

LETTER OPINION
98-L-142

September 11, 1998

Ms. Kathi Gilmore
State Treasurer
600 E Boulevard Ave
Bismarck, ND 58505

Dear Ms. Gilmore:

Thank you for your letter asking if North Dakota Century Code (N.D.C.C.) § 54-27-24 authorizes you to refund to a county the county's inadvertent overpayment into the general fund without having separate statutory authority to issue the refund.

Article X, Section 12 of the North Dakota Constitution provides:

All public moneys, from whatever source derived, shall be paid over monthly by the public official, employee, agent, director, manager, board, bureau, or institution of the state receiving the same, to the state treasurer, and deposited by him to the credit of the state, and shall be paid out and disbursed only pursuant to appropriation first made by the legislature . . .

There are several specific exceptions from this requirement which are not applicable to the present facts.

The history of refund authority in North Dakota law is lengthy, but not always explicitly stated. In 1927, the North Dakota Legislature enacted 1927 N.D. Sess. Laws ch. 72, § 1, which provided:

There is hereby appropriated out of any moneys in the State Treasury, not otherwise appropriated, the sum of \$6,000.00, or so much thereof as may be necessary for the purpose of making certain refunds out of the General Fund and which is known as the Miscellaneous Refunds account, used for the purpose of refunding money erroneously paid into or credited to the General Fund.

Thus, as early as 1927, a miscellaneous refund account was created and funded for the purpose of making refunds of money erroneously paid into or credited to the general fund. The same or very similar language continued for several legislative sessions thereafter, either in a separate bill or as a section to a general appropriation bill or a budget bill.

In 1965, the subject of miscellaneous refunds appeared in 1965 N.D. Sess. Laws ch. 28, § 3, subdivision 45, which read:

Miscellaneous Refunds

Grants--benefits	and	claims.....	\$
30,000.00			
Deficiency (to be made available immediately on			
passage	and	approval).....	
<u>5,000.00</u>			
Total.....			\$
35,000.00			

In 1965, the miscellaneous refunds appropriation was in a general appropriation bill for all branches of government and the public schools. The language of the specific appropriation for miscellaneous refunds did not specify a "miscellaneous refunds account" as it had in 1927, nor did it specify the purposes for which refunds could be paid out of it, such as erroneous payments or credits to the general fund.

After 1965, the subject of refunds was contained in legislation either in a general budget appropriation bill or a miscellaneous funds bill, but the bills did not mention the specific purposes for which refunds could be made from the miscellaneous refund appropriation.

In 1991, the Office of Management and Budget (OMB) sought introduction and passage of Senate Bill 2127 which was codified as N.D.C.C. § 54-27-24 and created the "state refund account." This account was to be used by each agency depositing funds collected into the general fund. OMB's appropriation for the 1991-93 biennium also included a line item appropriation for miscellaneous refunds. 1991 N.D. Sess. Laws ch. 31, § 1, subdivision 1.

In the 1997 legislative session, N.D.C.C. § 54-27-24 was amended to its current language which requires refunds to be paid out of the

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general fund where collections went to the general fund, according to accounting procedures prescribed by OMB in accord with the central accounting system. 1997 N.D. Sess. Laws ch. 454, § 1. But N.D.C.C. § 54-27-24 does not specify the circumstances under which refunds are authorized. The subject of refunds is dealt with in the Code in numerous sections (over 280 sections use the word), a great many of which relate to taxes. This office has previously stated that before the miscellaneous refund appropriation may be used, "there must be other statutory authority for paying the refunds in question." 1993 N.D. Op. Att'y Gen. L-32, n.1 (letter to Gilmore, Feb. 10).

In the present instance, two counties made miscalculations of amounts that were owed to the state pursuant to state law and overpaid the amounts that were properly owed. The mistaken overpayment was not discovered until after the money was deposited into the state general fund. Essentially, what is sought is a refund of money which should never have been deposited in the general fund because the money does not actually belong to the state. This situation may be distinguished from money which was properly owed to the state and intentionally deposited in the general fund, but which is desired to be refunded for some purpose other than to correct an error in the initial payment or deposit.

The above discussion shows that over the last 70 years the North Dakota Legislature has appropriated funds for making refunds out of the general fund, using varying language to accomplish the purpose. The appropriation for the refunds usually has not been made to a specific agency. (In 1991, upon creation of the state refund account, the refund appropriation was a line item in OMB's appropriation.) I am advised that during fiscal 1998, since the enactment of the current language in N.D.C.C. § 54-27-24, approximately two dozen general fund agencies and departments have issued refunds from the general fund. Courts give some weight to the practical construction of a statute by the agency administering it and to the long-continued practical construction placed on the statute by the officers charged with applying it. Northern X-Ray Co., Inc. v. State, 542 N.W.2d 733, 738 (N.D. 1996).

The term "public moneys" as used in Article X, Section 12, carries with it the implication that the public moneys were collected under authority of law for a statewide public purpose:

Under N.D. Const. Art. X, § 12, all fees collected by an officer or agent of the state for a state-wide public purpose, by authority of law, must be paid to the state Treasurer and spent only by specific appropriation. See

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Menz v. Coyle, 117 N.W.2d 290, 302 (N.D. 1962); Langer v. State, 69 N.D. 129, 138-39, 284 N.W. 238, 243 (1939). There is no dispute these fees [disputed in this case] are for a state-wide public purpose and are collected under authority of law.

Billey v. North Dakota Stockmen's Association, 579 N.W.2d 171, _____, (N.D. 1998). The payments received from the counties and deposited into the general fund were made in error, and were not for a statewide public purpose by authority of law. Although the county officers making the payment to the state, and the state officials receiving the payment and depositing it to the general fund, were acting in good faith under color of law, and therefore were not derelict in their duties, there was no legal authority for the excess amounts to be collected by the state and deposited into the general fund.

The conduct of agencies over the years and some prior Attorney General's opinions show the legislative intent supporting 70 years of appropriations for making refunds to be that, even without language in each agency's appropriation bill or enabling statutory language, when erroneous or inaccurate deposits are made to the general fund, general fund agencies are authorized to make refunds from the general fund to return the amounts erroneously deposited. It is therefore my opinion that you are authorized to refund to a county its inadvertent overpayment into the general fund without having a specific statutory authorization for issuing that refund because the inadvertent payment is not properly viewed as "public moneys" belonging to the state under Article X, Section 12 of the North Dakota Constitution. To the extent this opinion conflicts with 1993 N.D. Op. Att'y Gen. L-32, that opinion is overruled.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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