ATTORNEY GENERAL OPINION NO. 95-07

To: Honorable Tom Dorr
Idaho House of Representatives
160 Hughes Lane
Post Falls, ID 83854

Honorable Gordon F. Crow
Idaho State Senate
10202 Hillview Drive
Hayden Lake, ID 83835

Per request for Attorney General's Opinion from Representative Dorr dated September 14, 1995, and Senator Crow dated September 14, 1995, and as expanded by request of Senator Crow dated October 4, 1995.

QUESTIONS PRESENTED

1. May the State of Idaho "loan" state employees to the United Way for a period of approximately eight (8) weeks to assist the United Way in its annual fundraising campaign?

2. What are the limitations on loaning and/or sharing State of Idaho employees or facilities to or with private charitable foundations?

CONCLUSION

1. Loaning public employees to the United Way for eight (8) weeks while continuing to pay their salaries and benefits from state funds violates the "public purpose doctrine."

2. State of Idaho employees or facilities may not be shared with or loaned to private charitable foundations unless such action serves a public purpose and is directly related to a function of government. Moreover, such arrangements will be most likely to withstand a judicial challenge if the foundation involved exists for the benefit of the state agency and performs activities which the state agency can conduct. Additionally, there should be state control, whether contractual or otherwise, to ensure that the activities of the charitable foundation continue to meet the public purpose requirement.

ANALYSIS

1. State Participation in the United Way "Loaned Executive" Program

The United Way conducts a "loaned executive" program. Corporations and other entities "loan" upper-level executives to the United Way for approximately eight weeks to assist with its annual fundraising campaign. The executives are given administrative leave with pay. The State of Idaho has participated in this program and has, each year, loaned, on a full-time basis, two or three public employees to the United Way. As with employees from the private sector, these public employees continue to receive their salaries and benefits during their eight-week leave.

You have requested an opinion regarding the legality of this practice. It is the opinion of this office that this practice raises serious questions concerning the use of public funds for what is essentially a private purpose.

The Idaho Constitution requires that public funds only be expended for public purposes. This so-called "public purpose" doctrine is not explicitly stated in the constitution, but the Idaho Supreme Court has inferred it from a number of constitutional provisions, including Art. 8, sec. 2. While this section of the constitution is expressly directed at prohibiting the state from loaning "credit" to any "individual, association, municipality or corporation," the Idaho Supreme Court has held that this section also impliedly prohibits the state from engaging in or funding activities that "do not have primarily a public, rather than a private purpose." In Board of County Commissioners v. Idaho Health Facilities Authority, 96 Idaho 498, 531 P.2d 588 (1975), the Idaho Supreme Court, in reviewing and ultimately upholding the use of state funds to better improve health care facilities, discussed this principle:

> [T]his restriction must be inherent throughout state government and must be a fundamental limitation upon the power of state government under the Idaho Constitution, even though not expressly stated in it. Thus, no entity created by the state can engage in activities that do not have primarily a public, rather than a private purpose, nor can it finance or aid any such activity. Article 8, § 2, Idaho Constitution.

96 Idaho at 502, 531 P.2d at 592 (citation omitted).

There are several justifications for this inferred constitutional principle. First, it prevents the public's money from passing into the control of private associations or parties. Fluharty v. Board of County Comr's of Nez Perce County, 29 Idaho 203, 158 P. 320 (1916). Likewise, it prevents the state or one of its subdivisions from aiding or promoting a particular commercial or industrial enterprise to the detriment of others in the field, Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 353 P.2d 767 (1960), or conferring favored status on any private enterprise or individual in the

application of public funds, Boise Redevelopment Agency v. Yick Kong Corp., 94 Idaho 876, 499 P.2d 575 (1972). Finally, and perhaps most importantly, this limitation on government power precludes state action which principally aims to aid private schemes. Idaho Water Resource Board v. Kramer, 97 Idaho 535, 548 P.2d 35 (1976).

What constitutes a valid "public purpose" can be complicated. The Idaho Supreme Court has stated that a "public purpose is an activity that serves to benefit the community as a whole and which is directly related to the function of government." Idaho Water Resource Board v. Kramer, 97 Idaho at 559, 548 P.2d at 59. Importantly, if a proposed appropriation or expenditure meets the "public purpose" test, it is immaterial that, incidentally, private ends may also be advanced. Nelson v. Marshall, 94 Idaho 726, 497 P.2d 47 (1972); Boise Redevelopment Agency v. Yick Kong Corp., 94 Idaho 876, 499 P.2d 575 (1972); Engelking v. Investment Board, 93 Idaho 217, 458 P.2d 213 (1969). Thus, even a direct loan of state funds to private associations or individuals will be upheld if it primarily furthers a broad public purpose such as development of the state's water resources. Nelson v. Marshall, 94 Idaho at 731-32, 497 P.2d at 52-53. Conversely, however, if the primary object is to promote some private end, the expenditure is illegal even though it may incidentally also serve some public purpose. Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 353 P.2d 767 (1960); State v. Idaho Power Co., 81 Idaho 487, 346 P.2d 596 (1959).

In applying the "public purpose" requirement to the question before us, we first note that the payment by the State of Idaho of wages and benefits to state employees while they work for the United Way constitutes an expenditure of state funds and property. Consequently, the above principles are relevant. *See*, *e.g.*, Iowa Attorney General Opinion No. 94-1-6 (1994) (solicitation of charitable contributions by uniformed firefighters constitutes the use of public property, *e.g.*, city time, uniforms, vehicles and equipment); Texas Attorney General Opinion No. MW-89 (1979) (professional organizations' utilization of "release time" of public school personnel constitutes a benefit financed from public funds).

The next question is whether the loaning of these employees is primarily for a public or a private purpose. Our research has revealed little precedent that is directly on point. However, Oregon Attorney General Opinion No. 7997 addressed a similar question. The question presented to the Oregon Attorney General was whether it was "an illegal expenditure of public funds for state employees to work during office hours for the United Fund [United Way] campaign." The Oregon Attorney General concluded that incidental activities reasonably necessary to implement the charitable payroll deduction program were valid.[1] However, the Attorney General went on to suggest that anything beyond this was contrary to what the legislature had statutorily authorized in its charitable contribution payroll deduction program. In reaching this conclusion, the

Oregon Attorney General also suggested that such work, even if it were authorized by the legislature, might constitute promoting a private charity at state expense:

> However, we point out that the legislature did not authorize state employees to work for a private charitable organization while drawing a state salary. Whether or not it could have done so consistent with the public purpose doctrine, it did not purport to try.
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> . . . .
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> Although, as noted, the legislature authorized the deduction, it did not also purport to authorize state officers and employees to do "private" charitable work at state expense. It did by necessary implication authorize the activities reasonably necessary or incidental to effectuate the fringe benefit of the United Way deduction. But for the agency or its employees to spend substantially more time than necessary to accomplish this objective, would be to go beyond the legislative purpose and to promote a private charity rather than to administer a statutorily authorized deduction.

41 Or. Op. Atty. Gen. 347 (1981) (emphasis added; citation omitted).

In Texas Attorney General Opinion No. MW-89, the Texas Attorney General reviewed a policy of allowing teachers to work for professional organizations while continuing to receive their district salaries. Although this situation is not factually identical to our own, it is sufficiently similar that the Texas Attorney General's opinion is relevant. The Texas Attorney General concluded that the policy of permitting teachers to work for professional organizations while being paid salaries by the school district constituted "an unconditional grant of public funds to a private organization" and was "therefore unconstitutional." Tex. Atty. Gen. Op. No. MW-89 (1979). *But see*, Slawson v. Alabama Forestry Commission, 631 So. 2d 953 (Ala. 1994) (holding that providing state personnel to a private non-profit organization whose goals did not conflict with the State Forestry Commission's goals served a public purpose).

Turning to the current situation, allowing two or three top-level state employees to work for a private organization for approximately six to eight weeks each while being paid by the state is a significant state expenditure of funds. The policy of permitting these employees to take administrative leave with pay, as allowed under Idaho Personnel Commission rules, authorizes the transfer of a valuable benefit to the United Way. While the activities of these executives would be centered upon coordination of charitable contributions by fellow state employees, the private benefit to the United Way significantly outweighs the incidental public benefits. As stated in Village of Moyie Springs:

> It does not matter what such undertakings may be called or how worthwhile they may appear to be at the passing moment. The financing of private enterprises by means of public funds is entirely foreign to a proper concept of our constitutional system.

82 Idaho at 347 (quoting State v. Town of North Miami, Fla., 59 So. 2d 779 (Fla. 1952)).

It is the opinion of this office that allowing state personnel to work full time for the United Way to assist in its fundraising while also receiving wages and benefits from the state violates the public purpose doctrine.[2] The lack of legislative authorization buttresses this conclusion. While the United Way serves the public good by helping with public relief which might otherwise fall on the government itself, this purpose is not sufficient. As stated above, if the primary object is to promote some private end, the expenditure is illegal even though it may incidentally also serve some public purpose. Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 353 P.2d 767 (1960); State v. Idaho Power Co., 81 Idaho 487, 346 P.2d 596 (1959). Added to this is the concern that favored status not be given to a private enterprise or individual in the application of public funds at the expense of other organizations. Village of Moyie Springs; Boise Redevelopment Agency v. Yick Kong Corp., 94 Idaho 876, 499 P.2d 575 (1972). Allowing state employees to work for the United Way at state expense gives the United Way favored status and preferential treatment. In short, allowing state employees to work for the United Way for several weeks under the "loaned executive" program while receiving wages and benefits by the State of Idaho is an expenditure of public funds which does not satisfy the "public purpose" doctrine.

2. Limitations on the State Sharing Facilities or Employees With Charitable Organizations

The next question is of a more general nature. You also ask, "[w]hat are the limitations on loaning and/or sharing State of Idaho employees or facilities to or with private charitable organizations or foundations?"

This is a question of first impression in Idaho. Our courts have never reviewed a legal challenge to the state sharing facilities or personnel with a charitable foundation.[3] Likewise, case law from other jurisdictions is sparse. However, we will discuss what authority exists and, for your guidance, attempt to draw from that authority principles or limitations that would make a facility- or personnel-sharing arrangement most likely to withstand a judicial challenge.

Idaho has some state agencies that are closely associated with private charitable foundations. In some instances, a foundation is allowed to occupy space with a state

agency and agency employees may staff the foundation.[4] Clearly, sharing public facilities rent-free or allowing state employees to work for a charitable foundation is an expenditure of state funds. Consequently, it is the opinion of this office that the public purpose doctrine discussed in the foregoing section applies. To reiterate the public purpose test, an activity constitutes a valid public purpose if it serves as a benefit to the community and, at the same time, is directly related to the function of government. Idaho Water Resource Board v. Kramer, 97 Idaho 535, 548 P.2d 35 (1976). Therefore, to be legally permissible, the loaning or sharing of state employees or facilities must both benefit the community and be directly related to the function of government.

There is authority concluding that these arrangements can meet the public purpose requirement. The clearest example involves private foundations and universities. Universities throughout the nation are associated with private charitable foundations which are, in essence, simply fundraising arms for the universities. In Idaho, for example, all three of our universities are associated with foundations that raise money, through private donations, for use by a particular university. The sole purpose of these private foundations is to support the educational institution by soliciting public financial support and managing and investing such moneys. Often the universities allow the foundation to share university facilities, and university employees may staff the foundation.

Two attorney general opinions have concluded that these arrangements satisfy the public purpose doctrine. For example, a Texas Attorney General Opinion reasoned that as Texas statutory law, like Idaho statutory law, permits the universities and the State Board of Education to accept and administer gifts, donations and endowments for the benefit of the universities, "[a] university will have to devote some of its resources to administering grants it accepts, in particular the services of personnel." Tex. Atty. Gen. Op. No. MW-373 (1981). Because universities would be required to hire personnel and devote their resources to such activities in the absence of foundations, fulfilling these educational functions for the universities was deemed permissible. As the Texas Attorney General Opinion went on to note, "public education is an essential governmental function. . . . The assistance provided by the foundation to the university helps it accomplish a public purpose entrusted to it." *Id.*

A Utah Attorney General reached a similar conclusion. The Utah Attorney General was asked by the Utah State Auditor to explain the relationship between public universities and charitable foundations. In explaining these alignments, the Utah Attorney General stated:

> If a foundation is controlled by an institution of higher education it is certainly permissible for the institution to assist with the expenses of the foundation inasmuch as the foundation is really an arm of the institution

> and has been organized and operates solely for the purpose of benefiting the college or university, provided that the services are rendered on a fee for service basis. A reasonable arrangement would be to have the foundation pay for services rendered in terms of mailing, office space, etc., but allow the foundation a credit against these charges for contributions made to the college or university during the period services are provided to the foundation.

Ut. Atty. Gen. Informal Op. No. 78-183 (1978). The Utah Attorney General concluded that sharing arrangements between foundations and universities were permissible, although he also seemed to suggest that some form of consideration, if only in the form of contributions to the university, was essential.

The advantage to the state and the public from these sharing arrangements was explained by the Texas Attorney General in Opinion No. MW-373. Members of the university had easy access to the foundation office for coordination purposes. The administrators could work with the foundation to coordinate foundation activities with those of the state agency. "Their convenience will be served if the foundation is easily available for consultations. If the foundation also provides administrative services, these can be utilized easiest [sic] on the [premises]." Tex. Atty. Gen. Op. No. MW-373 (1981). Moreover, allowing the foundation to share facilities and personnel enhanced the cost effectiveness of operating the foundation. Because the foundation activities benefited the public university, the costs saved to the foundation necessarily went to the benefit of the university, and therefore to the public. In addition, the service the foundation provided was quite significant in monetary terms. Thus, as with the Utah scenario, there was some consideration flowing to the state from the arrangement.

Importantly, along with these public benefits, in both situations, there was also a significant amount of state control exercised over the sharing arrangement. The foundations were organized so that their functions were directly related to that of the public university with which they were associated. The purpose of the foundations was to support the universities with which they were aligned, and they engaged in activities that the universities were also authorized to conduct. Moreover, the details of the arrangements, including the purpose of the foundation and the terms and conditions of providing to it state premises and personnel, were memorialized in writing. And, there was sufficient state control to ensure that the public purpose, in fact, continued to be served. *Id.*

The sharing arrangements between foundations and universities appear to involve the existence of a private entity whose sole purpose is to support the public entity it serves. However, the Alabama Supreme Court, in Slawson v. Alabama Forestry Commission, 631 So. 2d 953, 955 (Ala. 1994), upheld the Alabama Forestry

Commission's use of its resources, personnel and equipment to support a private non-profit organization that did not exist solely to support the Alabama Forestry Commission. The private entity's stated goal was to protect landowners by "confronting environmental and political extremism," including federal environmental laws. The Alabama Supreme Court, nevertheless, upheld the commission's contributions of state resources and state personnel, stating that it would defer to the Forestry Commission's determination that the private organization's goals complemented and did not conflict with the goals of the commission. According to the Alabama Supreme Court, the commission's determination was sufficient to satisfy the public purpose doctrine. *Id*. at 957. However, the Alabama Supreme Court defined "public purpose" more broadly than have Idaho courts. The Alabama Supreme Court simply stated, "a public purpose has for its objective the promotion of public health, safety, morals, security, prosperity, contentment, and the general welfare of the community." *Id.* at 956. Unlike Idaho courts, the Alabama Supreme Court did not hold that the expenditure must be "directly related to the function of government" to satisfy the "public purpose" doctrine.

Reading the Utah and Texas Attorney General opinions in conjunction with the Alabama Supreme Court opinion, it is clear that there is some variation in terms of how the public purpose doctrine is applied when a state provides resources or personnel to a private organization. The Alabama Supreme Court appeared to take a significantly looser approach than did either the Texas or the Utah Attorneys General and to defer significantly to the executive agency's decision. Because of this variation and the limited number of cases available to review, it is difficult to state with absolute certainty what the limitations on facility and personnel sharing are. Nevertheless, this office's advice is that if the sharing arrangements are structured closely to the arrangements between universities and private foundations, they will be likely to withstand a judicial challenge. In this regard, this office offers the following suggestions. The most important point to remember is that when the state shares either public facilities or state personnel with a private charitable foundation, that arrangement must benefit the community, and it must be directly related to the function of government. Moreover, it would be desirable that the foundation's sole or principal purpose is to support the state agency, and the foundation only engages in activities which the state agency is specifically authorized to conduct. Finally, any sharing arrangement affecting personnel or other state resources should be memorialized in writing, and the state should retain some control over the foundation to ensure that the public purpose justifying the sharing arrangement continues to be served.[5]

Legal problems may develop if the foundation strays from the purpose for which it is organized. If the foundation is not organized solely for the benefit of a state agency, and the state agency is contributing personnel and facilities to it, this arrangement is more likely to be challenged. Moreover, if the foundation is using state facilities and personnel for activities in which the state agency would not be authorized to engage, abuses can

occur, and, in the long run, the public may not be benefited as a whole. There is even a risk that the "expenditures" of state money and resources would become primarily an action in support of a private as opposed to a public purpose and would be unconstitutional. In such an instance, at a minimum the foundation must be removed from the state premises and required to use its own resources and personnel.

Again, the question you have asked concerning facility and personnel sharing, while very important, is a general one, and, consequently, this office is only able to provide you with general guidance. Obviously, each particular arrangement, if questioned, would have to be reviewed carefully on its own and the facts unique to that situation evaluated. Nevertheless, those arrangements most likely to be upheld, if challenged, are arrangements in which the foundation's sole purpose is to benefit the state agency, the foundation only engages in activities the agency is authorized to conduct, and the state retains sufficient control, contractual or otherwise, to ensure that the public purpose justifying the sharing arrangement continues to be served. Finally, this office notes that if the legislature is concerned with these sharing arrangements, it may statutorily limit how they are structured.

CONCLUSION

In conclusion, the State of Idaho's participation in the United Way's "loaned executive" program violates the public purpose doctrine because that activity primarily benefits a private enterprise rather than serving a public purpose. Under certain circumstances, however, state agencies or institutions can share facilities and personnel with private charitable organizations or foundations. However, the sharing arrangement must accomplish a public purpose and must be directly related to the function of government. Moreover, for these arrangements to be most likely to withstand a judicial challenge, this office offers the following suggestions. Specifically, the foundation involved should exist for the benefit of the state agency and perform activities which the state agency is authorized to conduct. In addition, there should be sufficient state control, whether contractual or otherwise, to ensure that the activities of the charitable foundation continue to meet the public purpose requirement.

AUTHORITIES CONSIDERED

1. Idaho Constitution:

Art. 8, sec. 2.

2. Idaho Statutes:

Idaho Code § 67-2502

3. Idaho Cases:

Bevis v. Wright, 31 Idaho 676, 175 P. 815 (1918).

Board of County Commissioners v. Idaho Health Facilities Authority, 96 Idaho 498, 531 P.2d 588 (1975).

Boise Redevelopment Agency v. Yick Kong Corp., 94 Idaho 876, 499 P.2d 575 (1972).

Engelking v. Investment Board, 93 Idaho 217, 458 P.2d 213 (1969).

Fluharty v. Board of County Com'rs of Nez Perce County, 29 Idaho 203, 158 P. 320 (1916).

Idaho Water Resource Board v. Kramer, 97 Idaho 535, 548 P.2d 35 (1976).

Nelson v. Marshall, 94 Idaho 726, 497 P.2d 47 (1972).

Slawson v. Alabama Forestry Commission, 631 So. 2d 953 (Ala. 1994).

State v. Idaho Power Co., 81 Idaho 487, 346 P.2d 596 (1959).

Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 353 P.2d 767 (1960).

4. Other Authorities:

Iowa Attorney General Opinion No. 94-1-6 (1994).

41 Or. Op. Atty. Gen. 347 (1981).

Tex. Atty. Gen. Op. No. MW-89 (1979).

Tex. Atty. Gen. Op. No. MW-373 (1981).

Ut. Atty. Gen. Informal Op. No. 78-183 (1978).

DATED this 1st day of November, 1995.

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[1] Most states and the federal government have charitable payroll deduction programs. Employees contribute to a designated charity, and this contribution is deducted from their paychecks.

[2] In the current situation, there has been no legislative determination that the activities are for a "public purpose." Such a legislative finding or declaration, when it is made, while not determinative, is given considerable deference by courts in deciding whether an expenditure is for a public purpose. Bevis v. Wright, 31 Idaho 676, 175 P. 815 (1918); Village of Moyie Springs v. Aurora Mfg. Co., 82 Idaho 337, 353 P.2d 767 (1960). Consequently, this office distinguishes the current analysis from any analysis that might take place should the legislature expressly authorize the loaning of public employees, in certain circumstances, to private organizations and provide a legislative declaration of how this activity serves a public purpose.

[3] In this opinion, we will use the term "foundation" to include "organizations."

[4] It is these more permanent, on-going types of arrangements which will be the focus of this section of our opinion. This opinion will not focus on state government allowing private groups to use facilities on an irregular basis for meetings, etc.

[5] Before entering into such facility- and personnel-sharing arrangement, state agencies are required to obtain written approval of the governor. Idaho Code § 67-2502.