

**LETTER OPINION
2015-L-04**

June 4, 2015

Mr. Sparb Collins
Public Employees Retirement System
PO Box 1657
Bismarck, ND 58502-1657

Mr. Dave Hunter
Retirement and Investment Office
PO Box 7100
Bismarck, ND 58507-7100

Dear Mr. Collins and Mr. Hunter:

Thank you for your letter requesting my opinion on whether and to what extent the North Dakota Public Employees Retirement System and the North Dakota Retirement and Investment Office are authorized to make expenditures during the 2015-2017 biennium, without a biennial appropriation approved by the Legislature.

For the following reasons, it is my opinion that the express continuing appropriation authority granted these particular agencies, governed by boards which have fiduciary responsibilities over funds held in trust, carries with it the implied authority to expend funds for the salaries and associated operating expenses of the individuals needed to effectuate those appropriations, to the extent the implied authority is not prohibited under state law.

ANALYSIS

You have indicated that the Sixty-Fourth Legislative Assembly adjourned without approving Senate Bill 2022, and that this bill contained the biennial appropriations for both the North Dakota Public Employees Retirement System (NDPERS) and the North Dakota Retirement and Investment Office (NDRIO).¹ As introduced, S.B. 2022 proposed to appropriate funds to these agencies for salaries and wages, operating expenses, and

¹ See S. and H. Journals, S.B. 2022, 2014 N.D. Leg.

contingencies during the 2015-2017 biennium.² Subsequent to its introduction, various amendments were made to S.B. 2022 unrelated to the biennial appropriation for these agencies.³ Ultimately the Legislature adjourned without passing S.B. 2022.⁴ The Legislature did not, however, repeal, rescind, or otherwise alter the responsibilities of these agencies toward program participants and investment clients.

AGENCY RESPONSIBILITIES

While the Legislature did not approve a biennial appropriation for the salaries and wages of agency employees, board members, or other operating expenses, these agencies are and continue to be charged with the management, investment, and processing of total funds in excess of \$10.5 billion on behalf of the state, various political subdivisions, and public employees.⁵ Unlike many other state agencies, NDRIO and NDPERS are governed by boards that function in a fiduciary capacity and must satisfy the legal obligations of that role. Pursuant to state law, NDPERS is responsible for the administration of a myriad of programs that provide benefits to public employees, retirees, and their dependents and beneficiaries. These programs include the North Dakota public employees defined benefit hybrid retirement plan (“defined benefit plan”),⁶ the defined contribution retirement plan, the highway patrolmen’s retirement system, the job service retirement plan established under N.D.C.C. § 52-11-01, the deferred compensation plan, the pre-tax benefits program, and the uniform group insurance program.⁷ The NDRIO is responsible for administration of both the North Dakota Teachers’ Fund for Retirement (NDTFFR) plan and the investment program overseen by the North Dakota State Investment Board (NDSIB).⁸ The retirement plan established to provide retirement benefits to the teachers of this state and their beneficiaries is NDTFFR.⁹ The NDSIB is the body charged with the investment of multiple funds on behalf of the state and political subdivisions including NDPERS, NDTFFR, and the Legacy fund.¹⁰

² As introduced, S.B. 2022 proposed a total biennial appropriation of slightly more than \$15 million for salaries and wage, operating expenses, and contingencies, as well as 55.50 full-time equivalent positions, for these two agencies.

³ S. and H. Journals, S.B. 2022, 2014 N.D. Leg.

⁴ Id.

⁵ The Investment Performance Summary published by NDRIO indicates that the NDSIB for the quarter ended March 31, 2015 has over \$10.5 billion of assets under management; NDPERS and the NDTFFR are included in the funds under management.

⁶ The defined benefit plan encompasses the North Dakota judges retirement plan under N.D.C.C. § 54-52-06.1 and the law enforcement and national guard security officers and firefighters retirement plans under N.D.C.C. §§ 54-52-06.2, 54-52-06.3, and 54-52-06.4.

⁷ N.D.C.C. §§ 54-52-04, 54-52.3-02, 54-52.6-04.

⁸ N.D.C.C. § 54-52.5-01.

⁹ N.D.C.C. § 15-39.1-09.

¹⁰ N.D.C.C. § 21-10-06.

APPROPRIATION AUTHORITY

Under these unique circumstances, your question requires an examination of what, if any, appropriation authority these agencies have absent a specified biennial appropriation from the Legislature. An appropriation “is the setting apart from the public revenue of a definite sum of money for the specified object in such manner that officials of the government are authorized to use the amount so set apart, and no more, for that object.”¹¹ The Legislature is not prohibited, however, from enacting continuing appropriations.¹² “A continuing appropriation is an appropriation running from year to year, without further legislative action, until the purpose of the levy and appropriation is accomplished.”¹³ The North Dakota Supreme Court has stated that a continuing appropriation is a valid appropriation first made by the Legislature, and it remains continuing only if future legislative assemblies choose not to repeal or modify it.¹⁴ In a prior opinion I observed that continuing appropriations have long been recognized as valid in this state and are nothing new to the legislative process.¹⁵

NDPERS CONTINUING APPROPRIATION AUTHORITY

Previous legislative assemblies have granted NDPERS express continuing appropriation authority for almost all of the payments associated with the programs it is responsible for administering. For example, NDPERS has express continuing appropriation authority for: the payment of the benefits, consulting fees, and making of investments for the defined benefit plan;¹⁶ costs related to the making of investments and payments to beneficiaries of the North Dakota highway patrolmen’s retirement system;¹⁷ the administrative and consultant expenses of the defined contribution plan;¹⁸ the payment of consultants, vendors providing claims administrations services, any insurance costs associated with the medical spending account, and medical reimbursement for the medical spending account if necessary, and payments to the employees participating in, the pretax benefits

¹¹ Gammons v. Sorlie, 219 N.W. 105, 108 (N.D. 1928).

¹² N.D.A.G. 2004-L-78.

¹³ 81A C.J.S. States § 405.

¹⁴ Gange v. Burleigh Cnty. Dist. Ct., 429 N.W.2d 429, 436 (N.D. 1988).

¹⁵ N.D.A.G. 2004-L-78.

¹⁶ N.D.C.C. §§ 54-52-04(6), 54-52-13, 54-52-13.1, 54-52-14.1.

¹⁷ N.D.C.C. § 39-03.1-05.

¹⁸ N.D.C.C. § 54-52.6-06. This section provides for an explicit continuing appropriation for a consultant for the plan and indicates that any administrative expenses must be paid by the plan participants and authorizes the board or its contracted vendor to charge and deduct those expenses directly from the participants’ account.

program;¹⁹ the consulting fees and insurance benefits related to the uniform group insurance program, including investments of and contributions toward benefits permitted under the retiree health benefits fund, the payment of claims and costs as provided under the contingency reserve fund, the acceptance and expenditure of third party payments for the benefits, premiums and administrative expenses of the uniform group insurance program, and use of funds that may become available from various sources for a collaborative drug therapy program.²⁰

Notably, there is no express continuing appropriation authority for the payment of benefits for the deferred compensation plan established under N.D.C.C. § 54-52.2-01 or the retirement plan established under N.D.C.C. § 52-11-01 and administered by NDPERS (“job service retirement plan”). For the following reasons, however, there exists sufficient authority under state law to permit the payment of benefits under these programs.

Generally funds held in trust are not subject to the appropriation power of the Legislature:

To be subject to the appropriation power of the Legislature, funds held by state officers or agencies must belong to the state. Funds held in trust to be distributed according to legislatively prescribed conditions are not subject to appropriation, even though they are received on account of the state and the state treasurer is designated custodian.²¹

Both the deferred compensation program and job service retirement plan are comprised of funds held in trust by NDPERS.

Prior opinions of this office have observed that the administration of the deferred compensation program is for the benefit of the employees and involves the deferral of the employees’ compensation pursuant to the employees’ direction.²² State law requires NDPERS to act as administrator and fiduciary for the deferred compensation program.²³

¹⁹ N.D.C.C. §§ 54-52.3-03, 54-52.3-06. While this section does provide a continuing appropriation for many of the costs associated with the pre-tax benefits program, this continuing appropriation authority is not unlimited. N.D.C.C. § 54-52.3-03 goes on to state that “[a]ll other expenses of administering the program must be paid in accordance with the agency’s appropriation authority as established by the legislative assembly.” The language is indicative of a requirement for a biennial appropriation for the remaining administrative expenses of the program. N.D.A.G. Letter to Collins (May 16, 1990).

²⁰ N.D.C.C. §§ 54-52-04(6), 54-52.1-03.2, 54-52.1-04.3, 54-52.1-06, 54-52.1-06.1, 54-52.1-15, 54-52.1-16.

²¹ 63C Am. Jur. 2d Public Funds § 28.

²² N.D.A.G. Letter to Rolfson (Mar. 29, 1985); N.D.A.G. Letter to Person (Oct. 14, 1988)(1).

²³ N.D.C.C. § 54-52.2-03.

Further, administrators of the program are authorized to make payments or investments as specified by the employee, and, by statute such payments or investments are not a prohibited use of the general assets of the state, county, city, or other political subdivision.²⁴ Given that the funds of the deferred compensation program are held in trust for the participating employees, NDPERS is a fiduciary of those funds and has the authority to disburse and invest them, and state law specifically designates that such disbursement will not constitute a prohibited use of general assets of a governmental body, the investment and benefit payments of the deferred compensation program are not subject to the Legislature's appropriation authority.

Likewise, the job service retirement plan is a pension plan that was established for employees of Job Service North Dakota having assets held in trust for its members.²⁵ In another prior opinion, this office has observed that "it has been successfully argued that the assets of a state pension plan are owned by the members of the system and not the state."²⁶ As a result, the payment of benefits from the job service retirement plan is also not subject to legislative appropriation authority.²⁷

Additionally, it should be noted S.B. 2022 did not contain a biennial appropriation for benefits payable under the job service retirement plan. In finding appropriation authority was intended in a situation where a biennial appropriation was not made, the North Dakota Supreme Court has opined:

Where the meaning of a statute is doubtful, the construction placed upon it by the officers charged with the administration thereof is entitled to considerable weight; and this is especially so if it is apparent that the members of the state Legislature in dealing with the subject must have been aware of the construction which had been placed upon the statute by those administering it and failed to indicate any disapproval of such construction.²⁸

²⁴ N.D.C.C. § 54-52.2-05.

²⁵ N.D.C.C. § 52-11-01.

²⁶ N.D.A.G. Letter to Person (Jan. 11, 1988).

²⁷ Also, it is reasonable to conclude that there is continuing appropriation authority for benefit payments from the job service retirement fund. N.D.C.C. §§ 54-52-04(6) and 54-52-13.1 each provide continuing appropriation for benefit payments from a retirement fund administered by NDPERS. State statutory construction principles allow singular words to be interpreted to include the plural, so likewise it is reasonable to conclude there is continuing appropriation authority for benefit payments from the job service retirement fund as well. N.D.C.C. §1-01-35.

²⁸ Gammons v. Sorlie, 219 N.W. 105, 108 (N.D. 1928).

In this case, the administrators and legislators exhibited agreement that NDPERS had appropriation authority to make payments from the job service retirement plan and did not need additional legislative action to effectuate it.

NDRIO CONTINUING APPROPRIATION AUTHORITY

The governing boards supported by NDRIO have also been granted express continuing appropriation authority for almost all of the payments associated with the programs the agency is responsible for administering. The responsibility for the administration of NDTFFR and for the investment program overseen by NDSIB lies with NDRIO. Express continuing appropriation authority has been granted for NDTFFR for the payment of benefits and consultant fees.²⁹ The NDSIB is charged with the investment of various funds, and the board is granted continuing appropriation authority for the associated investment costs and “all moneys required for the making of investments of funds under the management of the board.”³⁰ Additionally, NDRIO itself also has some continuing appropriation authority for the cost of operation of the agency. Section 54-52.5-03, N.D.C.C., establishes the state retirement and investment fund and provides a continuing appropriation from the funds managed by the NDSIB to the state retirement and investment fund for the actual amount of administrative expenses incurred by NDRIO for services rendered. This section goes on to state that the actual amount of administrative expenses incurred by NDRIO must be paid from the fund in accordance with the agency’s appropriation authority.³¹ This statute provides continuing appropriation authority to transfer money to the retirement and investment fund from investment clients for the payment of administrative expenses but restricts disbursement from the fund to an amount established by the Legislature.

IMPLIED AUTHORITY

Given that the Legislature had granted these agencies continuing appropriation authority, and adjourned without approving a biennial appropriation, but left in place the appropriation authority and the responsibility to administer the programs, it is necessary to consider whether the continuing appropriation authority can be effectuated without funding for staff and other operational expenses.

While appropriation acts are strictly construed, they should not be construed so strictly as to defeat their manifest objects.³² Further, “an appropriation for a stated purpose or object may be used for any matter reasonably included within that purpose or object.”³³ “An

²⁹ N.D.C.C. § 15-39.1-05.2(4).

³⁰ N.D.C.C. §§ 21-10-05, 21-10-06, 21-10-06.2.

³¹ N.D.C.C. § 54-52.5-03.

³² 81A C.J.S. States § 409.

³³ 81A C.J.S. States § 410.

agency has only those powers given to it by the Legislature or necessarily implied therefrom.³⁴ In the absence of a state law to the contrary, an implied power may exist for an action if an express power cannot be effectuated without it.³⁵

As previously noted, NDPERS and NDRIO are expressly charged with the management, investment, and processing of funds on behalf of the state, various political subdivisions, and public employees. The boards supported by NDPERS and NDRIO act as fiduciaries for the funds invested and the programs overseen.³⁶ As fiduciaries holding funds in trust for the members, beneficiaries, and clients, the boards and their supporting agencies have legal obligations to administer those funds prudently. Those obligations must be fulfilled as long as there are member, beneficiary, and client funds managed by the agencies.³⁷ For the reasons below, those fiduciary obligations and the agencies' express authority to administer the funds give rise to the agencies' implied authority for the wages and operating costs of the individuals necessary to effectuate the continuing appropriations.

As fiduciaries, these boards and their supporting agencies must prudently administer the funds with which they are entrusted. The Legislature has provided continuing appropriations for most of the functions these agencies need to carry out as prudent plan administrators. To the extent these agencies lack express appropriation authority for necessary and prudent administrative and operating expenses, however, their legal obligations as fiduciaries would be frustrated without some implied appropriation authority.³⁸ For example, a continuing appropriation for the payment of any benefit under the programs is of no effect unless there is a person available to authorize the payment; nor is a continuing appropriation for the retention of consultants effective unless there is a person available and authorized to negotiate and sign the contract with the consultant; nor a continuing appropriation for the making of investments or payment of investment costs

³⁴ N.D.A.G. 2014-L-03.

³⁵ Id.

³⁶ N.D.C.C. chs. 54-52, 15-39.1; N.D.C.C. § 21-10-07; N.D.A.G. Letter to Omdahl (May 29, 1990).

³⁷ There is no indication in the legislative history that the Legislature's failure to pass a budget for these agencies was intended to defund or terminate the plans and programs the agencies administer.

³⁸ The failure of the Legislature to provide express appropriation authority for these activities places the agencies in a position where, absent implied appropriation authority, they could be subject to legal action by members, beneficiaries, and clients of the programs at issue.

unless there is a person available to authorize and monitor the investment.³⁹ It is not reasonable to conclude that these employees or board members could responsibly perform the necessary functions for administration of the various programs without incurring operating expenses including but not limited to expenses for office space, office supplies, appropriate equipment and technology support, necessary insurance, and being able to travel and engage in appropriate professional development activities.

The implied authority to effectuate express appropriation authority necessary to fulfill fiduciary obligations is strictly limited, however.⁴⁰ First, those same fiduciary obligations to plan beneficiaries that permit the existence of implied authority in this situation also circumscribe the agencies' authority to incur administrative and operating costs. By law, the boards must limit staffing and operating expenses to levels that do not exceed those which are required to prudently administer the programs for which these boards are responsible.⁴¹

Second, I have previously found implied authority may exist only when it is not prohibited by other law.⁴² While there is no express authority which generally prohibits a state agency from operating entirely on a continuing appropriation,⁴³ I refer to any limit specifically placed on the agencies' authority to expend funds for administrative expenses. Such explicit limitation would additionally curtail the agencies' implied appropriation authority.

³⁹ While I have found implied authority for these agencies to pay their board members, there is an argument to be made that the Legislature has already granted a continuing appropriation to these boards for board member pay. Generally "an unrepealed and unmodified legislative act which creates an office, fixes the salary, and designates the time, mode, or manner of payment constitutes a continuing appropriation." 63C Am. Jur. 2d Public Funds § 27; see State v. Jorgenson, 142 N.W. 450, 457 (N.D. 1913). The authority, amount, and frequency for payments to the board members of NDTFFR, NDSIB, and NDPERS are set forth in N.D.C.C. §§ 15-39.1-08, 21-10-01, 54-52-03.

⁴⁰ In an opinion provided to the North Dakota Wheat Commission I indicated that a theory of continuing appropriation could implicate the debt limit prohibition found in N.D. Const. art. X, § 13. N.D.A.G. 2004-L-78. I have considered, but do not find, the debt limit prohibition implicated here because the continuing appropriation authority relied on is still subject to repeal or modification by future legislative assemblies. See Lesmeister v. Olson, 354 N.W.2d 690, 700 (N.D. 1984).

⁴¹ It is reasonable to assume the current staffing levels and operating expenses fall within these limits.

⁴² N.D.A.G. 2014-L-03.

⁴³ For example there exist multiple state entities under N.D.C.C. title 4.1 that are wholly funded by continuing appropriations. N.D.C.C. §§ 4.1-02-19, 4.1-03-16, 4.1-04-17, 4.1-05-14, 4.1-06-18, 4.1-07-18, 4.1-08-05, 4.1-09-22, 4.1-10-15, 4.1-11-15, 4.1-12-08, 4.1-13-21, 4.1-52-11, 4.1-72-07.

Of particular note is the limitation on NDRIO's disbursement of funds otherwise appropriated for the payment of administrative expenses under N.D.C.C. § 54-52.5-03. This section provides continuing appropriation authority to transfer money to the retirement and investment fund for the payment of administrative expenses by NDRIO but limits disbursement of that money to amounts set by the Legislature. While the language of this limitation may be clear on its face, a latent ambiguity was created when read together with the continuing appropriation authority otherwise granted the investment and retirement programs it manages, and as applied to this particular set of facts. Statutes which contain a latent ambiguity when applied to a particular situation make it appropriate to consider the statute's meaning in light of extrinsic aids, which may include the object sought to be attained and the consequences of a particular construction.⁴⁴

The Legislature has granted NDRIO a continuing appropriation for the funds necessary to pay the benefits and consultants of the retirement program, the funds necessary to make and pay the cost of investments for the investment program, and the funds necessary to pay the administrative costs of these programs.⁴⁵ By adjourning without acting on S.B. 2022, the Legislature did not negate the funding of these programs, rather it failed to meet its obligation to advise NDRIO on how to spend the funds that had already been appropriated. There is no indication in the legislative history that the Legislature's failure to pass a budget for these agencies was intended to defund or terminate the plans and programs the agencies administer. A conclusion that this inaction prevents NDRIO from spending funds otherwise appropriated would result, for the reasons herein discussed, in a termination of the programs and a failure of fiduciary obligations. Therefore this latent ambiguity must be resolved in favor of NDRIO's implied authority to effectuate its continuing appropriations and fulfill the fiduciary obligations of the boards and the plans they administer.⁴⁶

⁴⁴ N.D.A.G. 2011-L-05.

⁴⁵ N.D.C.C. §§ 15-39.1-05.2(4), 21-10-05, 21-10-06.2.

⁴⁶ In addition, both the retirement and investment programs are responsible for administering funds having constitutional protection. The retirement program administers the TFFR plan, which is the successor fund to the teachers' insurance and retirement fund, assuming all of its money, rights and obligations. N.D.C.C. §§ 15-39.1-01, 15-39.1-02, and 15-39.1-03. N.D. Const. art. X, § 12 appropriates the funds necessary for payments required by law to be paid to beneficiaries of the teachers' insurance and retirement fund. Therefore, TFFR enjoys the special status conferred on the teachers' insurance and retirement fund. N.D.A.G. Letter to Hanson (Feb. 25, 1987). Likewise the investment program overseen by the NDSIB has a constitutional mandate to invest the legacy fund. N.D.A.G. 2011-L-05. Neither the Legislature nor the people may refuse to fund a constitutionally mandated function. N.D.A.G. 2011-L-05.

CONCLUSION

NDPERS and NDRIO are large, complex agencies governed by a myriad of state statutes. Among those statutes are a few laws that specifically require biennial legislative appropriation to pay certain expenses.⁴⁷ To the extent the agencies rely on their implied appropriation authority, they must recognize these express limits and, where practicable, avoid expending funds for activities that explicitly require biennial legislative action. Where such activities are inescapably intertwined with other agency activities, however, it would be unreasonable to require the agencies to separate them, especially considering that neither the agencies nor the members, beneficiaries, or clients of the funds they administer are responsible for the current circumstances necessitating this opinion.

Under these unique circumstances, it is my opinion that the express continuing appropriation authority granted these agencies combined with their independent legal obligations as fiduciaries of the plans they administer carry with them the implied authority to expend funds for the salaries and associated operating expenses of the individuals needed to effectuate those appropriations in order to fulfill their fiduciary obligations, to the extent the implied authority is not prohibited under state law. While I cannot, in a legal opinion, determine the actual amounts these agencies may expend pursuant to this implied authority, I will remind the governing Boards of these agencies that they are and remain fiduciaries, and any expenditure of funds must be done prudently.

Sincerely,

Wayne Stenehjem
Attorney General

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.⁴⁸

⁴⁷ See, e.g., N.D.C.C. §§ 54-52.3-03, 54-52-04(11), 39-03.1-04.

⁴⁸ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).