

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 98-F-23

Date Issued: July 10, 1998

Requested by: Senator Donna Nalewaja

- QUESTION PRESENTED -

Whether the legislative or executive branch of the State of North Dakota can donate a sum of money to the non-profit foundation entitled Women in Military Service for America Memorial Foundation, Inc.

- ATTORNEY GENERAL'S OPINION-

It would violate Article X, Section 18 of the North Dakota Constitution for the legislative or executive branch of the State of North Dakota to donate a sum of money to the non-profit foundation entitled Women in Military Service for America Memorial Foundation, Inc., unless the donation is made in connection with an enterprise that is authorized by the Legislature and serves a public purpose.

- ANALYSES -

The constitutional authority of a state agency to donate funds to a private corporation was summarized in a 1993 Attorney General's opinion.

The use of public funds is restricted by a number of state and federal constitutional provisions including Article X, Section 18 of the North Dakota Constitution, the Fourteenth Amendment of the United States Constitution and its North Dakota counterpart, Article I, Section 16.

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 Article X, Section 18 as not prohibiting a state or 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. Gripentrog v. City of Wahpeton, 126 N.W.2d 230, 237-38 (N.D. 1964). Rather, what it does prohibit is for the state or political subdivision to "otherwise" loan or give its credit or make donations. Id. . . .

Under the Fourteenth Amendment of the United States Constitution, a state may not "deprive any person of life, liberty or property without due process of law." North Dakota's constitution contains a similar provision in Article I, Section 16. Under these constitutional provisions, a state may expend public funds only for public purposes. Green v. Frazier, 253 U.S. 233 (1920). The legality of a given expenditure under these two due process constitutional provisions thus turns on whether it is primarily for a private or public purpose.

"A public purpose or public business 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." Gripentrog v. City of Wahpeton, 126 N.W.2d 230, 237 (N.D. 1964) (quoting Green v. Frazier, 176 N.W. 11 (N.D.), aff'd, 253 U.S. 233 (1920)). Although each case is dependent upon its own unique facts and circumstances, courts will generally defer to a legislative determination that a particular expenditure will promote the public welfare. Green v. Frazier, 253 U.S. 233 (1920).

1993 N.D. Op. Att'y Gen. L-313, L-314 to L-315.

The Women in Military Service for America Memorial Foundation, Inc., is a non-profit organization. Funds donated to the Foundation are used to maintain a memorial located at Arlington Memorial Cemetery honoring all women who have served or are serving in the Armed

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Forces, furnish and equip the Education Center located at the memorial, provide education regarding the memorial and the contributions of servicewomen throughout our history, provide tours of the memorial, and pay salary of staff. 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 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." See generally 1993 N.D. Op. Att'y Gen. L-313 (the Department of Veterans Affairs cannot make a donation to assist a private veterans organization); 1993 N.D. Op. Att'y Gen. L-292 (using revenues from the city sales tax to reduce individual property taxes would have the effect of transferring to property owners moneys held for all the people of the city and violate Article X, Section 18); 1985 N.D. Op. Att'y Gen. 43 ("[A] city may not contribute money to a private nonprofit corporation in order to assist the corporation in constructing the civic facility that the city will not own or control."); Letter from Attorney General Nicholas Spaeth to Kidder County State's Attorney Jerry Renner (Aug. 19, 1985) (a city park board cannot expend public monies to assist a nonprofit corporation in operating a swimming pool); 1968-1970 N.D. Op. Att'y Gen. 92 (county cannot contribute to a worthwhile county project); 1968-1970 N.D. Op. Att'y Gen. 507 (townships cannot make donations to entities such as the Red Cross or American Cancer Society); see also Solberg v. State Treasurer, 53 N.W.2d 49 (N.D. 1952) (a state transfer of a 50% mineral interest reserved in property without consideration would be an unconstitutional gift); Herr v. Rudolf, 25 N.W.2d 916 (N.D. 1947) (a transaction involving the sale of state owned property for less than what could be obtained for the property violates Article X, Section 18).

As stated above, courts will generally defer to a determination by the Legislature that a particular enterprise, and loans or donations thereto, serves a public purpose. Green, 253 U.S. at 239. Legislative enactments are presumed to be constitutional. N.D.C.C. § 1-02-38. The opinions cited in the previous paragraph were based on the absence of statutory authority to engage in a particular enterprise, and did not address whether a particular enterprise served a public purpose. Any legislation enacted to authorize a donation to the Foundation will have to serve a "public purpose" to survive constitutional scrutiny.

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- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.

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