

**LETTER OPINION
2004-L-78**

December 28, 2004

Mr. Harlan Klein
Chairman
North Dakota Wheat Commission
4023 State Street
Bismarck, ND 58503-0690

Dear Mr. Klein:

Thank you for your letter asking whether the North Dakota Wheat Commission (Commission) may, under N.D.C.C. ch. 4-28, incur legal and consulting expenses for its ongoing trade case beyond the revenues generated by the wheat tax levy dedicated for this purpose in the current biennium. For the reasons stated below, it is my opinion that the Commission lacks the authority under N.D.C.C. ch. 4-28 to incur legal and consulting expenses for its ongoing trade case beyond the revenues generated by the wheat tax levy dedicated for this purpose in the current biennium.

ANALYSIS

In your letter you indicated the Commission is a special fund agency with a continuing appropriation. The continuing appropriation is contained in N.D.C.C. § 4-28-08, which provides:

Each first purchaser shall make quarterly reports and returns to the commission, on or before the twentieth day of the month next succeeding each calendar quarterly period, commencing with the calendar quarter ending September 30, 1995. The commission shall prescribe the forms to be used. With each report and return, the first purchaser shall remit to the commission, in the form of a remittance payable to the state treasurer, the tax due. The commission shall transmit all such payments to the state treasurer to be deposited in the state treasury to the credit of a special revolving fund known as the "state wheat commission fund". All money in the state wheat commission fund is appropriated on a continuing basis to the commission for carrying out the purposes of this chapter. Expenditures from the fund may be made upon vouchers duly approved by the commission to carry out this chapter. Regular audits of the commission's accounts must be conducted in accordance with chapter 54-10.

(Emphasis added.)

Your letter also refers to revenues generated by the wheat checkoff authorized in N.D.C.C. § 4-28-07(1), and which provides that a “tax of ten mills per bushel [35.24 liters] by weight must be levied and imposed upon all wheat grown in this state, delivered into this state, or sold through commercial channels to a first purchaser in this state.” Further, the “commission may use the amount raised by two mills of the levy provided for in this section to support the commission’s involvement in trade issues throughout the world.” N.D.C.C. § 4-28-07(4) (emphasis added).

Section 4-28-08, N.D.C.C., refers to the creation of a revolving fund¹ into which is deposited the wheat checkoff funds collected and creates a continuing appropriation for all moneys in the revolving fund to carry out the purposes of the chapter, including the use of two mills to support the commission’s involvement in trade issues. N.D.C.C. § 4-28-07(4).

You question whether the Commission’s statutory continuing appropriation permits it to incur the legal expense for the trade case beyond current revenues generated by the checkoff. A continuing appropriation “is an appropriation running on from year to year without further legislative action until the purpose of levy and appropriation has been accomplished.” 9 Words and Phrases 217 (2003) (citing State v. Cooper, 536 S.E.2d 870 (S.C. 2000)). “A continuous or continuing appropriation runs from year to year without the need for further authorization in the budget act. The constitutional requirement for an appropriation is satisfied if moneys received by the state are set apart as a continuing appropriation for a particular specified purpose” 63C Am. Jur. 2d Public Funds § 35 (2d ed. 1997).

Continuing appropriations have long been recognized as valid in this state. “Continuing appropriations are nothing new to the legislative process [see State v. Sorlie, 56 N.D. 650, 219 N.W. 105 (1928)], and we agree with those courts which have held under similar state constitutional provisions that continuing appropriations are a valid ‘appropriation first made by the legislature.’ Moreover, a continuing appropriation is ‘continuing’ only if future legislative assemblies choose not to repeal or modify it. This appropriation does not violate Article X, § 12 or unconstitutionally bind future legislatures.” Gange v. Clerk of Burleigh County District Court, 429 N.W.2d 429, 436 (N.D. 1988) (citations omitted).

¹ A revolving fund is a “fund where moneys are continually expended and then replenished, such as a petty-cash fund.” Black’s Law Dictionary 697 (8th ed. 1999). It may “mean a fund, which, when reduced, is replenished by new funds from specified sources.” 37A Words and Phrases 342 (1950).

Courts in other jurisdictions have recognized the validity of continuing appropriations in the absence of a constitutional provision to the contrary. Button's Estate v. Anderson, 28 A.2d 404, 409-10 (Vt. 1942); Board of Regency of University of Nebraska v. Exon, 256 N.W.2d 330, 333-334 (Neb. 1977); McDonald v. Frohmiller, 163 P.2d 671, 674 (Ariz. 1945); State ex rel. Hawkins v. Oklahoma Tax Commission, 462 P.2d 536, 538-540 (Okla. 1969); Louisiana State Department of Agriculture v. Sibille, 22 So.2d 202, 208 (La. 1945).

N.D.A.G. Letter to Hoffner (May 23, 1988). An electronic search revealed 126 current and repealed statutes in the North Dakota Century Code containing the phrase "continuing appropriation."

Continuing appropriations have created fiscal management problems in the past. See, e.g., Langer v. State, 284 N.W. 238, 243-44 (N.D. 1939) ("Prior to [1915] it had been a common practice to maintain many continuing appropriations with the result that in addition to the specific appropriations made by the Legislative Assembly, there remained, from year to year, continuing appropriations (in some instances without specific limits) so that it was difficult to have a clear picture of the authorized expenditures of the State for any fiscal biennium."). To control the situation, some states have constitutional and statutory limitations on the use of continuing appropriations. For example, several states have constitutions which "place limitations upon the duration or existence of appropriations beyond a definite number of years." 63C Am. Jur. 2d Public Funds § 35 (2d ed. 1997).

The state of Arkansas has a statute dealing with multi-year contracts which provides, in part:

Original terms of such multi-year contracts shall terminate on the last day of the current biennium, and any renewals by the state based upon continuing appropriation shall not exceed the next succeeding biennium. When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent year of a multi-year contract, the contract for such subsequent year shall be terminated and the contractor may be reimbursed for the reasonable value of any nonrecurring costs incurred but not amortized in the price of the commodities or services delivered under the contract.

A.C.A. § 19-11-238(c) (discussed in Ark. Op. Atty. Gen. No. 99-352).

North Dakota has no similar constitutional or statutory provisions limiting expenditures or contracts for expenditures based upon continuing appropriations to a period of years. However, the Attorney General Contract Drafting & Review Manual (2002) does caution at page 10 that

A contract can properly extend beyond the current biennium if the agency has express authority to enter into such a contract or if the termination clause in the contract allows the agency to terminate the contract if sufficient funds are unavailable, if the law regarding the contract is changed, or without cause at any time. See Chapter 3, Termination; Letter to Robert Peterson (Mar. 18, 1977).

Section 54-16-03, N.D.C.C., provides that “[a] state officer may not expend, or agree or contract to expend, any amount in excess of the sum appropriated for that expenditure.” “Any state officer who violates section 54-16-03 is guilty of a class B misdemeanor.” N.D.C.C. § 54-16-05. Similarly, N.D.C.C. § 54-44.1-10 states that “[n]o payment may be made and no obligation may be incurred against any appropriation unless such payment or obligation has been authorized as provided by law. Every official authorizing payments in violation of this chapter is subject to the penalties and provisions of chapter 12.1-23.” In addition, “[a]ll expenditures of the state and of its budget units of moneys drawn from the state treasury must be made under authority of biennial appropriations acts, which must be based upon a budget as provided by law, and no money may be drawn from the treasury, except by appropriation made by law as required by section 12 of article X of the Constitution of North Dakota.” N.D.C.C. § 54-44.1-09.

Since continuing appropriations by their very nature are not biennial appropriations, N.D.C.C. § 54-44.1-09 would not appear applicable to them. However, it is arguable that a state officer would be in violation of N.D.C.C. § 54-16-03 if the officer actually expended more during a biennium than the agency had on hand or reasonably anticipated receiving in a continuing appropriation fund, since it would constitute deficit spending from the fund; any moneys used to pay the deficit during the biennium could not have been properly appropriated for that purpose, absent some authority from the Emergency Commission. See generally N.D.C.C. ch. 54-16.

Whether the prohibition in N.D.C.C. § 54-16-03 from contracting to expend amounts in excess of the sum appropriated would be applicable to a commitment to expend future receipts subject to a continuing appropriation is more problematic. It is rare that a continuing appropriation contains a finite dollar figure. In State v. Sorlie, 219 N.W. 105 (N.D. 1928), there was a “specific setting apart of the sum of \$200,000 for the use of the

Industrial Commission in carrying out the purposes of the act by which the commission was created.” Id. at 108. The appropriation “did not lapse at the expiration of the biennium; but was intended by the Legislature to be a continuing appropriation, available for the use of the Industrial Commission in carrying out the purposes of the act until the appropriation had been fully expended or repealed.” Id. (syllabus by the court). Unless a continuing appropriation contained some limit, contracting against future receipts is arguably not “in excess of the sum appropriated for that expenditure” within the meaning of the statute.

More typical for a continuing appropriation is a formula for determining the funds subject to the continuing appropriation. See, e.g., N.D.C.C. §§ 4-10.1-09, 4-10.2-08. Any specific continuing appropriation in question would have to be analyzed to determine if it was intended to be a limitation on expenditures within a biennium. Some continuing appropriation statutes, such as N.D.C.C. § 54-17.2-02.2,² clearly contemplate expenditures over a number of biennia. Others may contain limitations, such as limiting payment of expenses to an annual cycle. See, e.g., N.D.C.C. §§ 15-05-19,³ 15-07-22.

Continuing appropriations by their nature “exist over a prolonged period” and, therefore, are not limited to a single biennium unless constrained by specific language. The American Heritage Dictionary 317 (2d coll. ed. 1991). See N.D.A.G. 2004-L-42 (“In this instance, three of the distributions are subject to continuing appropriations. . . . As

² Section 54-17.2-02.2, N.D.C.C., provides as follows:

The moneys received by the industrial commission from the sale of evidences of indebtedness and lease rental payments, and moneys received by the industrial commission or the state agencies and institutions from revenue generated by projects authorized by the legislative assembly, are hereby appropriated as a continuing appropriation for the acquisition of these authorized projects and the payment of lease rentals for these projects.

³ Section 15-05-19, N.D.C.C., provides as follows:

There is appropriated annually the amounts necessary to pay expenses for minerals controlled by the board of university and school lands, including appraisal fees, consulting fees, refunds, and expenses determined by the board as necessary to manage, preserve, and enhance the value of the trust asset. Each payment must be made from the trust fund for which the land is held.

such, the appropriation is not cancelled at the end of the biennium, and the funds may be expended according to law.”); N.D.A.G. Letter to Sprynczynatyk (Apr. 3, 1990) (“The initial question is whether N.D.C.C. § 61-02-64.1 establishes a continuing appropriation authorizing the Water Commission to continually distribute moneys from the contract fund. A continuing appropriation would enable the Water Commission to develop the revolving loan fund concept discussed in your letter.”). Cf. N.D.A.G. 96-L-21 (“Appropriations for foundation aid are not continuing appropriations, and the Department of Public Instruction may spend the appropriations only for the purposes provided by law and fulfillment of obligations occurring during the relevant biennium.”).

Thus, it would not appear that a state agency would be acting unlawfully if it committed by contract to expend moneys in the future from a continuing appropriation,⁴ assuming there was no limiting language in the continuing appropriation and related statutory provisions and the amounts committed did not exceed any amounts reasonably anticipated to be received from the source of money comprising the continuing appropriation.⁵

Consequently, it is necessary to analyze whether the Commission’s continuing appropriation and related statutory provisions contain limiting language which would prevent it from contracting to expend moneys reasonably anticipated to be received from the revolving fund. Section 4-28-08, N.D.C.C., as quoted above, provides for collection of the wheat tax levy moneys and their deposit into the revolving fund. Section 4-28-08,

⁴ However, if the Legislature would repeal the continuing appropriation while there was an obligation outstanding, it would raise additional questions beyond the scope of this opinion.

⁵ That is not to say, however, that there are no fiscal constraints on contracting to expend future receipts of a continuing appropriation. The constitution contains a debt limit provision. See N.D. Const. art. X, § 13. In Lesmeister v. Olson, 354 N.W.2d 690 (N.D. 1984), the North Dakota Supreme Court determined that the theory of a continuing appropriation would not save a long-term obligation of the state from the prohibitions of the state debt limit. Id. at 700. The court noted that the “‘continuing appropriation’ in this case cannot be repealed once the bonds are issued without threat of a breach of contract action by the bond holders until the bonds and interest are paid in full.” Id. Thus, if the debt limit is implicated, i.e., that the amount of money involved is over \$2,000,000 and is payable from any general state tax, excise tax, or ad valorem tax, the constitutional debt limitation contained in N.D. Const. art. X, § 13 would apply and the obligation could not lawfully be incurred. However, I need not reach that issue in this case since I have determined that the Commission lacks the statutory authority to incur the expenses beyond the amounts available in the revolving fund for that purpose during the current biennium.

N.D.C.C., further states that “[a]ll money in the . . . fund is appropriated on a continuing basis to the commission for carrying out the purposes of this chapter.” Id. (emphasis added). The relevant purpose in this instance is contained in N.D.C.C. § 4-28-07(4), which provides that the “commission may use the amount raised” by two mills of the tax levy to support involvement in world trade issues. It is significant that the statutory words “amount raised” are not phrased in the future tense. See N.D.C.C. § 1-02-03. That is an indication of a limitation on the ability of the Commission’s use of the tax money to that which is currently available in the biennium and precludes an argument that the Legislature intended any use of amounts to be raised in the future.

Thus, it is my opinion that the Commission lacks the authority under N.D.C.C. ch. 4-28 to incur legal and consulting expenses for its ongoing trade case beyond the revenues generated by the wheat tax levy dedicated for this purpose in the current biennium. This whole problem can be avoided by agencies following the Contract Drafting & Review Manual and inserting appropriate language into multi-year agreements making them contingent on the availability of sufficient funds or appropriations. In this instance, the problem can be remedied by an amendment or modification to any agreements the Commission has entered into with its attorneys or consultants to make any payment obligation in a future biennium contingent on the availability of moneys in its revolving fund in that biennium or on the availability of other legally available funds. See N.D.C.C. § 9-09-06 (written contract may be altered).

Sincerely,

Wayne Stenehjem
Attorney General

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).