

LETTER OPINION
97-L-129

August 8, 1997

Ms. Sheila Peterson
Director, Fiscal Management
Office of Management and Budget
600 East Boulevard Avenue
Bismarck, ND 58505-0400

Dear Ms. Peterson:

Thank you for your letter asking about the proper deposit of a check from Piper Jaffray Companies (Piper Jaffray) made payable to "Securities Protection Fund of the State of North Dakota Securities Commissioners' Off. (Securities Protection Fund)"

The check was dated February 26, 1997, and was issued pursuant to a Consent Agreement between the North Dakota Securities Commissioner and Piper Jaffray, signed by the Securities Commissioner's attorney on his behalf on February 25, 1997, and by Piper Jaffray on February 13, 1997.

You ask whether the check in question should be deposited to the general fund or to the Securities Protection Fund created in 1997 by House Bill No. 1412, which became effective April 8, 1997. See 1997 N.D. Sess. Laws ch. 101, § 1.

At the time the check was received, N.D.C.C. § 10-04-03(4) provided that "[a]ll fees collected under this chapter shall be turned into the general fund of the state treasury." House Bill No. 1412 amended that subsection as follows:

All fees collected under this chapter ~~shall~~ must be ~~turned~~ deposited in ~~to~~ the general fund of the state treasury, except civil penalties collected from enforcement actions for the purpose of distribution to aggrieved investors may be deposited in a special securities protection fund. All other civil penalties collected, including those collected for the reasonable expenses for the administration of a particular case, must be deposited in the general fund.

The primary goal of construing a statute is to ascertain the Legislature's intent. Berg Transport, Inc. v. North Dakota Workers Compensation Bureau, 542 N.W.2d 729, 732 (N.D. 1996). The meaning of

Ms. Sheila Peterson
August 8, 1997
Page 2

a statute must be sought initially from the statutory language. County of Stutsman v. State Historical Soc'y, 371 N.W.2d 321, 325 (N.D. 1985). Words used in a statute are to be understood in their ordinary sense unless a contrary intention plainly appears. N.D.C.C. § 1-02-02; Kim-Go v. J. P. Furlong Enters., Inc., 460 N.W.2d 694, 696 (N.D. 1990).

Because no part of the North Dakota Century Code "is retroactive unless it is expressly declared to be so," it is important to determine whether N.D.C.C. § 10-04-03(4), before amended by House Bill 1412, applies to the check at the time the check was received. See N.D.C.C. § 1-02-10. The plain language of that subsection requires all fees collected under N.D.C.C. ch. 10-04 to be deposited to the general fund of the state treasury. The term "collect" has been defined, in part, by one source to mean "[t]o call for and obtain payment of: collect taxes." The American Heritage Dictionary, 291 (2d coll. ed. 1991). To receive payment by check necessarily implies that the check is negotiable. For an instrument to be negotiable, the following requirements must be met. The instrument must be (1) a promise or order (2) to pay a fixed amount of (3) money; (4) the promise or order must be unconditional, and (5) the instrument cannot state any other undertaking or instruction, except as permitted by the Uniform Commercial Code; (6) the instrument must be in writing and signed; (7) it must contain either special language of negotiability--payable to bearer or payable to order--or qualify as a check; and (8) it must be payable on demand or payable at a definite time. See N.D.C.C. §§ 41-03-04(1)[UCC § 3-104(a)]; 41-03-03(1)(f)[UCC § 3-103(a)(6)]; 41-03-03(1)(i) [UCC § 3-103(a)(9)].

The basic rule is that the person to whom an instrument is initially payable is the person intended by the signer issuing the instrument. See N.D.C.C. § 41-03-10(1) [U.C.C. § 3-110(c)(2)(iv)]. When an instrument is payable to a trust, estate, or person described as a trustee or representative of a trust or an estate, it is payable to the trustee, representative, or their successor. See N.D.C.C. § 41-03-10(3)(b)(1) [UCC § 3-110(c)(2)(i)].

The consent agreement entered into between Piper Jaffray and Cal Hoovestol as Securities Commissioner committed Piper Jaffray to "pay ONE HUNDRED TWENTY THOUSAND DOLLARS (\$120,000) payable to the Securities Protection Fund of the Securities Commissioner's Office." The Piper Jaffray check was issued in response to that commitment. It is reasonable to conclude that the person intended to endorse the check would be the trustee of the Securities Protection Fund.

Ms. Sheila Peterson
August 8, 1997
Page 3

Because the Securities Protection Fund did not exist at the time the check was received, the check was not negotiable at that time. Once the Securities Protection Fund was established pursuant to House Bill No. 1412, the Securities Commissioner became trustee of the fund. Once the fund and corresponding trustee was established, then the check at that time became negotiable. Once negotiable, N.D.C.C. § 10-04-03(4), as amended, permitted it to be deposited into the Securities Protection Fund. Thus, it is my opinion that the check must be deposited in the Securities Protection Fund pursuant to House Bill No. 1412 and the laws on negotiable instruments. The same result would occur if the Securities Commissioner received a post-dated check. That is, payment would not be received until the due date and would not be collected until that time.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

DEC/bah

cc: Cal Hoovestol, Securities Commissioner