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July 2, 1993

The Honorable Glen B. Gainer, III
State Auditor
State Capitol, Room W-100
Charleston, West Virginia 25305

Dear Auditor Gainer:

By letter dated February 24, 1993, you requested a formal opinion from this office regarding reimbursement of educational expenses to State employees. Your letter states, in part:

I am of the opinion, in reliance on a 1965 Attorney General's Opinion (51 Op. Atty. Gen. 575), that reimbursement cannot be made to these individuals **unless there is specific and express statutory authority to pay for such course expenses.** I realize that some statutory sections authorize training but such sections provide no express authority for the State to pay for the training.

Therefore, you have asked us to answer the following question: "Can reimbursements be made by the State to its employees for educational expenses absent express statutory authority authorizing the payment of such expenses?" You have also asked us to determine whether or not the State is responsible for the payment of educational expenses incurred by certain named employees of the State Board of Investments, the Division of Natural Resources, and the Commission on Aging. Before we begin our discussion, a brief citation of relevant authorities would be helpful.

West Virginia Constitution, art. X, § 3 provides:

No money shall be drawn from the treasury but in pursuance of an appropriation made by law, and on a warrant issued thereon by the auditor; nor shall any money or fund be taken for any other purpose than that for which it has been or may be appropriated, or provided. A complete and detailed statement of the receipts and expenditures of the public moneys, shall be published annually.

West Virginia Constitution, art. X, § 6 provides:

The credit of the State shall not be granted to, or in aid of any county, city, township, corporation or person; nor shall the State ever assume, or become responsible for the debts or liabilities of any county, city, township, corporation or person; nor shall the State ever hereafter become a joint owner, or stockholder in any company or association in this State or elsewhere, formed for any purpose whatever.

West Virginia Code § 12-3-5 (1991) provides:

When appropriation has been made by law, subject to the order or payable on the requisition of a particular officer, board or person, the order or requisition in writing of such officer, board, or person shall be sufficient authority to the auditor to issue his warrant for the same or any part thereof. Provided, that the appropriation has not expired and the amount thereof shall not be exceeded.

In a November 16, 1965 published opinion, former Attorney General C. Donald Robertson was asked to determine the propriety of using Federal funds earmarked for "state planning purposes" for an "in-service training program" which would defray the expenses incurred by a trainee of the Planning and Research Division of the Department of Commerce to attend graduate school while working part-time for the agency. The trainee would work for the state planning program during the summer months, and for a minimum of two years after graduation. The Attorney General's Opinion determined that no statute authorized the Department of Commerce to establish such a program, and disapproved the expenditure. The Attorney General observed that "[t]he fact that the funds are Federal funds in no way enlarges the authority of the Commerce Department or any other department to expend such," and suggested that the Department seek legislative authority for such expenditures in the future. 51 Op. Att'y Gen. at 579. The Opinion noted that:

The expenditure of State funds for the purpose of training an employee so as to enable him to better perform his duties has heretofore been recognized as being for a public purpose, and such expenditures do not constitute a grant of the credit of the State to a private person where the statute authorizes the same. For example, Code 18-2-2 authorizes the West Virginia Board of Education to grant a sabbatical leave to a professor from a State college for the purpose of pursuing graduate studies, upon condition that he will

return and resume his employment in the State upon the completion of the same. Also, Code 9-3-11 authorizes the Department of Welfare to provide specialized instructions for its employees, and payment therefor, as a part of regular employment.

In State ex rel. West Virginia Board of Education v. Sims, 139 W. Va. 802, 81 S.E. 2d 665, our court approved the granting of sabbatical leave to a professor of a state college during which time he was paid a salary, and he entered into an agreement to return to said college as a teacher upon the completion of his studies or else to repay the money advanced to him. . . . A similar conclusion was reached in State ex rel. Roth v. Sims, 139 W. Va. 795, 81 S.E. 2d 670 [employee of the Department of Public Assistance]. In the absence of a statute expressly authorizing such expenditures of public funds by the State Board of Education, our court's conclusion would doubtless have been to the contrary.

51 Op. Att'y Gen. at 577-78. The issue in each of the above cases was whether the statutes authorizing payment of such employment-related expenses constituted a pledge of the credit of the State for the benefit of a private individual, in violation of W. Va. Const. art. X, § 6. The West Virginia Supreme Court of Appeals found in both instances that the expenditures were for a public purpose, and ordered the Auditor to honor the requisitions for payment.

In Board of Education v. Sims, the Court approved payment from the college's personal services appropriation to a faculty member while on sabbatical leave to engage in graduate study. In Roth v. Sims, the Court approved payment from federal funds for an employee of the Department of Public Assistance to obtain technical and specialized training in child welfare services, pursuant to a plan adopted and approved by the state and federal Governments, and in accordance with state and federal legislation. Although no special appropriation had been made for this purpose, the Court said that where the statute authorizing the training provided that employees be compensated "as a part of regular employment," a general appropriation for the purpose of paying employees of the Department was sufficient.

The West Virginia Supreme Court of Appeals analyzed the public purpose doctrine as reflected by the above-cited cases in State ex rel. Appalachian Power Company v. Gainer, 149, W. Va. 740, 143 S.E.2d 351 (1965):

State ex rel. Roth v. Sims, 139 W. Va. 795, 81 S.E.2d 670, involved payment of public funds by the state director of public assistance to enable a state employee to study at the University of North Carolina in certain technical and specialized fields relating to child welfare. In holding that such an expenditure was not unconstitutional as an expenditure of public funds for private purposes, the Court stated (139 W. Va. 799, 81 S.E.2d 673): "It is true, of course, that the employee will receive a special benefit from the expenditure. That, however, is not the test. We have no difficulty in finding that the funds are to be expended for a public purpose." In State ex rel. West Virginia Board of Education v. Sims, 139 W. Va. 802, 81 S.E.2d 665, the Court held that the granting of sabbatical leaves to faculty members of state educational institutions, pursuant to an act of the legislature, to engage in graduate study and research to improve their teaching ability and the payment of public funds to such persons for that purpose were not violative of Constitution, Article X, Section 6. The court held that expenditure of public funds in such circumstances was "for a public purpose," notwithstanding the incidental personal benefit to the individuals receiving such sabbatical leaves.

Id. at 759-60, 143 S.E.2d at 364.

Early holdings of the West Virginia Supreme Court of Appeals on the issue of employee expenses in general were very restrictive, as illustrated by Syllabus point 1 of State ex rel. Carman v. Sims, 145 W. Va. 289, 115 S.E.2d 140 (1960):

In the absence of constitutional or statutory provisions directly or by necessary implication conferring such right, a State official or employee has no right to reimbursement for expenses incurred in the course of his official duties. [Emphasis added.]

However, the Court in the Carman case approved a claim by State employees for expenses incurred in traveling to and from their homes and the State Capitol, where the statute on travel expenses was silent but regulations promulgated by the Board of Public Works provided for reimbursement of such expenses when their homes were designated as their "official headquarters." The Court's reliance on the implied authority of the agency to promulgate travel regulations that would permit such reimbursements laid the groundwork for later interpretations which expanded the scope of its earlier decisions.

Although the 1965 Attorney General's opinion cited in your letter could be interpreted to foreclose such reimbursements in the absence of express statutory authority, we believe such a restrictive interpretation would be too narrow, particularly in light of decisions of the West Virginia Supreme Court of Appeals rendered since said opinion was issued.

In a February 2, 1954 Opinion, the Attorney General issued the following guidelines regarding the duty of the Auditor to issue a warrant for or to refuse payment of a requisition for expenditure of public funds:

It is the duty of the Auditor to refuse payment of a requisition for expenditure of public funds,

- a. if there is no appropriation for the proposed expenditure;
- b. if there is no statute, State or Federal, authorizing the proposed expenditure;
- c. if the statute authorizing the proposed expenditure is unconstitutional;
- d. if the appropriation for the proposed expenditure is not for a public purpose;
- e. if the requisition for the proposed expenditure shows on its face that it is for a public or other lawful purpose, but the Auditor has reasonable proof available that, in fact, the money has been spent, or is proposed to be spent, for personal or private gain.

45 Op. Att'y Gen. 583, 601 (1954). These guidelines were cited with approval by the West Virginia Supreme Court of Appeals in State ex rel. Foster v. Gainer, 166 W. Va. 88, 272 S.E.2d 666 (1980). In that opinion, the Court noted that:

Requisitions for annual dues in a voluntary association properly authorized by a department for a public purpose are to be paid by the auditor. State ex rel. Board of Governors of West Virginia University v. Sims, 140 W. Va. 64, 82 S.E.2d 321 (1954). The auditor is not to substitute his opinion or judgment for that of a state board, officer or department if it acts by statutory authority. State ex rel. West Virginia Board of Education v. Sims, 139 W. Va. 802, 81 S.E.2d 665 (1954).

Foster, 166 W. Va. at 92, 272 S.E.2d at 668.

In the Foster case, the Court approved an advance payment of expert witness fees for an indigent criminal defendant, where a statute authorized reimbursement of such expenses, an appropriation was made to pay them, and the proper authority had approved the expenditure. The Court found a constitutional requirement of due process and equal protection underlying the expenditure, a clear public purpose in equal justice without regard to wealth, and no proof that the money would be spent for private gain.

On the subject of educational expenses, many State agencies have been granted specific statutory authority to expend funds for employee training and education. For example, W. Va. Code § 9-2-6(7) (1990) gives the Commissioner of the Division of Human Services the authority to "[p]rovide at department [division] expense a program of continuing professional, technical and specialized instruction for the personnel of the department [division]." West Virginia Code § 18B-7-2 (1991) is the present authority for granting sabbatical leaves to higher education faculty members "for the purpose of permitting them to engage in graduate study, research or other activities calculated to improve their teaching ability." Under this statute, "[c]ompensation to a faculty member on sabbatical leave shall be paid from the regular personal services appropriations of the institution where employed." Id.

Pursuant to W. Va. Code § 16-1-20 (1991):

To insure adequate standards of public service, the state director of health is authorized to provide technical and specialized instruction for employees of the state department of health.

If upon review of the personnel records of any employee of the state department of health, the director is of the opinion that it would be in the best interest of the state department of health to provide any such employee with additional training or instruction, not to exceed nine months in any four-year period, in the field or vocation in which said employee is engaged, the director is authorized, upon approval of the governor, to direct that such employee obtain said additional training or instruction at such place as the director may deem suitable. Designated attendance of said employees shall be compensated for as a part of regular employment. The director is further authorized to pay out of federal funds and such state funds as are available to match such federal funds, any required tuition or enrollment fees.

Other agencies have been granted the authority to conduct programs for educating members of the general public, as well as their own employees. Pursuant to W. Va. Code § 20-1-7(28) (1989), the director of the Division of Natural Resources may "[c]onduct schools, institutions and other educational programs, apart from or in cooperation with other governmental agencies, for instruction and training in all phases of the natural resources programs of the state."

Finally, the Director of the Division of Personnel is directed by W. Va. Code § 29-6-7(b)(6) (1992) to "[d]evelop programs to improve efficiency and effectiveness of the public service, including, but not limited to, employee training, development, assistance and incentives;" and by W. Va. Code § 29-6-7(b)(12) (1992) to "[a]ssess cost for special or other services." West Virginia Code § 29-6-23 (1992) creates a special revolving fund in the State treasury for the Division of Personnel. Pursuant to that statute:

Each agency, department, division or unit of state or local government served by the division of personnel is hereby authorized and directed to transmit to the division for deposit in said special fund the charges made by the division of personnel for personnel services rendered, such charges to be those fixed in a schedule or schedules prepared by the director and approved by the secretary of the department of administration. Disbursements from the fund shall be made in accordance with an approved expenditure schedule as provided by article two [§ 5A-2-1 et seq.], chapter five-a of this code and shall be made under the direct supervision of the director.

The above-quoted statutes evidence a clear legislative intent that employee education and training can, in appropriate circumstances, be considered a valid purpose for which public funds may be expended. In this regard, it seems immaterial whether this instruction is provided by the employing agency, the Division of Personnel, a trade school or an institution of higher education. It would also not seem to matter whether the expense is directly incurred by the agency or reimbursed to the employee.

By an informal opinion letter dated May 23, 1989, this Office approved reimbursement of a manager in the Treasurer's office for the expenses of a graduate level class in management at the University of Charleston, even though no statute gave the Treasurer specific authority to reimburse employees for educational expenses. At that time, we concluded that specific statutory authority was

not necessary to authorize an employee to acquire job-related training or education at the expense of the State of West Virginia. In examining the provisions of W. Va. Const. art. X, § 3, and W. Va. Code § 12-3-1 et seq., our letter stated in relevant part as follows:

In construing a statute, custom and usage established over time should be used as an aid to understanding the statute. Heckler [sic] v. McCuskey, [79] W. Va. [129], 365 S.E.2d 793 (1987).

Each Officer and administrative agency provides the Commissioner of Finance and Administration with its budget request. The Commissioner of Finance and Administration submits these requests to the Governor who certifies them to the Legislature either modified or not. The Legislature conducts hearings and passes a budget bill that is loosely classified. From time immemorial, the personnel appropriation and the current expense appropriation of the budget has been construed to permit expenditures by officers of administrative agencies for the training of their personnel. The particular type of training as well as the manner of providing for training have been left to the sound discretion of the Officer or the Agency.

Letter of May 23, 1989, at 3.

We are of the opinion that neither specific statutory authority for such reimbursement, nor a special appropriation for payment thereof, is necessary to finding that employee educational expenses are reimbursable as for a "public purpose." Rather, the issue must be for what purpose the expenses were incurred, and whether the agency's statutory mission will be directly advanced by the education and training. In such a case, authority for such expenditures may be implied. It does not matter whether or not the employee will incidentally benefit from the education, if it will enable him or her to better perform the responsibilities of the public employment.

We conclude that training that is necessary to maintain an employee's current professional license (where that license is necessary to perform his or her public duties), or to enable him or her to remain current in a specialized field necessary to his or her current responsibilities, is clearly a reimbursable expense that serves a legitimate public purpose. However, we would draw the line at those educational expenses calculated to enable a person to become qualified for a different position, or to help him or her obtain employment in another field. Neither would the cited

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authorities support the payment of expenses of a temporary employee for education or training necessary to qualify him or her for a permanent position. Education or training expenses, to be reimbursable, must be directly related to maintaining or improving the public employee's performance of his or her existing responsibilities. There must be appropriated funds (in a personal services account or otherwise) from which to pay them, and approval by the proper authority within the agency or department. If these requirements are met, there is no basis for the auditor to challenge such payments.

Very truly yours,

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL

By 
DAWN E. WARFIELD
DEPUTY ATTORNEY GENERAL

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