

OPINION
63-134

August 13, 1963 (OPINION)

EMERGENCY COMMISSION

RE: Validity of Transfer of Funds

This is in response to your letter in which you state that at a meeting attended by all members of the State Emergency Commission on July 29, 1963, the Commission by majority action authorized the transfer of money from the State Contingency Fund in the following manner:

1. The sum of \$12,000 to the State Land Commissioner for salary of deputy - Chapter 1, page 8, 1963. Session Laws.
2. The sum of \$18,000 to the State Laboratories Department for salary of Director - Chapter 1, page 17, 1963 Session Laws.

While we were in the process of researching this question, we received an inquiry from Mr. Ralph Dewing, Director of the Department of Accounts and Purchases, wherein he asks if the following transfers were within the authority granted to the Emergency Commission. The Transfers about which he inquires are as follows:

Veteran's Aid Commission

AMOUNT	FROM	TO
**\$900.00	State Contingency Fund	Salary - Commissioner Chap. 46, S.L. 1963
**\$2,400.00	State Contingency Fund	Salary - Assistant Commissioners Chap. 46, S.L. 1963

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State Land Department

AMOUNT	FROM	TO
*\$12,000.00	State Contingency Fund	Salary - Deputy, Chap. 1, 1963 S.L.

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State Laboratories Department

AMOUNT	FROM	TO
**\$18,000.00	State Contingency Fund	Salary - Director
		Chapter. 1, 1963 S.L

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Department of Agriculture & Labor

AMOUNT	FROM	TO
**\$21,500.00	State Contingency Fund	Predatory Animal & Rodent Control, Chap. 1, S.L. 1963

* * *

*These line items were vetoed by the Governor.

**These items were reduced by Legislature from budget request.

The above items all relate to the authority of the Emergency Commission under Section 54-16-04 of the North Dakota Century Code.

Being that there is a great similarity and a duplication in the questions involved, we deemed it advisable to combine these requests (for an opinion), and consolidate the same into one opinion.

On April 29, 1963, we issued an opinion to Mr. Ben Meier, the Secretary of State, and a member of the Emergency Commission, wherein we set forth the authority of the Emergency Commission. (Copy of same is attached.) In that opinion we concluded by saying that it is incumbent upon the Emergency Commission to find and determine whether or not there has been such a change in conditions since the veto so that there now exists an emergency which is in the nature of a calamity or unforeseen happenings. We further advised that the application for funds may be granted only upon a determination and finding made by the Commission that such conditions do now exist and that the same constitutes an emergency as defined in Section 54-16-04 of the North Dakota Century Code. The statute in question is as follows:

MAY ORDER TRANSFER OF MONEYS BETWEEN FUNDS - ORDER MAY DRAW FROM STATE TREASURY. Whenever it is made to appear to the emergency commission by an itemized, verified petition of any board, commission, or officer authorized to expend public funds that an emergency exists, the emergency commission shall assume that an emergency exists demanding such action and may order money transferred from one fund to another fund belonging to or appropriated for the same institution or board or the same state enterprise, or in an extremity may authorize money to be drawn from the state treasury to meet the emergency until such time as the legislative assembly can make an appropriation available therefor. The term 'emergency' shall be limited to

calamities or unforeseen happenings subsequent to the time of the making of appropriations to be effected by such transfer and which were clearly not within the contemplation of the legislative assembly and the governor at the time of making such appropriation. The emergency commission shall not increase the amounts to be expended for any specific purpose by more than ten per cent, and this shall be done only to meet a deficiency arising in an attempt to carry out the purpose of the appropriation." (Emphasis supplied.)

The foregoing section defines what is meant by the term "emergency" and limits the same to the statutory definition. The term "emergency" is limited to calamities or unforeseen happenings subsequent to the time of making appropriations to be effected by such transfer. Webster defines a calamity to mean a state of deep distress or misfortune, misery, any great misfortune. The emergency as defined pursuant to the statutory definition must be one that came into existence after action by the legislative assembly or by the last legislative process. The Governor's veto is a legislative act (State ex rel. Sandaker v. Olson, 65 N.D., 561). Here the Court said: "It must not be overlooked that the governor when approving or disapproving items in an appropriation bill is acting in a legislative capacity and not simply as executive."

The powers of the Emergency Commission are in a sense discretionary, within the statutory limitations. It is the duty and obligation of the Emergency Commission to determine from the facts whether or not an emergency exists. Generally, in the absence of fraud, corruption or arbitrariness, the courts will not disturb the decision of a board (43 Am. Jur Section 255, page 73.) The following statement seems to sum up the law as pertaining to the instant situation: (67 C.J.S. Section 105, pages 376, 377.)

While the courts may, and sometimes do, exercise authority to compel public officers to act in matters where discretion is involved, in the absence of a statute to the contrary, where the decision of a question of fact has been committed to the discretion of a particular officer, his determination ordinarily will not be interfered with or reviewed by the courts, and they will refuse to substitute their judgment for that of the officer when he is acting within the scope of his authority, even if they might have made a different and wiser decision."

The same authority continues by saying:

On the other hand, it has been stated that the field within which the discretion of an officer may be exercised unhampered by judicial review is limited, and that, in the absence of a clear expression by the legislature to the contrary, the courts may review the exercise of a discretionary power vested in an officer to determine whether the case discloses circumstances which leave no possible scope for the reasonable exercise of discretion in the manner shown. The courts will interfere in the case of a clear abuse of discretion, as where an officer's discretion is exercised in an arbitrary, capricious, or unreasonable manner, or in the case of fraud on his part* * *."

We do not have any independent facts nor do we know whether or not an emergency existed or exists. In this instance, the Emergency Board or commission did not make any specific findings of fact. For that matter, the law does not require the Board to make same. In the absence of any such specific determination or findings, we must take the official record of the Emergency Commission as it stands to determine whether or not the Board acted within the authority granted in Section 54-16-04.

The record discloses that an application by the State Land Commissioner was made requesting the transfer of \$12,000.00 from the State Emergency Fund for salary of the deputy. The application itself relates reasons why the transfer should be made and states that additional duties have been placed upon the department by the 1963 Legislature, and in addition to that, Federal projects such as the Oahe Dam condemnations and acquisition of missile and other sites on school and institutional lands imposes greater obligations on the department. The Board in acting on the application, however, referred to it and apparently treated it as a reinstatement of appropriations. The minutes of the Board on said application state that the sum of \$12,000.00 "be reinstated" in said appropriation and that the sum of \$12,000.00 "be restored" to the Land Department salaries deputy fund.

As to the item pertaining to the State Laboratories Department, it is noted that the application is for the reinstatement of \$18,000.00 to the appropriation for Director for the biennium of 1963 to 1965 - the said sum to be reinstated from the Contingency Fund. The application further recites the following in support of its request:

The veto of the Director's salary and the passing of Senate Bill No. 176, which purports to give each employee \$5.00 per month credit on their group insurance, will deplete the "clerkhire" appropriation for the State Laboratories Department to the extent that its proper services will be greatly jeopardized."

The action of the Emergency Commission and the minutes reflect that an application to reinstate the sum of \$18,000.00 was submitted and that the Board by motion agreed to restore the sum of \$18,000.00.

As to the application for Predatory Animal and Rodent Control, we note that an application as such has not been submitted, at least none appears to be in the record. On July 8, 1963, Mr. Math Dahl, the Commissioner of Agriculture and Labor, in a letter addressed to the Emergency Commission stated as follows:

Referring to Minutes of Emergency Commission meeting of May 14, 1963, reaffirming the resolution of April 16 allowing funds for the Predatory Animal Control program on the same basis as used in the past biennium, which was \$101,500.00, this is to respectfully request that \$11,500.00 be made available from the Contingency Fund for the first quarter of the present biennium (July 1 thru January 1, 1964). This same amount of money (\$21,000.00) was expended during the first quarter of the past biennium for Predatory Animal Control."

The letter goes on to say:

The volume of requests from sheep, cattle and poultry producers for the continuation of the Predatory Animal Control program has conclusively emphasized the value and necessity for the program and I feel justified the expenditure for the protection of a large segment of the taxpayers in North Dakota."

The minutes of the Board show that a motion was made that the sum of \$12,500.00 be transferred from the State Contingency Fund to the Predatory Animal Control for the first quarter of the present biennium. It was further moved that the Emergency Fund will not be available after January 1st. As the record now stands it was merely in anticipation of a possible emergency. At the time funds were still available until July 1, 1963.

As to the request to transfer \$900.00 from the State Contingency Fund for the Commissioner of Veterans Affairs, we note that the application refers to reinstating the salary as approved by the Budget Board. The request is further explained by reciting the various activities that took place in the Legislature which ultimately resulted in reducing the commissioner's salary by \$900.00. The salary of the commissioner is a matter to be determined by the Legislative Assembly. Section 37-18-07 of the North Dakota Century Code provide that: "The salary of the commissioner shall be the amount appropriated therefor by the legislative assembly." It thus appears without question that the legislature determines the salary to be received by the commissioner. The legislature has done this under the provisions of Chapter 46 of the 1963 Session Laws. It is clearly beyond the authority of the Emergency Commission to grant such transfer to increase the salary of the commissioner.

As to the request to transfer \$2,400.00 from the State Contingency Fund to salaries for assistant commissioners, it is noted that the application again refers to reinstating the salaries as approved by the North Dakota Budget Board. On this item the application is accompanied by a detailed explanation of how the salary for the assistant commissioners was reduced by \$2,400.00, which was the amount requested to be transferred. The application does not state that any emergency exists as contemplated by Section 54-16-04. The minutes of the Emergency Commission merely recite that the transfer was approved, meaning both the transfer for the \$900.00 for salary for the commissioner and \$2,400.00 for salaries of the assistant commissioners.

Being that no written determination was made by the Emergency Commission we must take cognizance of the minutes as they appear in the official record. The minutes do not disclose that the Board deemed that an emergency existed. It is significant to note that the application for predatory Animal Control was initially made or considered on April 16, 1963, shortly after the end of the legislative process and a considerable time before the beginning of the new biennium, during which time the requested money was intended to be used. We have no independent knowledge that an emergency existed and the records to which we must give recognition do not indicate that an emergency existed or exists.

The Emergency Commission is not authorized or empowered to act as a "miniature appropriation legislature." It is not intended that the Emergency Commission be permitted to substitute its judgment for that of the legislature. If that were the case it would appear to be an unlawful delegation of legislative authority and be in violation of Section 186 of the North Dakota Constitution.

We also take notice of the fact that this is at the beginning of a biennium.

The statutes relating to the powers of an interim committee to authorize the transfer of money from state funds have been held valid where the legislature has set out guide lines and the conditions under which transfers may be made. In our specific instance, Section 54-16-04 sets out the circumstances and conditions under which transfers from the Contingency Fund can be made.

Being that we do not have independent facts and for that matter are not even permitted to substitute our judgment if independent facts were available, we must consider the facts on the transfers as they appear on the face of the official records. The facts as disclosed in the official records do not indicate that the conditions required under Section 54-16-04 existed or exist.

It is therefore our opinion, from the facts available or facts which we must consider, that the transfers are not valid and are beyond the scope of the authority granted to the Emergency Board or Commission under Section 54-16-04.

HELGI JOHANNESON

Attorney General