On October 14, 1999, you issued a financial audit report on the North Dakota University System. Your report, at note 16 thereof, states:

The related and affiliated organizations are separate North Dakota nonprofit corporations whose sole functions are to provide financial and other assistance to the institutions. The organizations conduct fund-raising activities and receive moneys and pledges for institutionally sponsored programs. As such, the institutions neither display nor disclose pledges. The financial activity of the organizations is not reflected in the accompanying financial statements. The

Honorable Robert R. Peterson
April 24, 2000
Page 4

assets, revenue, ar (sic) program service expenditures for each organization and the free services each institution provides as of June 30, 1999, are shown below.

Following that note, you listed all 11 institutions of higher education and their respective alumni organizations' assets, revenues, and expenditures for 1999. The expenditures were for the higher education institutions and amounted to more than \$10,000,000 for 1999. You also charted nine of the institutions of higher education and noted with check marks the kind of services the institutions provided to the alumni organizations. The services provided were predominantly office space, utilities, accounting, and payroll.

Contracts are either express or implied. N.D.C.C. § 9-06-01 provides:

A contract is either express or implied. An express contract is one the terms of which are stated in words. An implied contract is one the existence and terms of which are manifested by conduct.

Express contracts and implied contracts are based on the mutual intentions of the parties. Express contracts are based on the express oral and written assent of the parties, and implied contracts are based on the surrounding facts and circumstances to determine whether the parties actually intended to enter into a contract but failed to articulate their promises. Jerry Harmon Motors, Inc. v. Heth, 316 N.W.2d 324, 327 (N.D. 1982). "The main difference between an express contract and an implied contract in fact is that in the former the parties arrive at their agreement by words, either oral or written, while in the latter their agreement is arrived at by a consideration of their acts and conduct. In both of these instances there is, in fact, a contract existing between the parties, the only difference being in the character of the evidence necessary to establish it. To constitute either the one or the other, the parties must occupy toward each other a contract status, and there must be that connection, mutuality of will, and interaction of parties.'" Thiele v. Security State Bank of New Salem, 396 N.W.2d 295, 298 (N.D. 1986), quoting Bismarck Hosp. Ass'n v. Burleigh County, 146 N.W.2d 887, 892-93 (N.D. 1966).

As you noted in your October 14, 1999, audit report, the "sole functions (of the related and affiliated alumni organizations) are to provide financial and other assistance to the institutions." It would not be realistic to think that institutions of higher education could receive the large amounts of money that they do from the alumni organizations, and for those institutions in many cases to provide office space and utilities, accounting services, and mailing services, without there being at least an implicit agreement between them to accomplish these

Honorable Robert R. Peterson
April 24, 2000
Page 5

tasks. In the absence of a written agreement, these arrangements must be implied verbal arrangements evidenced by acts and conduct.¹

Prior to your October 14, 1999, financial audit noted above, you issued a performance audit of the higher education personnel systems on January 7, 1999. After relating two personnel relationships, you made your recommendation 3-6, on page 14 of your report, as follows:

We recommend the State Board of Higher Education develop a policy regarding the relationships of foundations to the campuses. The policy should address, at a minimum:

- a. Foundation employees and their relationship to the institutions;
- b. Payroll relationships between foundations and institutions;
- c. Sharing of resources between foundations and institutions; and
- d. Institution employees performing work for foundations.

In apparent response to your recommendation, the State Board of Higher Education adopted its policy no. 340.2 Foundations, effective on November 19, 1999. Policy no. 340.2 recognizes the importance of official relationships between higher education institutions and their various alumni foundations. The State Board of Higher Education policy is to promote and strengthen the operation of foundations and enhance a sound and a mutually supportive relationship between the institutions and their related foundations. The board policy encourages support of foundation operation and calls for each institution president to enter into written operating agreements with their related foundations. This agreement is to include a description of the services and benefits the

¹ The duration of the agreements is unknown and unstated, but because no time is apparently provided for their termination, they could be terminated at any time. To be invalid under the statute of frauds requiring written contracts, the contract must be impossible of performance within one year. N.D.C.C. § 9-06-04(1). If there is any possibility that an oral contract can be completed in one year, the contract is not within the statute of frauds even though it is clear that the parties may have intended and thought it probable the contract would extend over a longer period and even if it does so extend. Bergquist-Walker Real Estate v. William Clairmont, 333 N.W.2d 414, 418 (N.D. 1983). An oral agreement is not within the statute of frauds where it is terminable by either party at any time. North American Pump Corp. v. Clay Equipment Corp., 199 N.W.2d 888, 894 (N.D. 1972).

Honorable Robert R. Peterson
April 24, 2000
Page 6

institution and foundation provide each other and any payments made including use of institution facilities, equipment, and staff in foundation operations. It appears the State Board of Higher Education is aware of the need for relationships with its various foundations that include an exchange for value.

In the time needed for higher education institutions to entirely fulfill the State Board of Higher Education policy no. 340.2, even without formal written agreements, the relationships you noted in your audit reports disclose recognition by the institutions that substantial benefits are being provided by the alumni organizations and that, in exchange, the institutions provide some support to further the efforts of those organizations. Where these relationships are an exchange for value received, payments by the university for certain related mutually beneficial contract services or the provision of cost-free rent and utilities are not in violation of Article X, Section 18 of the North Dakota Constitution.

Sincerely,

Heidi Heitkamp
Attorney General

rel/pg