

N.D.A.G. Letter to Naaden (July 27, 1990)

July 27, 1990

Honorable L. L. Naaden
North Dakota State Senator
District 30
P.O. Box 153
Braddock, ND 58524

Dear Senator Naaden:

Thank you for your June 1, 1990, letter requesting my opinion concerning restoring allotted funds to administrative agencies. You indicate that the general fund revenue collections are running approximately \$29 million ahead of earlier projections. Your first question is whether Governor Sinner can now restore these funds on an equal basis to those appropriations that were allotted. Your second question is whether the Governor is mandated to restore these funds as they become available. I apologize for the delay in responding to your request, but the delay was necessitated because pending supreme court litigation squarely raised the issue you have inquired about. As is our practice, we awaited the outcome of that case, in which judgment became final last week.

N.D.C.C. § 54-44.1-13.1 is pertinent to your questions. That section provides:

54-44.1-13.1. Apportionment of reduction of spending authority caused by an initiative or referendum action. If as a result of any action taken pursuant to article III of the Constitution of North Dakota the moneys available in the state general fund or in any special fund in the state treasury are or will be reduced or eliminated, the director of the budget shall reduce the moneys available to all departments, agencies, and institutions for which moneys have been appropriated or are otherwise available from the affected fund for the current biennial period. The director of the budget shall reduce affected budgets by a percentage sufficient to cover the estimated losses caused by the initiative or referendum action, subject to the approval of the budget section of the legislative council. Notwithstanding the provisions of section 54-44.1-13, the authority to make reductions pursuant to this section applies equally to all entities of the executive, legislative and judicial branches.

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." 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 (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 the amount of funds available from a particular fund for affected departments and agencies of state government, excluding the legislative and judicial branches, when "[t]he moneys and estimated revenues in a specific fund from which the appropriation is made are insufficient to meet all legislative appropriations from the fund." 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." The question whether N.D.C.C. § 54-44.1-12 requires the director of the budget to restore allotted funds was an issue in the case titled North Dakota Council of School Administrators v. Sinner, which was decided recently by the North Dakota Supreme Court.

The court issued an opinion in which it held that the director of the budget does not have a legal duty pursuant to N.D.C.C. § 54-44.1-12 to restore allotted funds. North Dakota Council of School Administrators v. Sinner, No. 890301, slip. op. at 9 (N.D. July 3, 1990). (Judgment in this case, however, did not become final until July 17.) The court did not determine, however, whether the director of the budget has the authority to restore allotted funds. The court held that:

We need not determine whether Rayl, as director of the budget, had discretionary power under Section 54-44.1-12, N.D.C.C., to restore the funds. The relevant question in a mandamus proceeding is whether he had an absolute, nondiscretionary duty to restore the funds. The School districts have failed to carry their burden of demonstrating a clear legal duty to restore the funds. Accordingly, we conclude that the trial court did not abuse its discretion when it refused to issue a writ of mandamus.

Id. Thus, North Dakota Council of School Administrators did not resolve the issue whether the director of the budget has the authority to restore allotted funds.

N.D.C.C. §§ 54-44.1-12 and 54-44.1-13.1 are silent concerning the director of the budget's authority to restore funds to agencies once the reduction has been made. This office has advised the Office of Management and Budget in the past that it is not clear whether N.D.C.C. §§ 54-44.1-12 or 54-44.1-13.1 authorize the director of the budget, after he has ordered allotments of funds, to restore those funds to agencies if they become available. Letter from Nicholas J. Spaeth to Richard L. Rayl (March 16, 1990).

The allotment provisions of N.D.C.C. §§ 54-44.1-12 and 54-44.1-13.1 are very similar. Because neither statute provides any guidance on the issue whether the director of the budget has the authority to restore allotted funds, I recommend the enactment of legislation to fill these voids.

In the past, I also have advised the director of the budget that it is my opinion that to the extent N.D.C.C. § 54-44.1-13.1 authorizes the director of the budget to restore such

funds, he must do so on an across-the-board basis. Letter from Nicholas J. Spaeth to Richard L. Rayl (March 16, 1990).

I am sorry I cannot give you a definitive answer, but I hope my discussion of these issues has been of assistance to you.

Sincerely,

Nicholas J. Spaeth

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