

N.D.A.G. Letter to Rayl (March 16, 1990)

March 16, 1990

Mr. Richard L. Rayl
Director
Office of Management and Budget
State Capitol - Fourth Floor
600 East Boulevard Avenue
Bismarck, ND 58505-0400

Dear Mr. Rayl:

Thank you for your February 12, 1990, letter requesting an opinion on several issues concerning using budget stabilization fund moneys to restore funds cut from agencies' budgets pursuant to N.D.C.C. § 54-44.1-13.1.

In your letter you indicate that pursuant to N.D.C.C. § 54-44.1-13.1 you have obtained the approval of the Budget Section of the Legislative Council and have reduced the funds available to all general fund entities equally. Your first question is whether any part of the reduction may be restored to an agency when it receives additional funds that are to be deposited in the general fund. Your second question is whether the general fund appropriation to an agency may be increased through the use of the budget stabilization fund. Your third question is whether the budgets of all entities must be increased by the same amount if the budget of one entity is increased. I will answer your questions in the order presented.

N.D. Const. art. X, § 12 requires public officials to pay over "all public moneys, from whatever source derived" to the State Treasurer. This language was added to the constitution in 1938 to end the then common practice whereby agencies collecting taxes, fees, and extractions retained those funds, expended them at their discretion for expenses of the agency, and then at some point in time, turned over the balance to the State Treasurer. Langer v. State, 284 N.W. 238, 242-43 (N.D. 1939). N.D.C.C. § 54-06-07 provides that

[a]ll fees, which are not otherwise by the laws of this state directed to be deposited in a special fund or disbursed for a special purpose, received or charged by any elective or appointive officer or deputy state officer for any act or service rendered in his official capacity must be accounted for and paid over by him monthly to the state treasurer and must be credited to the general fund of the state.

Unless the Legislature has authorized a special fund or limited the use of funds for a special purpose, the State Treasurer must credit any moneys received by a state agency to the general fund.

Therefore, the fact that an agency collects additional moneys does not entitle it to retain those funds for its use. The moneys collected must be turned over to the State Treasurer and can only be spent if otherwise authorized.

N.D.C.C. § 54-44.1-13.1 authorizes the director of the budget to reduce the moneys available from a particular fund to all affected agencies, departments, and institutions, including the legislative and judicial branches, when the moneys available in that fund are reduced as a result of an initiated or referred measure. The question, then, is whether N.D.C.C. § 54-44.1-13.1 authorizes the director of the budget to restore to an agency the availability of funds previously cut pursuant to this statute if the agency receives additional moneys.

N.D.C.C. § 54-44.1-13.1 requires the director of the budget to "reduce the affected budgets by a percentage sufficient to cover the estimated losses caused by the initiative or referendum action." N.D.C.C. § 54-44.1-13.1. In an opinion issued on September 25, 1987, I interpreted N.D.C.C. § 54-44.1-13.1 as directing a uniform reduction for all affected budgets. Letter from Nicholas J. Spaeth to Richard L. Rayl dated September 25, 1987. N.D.C.C. § 54-44.1-13.1 makes no provision, however, for the restoration of funds to agencies if they become available.

N.D.C.C. § 54-44.1-13.1 is very similar to N.D.C.C. § 54-44.1-12. N.D.C.C. § 54-44.1-12 also authorizes the director of the budget to reduce, under certain circumstances, the amount of funds available from a particular fund for affected departments and agencies of state government, excluding the legislative and judicial branches. This provision provides that the reduction "must be made by specific fund and all departments and agencies that receive moneys from that fund must be allotted on a uniform percentage basis." Like N.D.C.C. § 54-44.1-13.1, N.D.C.C. § 54-44.1-12 is silent concerning the director of the budget's authority to restore funds to agencies once the reduction has been made.

This office has advised you in the past that it is not clear whether N.D.C.C. § 54-44.1-12 authorizes the director of the budget to restore funds to agencies if they become available. We have further advised you that to the extent the director of the budget has the authority to restore allotted funds pursuant to N.D.C.C. § 54-44.1-12, he must do so on a uniform percentage basis. This is also the position we have argued to the district court and the North Dakota Supreme Court in North Dakota Council of School Administrators v. Sinner.

It is also unclear whether N.D.C.C. § 54-44.1-13.1 gives the director of the budget the authority to restore funds to agencies after he has ordered reductions. To the extent that N.D.C.C. § 54-44.1-13.1 authorizes the director of the budget to restore such funds, it is my opinion that he must do so on an across-the-board basis.

To restore funds to one general fund agency but not to others because that agency received additional moneys that were then deposited in the general fund would not be an across-the-board restoration of funds to all agencies affected by the budget reductions. Therefore, in answer to your first question, it is my opinion that when an agency receives

additional moneys that are to be deposited in the general fund, N.D.C.C. § 54-44.1-13.1 does not permit the director of the budget to restore those moneys to that agency.

Pursuant to the North Dakota Constitution, the Legislature has the authority to appropriate state moneys. N.D. Const. art. X, § 12. An appropriation is "the setting apart of a definite sum of money for a specific purpose in such a way that public officials may use the amount appropriated, and no more than the amount appropriated for that purpose." American Fed. of State, County, and Municipal Employees v. Olson, 338 N.W.2d 97, 103 (N.D. 1983). Therefore, it is my opinion that a general fund appropriation established by the Legislature may not be increased by the executive branch through the use of the budget stabilization fund or any other moneys.

Although the establishment of an appropriation is a legislative function, the execution of the budget and the control of the expenditure of funds pursuant to an appropriation is an executive function. See Bowsher v. Synar, 478 U.S. 714, 732-34 (1986). The Legislature has given the director of the budget the authority to exercise control over the executive branch's expenditure of funds pursuant to legislative appropriations through a system of allotments. N.D.C.C. § 54-44.1-03(5). The Legislature has also given the director of the budget the authority to reduce the funds available to agencies under certain circumstances. N.D.C.C. §§ 54-44.1-12, -13.1.

The authority to reduce the funds available to agencies, however, is not the authority to reduce the appropriation or change the appropriations act. Thus, if the director of the budget reduces the funds available to an agency pursuant to N.D.C.C. § 54-44.1-13.1, and if he later uses moneys from the budget stabilization fund to restore to the agency the authority to spend those funds, he has not by that action increased the appropriation to that agency.

On December 20, 1989, I issued an opinion to Governor Sinner on the issue of whether he was authorized to order that the moneys transferred from the budget stabilization fund be used for particular purposes of state government within the limits of legislative appropriations. Letter from Nicholas J. Spaeth to Governor George A. Sinner dated December 20, 1989. In that opinion, I noted:

N.D.C.C. § 54-27.2-03 provides that any money transferred from the budget stabilization fund is to "be expended within the limits of legislative guidelines and general fund appropriations." The statute does not contain any additional restrictions on how the transferred money may be expended.

Id. Therefore, it was my opinion "that the Governor may order that moneys transferred from the budget stabilization fund be expended for particular purposes provided that the expenditure neither exceeds a budget unit's legislative appropriation authority nor contravenes a legislative guideline." Id.

Based on the opinion I issued on December 20, 1989, it is my opinion that moneys in the budget stabilization fund may be transferred to the general fund for use by one agency

without increasing the funds available to other agencies by a similar amount or percentage, provided that the agency's expenditure of those funds neither exceeds the agency's appropriation nor contravenes a legislative guideline.

In conclusion, it is my opinion that when moneys from the budget stabilization fund are transferred to the general fund, the Governor may direct that those funds be expended for a particular purpose without similarly increasing the funds available to other agencies. It is unclear whether the director of the budget has the authority to restore funds to agencies when moneys come into the general fund from a source other than the budget stabilization fund. To the extent that N.D.C.C. § 54-44.1-13.1 authorizes the director of the budget to restore such funds, it is my opinion that he must do so on a uniform percentage basis. Finally, it is my opinion that the Governor may not increase an agency's appropriation through the use of the budget stabilization fund moneys. However, restoring the availability of funds previously cut pursuant to N.D.C.C. § 54-44.1-13.1 does not constitute increasing an agency's appropriation.

Sincerely,

Nicholas J. Spaeth

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