

**LETTER OPINION**  
**93-L-313**

November 3, 1993

Mr. Allen Koppy  
Morton County State's Attorney  
210 Second Avenue NW  
Mandan, ND 58554

Dear Mr. Koppy:

Thank you for your September 23, 1993, letter regarding whether operating expense monies appropriated to the Department of Veterans Affairs can be used to match monies from private sources for the purchase of vans which would then be "donated" to the federal government for purposes of transporting veterans from various locations within North Dakota to VA medical facilities.

North Dakota Century Code (N.D.C.C.) ? 37-18-04 provides that "[i]t is the duty of the commissioner [of veterans affairs] to coordinate agencies or instrumentalities of the state set up to render service and benefits to returning veterans [and] to have charge of and implement programs and benefits authorized by statute." Further, it is the duty of the commissioner of veterans affairs "to assist, supervise, advise and direct the work of county service officers." Accordingly, questions such as those raised in Mr. Otto's September 9, 1993, letter to you should in the first instance be directed to the Commissioner of Veterans Affairs. However, in discussions with Commissioner Kane, it was indicated that the scenario outlined in your letter was being considered and was a subject on which some guidance would be appreciated.

Under the scenario described in your letter and as further described by Commissioner Kane, the Department of Veterans Affairs would utilize monies appropriated

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for operating expenses (transportation program) to participate in the purchase of vans in conjunction with private veterans' organizations. Title to the vans would initially lie with the private veterans' organizations which would then donate the vans to a VA medical facility. The vans would be used by the VA medical facility to transport North Dakota veterans to and from the VA facility. After the vans had outlived their useful life, they would be returned to the veterans' organization which presumably would use them as "trade-ins" for purposes of purchasing new vans to once again be donated to the VA medical facility.

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.<sup>1</sup>

The North Dakota Supreme Court has construed Article

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<sup>1</sup>Originally, this constitutional provision read: "Neither the state nor any county, city, township, town, school district or any other political subdivision shall loan or give its credit or make donations to or in aid of any individual, association or corporation, except for necessary support of the poor, nor subscribe to or become the owner of the capital stock of any association or corporation, nor shall the state engage in any work of internal improvement unless authorized by a two-thirds vote of the people."

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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, 237-238 (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. Also, this office has previously concluded that governmental entities are not individuals, associations, or corporations to which gifts are prohibited under Article X, Section 18 of the North Dakota Constitution. See 1983 N.D. Op. Att'y Gen. 53; Letter from Attorney General Nicholas Spaeth to Mayor Belisle, (April 7, 1992).

Under the Fourteenth Amendment to 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. Frasier, 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 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 at 237, (N.D. 1964) quoting Green v. Frasier, 176 N.W. 11 (N.D. 1920) affirmed 253 U.S. 233. 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. Frasier, 253 U.S. 233.

In your letter, you indicate that public funds will be matched with private funds to purchase vans which will then be donated to the federal government. However, you do not indicate what specific arrangements, contractual or otherwise, will be reached between the Department of Veterans Affairs, the private veterans' organizations, and the federal government. It is

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clear that the Department of Veterans Affairs cannot simply make a donation to assist a private veterans' organization in such a project. See generally 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 a civic facility that the city will not own or control.") Letter from Attorney General Nicholas Spaeth to Kidder County State's Attorney Jerry Renner, (August 19, 1985) (concluding that 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.) (Copies attached.)

Furthermore, the statutory authority for the Department of Veterans Affairs to engage in transportation program matters is within the \$450,000 operating expense amount provided in the operating expense line item in 1993 N.D. Sess. Laws ch. 30, § 1, subdivision 2. Legislative history indicates that a \$50,000 amount within that line item is for the transportation program. The authority for engaging in the transportation program was provided by the Legislature as an operating expense appropriation. Operating expense appropriations are not expendable as grants (which are contained in the grants line item).

It is therefore my opinion that the Department of Veterans Affairs is not authorized to make grants or donations with the \$50,000 transportation program appropriation appearing in its operating expense line item.

It may be that some type of arrangement between the respective parties could perhaps be reached to avoid any constitutional or statutory limitations. However, before any alternative arrangements for expenditure of the transportation program appropriation are made, the specific proposal should be reviewed for legal sufficiency with counsel from this office.

Sincerely,

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Heidi Heitkamp  
ATTORNEY GENERAL

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Enclosure

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