OPINION
64-12

October 21, 1964 (OPINION)

Mr. Ralph Dewing, Director

Department of Accounts and Purchases

RE: Appropriations - Refunds - Disposition

This is in response to your letter in which you advise that some state departments, agencies and institutions upon receipt of money from various sources deposit same with the State Treasurer to the general or special funds of the state and also credit same as refunds to the appropriation accounts of such departments, agencies and institutions. You then call attention to Section 186 of the North Dakota Constitution and ask for an opinion whether or not appropriation accounts may be credited with refunds and if so under what circumstances.

You also suggest that "refunds" may be made and credited to the appropriation account in instances such as cancellation of a warrant check issued and charged against a certain account, or moneys received as a refund on overpayment for merchandise or services, or to correct an obvious error in charging a certain account.

The provisions of Section 186 of the North Dakota Constitution as pertaining to public moneys are specific and are 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; * * * ."

This section requires that all moneys received or derived from whatever source shall be deposited with the State Treasurer to the credit of the state. The term "derived from whatever source" is all inclusive and refers to all public moneys.

The term "public moneys" has various shades of meaning. The exact meaning is, in most instances, determined from the language and manner in which it is found or used. The North Dakota Supreme Court has had occasion to construe such term and has held that moneys collected by the Workmen's Compensation Bureau pursuant to its established rates are "public moneys." (Claim of Healy Co., 109 N.W.2d. 249 and Langer v. State, 69 N.D. 129.) Also, in Menz v. Coyle, 117 N.W.2d. 290, the Court said:

> "Moneys received by a public official of the State which come under the provisions of Section 186 * * * must be deposited * * * with the State Treasurer, and may be paid out and disbursed only pursuant to appropriation * * * ."

This case involved filing fees for actions filed with the clerk of court. The Court also said that an attempted appropriation "of all funds received by the State Bar Association did not meet the constitutional requirements of being specific and direct."

The term "public moneys" as used in Section 186 means money which belongs or is under the control of the state as distinguished from private money. It is difficult to envision any money being received by the state which is not money being received by an official of the state at one time or another. Out of necessity the state must act through its officers. The officers are entrusted and empowered with such duties and responsibilities as the Legislature or Constitution from time to time may impose or grant. We are not aware of any statute which authorizes any state official to receive money which does not belong to the state except in specific instances where by statute a state officer is authorized to receive or hold money in trust. In such instances it is clear that the money so held (in trust) is in the nature of a trustee only. Money held in trust for a specific purpose is, of course, not subject to appropriation. Moneys received in the form of a gift or grant with conditions attached of course fall in the category of a trust.

In resolving the question at hand, we are primarily concerned with money which has been appropriated. It limits the scope of this opinion. Generally the Legislature can only appropriate public moneys. We must therefore assume in the absence of any showing to the contrary that the appropriations involved under which the questions are raised were made from public moneys pursuant to Section 186 of the North Dakota Constitution. As such, there can be no doubt that the provisions of Section 186 apply. This section strongly implies a "one-way" channel or theory for appropriated money and a "one-way" channel or theory for money received. The appropriated money can be used only for the purpose for which it was appropriated. Once the appropriated money is removed from the appropriated account on a properly approved voucher, it can only be replaced by an appropriation. The line item appropriation account is not a "fund" into which deposits can be made. Public moneys must be deposited with the State Treasurer in the general fund or in a certain specified fund and may not be expended until an appropriation is made. A line item account may not be replenished except by an appropriation or by action of the Emergency Commission pursuant to the provisions of Chapter 54-16 of the North Dakota Century Code. Similarly, a line item appropriation account may only be used for the purpose for which it was appropriated within the biennium and any remainder thereof reverts to the general fund or is cancelled pursuant to statutory provisions.

Assuming this construction is correct, and it appears to be, the only logical conclusion that can be placed on the constitutional provision is that it compels the further conclusion that any reimbursement or return of money to a state official or department must be placed into the general fund or in some cases a special fund, but it cannot be returned to the line item account from which it was taken without an appropriation by the Legislature. This would not permit a department to pay a bill for another department and upon reimbursement replace the money in the line item account. Any such reimbursement would have to go into the general fund or possibly the fund from which the

line item account was appropriated. The practice of replenishing the line item account would, in effect, make a revolving fund out of the line item appropriation, which is not contemplated by the appropriation and would first require appropriate legislation before such practice would be permissible.

Section 186 of the Constitution was adopted to provide a more accurate check and accounting on governmental finances and thereby maintain better control over expenditures and income. By permitting or allowing the appropriated accounts to be replenished or credited with refunds, grants or gifts would defeat the purpose for which Section 186 was adopted. As to grants or gifts and expenditure of same, much depends on the condition under which they are made or given. Regardless of the condition attached to a gift or grant, whether such gift or grant be from individuals or the federal government, such money should not be placed in a line item appropriated account but should be placed in a special fund. The line item appropriated account can be increased only pursuant to legislation or action by the emergency commission.

It is conceivable and understandable that errors will be made in bookkeeping and posting and that such errors should be and must be corrected. Likewise errors can occur in certain transactions, the correction of which will result in crediting the account with a refund. Such errors can be classified as accounting errors and can be corrected.

It is therefore our opinion that a line item appropriated account may not be credited with refunds except where the refund is the result of an accounting or bookkeeping error. The error referred to would include instances where a warrant check has been cancelled after charging same to an account or in instances where the refund is the result of an erroneous overcharge for merchandise and the overpayment is corrected by a refund, or where an account was erroneously charged with an expenditure which should have been charged to another account and is so corrected.

After careful consideration of the abstract questions submitted, we realize that many complex problems are involved. We hesitate to resolve all of them by an opinion without having specific facts to be considered because by doing so we would be in a sense legislating, which is a function reserved to the people or the Legislature.

At the time of the adoption of Section 186 federal grants and matching programs were virtually nonexistent and consequently any specific provisions were made for the admission and accounting of such funds. We are also mindful that many such programs have certain conditions and limitations attached thereto. Based on the provisions of Section 186 alone, it would strongly suggest that such funds could not be used to augment or increase an appropriation act without appropriate legislation. However, we are reluctant to express an opinion for general application to all such funds without the benefit of the circumstances, conditions and other criteria under which the funds are available or granted for fear of jeopardizing the full use of such funds on the basis of nonconformity, which can easily become a matter of concern.

We are also informed that over the years some practices have developed which are not in harmony with the conclusions reached herein and that some departments would suffer if they were forced to abruptly discontinue such practices without adequate notice. Such notice would not constitute condoning the practices employed but would assure an orderly transition without financially injuring any department or agency. As to the matters pertaining to federal grants and matching programs, and because of the practices which have developed over the years with apparent tacit approval, we deem it advisable that major changes be accomplished by legislation. It would also be beneficial to enact legislation setting forth guide lines for such programs, including a definition of the term "public moneys" as used in Section 186 of the North Dakota Constitution, particularly in the fringe area.

HELGI JOHANNESON

Attorney General