

## **N.D.A.G. Letter to Lamb (July 11, 1988)**

July 11, 1988

Mr. Joseph S. Lamb  
President  
Bank of North Dakota  
700 East Main  
P.O. Box 5509  
Bismarck, ND 58502-5509

Dear Mr. Lamb:

Thank you for your letter of February 4, 1988, in which you request my opinion as to whether the State Treasurer may invest the Veterans' Postwar Trust Fund in certificates of deposit issued by North Dakota savings and loan associations and commercial banks. I apologize for the delay in responding.

N.D.C.C. § 37-14-14 states as follows:

37-14-14. Veterans' postwar trust fund. The veterans' postwar trust fund shall consist of moneys transferred or credited to the fund, pursuant to the provisions of this chapter and of other laws. The fund must be invested by the state treasurer in legal investments authorized by section 15-03-04. The fund and all income received on the investments are to be utilized in benefit and service to veterans as defined in section 37-01-40, or their dependents, as determined and appropriated by the legislative assembly.

(Emphasis supplied.)

The legal investments authorized under N.D.C.C. § 15-03-04 (the legal list of investments for the Board of University and School Lands) include "North Dakota savings and loan association and commercial bank certificates of deposit to the extent that such certificates are fully insured or guaranteed by the United States or an instrumentality or agency thereof." N.D.C.C. § 15-03-04(8). Additionally, section 15-03-04 sets forth several other investment alternatives, including Bank of North Dakota certificates of deposit.

Although N.D.C.C. § 37-14-14 is clear on its face, the focus of our analysis is whether that statute is constitutional in light of N.D. Const. art. X, § 12. N.D. Const. art. X, § 12, requires that "all public moneys, from whatever source derived, shall be paid over monthly by the public official, employee, agency, 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." N.D. Const. art. X, § 12, goes on to establish continuing appropriations for specific state activities.

The requirement that state officials pay "public moneys" to the State Treasurer on a monthly basis promotes accountability and establishes a central source of fiscal responsibility. From a practical viewpoint, this requirement ensures that the moneys are reflected on the state's accounting system, provides a consistent audit trail, and establishes a central source of information relative to "public moneys." Upon receipt of such public moneys, the State Treasurer is constitutionally bound to deposit such funds to the credit of the state in accordance with law.

State law generally requires that the State Treasurer deposit such money in the Bank of North Dakota. N.D.C.C. §§ 21-04-02 and 6-09-07. N.D.C.C. § 21-04-02 provides that "[p]ublic funds belonging to or in the custody of the state shall be deposited in the Bank of North Dakota." N.D.C.C. § 6-09-07 states as follows:

6-09-07. State funds must be deposited in Bank of North Dakota. All state funds, and funds of all penal, educational, and industrial institutions must be deposited in the Bank of North Dakota by the persons having control of such funds or must be deposited in accordance with constitutional and statutory provisions.

Therefore, the general rule is that public moneys must be deposited by the State Treasurer with the Bank of North Dakota. This general rule, however, is subject to the last clause of N.D.C.C. § 6-09-07 which defers to more specific constitutional or statutory provisions that might control the depositing of state funds.

All public moneys deposited by the State Treasurer to the credit of the state comprise the state treasury. Whereas the state treasury is a constitutionally created concept, the Bank of North Dakota is a creature of legislation. Although the present system generally requires that the State Treasurer deposit all moneys of the state treasury with the Bank of North Dakota, the Legislature could clearly permit the State Treasurer to deposit all or a portion of public funds with other financial institutions. The Bank of North Dakota is not the "state treasury" as such.

Having established that the Bank of North Dakota is not the state treasury, the primary question is whether the investment of the Veterans' Postwar Trust Fund constitutes a transfer from the state treasury for which an appropriation is necessary.

After the State Treasurer deposits public moneys to the credit of the state, such funds may be "paid out and disbursed only pursuant to appropriation first made by the legislature." N.D. Const. art. X, § 12. An "appropriation," as that term is used in the North Dakota Constitution, "is the setting apart from the public revenue of a definite sum of money for a specified object in such a manner that the officials of the government are authorized to use the amount so set apart, and no more, for the object." State v. Holmes, 123 N.W. 884, 886-887 (N.D. 1909). In the Holmes decision, it was stated that "the purpose of limiting by law the amount which may be expended for a definite purpose, and requiring that it be stated in the act relating to the particular subject, is to enable the

Legislature and state officials to approximate in advance the total amount of appropriations made so they may be kept within the power of the state to pay." Id. at 886.

The funds in question were deposited to the credit of the state in the Bank of North Dakota (in a money market account) and are likewise deposited to the credit of the state with the local financial institutions. As opposed to an expenditure of state funds, the investment of moneys in the state treasury has the primary purpose of capital preservation and, hopefully, a positive return on the investment.

Inasmuch as the investment of public moneys does not contemplate a diminution of the state treasury, the primary purpose underlying the constitutional requirement that the disbursement of public funds shall be made only pursuant to a legislative appropriation is not implicated. Nevertheless, the fact that N.D. Const. art. X, § 12, contains a specific continuing appropriation for the investments of the Board of University and School Lands creates a negative implication that appropriation authority is necessary for the investment of any public funds.

Due to the lack of recorded history regarding N.D. Const. art. X, § 12, it is not possible to fully understand the drafters' intention for establishing a continuing appropriation for the Board of University and School Land's investments. Possibly, there existed a need to pay investment fees and costs associated with such investments. It is my opinion that the better interpretation of N.D. Const. art. X, § 12, is that a specific legislative appropriation is not necessary when the Legislature has expressly authorized the investment of state funds.

Although it is my opinion that the investment of public funds does not constitute an expenditure or disbursement so as to require a legislative appropriation as contemplated by N.D. Const. art. X, § 12, the authority to invest the public funds in question must be clearly set forth in statute. Absent such clear legislative direction, public funds must be deposited in the Bank of North Dakota in accordance with N.D.C.C. §§ 6-09-07 and 21-04-02.

When a state agency is investing public funds outside of the Bank of North Dakota, it is necessary to discuss N.D.C.C. § 54-27-16 which states as follows:

54-27-16. Permission of industrial commission necessary for investment of public funds. No officer, nor the head of any board, bureau, commission, institution, or industry of the state, except the Bank of North Dakota, shall buy, sell, exchange, or in any manner acquire or dispose of any stocks, bonds, certificates of indebtedness, notes, mortgages, or other evidence of debt in which any of the public funds of said officer, board, bureau, commission, institution, department, or industry are or may be invested, without first having obtained permission from the industrial commission of the state. Such permission shall be granted by a resolution duly adopted. The provisions of this section shall not apply to loans and investments made by the board of university and school lands or by the

state investment board on behalf of the funds enumerated in section 21-10-06.

To invest public funds outside of the Bank of North Dakota, except for investments made by the Board of University and School Lands or by the State Investment Board, not only is express statutory authority required but the Industrial Commission must approve of such action. Absent Industrial Commission approval, the State Treasurer is not authorized to invest the Postwar Veteran's Trust Fund in the enumerated asset categories set forth in N.D.C.C. § 37-14-14.

I trust that this discussion will be of assistance to you.

Sincerely,

Nicholas J. Spaeth

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