

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL



Legal Counsel Division

July 13, 2005

Philip C. Spalding
Commissioner, ANC 1B-02
1929 13th Street, N.W.
Washington, DC 20009

Re: Whether an ANC is permitted to issue a grant to a non-profit organization for the purchase or rental of sound equipment for community performances in a commercial establishment

Dear Commissioner Spalding:

This responds to your letter sent on April 22, 2005 regarding a grant issued to the Blackout Arts Collective for the rental or purchase of sound equipment to be used at Sankofa Books & Videos (Sankofa). The grant raises three issues, each of which we address herein. They are: (1) whether a grant can be issued which indirectly benefits a local business; (2) whether the subject grant impermissibly uses government funds for entertainment; and (3) if permissible, whether it is more appropriate to purchase the sound equipment outright or to enter into a lease.

The Blackout Arts Collective, a non-profit organization, and Sankofa requested funds to purchase or rent sound equipment that will allow the continuation of a weekly program called "Arts Under the Stars." The grant application states that Arts Under the Stars is a collaborative program between the Blackouts Arts Collective and Sankofa that provides a free and open forum for community members to share their art and discuss community issues which takes place every Friday at Sankofa.

The Sankofa website advertises Arts Under the Stars as an "open mike" program. <http://sankofa.com/news.shtml> (accessed on July 1, 2005). These open mike performances provide all community members with an opportunity to sing, rap, read poetry, and discuss issues relevant to themselves or the community.

At the April 7, 2005 ANC 1B meeting the grant application was approved on the basis that the funds be given to the Blackout Arts Collective, not Sankofa. Members of the commission expressed concern that it would be impermissible to provide grant funds to a

for profit corporation such as Sankofa. You question the grant based on concerns that it nonetheless improperly funds or supports a local business.

As a framework we turn first to the statutory authority empowering ANC's to make grants and the limitations therein. Section 16(m) of the Advisory Neighborhood Commissions Act of 1975, effective October 10, 1975, D.C. Law 1-21, D.C. Official Code § 1-309.13(m) (2004 Supp.), as amended by the Comprehensive Advisory Neighborhood Commissions Reform Amendment Act of 2000, effective June 27, 2000, D.C. Law 13-135 (collectively, the "ANC Act"), limits the purposes and recipients of grants. It states in relevant part:

(m)(1) ... A Commission may approve grants only to organizations that are public in nature and benefit persons who reside or work within the Commission area...

The meaning of this language was thoroughly discussed in the footnote of a previous letter issued by this Office regarding a similar issue. Letter to Deborah K. Nichols, Aug. 4, 2000. The full footnote states:

The language of the statute [§ 1-309.13(m)] is ambiguous as to whether the final phrase, "that are public in nature and benefit persons who reside or work within the Commission area", modifies the word "organization" or the word "grant". The legislative history does not elaborate upon the meaning of this new language. I conclude, based on the pre-existing language that prevented grants to individuals and that required that grants provide a benefit that is public in nature and benefit persons who reside or work in the Commission area, that the phrase modifies the word "grant" and that the awkward reference to an organization is an attempt to retain the ban on grants to individuals. A contrary interpretation, where the organization must be public in nature, would prohibit grants to private groups, which were previously permissible, and would not require that the specific grant at issue benefit the ANC community, only that the organization to whom the grant is made benefit the community. There is no indication that the Council intended to make such a change by re-writing the section.

A grant, therefore, must be to an organization, not an individual; the benefits from a grant must be public in nature; and a grant must benefit persons who reside or work within the Commission area. There is nothing in the ANC statute that restricts secondary benefits to private groups or individuals.

A grant to either the Blackout Arts Collective or Sankofa will meet all three of the above requirements. First, the Blackout Arts Collective and Sankofa are both organizations not individuals. Second, the benefits of the grant are public in nature because the funds will be used to conduct open performances by community members. In this case there are incidental benefits to private organizations but these only result from neighborhood

citizens enjoying the public benefits of the grant. Third, the grant benefits citizens of the community because the performances will occur within the bounds of the ANC area and are freely open to the public.

Further, the concept of an ANC grant is that money is needed to secure a community benefit. Sometimes this can only be achieved by directly benefiting private parties.¹ As a practical matter, the indirect benefits that flow from an ANC grant are a necessary consequence of any expenditure. In fact, much of the power and importance of the grant funds is that they do provide secondary benefits to many businesses and people in the community.²

The second issue raised by this grant, although not in your letter, is whether the grant impermissibly funds entertainment activities. According to the General Accounting Office (GAO), the use of federally appropriated funds for entertainment purposes is prohibited unless specifically authorized by statute. *See* General Accounting Office, Principles of Federal Appropriations Law, 4-123 (3d ed., Jan. 2004), *see also* Letter to Westy McDermid, May 26, 1994.³ Although not attempting to precisely define "entertainment" the GAO has suggested that the term is very broad, including sports, recreation, performances, or other sources of amusement. Principles of Federal Appropriations Law at 4-101 to 102.

The presumption against entertainment expenditures is derived from the general principle that government funds cannot be spent unless Congress authorizes the expenditure. *Id.* at 4-6. An ANC receives such congressional authorization to expend funds from two sources: expressly from Congress' enactment of the D.C. Home Rule Act; and from Congress' enactment of the ANC budget. Because I am unaware of any Congressionally-approved budget specifically for entertainment expenses, to determine whether the grant is permissible we must analyze the ANC's authorization to give grants pursuant to the D.C. Home Rule Act, as reasonably construed in legislation by the Council.

Section 738 of the Home Rule Act, approved Dec. 24, 1973, Pub. Law 93-198, D.C. Official Code § 1-207.38(e) (2004 Supp.), states that an ANC shall receive funds "to conduct programs for the welfare of the people in a neighborhood." Though not specifically mentioning ANC grants, this language can reasonably be read to include grants within the meaning of such programs.

¹ One example, which this Office approved, was a grant to a community group that paid the wages of five neighborhood youths to perform work within the community. The youths benefited from receiving a wage but the benefit was considered public because the work performed by the five youths enhanced the entire community. Letter to Deborah K. Nichols, Aug. 4, 2000.

² For instance, in the present case you are concerned with the incidental benefits to Sankofa, however there are many other parties who may benefit as well. The company that leases out the sound equipment for the performances will likely profit from the lease, adjacent businesses may receive increased exposure, and further suppliers to these companies may receive increased sales. One could draw up a vast list of businesses and suppliers that will potentially have increased revenue from this or any other ANC grant. As long as the Blackout Arts Collective and Sankofa allow free access for the community to perform and watch, they appear to be meeting the requirements of § 1-309.13(m).

³ The money allocated to an ANC by the District falls under this federal restriction because Congress must appropriate the District's local revenue before the District can use it.

Section 16 of the ANC Act, D.C. Official Code § 1-309.13(l)(1), specifically authorizes an ANC to give grants and states, in part: "A Commission [ANC] shall expend funds ... for public purposes within a Commission area ... Expenditures may be in the form of grants by the Commission for public purposes within the Commission area."

The meanings within the two sections are roughly synonymous, even though the language of the Home Rule Act and the ANC Act may differ slightly in wording. The D.C. Court of Appeals has suggested that the ANC Act was enacted to specifically implement the government structure authorized by the Home Rule Act. *Kopff v. Dist. of Columbia Alcoholic Beverage Control Board*, 381 A.2d 1373, 1380 (D.C. 1977). In the present case, D.C. Official Code § 1-309.13(l)(1) provides authorization to conduct a grant program, which is one type of program for the public welfare. Thus, this portion of the ANC Act implements the authority granted to the ANCs under the Home Rule Act. Based on the common intent and meaning of the two acts, the phrases "for the welfare" of the public and "for public purposes" create the same degree of authority for the ANC to expend funds. *See Kopff* at 1380.

Although the two sources of ANC grant authority provide broad authorization to spend for a public purpose, the language does not plainly authorize expenditures for entertainment purposes. Thus, following the presumption against such expenditures, there is no authority for an ANC to provide a grant for the purpose of entertaining its citizens even if the entertainment may be enjoyable. This applies equally to a grant paying for a performer or for the goods and services necessary to support it.

In accordance with the above principle that government funds cannot be used to provide entertainment, this Office has opined against the expenditure of funds on a series of jazz concerts (Letter to Alice Gilmore, Oct. 20, 1994) and the purchase of a generator to power sound equipment for music at a roller-skating event (Letter to Sandra Seegars, June 25, 2004). These activities would have provided enjoyment to the citizens of a community, but do not satisfy the public purpose requirement because they are passive activities which do not improve the community or train or educate its citizens. Further, these activities would clearly fall within the area of impermissible entertainment as discussed by the GAO. Indeed, the GAO has prohibited expenditures to hire performers or to play recorded music. Principles of Federal Appropriations at 4-102.

However, ANC's have been allowed to spend funds for recreational purposes consistent with the aforementioned public benefit authority of the Home Rule Act. For instance, this Office authorized the expenditure of funds for football equipment (Letter to Otis Troupe, Dec. 28, 1992), roller-skates (Letter to Sandra Seegars, June 25, 2004), and other athletic equipment (Letter to Alice Gilmore, Oct. 20, 1994). In approving the grant for roller-skates we expressly distinguished the grant as one which would provide recreation and "not mere entertainment." Letter to Sandra Seegars, June 25, 2004.

These approved grants serve a public purpose by facilitating community participation in the funded activity. Further, all of the previously approved grants provided a number of

other benefits to the community, such as affording safe and constructive activities for community youth.

As demonstrated by the above letters, this Office has traditionally distinguished acceptable grants as recreation and unacceptable grants as entertainment. *See id.* In retrospect that distinction is too vague. The true difference between recreation and entertainment is that grants for recreation provide an open opportunity for community participation in an activity that enriches the participants rather than mere passive observance of an event as would be the case with entertainment. Thus, the prohibition against entertainment expenditures as applied to an ANC is narrower in scope than the prohibition against entertainment used by the GAO.

Based on the above analysis, a grant to fund the Arts Under the Stars program is permissible. As discussed in the grant application, the predominant purpose of the grant is to provide a forum for community artists and citizens to perform. Though the program may provide entertainment for those who attend the weekly event, this result is only incidental to the community's participation in the program. Analogous and permissible entertainment may also occur when a parent attends a child's football game made possible by an ANC grant for football equipment, though that is not the grant's purpose.⁴ Additionally, as stated in the grant application, Arts Under the Stars enriches participants by allowing artistic expression and development.

Were the Blackout Arts Collective to limit performances to only select members of the community or non-community based performers, the primary purpose would no longer be participation but entertainment. However, that is not the case. We view the community artists' use of the sound equipment as analogous to the community football players' use of pads and a helmet, both of which are acceptable.

Finally, an ancillary concern to the previous two issues is that by purchasing or entering into a long-term lease the sound equipment will be easily available for impermissible entertainment or commercial purposes while in the custody of the grant applicant. In the past this Office described an ANC grant to purchase a VCR as suspect because it could be used for entertainment purposes and the VCR was out of the ANC's control. Letter to Deborah K. Nichols, Aug. 15, 2000.

Insofar as the sound equipment presents similar concerns, this Office reiterates the suggestion made in the Aug. 15, 2000 letter that before making a questionable grant the commission seek assurance from the grant recipient that they will not use ANC funded

⁴ Although this Office, consistent with the above reasoning, has previously approved the funding of sports equipment, we would be as unwilling to categorically permit all sports expenditures as we are to permit all other performance expenditures. Sports on the professional level is often performed just as much for entertainment as a music concert and the use of ANC funds to provide a grant with the predominant purpose of entertainment would be clearly impermissible. However, when sports or some other performance activity is made available for open community participation in a manner which benefits the community, the grant does not violate the general restriction on entertainment but falls within the public benefit provisions of both the Home Rule Act and the ANC Act.

