

**LETTER OPINION
2012-L-06**

May 25, 2012

Mr. William R. Hartl
Rugby City Attorney
223 S Main Ave
Rugby, ND 58368-1720

Dear Mr. Hartl:

Thank you for your letter asking three questions concerning the distribution of certain insurance premium taxes in support of city and township fire departments and rural fire protection districts.¹ You ask whether insurance tax funds distributed to fire departments pursuant to N.D.C.C. ch. 18-04 are public funds subject to the same laws as other public funds; whether these funds are under control of the fire department or under control of the governing body under which the fire department exists; and whether the funds may be used to pay for the startup costs and creation of a non-profit corporation serving as a “firefighters relief association.”²

For the reasons stated below, it is my opinion that the insurance premium tax funds distributed to local fire departments under N.D.C.C. ch. 18-04 are public funds subject to the same laws as other public funds; that the governing body of a city or township retains control over use of the funds when these public funds are distributed to a fire department under control of a city or township, but that the board of directors of a rural fire protection district controls the funds of that district; and that insurance premium tax proceeds distributed pursuant to N.D.C.C. ch. 18-04 may be used to pay the costs associated with creation of a non-profit corporation serving as a firefighters relief association under chapter 18-05.

¹ Although you asked specifically about volunteer fire departments this analysis is applicable to all fire departments.

² See N.D.C.C. ch. 18-05.

ANALYSIS

You state in your letter that the volunteer fire department for the city of Rugby is essentially comingled with the Rugby Rural Fire Protection District,³ and that both receive insurance premium tax funds under N.D.C.C. ch. 18-04. Correspondence enclosed with your letter demonstrates the desire to form a firefighters relief association under N.D.C.C. ch. 18-05, and your questions concern the ability to use funds generated by an insurance premium tax and provided to local fire departments to accomplish this purpose.

This office has previously described the insurance premium tax program:

N.D.C.C. § 26.1-03-17 provides for the collection of an insurance premium tax on certain lines of insurance. The revenue from that insurance tax is deposited into the insurance tax distribution fund for distribution to eligible entities. N.D.C.C. § 18-04-04.1. Eligible entities are cities, one or more townships, or fire districts. N.D.C.C. § 18-04-01. The State Insurance Commissioner distributes the insurance premium tax revenue to eligible entities that have filed certificates of existence pursuant to N.D.C.C. § 18-04-02. N.D.C.C. § 18-04-01. The Insurance Commissioner distributes revenues for city fire departments to the city auditor. N.D.C.C. §§ 18-04-05, 18-04-07. The manner in which the insurance premium tax proceeds are disbursed by the city auditor to the fire department depends on how the fire department is organized. N.D.C.C. § 18-04-07.⁴

The term "public funds" is defined by statute as:

"[p]ublic funds" includes all funds derived from taxation, fees, penalties, sale of bonds, or from any other source, which belong to and are the property of a public corporation or of the state, and all sinking funds of such public corporation or of the state, and all funds from whatever source derived and for whatever purpose to be expended of which a public corporation or the state have legal custody. The term includes funds of which any board, bureau, commission, or individual, created or authorized by law, is authorized to have control as the legal custodian for any purpose whatsoever whether such funds were derived from general or special taxation or the assessment of persons or corporations for a specific purpose. The term does not include funds of students or student

³ For the purposes of this opinion, I assume that there is a lawful contract or joint powers agreement between the city of Rugby and the Rugby Rural Fire Protection District.

⁴ N.D.A.G. 95-L-142.

organizations deposited in a student financial institution approved by and under the control of the school board.⁵

The funds distributed to local fire departments under the authority of N.D.C.C. ch. 18-04 meet the statutory definition and therefore are public funds. The governmental entities receiving these funds may spend them according to legislative authorization.⁶ There are no statutes treating these funds categorically differently from other public funds. Therefore, it is my opinion that the insurance premium tax funds distributed to local fire departments under N.D.C.C. ch. 18-04 are public funds and are generally subject to the same laws as other public funds.

The funds disbursed to local fire departments under N.D.C.C. ch. 18-04 are under the control of the governing body appropriate to the entity receiving the funds and may only be provided to three types of eligible governmental entities. Those entities are cities, townships, or organized fire districts.⁷ A city's fire department is a part of the city government and, accordingly, is subject to the city's control.⁸ Similarly, the electors of a township may allow the board of township supervisors to provide by contract or otherwise for protection from fire.⁹ If the township chooses to form its own rural fire department, those funds would be subject to control of the township board of supervisors.¹⁰ However, once established by a county or counties, a rural fire protection district is governed by its board of directors.¹¹

This board of directors has authority to manage and conduct the business affairs of the district, and also to form a budget and certify that amount to the county auditor or auditors for lands within the district in order to levy a tax to maintain the district.¹² Therefore, it is my further opinion that the governing body of a city or township retains control over use of the funds when these public funds are distributed to a fire department under control of a

⁵ N.D.C.C. § 21-04-01(5).

⁶ N.D.A.G. 2002-L-72 (city must have either statutory authority or authority under a home rule charter to fund a city centennial association), N.D.A.G. 2002-F-09 (in the absence of express statutory authority, a county without home rule authority may not donate money to a nonprofit organization to defray the costs of a Fourth of July celebration), N.D.A.G. 93-L-175 (rural fire protection district must have specific statutory authority to construct a building and lease it to another entity).

⁷ N.D.C.C. § 18-04-01.

⁸ N.D.A.G. 95-L-142.

⁹ N.D.C.C. § 18-06-10.

¹⁰ N.D.C.C. § 58-06-01(1).

¹¹ N.D.C.C. § 18-10-06.

¹² N.D.C.C. §§ 18-10-06(3) & (4), 18-10-07. Cf. N.D.A.G. 96-L-230 (district board of health has authority to determine the compensation of district personnel within its budget).

city or township,¹³ but the board of directors of a rural fire protection district controls the funds of that district.

The ability of a political subdivision to incorporate a non-profit or for-profit corporation depends upon the authority that has been granted to the political subdivision. A political subdivision must have specific authority to act in a particular subject area before it may take an action. "In defining a [political subdivision's] powers the rule of strict construction applies and any doubt as to the existence or the extent of the powers must be resolved against the [political subdivision]."¹⁴ This office has previously held that the incorporation of a separate non-profit or for-profit corporation is not merely a manner and means of exercising governmental powers, "but is instead a power in and of itself to create a separate entity which has an independent identity."¹⁵ Further, "[p]ublic policy indicates that governments should be accountable to the people and the power to incorporate a separate entity would weaken that public policy."¹⁶ Therefore, this office has held that specific statutory authority is required before a political subdivision may charter a corporation.¹⁷

In this instance, there is such authority. State law provides:

A firefighters relief association may be organized in any city, rural fire department, or rural fire protection district that has a fire department. In organizing a firefighters relief association, the procedure provided in chapter 10-33 must be followed.¹⁸

Chapter 10-33, N.D.C.C., is the chapter governing the formation of non-profit corporations. Therefore, state law permits both the city of Rugby and the Rugby Rural Fire Protection District to organize a firefighters relief association as a non-profit corporation.

However, the express powers of a city and a board of a rural fire protection district to establish a firefighters relief association are silent as to the source of funds to be used in establishing the association. There are no statutory requirements or limitations on the use

¹³ A city, township, or rural fire protection district may also contract for the provision of fire protection services. N.D.C.C. §§ 18-06-10, 18-10-10, 58-03-07(15); N.D.A.G. 95-L-142. N.D.C.C. § 18-04-07. Funds provided under N.D.C.C. ch. 18-04 may be paid by the political subdivision receiving the same to an entity that it contracts with for the provision of fire protection services. N.D.C.C. § 18-04-07.

¹⁴ Roeders v. City of Washburn, 298 N.W.2d 779, 782 (N.D. 1980).

¹⁵ N.D.A.G. 97-F-07.

¹⁶ Id.

¹⁷ Id.

¹⁸ N.D.C.C. § 18-05-01.

of insurance premium tax funds under N.D.C.C. ch. 18-04. Once established, money received by the firefighters relief association may only be disbursed for certain purposes which includes the maintenance of the association.¹⁹

If authority is not expressly granted to a political subdivision or state agency it must be determined whether that power is necessarily implied from those powers expressly granted or otherwise necessary to carry out the purpose.²⁰

In cases where the North Dakota Supreme Court has found an incidental or implied power to exist, there appears to be a direct correlation between the express and incidental or implied power. For example, in one case, the Court found that a county court had incidental authority to resolve an issue of paternity because the resolution was reasonably necessary to enable the court to effectively adjudicate who should inherit the estate in question. Matter of Estate of Sorensen, 411 N.W.2d 362 (N.D.1987). In another case, the Court found that the general powers conferred upon a city to contract for electrical energy necessarily includes implied powers, such as the power to engage engineering and legal services to explore the feasibility of such undertaking. Anderson v. City of Hankinson, 157 N.W.2d 833 (N.D. 1968). Similarly, the Court found that the power of a drainage board to continue a hearing on petition to establish a drain was an implied power of the board. Chester v. Einarson, 34 N.W.2d 418 (N.D. 1948).

In the cases referenced above, the express power could not be fully exercised without the implied power.²¹

In this situation, there is a direct correlation between the express authority of a city and a board of a rural fire protection district to establish a firefighters relief association and an implied authority to expend funds to fully exercise the express authority. Funding to both entities includes insurance tax funds distributed under ch. 18-04. A board of a rural fire protection district is provided express authority to perform all acts necessary to fully carry out the purposes of ch. 18-10²² and a municipality is provided express authority to control the finances.²³

Thus, a city or a rural fire protection district may expend funds received under chapter 18-04 for their legally authorized activities and state law permits them to form a firefighters

¹⁹ N.D.C.C. § 18-05-05(1).

²⁰ N.D.A.G. 2004-L-08.

²¹ Id.

²² N.D.C.C. § 18-10-06(9).

²³ N.D.C.C. § 40-05-01(2).

LETTER OPINION 2012-L-06
May 25, 2012
Page 6

relief association as a non-profit corporation. Therefore it is my further opinion that insurance premium tax proceeds distributed pursuant to N.D.C.C. ch. 18-04 may be used to pay the costs associated with creation of a non-profit corporation serving as a firefighters relief association under chapter 18-05.

Sincerely,

Wayne Stenehjem
Attorney General

eee/vkk

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.²⁴

²⁴ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).