

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 98-F-21

Date Issued: June 15, 1998

Requested by: Carol Olson, Executive Director, North Dakota  
Department of Human Services

- QUESTION PRESENTED -

Whether the North Dakota Department of Human Services (Department) has authority, without an appropriation made by the North Dakota Legislature, to make direct payments to a tribe to assist the tribe in carrying out a tribal family assistance program under 42 U.S.C. § 612.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that the Department is prohibited by N.D.C.C. § 54-16-03 from making direct payments to a tribe without a legislative appropriation unless the proposed expenditure falls within a line item in the Department's current appropriation that is not sufficient to make the payments due to an "emergency" as defined in N.D.C.C. § 54-16-00.1 and the Emergency Commission transfers additional funds under N.D.C.C. § 54-16-04.

- ANALYSIS -

State officers and agencies may not expend public funds except pursuant to an appropriation, and may not use an amount appropriated for one purpose for any other purpose without prior approval of the Emergency Commission under N.D.C.C. ch. 54-16. N.D. Const. art. X, § 12; N.D.C.C. §§ 54-16-03, 54-44.1-09, 54-44.1-10.

The source of the Emergency Commission's authority to approve the use of appropriated state general funds for a different purpose is N.D.C.C. § 54-16-04, which provides:

A state officer may present to the emergency commission an itemized, verified petition requesting approval of a transfer of spending authority from the state contingencies appropriation, a transfer of money or

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spending authority between funds or line items, or expenditure of federal funds. . . . If the emergency commission finds that an emergency exists, the emergency commission may order money or spending authority transferred from one fund or line item to another fund or line item belonging to or appropriated for the same institution or board or the same state enterprise, may order a transfer of spending authority from the state contingencies appropriation, may authorize expenditure of federal funds, or in an extremity may authorize money to be drawn from the state treasury to meet the emergency until the legislative assembly can make an appropriation available.

The term "emergency" means "calamity or unforeseen happening subsequent to the time the appropriation was made and which was clearly not within the contemplation of the legislative assembly and the governor." N.D.C.C. § 54-16-00.1(1). Whether an "emergency" exists is a question of fact that cannot be answered in an Attorney General's opinion. Letter from Attorney General Nicholas Spaeth to Gary Helgeson (June 3, 1983).

Under the North Dakota Supreme Court's interpretation of N.D.C.C. ch. 54-16, the Emergency Commission can supplement existing general fund appropriations that are insufficient due to an "emergency" but is not authorized to "allocate moneys to create a new fund or new appropriation." Backman v. Guy, 126 N.W.2d 910, 916 (N.D. 1964). See also 1996 N.D. Op. Att'y Gen. L-135, L-137 (July 30 letter to Peterson); 1996 N.D. Op. Att'y Gen. L-21, L-23 (Feb. 22 letter to Sanstead). Thus, the Department's current general fund appropriation cannot be supplemented or changed by the Emergency Commission unless the proposed expenditure is authorized under a line item in the Department's current appropriation.

A tribe has requested state general funds from the Department to assist the tribe in establishing its own tribal family assistance program under 42 U.S.C. § 612 rather than participating in the state Temporary Assistance to Needy Families (TANF) program. If the requested payments are authorized under a line item in the Department's current appropriation which is not sufficient to make the payment, the Department can petition the Emergency Commission to find that an "emergency" exists as defined in N.D.C.C. § 54-16-00.1 and to make one or more of the transfers described in

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N.D.C.C. § 54-16-04.<sup>1</sup> However, if there is no current appropriation authorizing the payments, as the opinion request indicates, then the Department is prohibited by N.D.C.C. § 54-16-03 from making the payments.

- EFFECT -

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.

Heidi Heitkamp  
ATTORNEY GENERAL

Assisted by: James C. Fleming  
Assistant Attorney General

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<sup>1</sup> In the legislative history of 1997 House Bill 1012, the Department's appropriation bill for the current biennium, there are references to the potential fiscal consequences to the state of a tribe's option to establish its own family assistance program. See, e.g., Hearing on H. 1012 Before the House Appropriations Comm. 55th N.D. Leg. (Jan. 10, 1997) (Executive summary of TANF plan attached to written testimony of Kevin Iverson); Hearing on H. 1012 Before the Senate Appropriations Comm. 55th N.D. Leg. (March 6, 1997) (Written testimony of Betty Keegan). Thus, even if the proposed payments fall under a line item in the Department's current appropriation, it may be argued that the reason for the requested payments is not a "calamity or unforeseen happening" beyond the contemplation of the Legislature or the Governor as required in N.D.C.C. §§ 54-16-00.1, 54-16-04.