

OPINION
66-208

September 19, 1966 (OPINION)

Mr. Ralph Dewing, Director

Accounts and Purchases

RE: State - Appropriations - Reductions

This is in response to your letter in which you ask for an opinion at the request of the Legislative Audit and Fiscal Review Committee on the question whether or not the Director of Accounts and Purchases may reduce appropriations through the use of an allotment system as set forth in section 54-44.1-12 of the North Dakota Century Code. This section provides as follows:

"54-44.1-12. CONTROL OVER RATE OF EXPENDITURES. The director of the budget shall exercise continual control over the execution of the budget affecting the departments and agencies of the executive branch of the state government, involving approval of all commitments for conformity with the program provided in the budget, frequent comparison of actual revenues and budget estimates, and control of the rate of expenditures through a system of semiannual, quarterly, or monthly allotments."

It is observed that neither this section or related sections set forth the conditions, circumstances or facts to be considered in making the allotments. It appears from the language that such allotments would be subject to the sole discretion of the Director of Accounts and Purchases. The Act does not set forth any guide lines or policies. While we are not suggesting that the Director of Accounts and Purchases would, nevertheless under the present language of the Act he could allocate to any of the Departments the sum of \$1.00 per month. We use this illustration not to indicate that the Director of Accounts and Purchases would do so, but merely to accentuate the wide discretion left to the Director.

The North Dakota Supreme Court in *Wilder v. Murphy*, 56 N.D. 436, 218 N.W. 156 said: "Where the constitutionality of a statute depends upon the power of the legislature to enact it, its validity must be tested not by what has been or is being done under it but by the things which may be done under it." Apparently this is one of the tests which would be applied to the present Act.

It also appears that the statute attempts to delegate a legislative function which is not in complete harmony with section 25 of the North Dakota Constitution, which vests the legislative functions in the Legislature. This principle was recently considered by the North Dakota Supreme Court in *Nord v. Guy*, 141 N.W.2d., 395, in which the provisions of chapter 155 of the 1965 Session Laws was under consideration. Said law related and pertained to the issuance of general obligation bonds to finance the construction and betterment of buildings and equipment at State Institutions of Higher Learning.

In the above case, the court quoted with approval from the opinion of the United States Supreme Court in Mutual Film Corporation v. Industrial Commission, 236 U.S. 230, 35 S.Ct. 387, 59 L.Ed. 552, as follows:

While administration and legislation are quite distinct powers, the line which separates exactly their exercise is not easy to define in words. It is best recognized in illustrations. Undoubtedly the Legislature must declare the policy of the law and fix the legal principles which are to control in given cases; but an administrative body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply. If this could not be done there would be infinite confusion in the laws, and in an effort to detail and particularize, they would miss sufficiency both in provision and execution.'"

The North Dakota Supreme Court then found and held that chapter 155 did not declare the policy of the law and fixed the legal principles which are to control but, in fact, attempted to delegate to the board powers and functions of the Legislature, and for said reason was unconstitutional. The same rationale could be applied to this section.

On the basis of the foregoing reasons discussed herein, it is our opinion that it would be difficult to defend the validity of this section and that serious doubts exist as to the validity of this section. It is conceivable, even though the statute does not so provide, that the allotment provisions would apply only if there were a deficiency of funds already appropriated. It is also conceivable that the Legislature intended that if there were insufficient funds to meet all of the appropriations made that the Director of Accounts and Purchases be authorized to allocate funds to the various departments as to permit the orderly function of government and prescribe a priority to those departments which are more essential. Unfortunately if this is what the Legislature intended, the Act does not so provide.

HELGI JOHANNESON

Attorney General