

OPINION
63-55

April 2, 1963 (OPINION)

CIVIL DEFENSE

RE: Administration of Federal Funds

Your letter request for an opinion dated March 7, 1963, relative to your administration of federal funds advances and reimbursement moneys is acknowledged. Since March 7, 1963, you have supplied us with additional correspondence dated March 15, 1963, from the Region 6 Director, Mr. Ren F. Read, of Denver, Colorado, and also copies of letters dated February 13, 1963, from Mr. James J. Kearney, Assistant General Office (Administration), and letter from John L. Turpin, Director of Support Requirements, Denver, Colorado, dated March 6, 1963, all of which must be read and interpreted in connection with your first question. We wish to further confirm that we have held a joint conference with you, Mr. Ralph Dewing, Director of the State Department of Accounts and Purchases, Mr. Vance Steen, Auditor for that same department, and Mr. Roger McKinnon, Special Assistant Attorney General and Attorney for the State Auditor, said conference taking place on March nineteenth and March twentieth, 1963, in this office.

In your letter of March 7, 1963, you request an opinion three questions which are labeled as Parts I, II and III in this opinion. The first is as follows:

PART I

"I. Refund of unused portions of an Advance to cover a Specific Project Application. (See Attached Memorandum from DOD/OCD, Washington 25, D.C.)

(a) QUESTION: What procedure should be followed to effect refund of unused portions of funds if we do not follow the State Voucher System established."

In direct response to this question, this office has consistently taken the position that the use of the procedures involving the state vouchering system is the only method which can be utilized by state agencies in matter such as this, in view of certain statutory requirements and interpretations of the statutes by members of this office. In this connection, I refer you to a letter dated February 1, 1960, a copy of which is enclosed as Enclosure No. 1, written by the present First Assistant Attorney General, Mr. Paul M. Sand, to Colonel Noel Tharalson, then the Civil Defense Director for this state, and we quote from the second paragraph thereof as follows:

"The North Dakota laws do not permit either the state or its political subdivisions to assume any obligations other than their own. The state is not authorized, or for that matter neither are any of its political subdivisions, to assume or pay

any obligation which belongs to another state, or any other subdivision, or Federal government. The state and its political subdivisions may spend only such moneys as are specifically appropriated for a certain purpose. Any state agency or department has only such powers or authority as are granted or implied from the statutes granting the powers."

To further explain the views of this office, we refer to the provisions of section 21-0101 of the North Dakota Revised Code of 1943 (now section 21-01-01 of the North Dakota Century Code) which were discussed by Mr. Roger McKinnon, the former Deputy State Auditor, and now a Special Assistant Attorney General and Attorney for the State Auditor's office, in a letter to the late Colonel Noel Tharalson, dated February 9, 1960, listed as Enclosure No. 2, and we quote in part from the second paragraph of said letter as follows:

"Section 21-0103 of the North Dakota Revised Code of 1943 entitled 'Maximum Amount of Warrants or Indebtedness; Violation of Provisions; Liability For.', states in part: 'No warrant purporting to be drawn upon the funds in the hands of the treasurer in any taxing district shall be issued in excess of the amount of cash in the hands of the treasurer.'
. . . Further, 'no indebtedness shall be incurred, and no undertakings or expenditures authorized, in excess of unencumbered, uncollected taxes which have been levied during the current year.'"

Further, section 21-01-01 of the North Dakota Century Code, at subsection 2 thereof, defines the term "Warrant" as follows:

"2. The term 'warrant' when used in this chapter shall mean an order drawn by the proper taxing district officials on the treasurer of said taxing district, the warrant or order to be so drawn that when signed by the treasurer in an appropriate place it becomes a check on the taxing district depository. No warrant upon the treasurer shall be delivered or mailed to the payee or his agent or representative until such warrant has been signed by the treasurer and entered on the treasurer's books as a check drawn on a bank depository."

Next, section 21-01-03 of the North Dakota Century Code presently provides as follows:

"21-01-03. MAXIMUM AMOUNT OF WARRANTS OR INDEBTEDNESS - VIOLATION OF PROVISIONS - LIABILITY. Except as otherwise provided in this chapter, no warrant purporting to be drawn upon the funds in the hands of the treasurer of any taxing district shall be issued in excess of the amount of cash in the hands of the treasurer exclusive of sinking funds and funds for the payment of interest upon bond issues. No indebtedness shall be incurred, and no undertakings or expenditures authorized, in excess of unencumbered uncollected taxes which have been levied during the current year plus the unencumbered uncollected taxes of the four preceding years. Any warrant issued, contract entered into, or purported indebtedness incurred, in contravention of this section shall be null and

void, but this provision is not intended to detract from the provisions of section 21-02-03 with reference to the incontestability of certificates of indebtedness. Any officer knowingly and willfully executing or participating in the execution of any warrant or contract or attempting to incur any indebtedness of any such taxing district in contravention of this section is guilty of a misdemeanor. Any officer executing or participating in the execution of any warrant in contravention of this section shall be personally liable for the payment thereof to the holder in due course." (Emphasis supplied).

In referring back to Mr. McKinnon's letter of February 9, 1960, we note his conclusion as follows:

"From these sections it is readily seen that by construction and inversive interpretation by operation of law, it actually becomes mandatory that the Federal funds be advanced and on deposit prior to any negotiation or incurrence of liability on the part of any said taxing district, as to any installation program of equipment authorized by the provisions of the North Dakota Civil Defense Act."

We believe that the conclusions reached by Mr. Sand and Mr. McKinnon are sound, and are the correct conclusions in each instance.

However, to further support the conclusions reached we now refer to Section 186 of the North Dakota Constitution, which provides in part as follows:

"Section 186. (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: * * *" (Emphasis supplied).

This section continues by making provision for certain specific appropriation items, and the subject of Civil Defense is not included in these items. At subsection 2 of Section 186 of the Constitution, the following is provided:

"(2) No bills, claims, accounts, or demands against the State or any county or other political subdivision shall be audited, allowed, or paid until a full itemized statement in writing shall be filed with the officer or officers whose duty it may be to audit the same, and then only upon warrant drawn upon the Treasurer of such funds by the proper officer or officers." (Emphasis supplied).

It can be seen then, that Section 186 provides that all funds shall be paid out and disbursed only pursuant to a legislative appropriation, and that the proper officials (agency heads) may receive such funds, only upon warrants drawn upon the treasurer of such funds.

In this connection then, we refer to the leading North Dakota case of *Campbell v. Towner County*, 71 N.D. 616, 3 N.W.2d. 822 (1941) which held that under the state constitution all moneys belonging to the state must be paid to the state treasurer and cannot be disbursed except pursuant to legislative appropriation, and only on warrants drawn on the treasurer. This case further held that an appropriation was 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 that specific object.

Next, section 54-44-04 of the North Dakota Century Code, dealing with the powers and duties of the department of accounts and purchases director, provides at subsection 10 the following:

"10. Shall record all regular purchase orders and other encumbrance documents as encumbrances against available appropriations and allotments and certify as to availability of funds before issuance to vendors;"

Chapter 54-27 of the North Dakota Century Code under the title Fiscal Administration provides generally for appropriations, and sets forth control procedures to be utilized by the responsible officials, and at section 54-27-11 vests certain powers and duties, and sets limitations in regard to the supervisory bodies involved, namely the Department of Accounts and Purchases and the state treasurer.

Finally, section 12-10-02 of the North Dakota Century Code provides a penalty for unlawful spending of public funds as follows:

"MISAPPROPRIATION AND UNLAWFUL SPENDING OF PUBLIC FUNDS - FELONY. Any public officer or employee who has the power to expend public funds or to cause public funds to be expended and who willfully shall expend such funds, or cause the same to be expended, contrary to law, shall be guilty of misappropriation of public funds and shall be punishable as for a felony."

Therefore, in summing up the elements discussed, we point out that Section 186 of the North Dakota Constitution provides that no disbursements can be made without legislative appropriation being provided first, and then only upon warrants drawn upon the treasurer by the proper officials. Section 21-01-03 of the North Dakota Century Code provides that no warrant shall be drawn in excess of the amount of cash in the hands of the treasurer of the taxing districts involved. The case law referred to above supports the constitutional and statutory provisions involved also. Further, control procedures are set up under chapter 54-44 and chapter 54-27 of the North Dakota Century Code, while penalty provisions are found in section 12-10-02 of the North Dakota Century Code for officials expending funds contrary to law.

Therefore, we reiterate that the conclusions reached above are, we believe, the proper interpretations of the law concerned; thus, it is our opinion that advances of Federal moneys for Civil Defense purposes must be deposited with the treasurer, and the only acceptable method of handling refunds of these advances is by utilizing the so-called "State Voucher System."

Finally, in connection with your first question, you have also supplied us with copies of certain documents entitled "CERTIFICATES OF LEGAL NECESSITY," said documents being enclosed with a letter written to you, labeled as Enclosure No. 3, by Mr. Ren F. Read, Regional Director of Civil Defense, Denver, Colorado. In Mr. Read's letter, he states that the Regional Office has been directed, by a memorandum, labeled as Enclosure No. 4, issued by the Director of Accounting, Mr. Donald Thompson, Washington 25, D.C., dated March 6, 1963, not to process any further requests for advance moneys, until certificates of legal necessity made out by the North Dakota Attorney General are filed with the regional office. Three different types of certificates were enclosed and this office, after due consideration and examination, has determined that the certificates numbered as Enclosure No. 5 would be the proper certificate to file with the regional office. Therefore, that document is returned as Enclosure No. 5 properly executed and signed by the Attorney General of North Dakota. We believe that this action obviates any further discussion in regard to your first question.

PART II

Your second question is as follows:

"II. The Federal Personnel and Administrative Expense Program provides funds for reimbursement of one-half total cost of eligible expenses incurred to States and Political Subdivisions. Personnel salaries and wages cannot be paid legally to elected officials under the broad provisions of the Hatch Act. It has been determined that if the State would issue an Opinion through its Attorney General that the Specific elected Officials Involved are elected on a no-party ballot and that the office to which they are elected considered nonpartisan in nature so that payment to these officials could be eligible for reimbursement from Federal moneys.

(a) QUESTION: Do the following elected officials fall in the category of nonpartisan elections as set forth in North Dakota Century Code 16-18-01:

1. States Attorney
2. City and County Auditor
3. County Sheriff
4. County Superintendent of Schools
5. Clerk of Court.
6. Register of Deeds
7. County Judge
8. City Alderman

9. City Commissioners
0. Chairman of Board of Village Trustees
- 1.1 Chairman of Park Commission
2. Police Magistrate

This list would also include any County or Municipal Official elected by ballot."

Chapter 16-08 of the North Dakota Century Code entitled "NO-PARTY BALLOT" at section 16-08-01 provides as follows:

"16-08-01. REFERENCE TO PARTY AFFILIATION IN PETITION AND AFFIDAVIT PROHIBITED FOR CERTAIN OFFICES. No reference shall be made to a party ballot or to the party affiliation of a candidate in a petition and affidavit filed by or in behalf of a candidate for nomination in the primary election to an elective county office the office of judge of the supreme court, judge of the district court, superintendent of public instruction, or tax commissioner."

Further, section 16-08-02 of the North Dakota Century Code provides as follows:

"16-08-02. NO-PART PRIMARY BALLOT - CONTENTS. There shall be a separate ballot at all primary elections which shall be entitled 'no-party primary ballot.' The names of all candidates for any of the offices mentioned in section 16-08-01 shall be placed thereon without party designation and there shall be stated thereon the number of persons for which each elector may vote for each office, which shall be the number to be elected to such office at the next succeeding general election."

Next, section 16-08-04 provides in part as follows:

"* * * No partisan nominations shall be made for any of the offices mentioned in section 16-08-01." (Emphasis supplied).

Finally, section 16-08-05 provides for a no-party ballot in general elections in the following language:

"NO-PARTY BALLOT AT GENERAL ELECTIONS - CONTENTS - DELIVERED TO ELECTOR. There shall be a separate no-party ballot at the general election upon which shall be placed the names of all candidates who have been nominated on the no-party primary ballot at the primary election. Such ballots shall be in the same form as the no-party primary ballot and shall be delivered to each elector by the proper election official. The candidate or candidates to the number to be elected for each office receiving the highest number of votes shall be duly elected to such office."

It is the opinion of this office then, that all county officials, who are elected, are to be elected on a no-party ballot.

Therefore, the following offices would be subject to chapter 16-08, namely, the state's attorney, county auditor, county sheriff, county superintendent of schools, clerk of the district court, register of deeds and county judge all of whom are elected officials and said officers are to be elected on the no-party ballot.

You also state that you believe that municipal officials would also be included in the group of officials to be elected on a no-party ballot. In this connection, we refer you to chapter 40-21 of the North Dakota Century Code, which provides in section 40-21-06 the following:

"40-21-06. REFERENCE TO PARTY BALLOT OR AFFILIATION IN PETITION OF CANDIDATE FOR MUNICIPAL OFFICE PROHIBITED - PRINCIPLES STATED. No reference shall be made to a party ballot nor to the party affiliation of a candidate in a petition to be filed by or in behalf of a candidate for nomination to a public office in any incorporated city or village in this state.* * * *." (Emphasis supplied).

In view of the above-quoted provisions, it is also our opinion that elective city officials, such as the city auditor, city alderman, city commissioners, and park commissioners (see section 40-49-07), all are to be elected on the no-party ballot. Further, police magistrates are also to be elected under the provisions of Section 113 of the North Dakota Constitution, and specifically, by chapter 40-15 (election in commission cities), by chapter 40-14 (election in council cities), and by chapter 40-07 (election in villages). Finally, provisions for the election of village trustees and other village officers are found in section 40-07-08 of the North Dakota Century Code.

In conclusion then, all of the officials listed in your second question are officers who are to be elected on the no-party ballot, and we so hold on the authority referred to above.

PART III

Your third question labeled "III. PROVISIONS OF A CONTRACT." is as follows:

- "(a) QUESTION: What are the minimum monetary requirements for bidding procedures at State and Local Political Subdivision level.
- "(b) Authority to purchase.
 - (1) QUESTION: What is the relationship of the ultimate user of equipment to other parties of contract to purchase commodities through State Purchasing Agency with funds administered by another State Agency. In other words, does the user or the administrative agency in charge of Federal Funds have the sole authority and responsibility for purchase."

In response to your Question III(a) we refer to the provisions of section 11-11-26 in connection with bidding authority of the board of county commissioners, which provides as follows:

"11-11-26. WHEN BOARD SHALL ADVERTISE FOR BIDS. When the amount to be paid during the current year for the erection of county buildings, for the purchase of fuel, or for election ballots and supplies, exceeds one thousand dollars, the board of county commissioners shall cause an advertisement for bids to be published at least once each week for two successive weeks in the official newspaper of the county and in such other newspapers as it shall deem advisable. The first publication shall be made at least thirty days prior to the day set for the opening of the bids."

Further, section 11-11-28 provides that the bids referred to above must be accompanied by a certified check in a sum equal to five percent of the amount of the bid, as a guaranty that the bidder will enter into the contract if it is awarded to him and that he will furnish the necessary bond.

In connection with the bidding procedures at state level, through the Department of Accounts and Purchases, there are no specific statutes governing this matter as it relates to Civil Defense procurements. In discussing this with representatives of the Department of Accounts and Purchases, we find that department's policy is to advertise for bids on items which exceed \$1,000.00 in value. Further, that department has established a policy in connection with items and supplies valued at between \$200.00 and \$1,000.00 to receive informal price quotations on said items, and then the normal purchasing procedure comes into play. Such procedure them, in either case, would involve a purchase requisition or request, followed by either an advertising for bids or a receipt of price quotations from suppliers. Next, either an award is made or the requisitioning agency is notified as to the price quotations, and at that time, either the Department of Accounts and Purchases or the requesting agency places the order. Upon receipt of the supplies involved, and after the inspection of the supplies, the payment or vouchering process is commenced by either the Department of Accounts and Purchases, or by the requesting agency, depending on the circumstances. We trust that this information is helpful to you in connection with the purchasing procedures involved at state level.

In view of the fact that you withdrew the last question, labeled Part III(b)(1), on April 1, 1963, we then conclude this opinion, and trust that the opinions rendered herein are helpful to you.

HELGI JOHANNESON

Attorney General