

**OPINION
63-104**

January 28, 1963 (OPINION)

DEPARTMENT OF ACCOUNTS AND PURCHASES

RE: Duties and Powers

This is in response to your request for an opinion to clarify the status of the Accounts and Purchases Department "as to whether or not there are any departments, agencies or institutions of the state government which are not required by law to have their purchasing channeled through the Department of Accounts and Purchases."

The legislative intent which is important and which will be discussed later is found in section 54-44-01 of the North Dakota Century Code and provides as follows:

DECLARATION OF LEGISLATIVE INTENT. It is the intent of the legislative assembly to establish a department of accounts and purchases which together with the auditing board will be a central authority, vested with the control and supervision of the fiscal administration of the executive branch of the government, and which will be directly responsible to the governor. It is further the intent of the legislative assembly to endow the office of the state auditor with the primary responsibility of conducting a true independent post audit of all the executive departments and agencies. In addition, it is the intent of this body to consolidate and vest in the office of the state tax commissioner the responsibility of collecting additional taxes.

Therefore, the provisions of this chapter shall be liberally construed in a manner which will implement the intent of the legislative assembly herein declared."

The duties, powers and responsibilities of the Department of Accounts and Purchases as pertaining to the operation of a centralized purchasing service are found in subsections 21 and 22 of section 54-44-04 of the North Dakota Century Code and are as follows:

- 1) "* * * * Shall be vested with the duties, powers and responsibilities involved in the operation of a centralized purchasing service. This purchasing service shall include the purchase of all equipment, furniture, fixtures, printing, materials, supplies and other commodities for all state departments, institutions, offices, and agencies, excluding land, buildings, or space, or the rental thereof, and excepting emergency purchases that are impossible of execution by the department of accounts and purchases within the required time, highly specialized equipment which can be better purchased by the department, institution or office which is to utilize such equipment, and such specific items and minor purchases as the director

may exempt;

- 2) "Shall maintain and operate such supply rooms as may be found desirable to supply the several departments with office supplies and other commonly used commodities, however this subsection shall not be construed as authorizing the establishment of a warehousing system; * * * *."

In addition to this, the Department of Accounts and Purchases pursuant to section 54-44-02 is vested with the duties, powers, and responsibilities necessary to supervise and administer the fiscal transactions of various state departments, agencies, boards and commissions.

It must be observed that while the law imposes a duty upon the Accounts and Purchases Department to operate a centralized purchasing services, it does not provide that the state departments, agencies, etc. are by law required to channel their purchases through said department. This becomes significant in comparing former section 54-2202 of the North Dakota Revised Code of 1943 (relating to Purchasing Department under Board of Administration which was repealed), which contained a mandate that the supplies of "* * * *the different departments of government of the State of North Dakota, other than those under the control of the Industrial Commission, shall be purchased by or through the purchasing agent * * * *." The comparison of said section to the present law discloses that the present law does not contain this mandate.

While it may be strongly contended that the executive departments, such as the auditor, secretary of state, attorney general and other similar departments are required to purchase through the Accounts and Purchases Department, it is very doubtful that such contention would apply to boards and commissions of departments, agencies and institutions which by law are charged with the duty to operate, manage and control such departments, agencies, etc.

The Accounts and Purchasing Law authorizes and directs the department to operate and maintain a central purchasing service. The mandate is on the director of the Accounts and Purchases to operate a purchasing service but the mandate is not on the other state departments to use it.

The language of Chapter 54-44 is not strong enough to repeal other sections of the Code which contain specific provisions. For that matter, repeal by implication is frowned upon by the courts.

Chapter 54-44, is in this respect, at the most a general statute as to other departments. The other departments are still controlled by the special statute relating to said department or agency. The provisions of law as to the other departments, agencies, institutions contain the provision that the operations, management, control and government of such agencies, departments, etc., is vested in its governing body, board or commission.

As to agencies, departments or institutions under the Industrial Commission, section 54-17-01 of the North Dakota Century Code

contains the provisions that the Industrial Commission is to conduct and manage same. Specifically as to the mill and elevator, section 54-18-03 provides that the Industrial Commission shall manage and control said mill and elevator. Similarly as to the Bank of North Dakota, section 6-09-02 provides that the Industrial Commission shall operate, manage and control said bank.

The term "manage" has been judicially defined to mean: "to have under control and direction, to govern, to administer, to guide, to carry on, to determine, to handle, to order, to oversee, to take charge of, etc." (55 C.J.S., page no. 1.)

The term "control" has been judicially defined to mean: "the power to govern, direct or supervise the conduct of another, also to manage, direct, supervision, restricting or regulate." (18 C.J.S., page no. 28.)

The term "operate" has been judicially defined to mean: "to put into activity, to manage, to control or manage authoritatively, to conduct, to carry out, to direct to an end, etc." (67 C.J.S., page no. 502.)

Where these terms are used together or in conjunction with each other, the legal conclusion is that the terms shall be given a broad meaning. In this instance, the terms complement each other and as a group convey all of the meanings ascribed to said terms, severally and jointly.

The Industrial Commission is composed of three constitutionally elected officers, whereas the Department of Accounts and Purchases is an appointive office appointed by the governor, a member of the Industrial Commission. It is doubtful that an appointive officer would be in a position to direct activities of a board consisting of constitutional elective offices on matters which by law are placed under the control, custody and management of such board, unless such appointive officer is specifically so directed by law or the constitution.

The direction, control and supervision invariably, including governmental affairs, is from the top down and not from the bottom up. The basic authority stems from the people. It would therefore follow that unless the constitution or statute provide otherwise that everything else being equal, a constitutional elective officer has a higher standing in government than an appointive office. While this is not a sole factor, it is a matter to be considered.

As to the Act relating to the Accounts and Purchases Department, the legislative intent does not mention anything with reference to the centralized purchasing service. Consequently, subsections 21 and 22 are not entitled to any special construction. In the minds of the individual legislators, it might well have been that they wanted to place all agencies, departments and institutions in a position whereby they were required to channel their purchases through the Accounts and Purchases Department. However, be that as it may, we are confined to the Act as it was passed and the language employed to determine legislative intent.

It is also noted that Chapter 54-44 does not provide for any penalty or method of compelling an agency or department to use such centralized purchasing service. On this, the statutes are silent.

For the reasons stated above, it is our opinion that it is very doubtful that the departments, agencies, institutions, etc., under the control of the Industrial Commission must use said centralized purchasing service. The Industrial Commission may, however, direct such agencies, departments, institutions, etc. to use the centralized purchasing service.

As to the institutions under the Board of Administration, we note section 54-23-01 provides that the Board of Administration shall have full power to manage, control and govern them. However, sections 54-23-31, 54-23-33, 54-23-34, 54-23-35 and 54-23-37 specifically provide that the Accounts and Purchases Department shall advertise for bids and secure supplies, etc. for the institutions under the Board of Administration. It is therefore our opinion that the institutions under the Board of Administration must channel their purchases through the Accounts and Purchases Department.

As to the Workmen's Compensation Bureau, section 65-02-05 provides, amongst other things, "* * * * The bureau, at the expense of the fund, shall provide all necessary equipment, supplies, stationery and furniture, * * * *." This authority includes purchasing supplies. There being no specific provision to the contrary - at least our research did not disclose any as is found in the Board of Administration, it is our conclusion that the Workmen's Compensation Bureau is not required by law to purchase supplies through the Accounts and Purchases' supply service. They, however, may do so.

As to the institutions of higher education, the Board of Higher Education under Article 54 of the Constitution shall give full power to control expenditure of funds and shall have full authority under the institutions. This is a constitutional provision. We, therefore, conclude that while the institutions are not required by law to use the central purchasing service, they may do so upon direction of the Board of Higher Education.

As to the Highway Department, section 24-02-04 gives the commissioner full control, management, supervision, administration and direction of the department. It is our conclusion that the Highway Department is not required by law to purchase through the Accounts and Purchases Department, unless there is a statute specifically directing the Highway Department to do so. Time did not permit us to make an extensive research in this respect.

In addition to the foregoing, there are other commissions and bureaus - for example, the Wheat Commission and the Water Conservation Commission, which are operating under the direction and control of a board. If the powers given to such boards or commissions are substantially the same as found in the Highway Department, Workmen's Compensation, etc., it would follow that they would not be required to make purchases through the Accounts and Purchases Department, unless the statutes there specifically so provide.

We might make a general observation that the Accounts and Purchases

Department is not specifically required by law to advertise for bids, etc. as provided for with reference to the Board of Administration. We have deliberately refrained from commenting whether or not it is wise to provide that all departments, institutions, agencies, etc. shall channel their purchases through the Accounts and Purchases Department for we believe this is a matter for the Legislature.

With reference to the comment that "no mandate is found in the law which applies to the various departments", this has no application to the Board of Administration for the reason that special statutory provisions govern.

It is a possibility that some legislation might be found in some of these departments which did not come to our attention in the research of this question. However, within the short time allowed, we have expressed our opinion on the laws referred to herein.