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OPINION
OF
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Opinion No. 88-21

By: Michael J. Vargon
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To: Honorable Harroll H. Adams
State Auditor
PERA Building, Room 302
Santa Fe, New Mexico 87503

QUESTION:

1. Can the Board of Trustees for Miners' Hospital commit the Miners' Trust and the State of New Mexico to acquire Northern Colfax County Hospital and agree to operate a general hospital to provide at least the health care services of the scope and quality appropriate to the needs of the population of Colfax County?

2. If non-miners are treated at the Miners Hospital, must the non-miners pay all expenses for treatment and care in accordance with the applicable laws or may the fixed costs be charged to the trust and only variable costs recovered from non-miners?

3. Has the Board violated the terms of the trust by placing \$1 million in escrow for 75 years for the purchase of a facility that, under one method of valuation, had no significant value at the date of acquisition?

4. Must Miners Hospital conform to a strict policy of admissions based on the requirement that the miner is sick or injured in their line of occupation?

ANSWERS:

1. The Board of Trustees may, within the terms of the trust, expand the hospital's facilities. If the most economical method

to expand the facilities is to acquire an existing facility that is capable of providing health care services of a scope and quality appropriate to the needs of the population of Colfax County, then it may acquire and operate such a facility.

2. Non-miners who are treated at a facility operated through the Miners Trust funds must pay all expenses attributable to their treatment.

3. No.

4. Yes.

ANALYSIS:

Miner's Hospital has been administered as a charitable trust. The trust res consists of the income derived from two grants of land by the United States to the Territory of New Mexico in 1898 and 1910. See Ferguson Act, 30 Stat. 484; New Mexico Enabling Act, 36 Stat. 557. The beneficiaries of the trust are disabled miners. The trustee is the State of New Mexico. The terms of the trust derive from these federal statutes. United States v. New Mexico, 536 F.2d 1324, 1327 (10th Cir. 1976). The manner in which New Mexico has administered the trust over a substantial period of time with the acquiescence of the United States provides additional guidance as to the terms of the trust. Id. at 1328.

In 1898, Congress granted 50,000 acres of land to New Mexico "for a miners' hospital for disabled miners." Ferguson Act, supra, §6. The Act did not further limit the class of beneficiaries. In 1903, the territorial legislature created the miners' hospital and declared that it was "intended and meant to be for the free treatment and care of resident miners of the Territory of New Mexico, who may become sick or injured in the line of their occupation." 1903 N.M. Laws, ch. 2, §§4, 9. The limitations of residency and occupational-related disability do not appear in the federal statute. In 1907, the territorial legislature amended the 1903 laws to add that the hospital could "take in other patients

1 In answering these questions, we rely upon the information provided in the opinion request as well as two studies of Miners Hospital: the Long Range Plan for Miners Hospital by Amherst Associates, Inc. (1983) (hereinafter "Amherst"), and the feasibility study of the merger of Miner's Hospital and Northern Colfax Hospital, by Tribrook Group, Inc. (1986) (hereinafter "Tribrook").

for treatment and care, upon payment of all expenses therefore, by said patients, when the same may be so received and treated without excluding any miners from said hospital." 1907 N.M. Laws. ch. 48, §2. In 1910, Congress granted an additional 50,000 acres to New Mexico "for miners' hospital for disabled miners," and further transferred all grants made to the Territory, including previous grants, to the State to be held in trust for the purposes for which they were granted. New Mexico Enabling Act, supra, §§ 7, 10.

Pursuant to these statutes, New Mexico operated the Miners' Hospital as a general hospital providing a full range of health care, including maternity care, from 1904 until 1971. Miners' Hospital provided these services to miners as well as non-miners, although it required non-miners to pay all expenses. In 1968, the State implemented a plan to use the funds of the miners trust to provide care at hospitals statewide. In 1971, the Miners' Hospital lost its accreditation as a hospital but continued to operate as an intermediate care facility. In 1972, a law suit challenged the diversion of the trust funds to other hospitals. United States v. New Mexico, 536 F.2d 1324 (10th Cir. 1976). The plaintiffs prevailed and, in 1979, the State reopened Miners' Hospital as a licensed ten-bed acute care facility. Once again, the hospital treated non-miners.

When Miners' Hospital ceased to be an accredited hospital in 1971, a new hospital was built to serve the medical needs to Colfax County. Northern Colfax County Hospital opened in 1972 and had 52 acute care beds.

Amherst Associates, Inc. completed a long range planning study in 1983. It showed that Colfax County residents needed only one general acute care hospital. It also pointed out many inadequacies in the size and age of Miners' Hospital.

The first question is whether the Board of Trustees for Miners' Hospital can, within the terms of the trust, acquire Northern Colfax County Hospital and agree to provide at least the health care services of the scope and quality appropriate to the needs of the population of Colfax County. A trustee owes a duty of loyalty to the beneficiary to administer the trust solely in the interest of the beneficiary. Restatement (Second) of Trusts §170 (1959); G. Bogert, Trusts and Trustees §543 (2d ed. 1978). A trustee also has a duty to use reasonable care and skill to make the trust property productive. Manchester Band of Pomo Indians, Inc. v. United States, 363 F.Supp. 1238, 1244 (N.D. Cal. 1973); In re Estate of Dwight, 681 P.2d 563, 568 (Haw. 1984); Restatement (Second) of Trusts, §181 (1959).

The studies commissioned by the Board indicated that:

1) The small size of the existing Miners' Hospital was not conducive to good quality acute care. Amherst at 4, 33, 34; Tribrook at. I-10, IV-15.

2) The age of the existing physical plant was a weakness, and required substantial renovation. Amherst at 34.

3) Assuming the total number of employed miners in New Mexico (17,860 in 1980) was the relevant market for Miners' Hospital and assuming a use rate of 4 beds per 1,000 population, Miners Hospital should have 71 beds. Amherst at 32. Although the number of employed miners in New Mexico had declined to 9,336 in 1986, that population still needed 37 beds. Miner's Hospital had 10 acute care beds.

4) A new 68 bed facility would cost \$13.6 million in 1986 dollars. Tribrook at VI-4.

5) Acquiring and renovating Northern Colfax County Hospital would cost \$7 million in 1986 dollars. Tribrook at VI-4.

6) The existence of two hospitals in Raton created cost inefficiencies for each hospital. Tribrook at VI-7-9, IV-15, Amherst at 10.

Based on these facts, the Board agreed in 1986 to acquire Northern Colfax County Hospital. The agreement required the Board to operate a licensed general acute care hospital and provide at least the health care services of the scope and quality appropriate to the needs of the population of Colfax County.

We note that, from 1904 until 1971, Miners' Hospital operated as a general hospital serving the population of Colfax County as well as miners. The United States never objected to this practice. This indicates that the practice is within the terms of the trust. United States v. New Mexico, 536 F.2d at 1328. Given the factors addressed in the Amherst and Tribrook studies, the Board properly could determine that acquiring Northern Colfax Hospital was in the beneficiaries' best interests.

The line of demarcation at which point the courts will interfere with the discretion of those governing a public charity reasonably is the point of substantial departure by the governors (or Board) from the dominant purpose of the charity, and, unless the directors so administer it that there is such a substantial departure from the the charity's dominant purpose as to amount to a perversion of it the court will not interfere.

Taylor v. Baldwin, 362 Mo. 1224, 1241, 247 S.W.2d 741, 750 (1952) (emphasis original). For these reasons we conclude that the Board can, within the terms of the trust, acquire Northern Colfax County Hospital and agree to provide health care services of a scope and quality appropriate to the needs of the population of Colfax County.

The second question is closely related to the first. As previously noted, Miners' Hospital always has provided treatment for non-miners when miners did not need the space. Pursuant to the 1907 Act of the territorial legislature (presently codified at Section 23-3-1 NMSA 1978), non-miners must pay "all expenses therefor". We also note that the trust beneficiaries derive certain benefits from the larger number of patients served, such as cost efficiencies and the ability to attract and maintain higher quality professional services. Non-miners must pay all variable costs associated with their care. Miners Hospital should charge fixed costs (costs that exist whether or not patients are treated) to non-miners based upon the extent to which they use the hospital facilities. We do not imply that the trust terms or the statutes mandate any single formula for allocating fixed costs. However, Miners Hospital must develop a method for charging non-miners for administrative overhead, depreciation and other fixed costs that are reasonably attributable to their care.

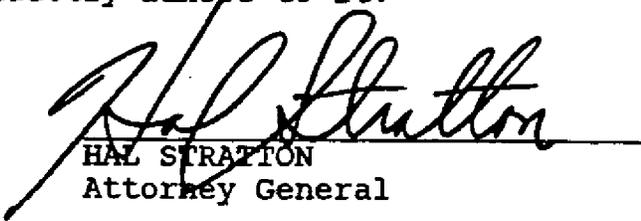
The third question relates to the purchase price for the Northern Colfax County Hospital. The Board agreed to place \$1 million in trust for 75 years, with the interest to be paid to Colfax County as payment for the inventory and facilities of Northern Colfax County Hospital. The Tribrook study found that, according to two appraisal methods Northern Colfax County Hospital had no significant value. (Tribrook at VI-2,3) First, because there is no active market for small rural hospitals in New Mexico, the hospital does not have a market value as a going concern. Second, because the hospital historically has incurred operating losses in excess of operating income, income-based valuation also indicate that it has no significant value. According to three other valuation methods, however, the Tribrook study found that Northern Colfax County Hospital has a value of between \$1.2 million and \$4 million:

1. Net patient revenues (add value of assets to patient revenues net of contractual allowances and noncontractual deductions), \$3,013,148;
2. Historical book value (original cost less depreciation), \$1,159,114; and

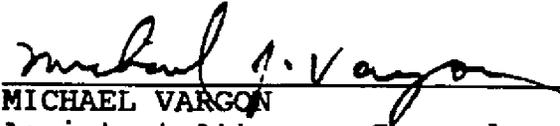
3. Current reproduction cost (present cost of reproducing the land, buildings and equipment, less accumulated depreciation), \$4,004,486.

We note that the losses that Northern Colfax County Hospital historically incurred were to some extent due to the presence of two hospitals in Raton. Thus, the income valuation method does not necessarily accurately reflect the hospital's profitability after the acquisition by Miners' Hospital. If the conclusions in the Amherst and Tribrook studies that Miners' Hospital needed to expand and renovate are valid, then the trust terms allow New Mexico to accomplish this goal by acquiring a facility rather than by building a new facility. The Tribrook study indicated that the cost of building a new facility would be \$13.6 million. The acquisition of the Northern Colfax County Hospital therefore appears to be the more cost effective means of achieving the goal.

The last question deals with Miners' Hospital admission policy. Although not imposed by the terms of any of the federal statutes, New Mexico has restricted free care to miners who "become sick or injured in the line of their occupation."² Section 23-3-1 NMSA 1978. Unless the legislature changes this provision, the hospital must strictly adhere to it.



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2 The free care policy does not violate the constitutional prohibition against making a donation to or in aid of any person. N.M. Const. art. IX, § 14 provides an exception for aid for the care and maintenance of sick and indigent persons. This provision has been interpreted to mean sick or indigent. See Att'y Gen. Ops. 57-26 (1957), 58-135 (1958). In addition, the Miners Hospital administration informs us that when a miner who otherwise meets the criteria for free service has financial resources to pay for care, the Hospital seeks reimbursement for expenses.