

OPINION
63-180

September 13, 1963 (OPINION)

PUBLIC MONEYS

RE: State Departments and Institutions - Deposited with Treasurer

This is in reply to your letter in which you state that there is some misunderstanding of constitutional and statutory requirements regarding the depositing of public moneys in the State Treasury. You also advise that you believe it is your duty under subsection 9 of section 54-44-04 and section 54-44-02 of the North Dakota Century Code to have these difficulties resolved.

You then ask for an official opinion of this office as to what public moneys of the State must be deposited with the State Treasurer. You further request that the opinion give attention to all income of charitable and penal institutions and institutions of higher learning, and state department agencies, bureaus and institutions of the State of North Dakota, including income from produce, patient care, fees, rent, operation of stores, grants, requests, athletic events, libraries, and all other miscellaneous income.

Section 186 of the North Dakota Constitution seems to be controlling. This section, as is material here, provides as follows:

(1) All public moneys, from whatever source derived, shall be paid over monthly by the public official, employee, agent, 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 provided, however, that there is hereby appropriated the necessary funds required in the financial transactions of the Bank of North Dakota, and required for the payment of losses, duly approved, payable from the State Hail Insurance Fund, State Bonding Fund, and State Fire and Tornado Fund, and required for the payment of compensation to injured employees or death claims, duly approved, payable from the Workmen's Compensation Fund, and required for authorized investments made by the Board of University and School Lands, and required for the financial operations of the State Mill and Elevator Association, and required for the payment of interest and principal of bonds and other fixed obligations of the State, and required for payments required by law to be paid to beneficiaries of the Teachers' Insurance and Retirement Fund, and required for refunds made under the provisions of the Retail Sales Tax Act and State Income Tax Law, and the State Gasoline Tax Law, and the Estate and Succession Tax Law, and the income of any State institution derived from permanent trust funds, and the funds allocated under the law to the State Highway Department and the various counties for the construction, reconstruction, and maintenance of public roads.

This constitutional amendment shall not be construed to apply to fees and moneys received in connection with the licensing and organization of physicians and surgeons, pharmacists, dentists, osteopaths, optometrists, embalmers, barbers, lawyers, veterinarians, nurses, chiropractors, accountants, architects, hairdressers, chiropodists, and other similarly organized, licensed trades and professions; and this constitutional amendment shall not be construed to amend or repeal existing laws or acts amendatory thereof concerning such fees and moneys." (Underscoring ours.)

As to state institutions, such as the charitable and penal institutions, section 54-23-25 of the North Dakota Century Code provides that "All moneys belonging to the state, derived from any source at any of the institutions under the control of the board shall be accounted for and remitted to the state treasurer on the first day of each month, and all funds for necessary expenditures of such institutions shall be drawn from the state treasury as provided by this chapter." This section is in full harmony with Section 186 of the North Dakota Constitution quoted above.

Section 54-06-07 of the North Dakota Century Code, in substance, provides that all salaries of elective and appointive state officials shall be full compensation for all official service and that all fees which are not otherwise by State Law directed to be deposited in a special fund or disbursed for a special purpose shall be accounted for and paid over monthly to the State Treasurer and shall be credited to the General Fund of The State.

Section 54-23-06 of the North Dakota Century Code provides that the State Board may permit a contingent fund in any institution under its control not to exceed \$10,000.00. Said fund is to remain in the hands of the managing officer of such institution. It then sets forth some of the specific requirements of the contingent fund.

The North Dakota Supreme Court in *Langer v. State*, 69 N.D., 129, on Page 148, (284 N.W. 238), in construing the first sentence in Section 186 of the Constitution had this to say:

* * *If moneys are collected for a special public purpose (as for instance premiums for the Fire and Tornado Fund) they must be deposited by the state treasurer to the credit of the state; but it is not contemplated that they shall become part of the general revenue of the state, and disbursed for general governmental purposes. Section 186, as amended, does not abolish or prohibit special funds. It restricts the use of moneys in such funds to the purposes that are designated in the appropriations set out therein, and such further appropriations as may be made by the legislature.

It is of no consequence whether moneys are available for appropriation for general purposes or whether they are collected, and must be expended, for certain designated purposes. The fact remains that the laws under which the moneys in these several funds have been, are being, and will be collected, are general state laws, and the moneys in these

funds have been collected, and must be expended, for certain public purposes designated in acts under which they have been collected. The funds have been created by legislative authority. They are being maintained and operated pursuant to legislative authority, and the moneys in them now, or that hereafter will be placed in them, have been, and will be, collected pursuant to legislative authority. Section 186 of the Constitution, as amended, is intended to throw further safeguards around the expenditure of moneys collected pursuant to law, and to be expended for public purposes. There is as much reason for safeguarding the expenditure of moneys held by the state in trust for expenditure for certain designated purposes as there is to place safeguards around the expenditure of moneys collected for general purposes. The language employed in Section 186 of the Constitution, as amended, discloses that it was the intention that all moneys collected from any source for any, and all, of said funds should be within the provisions of said section, otherwise the provision appropriating the necessary funds for the payment of claims against these several funds would be meaningless.* * *." (Underscoring ours.)

The last sentence has direct bearing on the questions you submitted. The Court construes Section 186 of the Constitution to mean that all moneys collected from any source for any and all said funds should be within the provisions of said section.

While the case of Langer v. State, cited above, is centered on the question whether or not certain departments, agencies, commissions etc. are required to submit a budget, research of the case discloses that the declaratory judgment was, in reality, brought to determine what is meant by the first sentence of Section 186 of the Constitution. Therefore, the comments of the Court on this matter are a real significance.

As to the charitable institutions, section 25-09-08 of the North Dakota Century Code, as amended, provides that the moneys collected from the patients, their estates or responsible relatives shall be deposited with the State Treasurer and credited to the General Fund.

Section 25-01-10 of the North Dakota Century Code provides as follows:

BOARD MAY ACCEPT GIFTS AND BEQUESTS - STATE TREASURER TO HAVE CUSTODY OF FUNDS. The board may accept in the name of the state and hold in trust for any institution mentioned in this chapter any lands conveyed or devised and any money or other personal property given or bequeathed for application to any purpose connected with such institution. All moneys and property coming into the hands of the board as donations, devises, gifts, and bequests shall be used for the specific purposes for which they are donated, devised, bequeathed, or given. If no terms are imposed upon the use of any donation, devise, bequest, or gift, it shall be used for the general maintenance of the institution for the benefit of which it is made. Except as otherwise provided in this section, all moneys appropriated by the legislative assembly and all moneys raised

in any other manner for any institution named in this section shall be deposited with the state treasurer and kept in a special fund to be used exclusively for the benefit of the institution for which such money was appropriated or raised."

It is to be observed that all moneys must be deposited with the State Treasurer. It is further observed that unless by statute or by constitutional provisions the moneys are designated for a specific purpose, they are to be credited to the General Fund. Money or funds which are raised for a specific purpose, nevertheless, must still be deposited with the State Treasurer but the same shall be kept in a special fund and such money or fund shall be used exclusively for the purpose for which it was obtained or raised.

It is, therefore, our opinion that all income of charitable and penal institutions must be deposited with the State Treasurer. Donations or grants given or made subject to certain limitations are received and accepted with the conditions attached. If the condition or stipulation of the grant or donation does not provide that the money shall be deposited in some specific place, it shall be deposited with the State Treasurer in a special fund.

Income of funds obtained by operation of stores come within the provisions of Section 186 of the North Dakota Constitution, unless and except where the operation of a store is an extracurricular activity and is not operated by the State or its employees and public funds are not used in "stocking" the store and is, in a sense, a mutual operation by and for the benefit of the inmates of the institution. This type of operation out of necessity must be very limited and can pertain only to such store activities as selling candies, confectioneries and related items. These funds, in reality, belong to the inmates of the institution and may be used for such purpose. In this respect, however, care must be observed to avoid a misapplication of such funds.

As to institutions of higher learning, it is observed that section 15-14-05 of the North Dakota Century Code provides that "All moneys appropriated by the legislative assembly, including all moneys raised in any other manner for said school, shall be deposited with the state treasurer and kept in a separate fund known as the 'state normal and industrial school fund,' and such fund shall be used exclusively for the benefit of said school."

Similarly, section 15-10-12 of the North Dakota Century Code provides that "The state board of higher education may receive donations, gifts, and bequests offered or tendered to or for the benefit of any institution of higher education under its control or subject to its administration, and all moneys coming into the hands of the board as donations, gifts, and bequests shall be used for the specific purpose for which they are donated or given. Except as otherwise provided in this section, all moneys appropriated by the legislative assembly, including all moneys raised in any other manner for any institution of higher education, shall be deposited with the state treasurer and kept in a special fund used exclusively for the benefit of the school for which such money was appropriated or raised."

All of these laws, including Chapter 40 of the 1963 Session Laws, are

in harmony with Section 186 of the Constitution. In this respect, even section 15-11-28, which provides that the University of North Dakota is authorized to pledge future hockey admission receipts to repay any loan made for the purpose of remodeling buildings and purchasing and installing artificial ice equipment for hockey and skating purposes at the university, is not unconstitutional or contrary to Section 186 of the Constitution. While these funds are made available for certain purposes, they are still required to be deposited with the State Treasurer.

Section 15-03-03 of the North Dakota Century Code provides as follows:

STATE TREASURER TO HAVE CUSTODY OF CERTAIN SCHOOL FUNDS. The state treasurer shall be the custodian of all funds arising from the sale or leasing of any lands granted to any institution of higher education and such funds shall be deposited with him. He shall keep a separate fund for each institution of higher education to which a land grant has been made, exclusive of institutional funds which may be subject to the order of the president as hereinafter specified. All funds in the hands of the state treasurer shall be kept by him in separate accounts on behalf of the several institutions and such funds shall be used exclusively for the benefit of the institution to which they belong. Any money received by any such institution for tuition, matriculation, registration, or incidental fees may be kept and disbursed by the institution subject to the order of the president thereof any may be used for the purposes for which they were collected."

The last sentence gives rise to some difficulty. A research on this section discloses that the provision in question initially related to the "Academy of Science", which is now the Wahpeton School of Science. The original provision provided that the board of trustees would have control of such money. The revisory's notice with reference to this section is as follows:

This section is revised to make it applicable to all of the institutions of higher education. The section states the practice at the time***."

The note goes further and explains that the revisors, in reality, substituted "president" instead of "secretary" of such board on the basis that the board of trustees no longer existed because of the adoption of Article 54 which created the board of higher education.

However, as to the practice existing to which reference is made by the revisor, the Court in *Langer v. State*, in substance, said that the amended version of Section 186 of the Constitution was adopted to eliminate or ban such practices. In addition to this, we must observe that section 15-03-03 as it existed was prior to the adoption of the amended version of Section 186. Custom and practice may be resorted in construing uncertain language in a statute or language which is ambiguous. However, here we do not have this question. The provisions of Section 186 of the Constitution must prevail over any statutory provision inconsistent therewith.

Every effort must be made to harmonize a statute with the constitution. In doing so, we come to the conclusion that section 15-03-03 can only be treated now as an appropriation but it does not eliminate or exempt the money received by such institution for tuition, matriculation, registration or incidental fees from being deposited with the State Treasurer in accordance with Section 186 of the North Dakota Constitution. This is the only logical construction that can be placed on this section, otherwise it would be unconstitutional.

It is, therefore, our opinion that all income of institutions of higher learning, including income from tuition fees, produce, etc., must be deposited with the State Treasurer. It is our further opinion that the income is to be placed in a special fund by the State Treasurer and that it is to be used only for the purpose for which it was appropriated, raised or obtained. This conclusion is in harmony with the "Enabling Act" and its provisions relating to educational grants and income for educational institutions and Article 54 of the North Dakota Constitution.

As to grants or donations received, the condition under which the grant and donations are made must be considered. Unless the condition of the grant or donation provides that the funds be deposited or held in trust by a certain person or institution, such funds must be deposited with the State Treasurer and kept in a separate fund, and disbursements therefrom are to be made only for the purpose for which the fund was granted or donated.

In this respect, we also wish to call attention to section 6-09-07 of the North Dakota Century Code which provides that all state funds and funds of all state penal, educational and industrial institutions shall be deposited in the Bank of North Dakota by the persons having control of such funds. Also, section 21-04-02 provides that "public funds belonging to or in the custody of the state shall be deposited in the Bank of North Dakota."

As to state institutions and agencies, it is significant to note that the North Dakota Supreme Court in *Langer v. State*, *Supra*, also said:

The language employed in Section 186 of the Constitution, as amended, discloses that it was the intention that all moneys collected from any source for any, and all, of said funds should be within the provisions of said section, otherwise the provision appropriating the necessary funds for the payment of claims against these several funds would be meaningless.

It will be noted that the appropriations made (in Section 186, as amended) from the various funds, is limited to certain definite purposes. There is no general appropriation from any of the funds. There is no appropriation, for instance, for administrative purposes. It is apparent, therefore, that no disbursement may be made for such purposes, or for any purposes other than those specified in the constitutional amendment, except pursuant to specific legislative appropriation.* * *."

The Supreme Court in *claim of S. A. Healy Company*, 109 N.W.2d., 249, said that Workmen's Compensation premiums are public moneys under the

provisions of Section 186 of the Constitution. The Workmen's Compensation Bureau, like the State Mill and Elevator and other state institutions, is an enterprise. However, the premium for Workmen's Compensation is in a sense a tax - an exaction by law - and as such the analogy is not complete.

The North Dakota Supreme Court considered the term "public money" in the following cases:

Campbell v. Towner County, 71 N.D. 616 (3 N.W.2d., 822);

State ex rel. Strutz v. Nelson, 72 N.D. 402 (7 N.W.2d., 735); and,

Oesterle v. Lavik, 78 N.D. 888 (52 N.W.2d., 297).

In reviewing these cases, we cannot formulate a simple statement which would be applicable in all instances. The meaning of the term varies and depends to a great degree on the manner in which the term is used.

However, what has been said in the Langer v. State case seems to apply to all other state institutions and agencies. It is, therefore, our opinion that Section 186 of the North Dakota Constitution applies to all state institutions. As to certain enterprises, it is not entirely clear at what stage or point receipts (income) are considered public moneys. This specific phase must be resolved by taking into consideration all of the facts surrounding the transactions involved. In some respects, it might be the net income which would be considered public money. This might well be in the situation as pertaining to the State Mill and Elevator. Legislative enactments merely clarifying this particular point would be helpful, however, we are aware that any legislation could only be in furtherance of the constitutional provision and could not be in contravention thereof.

It should be noted that nothing contained in this opinion is to be construed as depriving any board, commission, bureau, institution or agency of any appropriation made by the legislative assembly or pursuant to Section 186 of the North Dakota Constitution. The opinion is limited to the question of whether or not public moneys received by various departments, institutions, agencies, etc. are to be deposited with the State Treasurer. In our opinion they must be so deposited.

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