

Opinion No. 2012- 066

June 18, 2012

The Honorable Clark Hall  
State Representative  
302 Elm Street  
Marvell, Arkansas 72366-8729

Dear Representative Hall:

This is my opinion on your questions about a county's summer youth employment program. Your request states:

The Phillips County's summer youth employment program selects 100 youth to work part-time for four weeks and earn a maximum of \$1,000.00. The youth are placed for employment with; elected county officials, the county library, cities, towns, and non-profit organizations (Phillips County Chamber of Commerce, Boys and Girls Club and the Adult Community Development Center in Marvell).

Your questions are:

1. Whether the county's use of public funds to finance a summer youth employment program conflicts with Arkansas Constitution Article 12, § 5, Arkansas Constitution Article 16 § 13; any other provision of the Arkansas Constitution; or any other provision of Arkansas law, including the Arkansas Code?
2. Whether the county's summer youth employment program conflicts with Arkansas Constitution Article 12, § 5, Arkansas Constitution Article 16 § 13; any other provision of the Arkansas Constitution; or any other provision of Arkansas law, including the Arkansas Code?

## **RESPONSE**

The answers to your questions depend on the prevailing facts and circumstances. You state some basic facts about the program but do not provide information about several matters that will be relevant or even determinative in assessing the program's legality. I cannot, accordingly, provide definitive answers to your questions about the Phillips County program in particular. I can, however, discuss the governing law generally and give you my views of the legality of a generic county summer youth employment program, assuming certain facts and circumstances.

***Question 1 – Whether the county's use of public funds to finance a summer youth employment program conflicts with Arkansas Constitution Article 12, § 5, Arkansas Constitution Article 16 § 13; any other provision of the Arkansas Constitution; or any other provision of Arkansas law, including the Arkansas Code?***

### Ark. Const. art. 12, § 5

Our constitution states in relevant part that “[n]o county . . . shall . . . appropriate money for . . . any corporation, association, institution or individual.” Ark. Const. art. 12, § 5. This provision has been interpreted to apply more broadly than one might expect from a casual reading of its express language. It “memorializes, with respect to local government, the general principle that no government can use public resources for private purposes.” Op. Att’y Gen. 2008-179. Article 12, section 5, “has been judicially interpreted to foreclose *any* local government contributions . . . to a private nonprofit corporation.” Op. Att’y Gen. 2011-149. It expressly refers to individuals as well as corporations, so the prohibition on local government contributions to private corporations applies equally to local government donations to individual persons.

Article 12, section 5, might arguably apply to a county summer youth employment program in at least two distinct ways.

First, one might argue that article 12, section 5, prohibits the county's payments to the young employees themselves, as an appropriation of money to individuals.

That could be the case if the payments amounted to gifts, but I will assume that the county will receive adequate consideration from the young employees – *i.e.*, their labor – in exchange for the payments. Article 12, section 5, obviously does not prohibit counties from hiring and paying employees, activities affirmatively permitted by the constitution. *See* Ark. Const. amend. 55, §§ 3, 4 (county judge empowered to hire county employees, quorum court empowered to fix number and compensation of county employees). A county may contract with a private corporation to provide public services, provided the contract is supported by adequate consideration. *See, e.g.*, Op. Att’y Gen. 2012-007. Similarly, a county may employ individuals, whose work is delivered in consideration of their pay.<sup>1</sup>

Second, the county’s provision of a young person’s labor to another entity (such as a city or a private organization) could be characterized as a donation<sup>2</sup> to a corporation, association, or institution and thus in conflict with article 12, section 5.

Private entities and governmental entities are not treated the same for article 12, section 5, purposes.

With respect to a private entity, article 12, section 5, “bar[s] any and all donations to any . . . private, nonprofit corporation, regardless of how exalted its purpose.” Op. Att’y Gen. 2005-205 (citing, *inter alia*, *City of Jacksonville v. Venhaus*, 302 Ark. 204, 788 S.W.2d 478 (1990) (reversing a chancellor’s distribution of residual common-fund proceeds to charities, including private nonprofit corporations)); *see also* Op. Att’y Gen. 1999-408 (stating that it is “establishe[d] beyond all question that a municipality cannot contribute to a private, nonprofit corporation regardless of whether the corporation serves a ‘public purpose.’”). Accordingly, the program would be prohibited by article 12, section 5, to the extent it only involved providing labor to a private entity.

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<sup>1</sup> I assume the county library to which you refer in your request is an instrumentality of Phillips County. *See* Ark. Const. amend. 38; A.C.A. § 13-2-401 (Supp. 2011).

<sup>2</sup> This office has previously opined that article 12, section 5, applies to donations of tangible property as well as cash donations. *See, e.g.*, Op. Att’y Gen. 2008-179 (office furniture and equipment); 2002-313 (bicycles). I have no reason to believe that article 12, section 5, would be held not to apply to governmental donations of labor or, for that matter, anything else of value.

But a county may contract with a private entity to provide public services, provided the contract is supported by adequate consideration:

[N]othing in the constitution precludes the county from contracting with a private nonprofit charity, so long as the contract is supported by adequate consideration and serves a proper governmental end. Cities and counties clearly can enter into contracts that are supported by valid consideration. *See* Ops. Att’y Gen. No. 98-025 and 97-250; A.C.A. § 14-54-101(2); *City of Ft. Smith v. Bates*, 260 Ark. 777, 544 S.W.2d 525 (1976); *City of Harrison v. Boone County*, 238 Ark. 113, 378 S.W.2d 665 (1964). Moreover, this authority includes the power to contract with nonprofit organizations. *See Woodruff v. Shockey*, 297 Ark. 595, 764 S.W.2d 431 (1989). Such contracts have been upheld as not being in violation of Article 12, § 5. *See Arkansas Uniform & Linen Supply v. Institutional Services Corp.*, 287 Ark. 370, 700 S.W.2d 358 (1985).

Op. Att’y Gen. 2012-007 (quoting Op. Att’y Gen. 1999-408).

It may be that the program is structured so that specified private entities are acting under contract with the county and supply adequate consideration to the county in return for the labor they receive from the county. A predecessor in this office considered a city’s “on the job training” program for at-risk youth, which involved the city’s providing the labor of young employees to private employers, and concluded that article 12, section 5 “does not stand as an impediment to the program . . . .” Op. Att’y Gen. 95-165. I concur in the result of that opinion, which cited the fact that the private entities involved would provide adequate consideration, in the form of training, in return for the labor provided by the city.

With respect to a recipient of labor that is another public entity such as a city or town within the county, article 12, section 5, likely does not apply at all. A predecessor in this office, in considering a county’s proposed cash donation to a city, opined that the constitutional prohibition simply does not apply “where the recipient of the funds is another public entity.” Op. Att’y Gen. 95-046. Later authority has mostly considered recipients that may have less of a public pedigree than entities like cities and towns, but has generally reached the same substantive

conclusion: *i.e.*, that article 12, section 5, does not prohibit the contribution. *See, e.g., McCutchen v. Huckabee*, 328 Ark. 202, 943 S.W.2d 225 (1997) (approving a county's contribution to a public facilities board created by that county); Op. Att'y Gen. 2012-021 (citing *McCutchen* and opining that article 12, section 5, likely does not prohibit a county's cash donation to a conservation district).

Even if article 12, section 5, would otherwise apply to a county's donation of labor to a city or town within the county, the program might be structured so that the city or town acts under contract with the county and supplies adequate consideration to the county in return for the labor received.

#### Other provisions of law

Your request asks whether public funding of the program would conflict with any provision of the constitution other than the two sections you cite or with any other provision of Arkansas law.

Our constitution provides that no person may "be deprived of life, liberty or property, without due process of law." Ark. Const. art. 2, § 8. "No principle of constitutional law is more fundamental or more firmly established than the rule that the State cannot, within the limits of due process, appropriate public funds to a private purpose." *Chandler v. Bd. of Trustees*, 236 Ark. 256, 258, 365 S.W.2d 447 (1963).

It seems reasonable to assume that there is a public purpose underlying a county's employing people to perform work for the county's benefit. The public purpose, if any, underlying a county's employment of people to perform work for other entities is less clear and is not stated in your request. It may be that the county perceives a public purpose in merely providing employment for some of its young residents, regardless of the entity receiving the benefit of the young people's labor. Or the county may see a public purpose in providing training and experience to young people. If a public purpose underlies the program, it will comport with due process.

Subject to the constitutional requirement that a public purpose be present, a county is authorized by statute to provide through ordinance for any service not expressly

prohibited by law, including, among others, economic development services, human services including youth services, and other services related to county affairs. A.C.A. § 14-14-802(b)(2)(B)(i), (b)(2)(E)(ii), (b)(2)(I) (Repl. 1998). Depending on the prevailing facts and circumstances, it is possible that the program might fairly be characterized as constituting one or more such services.

It should be noted that a statute elaborates on the county judge's constitutional hiring authority. A.C.A. § 14-14-1102(b)(5) (Supp. 2011). I have said that "the county judge's authority to hire and fire county employees [other than those employed by other elected officials of the county] is established beyond reasonable argument." Op. Att'y Gen. 2011-087. Power to hire and fire implies the power to supervise. A county contemplating providing the labor of county employees to third parties should consider the extent to which supervisory authority over those employees could or should be delegated to the third party. Having no relevant facts in my possession, I am unable to offer any informed conclusions in this regard.

I know of no other provision of law, constitutional or otherwise, with which public funding of the program would necessarily conflict. I again remind you, however, that your request does not state all material facts pertaining to the program and that the presence of other facts or absence of facts I have assumed are present might implicate laws that do not appear, on the facts known to me, to be applicable. You should also note that it is not practicable for this office to survey the entirety of Arkansas law and attempt to determine the possible applicability of numerous provisions of law to a program about which this office does not possess all material facts.

Ark. Const. art. 16, § 13

This constitutional provision supplies a remedy "against the enforcement of any illegal exactions whatever." Ark. Const. art. 16, § 13.

An illegal exaction is defined as any exaction that either is not authorized by law or is contrary to law. . . . Two types of illegal-exaction cases can arise under article 16, section 13: "public funds" cases, where the plaintiff contends that public funds generated from tax dollars are being misapplied

or illegally spent, and “illegal-tax” cases, where the plaintiff asserts that the tax itself is illegal.

*Carnegie Pub. Library of Eureka Springs v. Carroll Cnty.*, 2012 Ark. 128, \*4, 2012 WL 1036847.

Here, you do not suggest that a tax would be imposed to finance the program, so any illegal exaction arising in connection with the program presumably would be of the public funds type. As suggested by the quoted language, article 16, section 13 does not, in and of itself, prohibit any particular application or payment of public funds. Rather, it provides a remedy when public funds have been, or are threatened to be, applied or paid in violation of some other legal standard. *See, e.g., Chapman v. Bevilacqua*, 344 Ark. 262, 42 S.W.2d 378 (2001) (expenditures were consistent with article 12, section 5; “[t]herefore there is no illegal exaction under Art. 16, § 13”); and Op. Att’y Gen. 2005-205 (“[i]f certain political subdivisions are . . . making . . . contributions [to private, nonprofit corporations], I believe they are doing so in derogation of Ark. Const. art. 12, § 5 and the contributions might be challenged as illegal exactions” and “any payments [made in] violat[ion of a specified] statute [would] invite an illegal-exaction challenge”). It is my view, therefore, that article 16, section 13 will be implicated, and may provide a remedy, only if the program involves payments of public funds that violate article 12, section 5, due process, or some other legal standard apart from article 16, section 13.

***Question 2 – Whether the county’s summer youth employment program conflicts with Arkansas Constitution Article 12, § 5, Arkansas Constitution Article 16 § 13; any other provision of the Arkansas Constitution; or any other provision of Arkansas law, including the Arkansas Code?***

Your first question focuses on the county’s use of public funds to finance the program. This question, your second, is not clear in its focus. You may be asking whether the program would be lawful if financed from some private source, but you have not identified any private source of funding or stated its extent – including whether it would cover costs of administration as well as the costs of youth wages. Nor have you stated how or by whom the program would be administered. You may, on the other hand, be asking whether some aspect of the

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program apart from its funding would make it unlawful, but you do not identify any provision of law that would suggest such a result; indeed, your question cites only laws that generally concern public money. Your question's focus may be on some matter I have not identified. The fact is that I perceive little or no substantive difference between your questions, on their face. In any event, my uncertainty about the thrust of your second question, coupled with the absence of statements of material facts in your request, makes it impossible to for me to render a meaningful opinion in this instance.

Assistant Attorney General J. M. Barker prepared this opinion, which I approve.

Sincerely,

DUSTIN McDANIEL  
Attorney General

DM:JMB/cyh