



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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January 28, 2011

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The Honorable John M. O'Bannon, M.D.
Member, House of Delegates
P.O. Box 70365
Richmond, Virginia 23255-0365

Dear Delegate O'Bannon:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You inquire whether certain proposed budget amendments calling for appropriations to be made to two charitable institutions are permissible under the Constitution of Virginia.

Response

It is my opinion that the proposed budget amendments, while noble in purpose and salutary in effect, are precluded by operation of Article IV, § 16 of the Constitution of Virginia.

Background

The budget proposed by the Governor for the 2011 General Assembly includes an amendment to the state budget appropriating \$500,000 for Operation Smile. Operation Smile is a nonprofit organization located in Virginia that is devoted to providing free reconstructive surgery and other healthcare to persons who suffer from facial deformities, such as cleft lips, cleft palates, tumors and burns. Operation Smile also trains local medical professionals and donates medical equipment. The proposed amendment

Provides general fund support for Operation Smile. Operation Smile is an international medical humanitarian organization dedicated to raising awareness of this life-threatening issue and providing lasting solutions that will allow children to be healed, regardless of financial standing, well into the future.^[1]

The Governor proposed another amendment to the current biennial budget to provide an additional \$500,000 in state funding for the Federation of Virginia Food Banks. The amendment would be used to support the Kids BackPack initiative, which ensures nutritious meals for low-income children when school is not in session. This amendment

¹ Executive Amendments to the 2010-12 Biennial Budget, B-107 (Dec. 17, 2010). This document is available at <http://dpb.virginia.gov/budget/buddoc11/pdf/budgetdocument2011.pdf>

Provides funding for the Federation of Food Banks to purchase food, which will be distributed to needy Virginians through the Commonwealth's network of food banks. This support will assist food banks across the state meet increasing demands. It is estimated that Virginia's food banks are giving out over twenty percent more food than a year ago. None of the funding provided can be used for administrative or overhead purposes.^[2]

Such appropriations are not a new phenomenon. Past Governors and General Assemblies have enacted similar measures for some time. For example, in the last dozen years, the Virginia General Assembly has appropriated public funds for such groups as SERVE Homeless Shelter to provide food and shelter for those in need (FY 2007),³ Virginia Quality of Life to construct a center for medical and other services in rural Virginia (FY 2000, 2001, 2003, 2007),⁴ Virginia Waterfront International Arts Festival to promote the region as a cultural tourism destination (FY 2001),⁵ Maryview Foundation Healthcare Center for medical services and medication assistance for indigent and uninsured persons (FY 2007),⁶ and Special Olympics of Virginia for a year-round sports training and athletic competition (FY 1999, 2000, 2001, 2003, 2007).⁷

Applicable Law and Discussion

The Virginia Constitution forbids the General Assembly from making "any appropriation of public funds, personal property, or real estate . . . to any charitable institution which is not owned or controlled by the Commonwealth."⁸ Several exceptions to this rule exist. The General Assembly can make "appropriations to nonsectarian institutions for the reform of youthful criminals and may also authorize counties, cities, or towns to make appropriations to any charitable institution or association."⁹ Furthermore, the General Assembly may assist non-state educational institutions of higher education with borrowing money for the construction of facilities, provided that the Commonwealth is not liable for the debt.¹⁰ The term "charitable institution" is not defined in the Constitution.

The purpose of Article IV, § 16, as its plain language indicates, is "to prohibit the appropriation of public funds . . . for charitable purposes."¹¹ When an appropriation runs afoul of constitutional strictures, the Supreme Court of Virginia does not hesitate to strike down the appropriation, however noble its purpose might be. The Court invalidated a law that sought to create a relief fund "to be used by

² *Id.*

³ 2007 Va. Acts ch. 781, Item 481.

⁴ HB 1600 and SB 800, Item 571, 2001 Reg. Sess. (Va.); 2003 Va. Acts ch. 1042, Item 532; 2007 Va. Acts ch. 781, Item 481.

⁵ HB 1600 and SB 800, Item 571.

⁶ 2007 Va. Acts ch. 781, Item 481.

⁷ 2000 Va. Acts ch. 1073, Item 571; HB 1600 and SB 800, Item 571; 2001 Reg. Sess. Va.; 2003 Va. Acts ch. 1042, Item 532; 2007 Va. Acts ch. 781, Item 481.

⁸ VA. CONST. art. IV, § 16.

⁹ *Id.* The General Assembly has enacted enabling legislation that permits such donations by localities. VA. CODE ANN. § 15.2-953 (Supp. 2010) (authorizing counties to make appropriations and donations to charities located within their jurisdiction).

¹⁰ VA. CONST. art. VIII, § 11.

¹¹ *Commonwealth v. Nat'l Fire Ins. Co. of Hartford*, 161 Va. 737, 744, 172 S.E.2d 448, 451 (1934).

disabled firemen and relief of widows and dependent children of deceased firemen.”¹² It also declared invalid a law designed to provide educational opportunities for orphans of veterans killed during World Wars I and II.¹³ In each case, the Court looked to whether the purpose and effect of the appropriation was to provide a direct benefit to the charity.¹⁴

Although the text of the provision and the cases interpreting make it clear that appropriations to charities are not permitted, I further note that the Commission on Constitutional Revision in 1968-69 considered whether to redraft this provision. The Commission recognized that “[p]rivate charitable organizations often perform functions that, were they not the subject of private initiative, would surely have to be performed by public bodies at public expense.”¹⁵ Therefore, “[a] reasonable argument could be made that at least some appropriations would be in the public interest.”¹⁶ The Commission found that “the problem lay in fashioning a constitutional provision which would allow selective and limited appropriations in legitimate cases without opening the floodgates to demand by, and appropriations to, the vast number of private groups that would consider themselves equally entitled to share in the public largess.”¹⁷ The Commission – and, of course, ultimately, the people who ratified the Constitution – left the existing provision banning all such appropriations essentially undisturbed from the prior Constitution.¹⁸ Although one could, like the Commission, ponder whether this provision should remain in the Constitution, there is no escaping the fact that the provision was retained in the Constitution and is, therefore, binding.

The Virginia Constitution does not prohibit categorically all payments to charities from the State. The General Assembly can establish a program to provide services to its residents, and make appropriations to state agencies that, in turn, result in payments to charitable entities for goods purchased or services provided. For example, a state program designed to provide medical care for indigents could appropriate money to a state agency, which then pays a non-profit hospital for services it provided under the program.¹⁹ The budget amendments at issue, however, do not fit this paradigm. They are direct appropriations to a charity for benevolent purposes.

The question is not whether these proposed amendments serve noble purposes and that they would provide needed relief – unquestionably, they are and they would. The question is one of fidelity to

¹² *Nat'l Fire Ins. Co. of Hartford*, 161 Va. at 740, 172 S.E.2d at 450.

¹³ *Almond v. Day*, 197 Va. 419, 422, 89 S.E.2d 851, 854 (1955).

¹⁴ *Nat'l Fire Ins. Co. of Hartford*, 161 Va. at 746, 172 S.E.2d at 452; *Almond v. Day*, 197 Va. at 428, 89 S.E.2d at 857.

¹⁵ I A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 551 (1974).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Persuasive authority from other States illustrates this concept. See *Nebraska v. Smith*, 353 N.W.2d 267 (Neb. 1984) (grants and contracts regarding medical research for cancer and smoking diseases were not prohibited by Nebraska constitutional provision prohibiting “appropriation of public funds . . . to any school or institution of learning not owned or exclusively controlled by the state”, NEB. CONST. art. VII, § 11); *Pennsylvania Ass'n of State Mental Hosp. Physicians. v. Commonwealth*, 437 A.2d 1297 (Pa. 1981) (payment of public funds to a private medical college pursuant to a contract for management of the state's psychiatric institute did not violate Pennsylvania's constitutional prohibition forbidding appropriations to “any charitable or educational institution not under the absolute control of the Commonwealth” PA. CONST. art. III, § 30).

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the text of our constitution. And where the Constitution commands or forbids, the government must obey.

Conclusion

Accordingly, it is my opinion that the proposed budget amendments, while noble in purpose and salutary in effect, are precluded by operation of Article IV, § 16 of the Constitution of Virginia.

With kindest regards, I am

Very truly yours,

A handwritten signature in blue ink that reads "Ken C II". The signature is stylized, with "Ken" and "C" being the most prominent parts, and "II" written as a Roman numeral to the right.

Kenneth T. Cuccinelli, II
Attorney General