

**LETTER OPINION
2003-L-54**

November 20, 2003

Ms. Pam Sharp
Director
Office of Management and Budget
600 E Boulevard Ave Dept 110
Bismarck, ND 58505-0400

Dear Ms. Sharp:

Thank you for requesting my opinion on two issues presented by chapter 665 of the 2003 North Dakota Session Laws.

A. Transfer of savings.

Your first question is whether the Office of Management and Budget (OMB) is “authorized to transfer to the general fund all of the savings resulting from the consolidation of information technology services as specified under 2003 North Dakota Session Laws, chapter 665, section 11.” The Fifty-eighth Legislative Assembly, in a special session, validly enacted chapter 665 of the 2003 North Dakota Session Laws. Section 11 requires OMB to “transfer the savings accumulated as a result of [the consolidation activities] in the amount of \$1,400,000 to the general fund by June 30, 2005.” 2003 N.D. Sess. Laws ch. 665, § 11. In addition, section 2 requires OMB to transfer \$862,059 from special funds of 20 state agencies to the Information Technology Department. 2003 N.D. Sess. Laws ch. 665, § 2. Accordingly, OMB is not only authorized, but is required, to transfer those funds.

The issue is whether the Legislative Assembly’s stated requirement violates any constitutional provisions.

North Dakota Century Code section 1-02-38 provides that, when enacting a statute, it is presumed that the Legislature was intending to comply with the state and federal constitutions. It has been a long-standing policy of this office that statutes of the sovereign State of North Dakota are presumed to be constitutional until declared to be otherwise by the courts of this state. Only where the statute is clearly and patently unconstitutional, for example,

when the United States Supreme Court has clearly spoken on the precise issue, will this office deviate from this presumption of constitutionality. The North Dakota Supreme Court, in numerous cases, has reiterated this presumption of constitutionality. In Menz v. Coyle, 117 N.W.2d 290 (N.D. 1962), the Court held that an act is presumed constitutional and will be upheld unless “manifestly” contrary to the state or federal constitutions, that every presumption in favor of constitutionality will be adopted, and that only when the statute is unconstitutional “beyond a reasonable doubt” will it be declared void. Id., at p. [sic] 295.

N.D.A.G. Letter to Tangedahl (April 15, 1980).

There is a duty incumbent upon the Attorney General to defend the presumed constitutionality and legality of any enactment of the Legislative Assembly. The only possible exception to this rule would be the duty the Attorney General owes to uphold and defend the Constitution of the United States and the Constitution of North Dakota which must prevail in the face of any enactment of the Legislative Assembly which is clearly contrary to the Constitution of the United States and the Constitution of the State of North Dakota.

N.D.A.G. Letter to Adams (Oct. 28, 1983). Accordingly, any analysis of your question must be tempered by a strong presumption of constitutionality.

I note in reviewing chapter 665 of the 2003 Session Laws that sections 2 and 11 potentially affect over 205 different special funds and 28 different state agencies. To answer your question for each of those special funds and agencies would necessarily involve a complete analysis of the factual underpinnings of each fund and each agency’s budget. Because of the sheer number, it is not feasible to issue you an opinion that would apply to all of those funds and agencies. See N.D.A.G. Letter to Hanson (May 31, 1990) (“Because the question of whether moneys in a particular fund are public moneys or moneys held in trust depends upon the terms and conditions by which the moneys are held, it is not possible to issue a single opinion that would apply to all special funds.”). Nonetheless, I have identified five issues that must be addressed before special funds could be transferred. These issues would apply equally to sections 2 and 11 of chapter 665 of the 2003 Session Laws. While I will provide as much analysis as feasible, the variety of special funds and agencies and the innumerable factual differences involved may create further issues that cannot be foreseen.

1. Restrictions on the use of special funds.

Several of the agencies are special fund agencies, completely funded by special funds. Special funds are monies that have been acquired by the state for a specific purpose, Langer v. State, 284 N.W. 238, 248 (N.D. 1939), and may be held in trust for the benefit of individuals or entities to which that purpose relates, N.D.A.G. Letter to Hanson (May 31, 1990). Although it has been argued that special fund monies can never be used for any purpose other than that for which the funds were acquired, North Dakota law is to the contrary. See State ex rel. Sathre v. Hopton, 265 N.W. 395, 405 (N.D. 1936) (holding that special fund monies can be diverted to other uses if there is a surplus over and above what is needed to accomplish the purpose for which the fund was created). Trusts created by the state can be amended by the state. Nonetheless, any diversion of special fund monies may not retroactively affect contractual or vested rights. See Thompson v. North Dakota Workers' Comp. Bureau, 490 N.W.2d 248, 251 (N.D. 1992) (“[S]tatutory amendments may not operate retrospectively to abrogate contractual or vested rights.”). On the other hand, prospective changes to the use of special fund monies may be acceptable in certain circumstances.

2. Special funds derived by tax levies.

Some of the special funds may be funded by tax levies. Article X, section 3, of the North Dakota Constitution states that “[n]o tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied.” Thus, tax levies can only be used for the purposes stated in the law imposing the taxes. Brye v. Dale, 250 N.W. 99, 104 (N.D. 1933). However, if there is a surplus above what is needed for the purpose for which a tax was levied, excess monies may be diverted to other purposes. Hopton, 265 N.W. at 405.¹ Accordingly, if a special fund affected by chapter 665 of the 2003 Session Laws is funded by tax levies, an appropriation of those funds for a use other than that stated in the law creating the levy would be unconstitutional unless there was a surplus.

3. Special funds derived from contractual relationships.

Some of the special funds may be funded through contracts with the funding entities. Article I, section 18 of the North Dakota Constitution prohibits any “law impairing the obligations of contracts.” Altering the vested rights under a contract “impairs the obligation of the contract and is a deprivation of property without due process of law.” Permann v. Knife River Coal Mining Co., 180 N.W.2d 146, 163 (N.D. 1970), overruled on other

¹ Of course, whether a purpose has been fulfilled would be a factual determination this office may not make. Conversely, the determination of whether a fund is funded by tax levies is a legal question.

grounds, Haag v. State Board of University and School Lands, 219 N.W.2d 121, 130 (N.D. 1974). Accordingly, legislation that transfers monies to the general fund from special funds that are funded through contracts may be unconstitutional, depending on the terms of those contracts and how those special funds are held.

4. Other constitutional limitations.

Other constitutional limitations may apply depending on the special fund affected. For example, Article X, section 11 of the North Dakota Constitution restricts the use of revenue from gasoline and other motor fuel excise and license taxes and motor vehicle registration and license taxes. See McKenzie County v. Lamb, 298 N.W. 241, 243 (N.D. 1941) (purpose of the constitutional provision “was to prevent any use of the gas revenues for other than highway purposes.”) Unless there is a surplus, any attempt by the Legislative Assembly to appropriate those taxes to any other purpose would be unconstitutional. Hopton, 265 N.W. at 405.

5. Impact of federal restrictions.

Finally, federal restrictions may also limit the Legislative Assembly’s ability to transfer funds from special funds to the general fund. The U.S. Supreme Court has recognized that “Congress may attach conditions on the receipt of federal funds” South Dakota v. Dole, 483 U.S. 203, 206 (1982). For example, 16 U.S.C. § 669 allows the Secretary of the Interior (Secretary) to cooperate with States in wildlife-restoration projects. However, a state may not spend any of the money received from the Secretary until it has agreed to a “prohibition against the diversion of license fees paid by hunters for any other purpose than the administration of said State fish and game department.” 16 U.S.C. § 669. North Dakota has so agreed: “Hunting and fishing license fees and application fees assessed under section 20.1-03-12.2 may only be used for departmental programs and administration.” N.D.C.C. § 20.1-02-17. Diverting those monies from the game and fish department to the general fund would not only violate the agreement with the Secretary, but would potentially cause the loss of millions of dollars of federal aid and may also violate the contract clause of Article I, section 18 of the North Dakota Constitution.

Likewise, state unemployment benefits that are financed through state payroll taxes and administered by Job Service North Dakota (Job Service) are held in individual state trust fund accounts in the U.S. Treasury’s Federal Unemployment Trust Fund. 42 U.S.C. § 1104. Federal law prohibits the use of these funds for any purpose other than payment of unemployment benefits and certain administrative expenses. Id.; 42 U.S.C. § 503.

Similarly, OMB Circular A-87, “Cost Principles for State, Local and Indian Tribal Governments,” ¶ 25(d)(5) states: “Whenever funds are transferred from a self-insurance reserve to other accounts (e.g., general fund), refunds shall be made to the Federal

Government for its share of funds transferred. . . .” OMB Circular A-87 is a federal regulation that must be followed by government entities receiving federal funds. The requirements of OMB Circular A-87 clearly apply to the Fire and Tornado Fund. See Letter from Rod Backman, director of the Office of Management and Budget, to David S. Low, Director of the Department of Health and Human Services Division of Cost Allocation (DCA Western field office)(August 2, 1999) (enclosing a check for \$24,673.57 as repayment of the federal portion of the fiscal 1999 transfers of excess funds from the Fire and Tornado Fund to the state Fire Marshal’s office). These are just a few examples of federal restrictions on the use of federal monies.

6. Application to specific funds.

As the entity with the responsibility to transfer the monies reflected in sections 2 and 11 of chapter 665 of the 2003 North Dakota Session Laws, the Office of Management and Budget will need to examine each of the special funds that may be affected by those sections before transferring any of those monies to determine whether any restrictions, including the ones identified above may apply to the funds. If you determine that the transfer of money from a special fund would be problematic, I would encourage you to consult with this office prior to refusing to comply with the transfer requirements.

An analysis of two different funds may aid in your determinations. First I will address Workforce Safety and Insurance (WSI), formerly known as the worker’s compensation program. Unlike many other state agencies, WSI is not funded through general funds appropriated from North Dakota tax revenues. “Each employer . . . [in the state of North Dakota is required to] pay into the [WSI] fund annually the amount of premiums determined and fixed by the organization for the employment or occupation of the employer.” N.D.C.C. § 65-04-04. “The [WSI] organization . . . [is required to] maintain adequate financial reserves to ensure the solvency of the fund and the payment of the future benefit obligations, based upon actuarially sound principles.” N.D.C.C. § 65-04-02.

WSI received an appropriation of \$32,397,631 from “special funds derived from the workers’ compensation fund in the state treasury . . . for the purpose of defraying the expenses of the workers compensation bureau for the biennium.” 2003 N.D. Sess. Laws ch. 44, § 1. As a previous Attorney General’s opinion noted:

The general rule is that ‘[w]here a special fund is created or set aside by statute for a particular purpose or use, it must be administered and expended in accordance with the statute, and may be applied only to the purpose for which it was created or set aside.’ 81A C.J.S. States §228, p. 800 (1994).

The Langer decision supports the notion that WSI fund assets are trust funds.² In Langer, the Supreme Court said:

Section 186 of the Constitution [now N.D. Const. art. X, § 12] . . . does not say that all public moneys shall be deposited in the general fund of the State, or made available for appropriation by the Legislative Assembly for any general purpose it may choose . . . [I]t is not contemplated that they [moneys collected for a special governmental purpose] shall become part of the general revenue of the State, and disbursed for general government purposes. Section 186, as amended, does not abolish or prohibit special funds. It restricts the use of moneys in such funds. . . [to certain definite purposes].”³

Langer v. State, 284 N.W.2d 238, 248 (N.D. 1929).

The WSI funds are special funds acquired by a tax on employers. As such, retroactive changes to how those funds are used would be prohibited. Further, the monies cannot be diverted to the general fund unless there is a surplus above what is needed to accomplish the purpose of the fund. Because WSI is statutorily required to set the lowest rate possible and still maintain funding sufficient to fulfill its responsibilities, I question whether the purpose of the employer tax will ever be fulfilled to the extent that would allow the transfer of monies to the general fund. Accordingly, I believe it would be unconstitutional to transfer WSI funds to the general fund.

The transfer of Job Service trust fund monies is also restricted, but for a different reason. As stated above, the Job Service fund monies are held in the U.S. Treasury’s Federal

² Two earlier North Dakota decisions went further, holding that the workers compensation fund is not a state fund. State v. Olson, 175 N.W. 714, 716-17 (N.D. 1919) (the workers compensation fund “is a special fund, accumulated by the collection of annual premiums from employers . . . and [it] is not a state fund . . . [and] not . . . a public [fund]”). See also Bordson v. N.D. Workmen’s Compensation Bureau, 191 N.W. 839, 842 (N.D. 1922), where the court compared the state workers compensation program to a workers compensation policy issued by a commercial insurance company and stated: “claims against the workmen’s compensation fund . . . are not claims against the state, and the moneys in the fund are not state funds.” (Citations omitted).

³ The Supreme Court’s decision in In re S.A. Healy Co., 109 N.W.2d 249 (N.D. 1961), which held that workers compensation premiums are “public moneys” within the meaning of what is now Art. X, § 12, N.D. Const., does not conflict with Langer or the earlier decisions limiting the use of moneys in the workers compensation fund. It merely requires that the funds to be used by WSI be appropriated by the legislature.

Unemployment Trust Fund. See 42 U.S.C. § 1104. Those funds may only be used for unemployment benefits and certain administrative expenses. Id.; 42 U.S.C. § 503. Accordingly, federal law prohibits the transfer of Job Service trust fund monies to the general fund, and OMB may not comply with the Legislative Assembly's directive to transfer those monies. In fact, since those monies are held by the federal government, there is no conceivable way in which OMB could complete that transfer.

B. Equipment transfer.

Your second question is whether the Legislative Assembly is authorized to transfer computers and other property from certain affected state agencies to the Information Technology Department. The Legislature's authority to establish the scope and size of state agencies is one of its most important functions. As Justice VandeWalle stated,

[t]here should be little doubt that one of the more basic roles of the legislative branch – if not the most fundamental role because of the repetitiveness with which it must be performed – is that of "the power of the purse," i.e., the appropriation of funds for the operation of the entire government. N.D. Const. art. IV, §§ 35 and 36 [specifying the manner and time for appropriation bills] and N.D. Const. art. X, § 12 [public moneys to be disbursed only pursuant to legislative appropriation].

ND Council of School Admin. v. Sinner, 458 N.W.2d 280, 286-87 (N.D. 1990) (VandeWalle, Justice, concurring) (footnote omitted).

Consistent with the appropriations power is the well-established principle that "[t]he legislature of this state is invested with legislative power to the fullest extent, except so far as limited expressly or by necessary implication in the Constitution of the state and the United States'." State Bd. of Educ. v. Fasold, 445 P.2d 489, 492 (Or. 1968). "The General Assembly has power to enact any legislation it sees fit provided it is not clearly and plainly prohibited by some constitutional provision." Becker v. Bd. of Educ., 138 N.W.2d 909, 912 (Iowa 1965). The legislature's power to enact laws necessarily includes the power to modify or repeal prior laws. Norman J. Singer, 1A Statutes and Statutory Construction (Sutherland's Statutory Construction) § 23.3 at 439-40 (6th ed. 2002 rev.).

This principle is explicit in the North Dakota Constitution: "The legislative assembly shall enact all laws necessary to carry into effect the provisions of this constitution." N.D. Const. art. IV, § 13. The North Dakota legislature has previously exercised its authority to reorganize state agencies. See, e.g., 1981 N.D. Sess. Laws ch. 486, § 1 (creating the Department of Human Services and transferring the mental health division of the Department of Health, including the state hospital, to the new department). Since the legislature has the authority to create, repeal or reorganize government agencies (except as limited by the Constitution), there is little doubt that the legislature may

require the transfer of equipment to facilitate carrying out newly assigned responsibilities. See N.D.C.C. § 31-11-05(27) (the greater includes the lesser).

Some of the equipment to be transferred was undoubtedly paid for with special funds. If the Legislative Assembly were to have merely directed the transfer of that equipment between agencies, that directive may have suffered from the same constitutional problems identified in the first part of this opinion. However, in developing proposed rates for information technology services, it appears that agencies are given credit for equipment that is transferred to ITD. See North Dakota Information Technology Functional Consolidation Project, Final Recommendations Report (Version 3.0, Sept. 15, 2003) at 13. As long as agencies are adequately reimbursed or credited for equipment purchased with special funds, there should be no constitutional issue with the transfer of that equipment to a different agency.

Some of the equipment to be transferred was also undoubtedly paid for with federal funds or supplied by a federal agency. Some agreements under which federally owned equipment is operated by a state agency permit the agency, with federal approval, to enter into an agreement under which another state agency or a private contractor will perform day-to-day operations of the federal system. See, e.g., Centers for Medicare and Medicaid Services (CMS), Memorandum to State Survey Agency Directors from Director of Survey and Certification Group re: Fiscal Year (FY) 2004 State Survey and Certification Budget Call Letter, Tab A, at 11 (June 3, 2003). The federal agency's agreement may, however, require an assurance that the state agency to whom federally owned equipment was originally supplied will be provided with real-time access to fully support the business applications of the system, and an assurance that the equipment is maintained in a system with high capacity, fault-tolerant network connections to ensure reliable support for the state agency's daily operations. Id.

Each agreement under which federal information technology equipment has been supplied to a state agency should be examined on a case-by-case basis. Federally owned computer equipment may be transferred to ITD only if the transfer is permitted under the agreement providing the equipment to a state agency or the transfer is otherwise permitted by the federal agency involved. Further, the transfer of equipment purchased with federal funds should also be examined to ensure there are no restrictions on that transfer.

Under section 16 of North Dakota Session Laws chapter 665, “[e]ach state agency and institution [unless excluded or exempted] shall obtain electronic mail, file and print server administration, data base administration, storage, application server, and hosting services through a delivery system established by the information technology department.” 2003 N.D. Sess. Laws ch. 665, § 16. The consolidation is part of a program to “achieve efficiencies . . . relating to the required consolidation of information

LETTER OPINION 2003-L-54
November 20, 2003
Page 9

technology functions . . . [and] through [the] efficiencies resulting from this consolidation. . . [to] achieve accumulated net savings totaling \$1,400,000 for the 2003-05 biennium.” 2003 N.D. Sess. Laws ch. 665, §11. Because the Legislative Assembly has clear authority to establish, abolish, and reorganize state agencies, the Legislative Assembly also has authority to require the transfer of equipment between agencies in legislation consolidating specified information technology services as long as all constitutionally- and federally-imposed requirements are met.

Sincerely,

Wayne Stenehjem
Attorney General

sam/mjm/vkk