

**OPINION
74-232**

August 13, 1974 (OPINION) REVISED

(Revised to correct minor errors)

Mr. Robert F. Reimers
District 29
R.R. 3, Box M-40
Carrington, ND 58421

Dear Mr. Reimers:

This is in response to your letter in which you state as follows: "I need to know the legality of actions by the Emergency Commission in the transferring of funds from category to category.

1. Does the Emergency Commission have authority to transfer from one budget category to another, specifically salaries and wages upon need or emergency?
2. Does the Emergency Commission have authority to create liabilities or obligations to the state for which appropriations have not been made?
3. What authority does the State Board of Higher Education have to transfer from one line item to another; and does the Emergency Commission have authority to transfer from one line item to another?
4. Does the Board of Higher Education and the Emergency Commission have authority to create obligations beyond appropriations made by the legislature?

The references in this request relate to appropriations made by the 1973 legislature for the '73 - '75 biennium."

The answer to your questions requires examination and review of statutory provisions that may have direct application.

Section 54-27-10 of the N.D.C.C. provides as follows: "Unless otherwise authorized as provided in this section seventy-five percent of the total of all appropriations and of each separate item thereof made by the legislative assembly for the maintenance of any state institution, department, board, commission, or bureau for the biennium, except institutions under the jurisdiction and supervision of the state board of higher education, shall become available on the first day of July next succeeding the enactment by the legislative assembly. The remaining twenty-five percent of any such appropriation shall be available only at the beginning of the fourth quarter of the biennium. No state institution, department, board, commission, or bureau for which an appropriation is made shall disburse more than seventy-five percent of the appropriation during the first eighteen months of the biennium nor incur any expense or liability which shall be discharged from such appropriation or for which such appropriation shall become available. The term

"maintenance" shall not apply to nor include moneys appropriated for the payment of the cost of any buildings or equipment or for making improvements and repairs to buildings and grounds, or any other special appropriations exempted from the operation of this section by the act of making such appropriation. Whenever it is made to appear to the emergency commission by a verified petition submitted by a state institution, department, board, commission, or bureau that the percentage of the appropriation allocated for the first three quarters of the biennium will not be adequate to properly perform its duties and functions, because of seasonal or other unusual circumstances, it may authorize a revision of the allocated percentage in any item, except salaries and wages, provided it will not deprive such state institution, department, board, commission, or bureau from maintaining its office for the fourth quarter of the biennium."

The last sentence is significant. The accumulative effect of this sentence requires the retention of a certain portion of the appropriation. As it may pertain to the question submitted, twenty-five percent of the line item for wages and services must be available on January 1, 1975. It is also noted that the last sentence also imposes a condition which must be satisfied before the funds may be transferred. The transfer may be accomplished if it will not deprive the department, agency, etc., from maintaining its office for the fourth quarter of the biennium. (The fourth quarter would be the period of time beginning January 1, 1975, and ending June 30, 1975).

Realistically the questions relate to an expenditure of more than seventy-five percent for the line item wages and salaries. It therefore becomes necessary to examine and consider the provisions of section 54-16-04 of the N.D.C.C. as amended. It provides as follows: "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, and after receiving information from the director of the department of accounts and purchases, that an emergency exists, the emergency commission shall assume that an emergency exists and may order money transferred from one fund to another fund belonging to or appropriated from 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 thereof. The term "emergency" shall be limited to calamities or unforeseen happenings subsequent to the time such appropriation was made and which were clearly not within the contemplation of the legislative assembly and the governor."

This section at one time contained a limitation of ten percent and also contained language which prohibited the transfer of any moneys to or for a purpose for which no appropriation had been made. (See *Backman v. Guy*, 126 N.W.2d. 910) (1964). As a result of this case, the legislature amended this section. The report of the Legislative Audit and Fiscal Review Committee on page 9 states the purpose of the amendment as follows: "Senate Bill Number 31 amends the emergency commission laws to conform with the recent Supreme Court decision on these laws and to make the commission more flexible in meeting their purposes. The laws, as amended by the bill, would be changed so that

funds could be provided for true emergencies regardless of whether or not an appropriation has been made. The committee believed that the state should be able to provide necessary funds to combat a situation which is a true emergency. With this thought carried further, the committee felt that the ten percent restriction on amounts already appropriated for an agency should be stricken because if a real emergency exists it seems possible that there would always be such a thing as a ten percent emergency."

Under the current provisions of section 54-16-04 there is no restriction on the amount by which the appropriation may be increased by transferring funds from the other funds or by directing the money to be paid from the "state treasury to meet the emergency until such time as the legislative assembly can make an appropriation available transfer".

We have, at this time, no case law or prior interpretations as to when or under what conditions moneys may be drawn from the state treasury, however, taking into account the provisions of section 186 of the North Dakota Constitution it would appear that the language in effect refers to "contingency or emergency appropriation." The language "from the state treasury" was part of the statute before the revision of section 186 of the North Dakota Constitution, known as the Jackpot Law.

Section 54-16-04 as amended, however, does not negate or nullify the provisions of section 54-27-10 cited above which requires that twenty-five percent of the salaries and wages line item must be available and be on hand at the beginning of the last six months of the biennium.

It is also necessary to examine the provisions of section 54-27-11 as amended which provides as follows: "The department of accounts and purchases and state treasurer each shall keep a record in their office showing:

1. The total amount appropriated for maintenance for each state officer or agency, and of each separate item thereof;
2. The amount equal to seventy-five and twenty-five percent of the total appropriated and each separate item thereof; and
3. The amount disbursed and the balance on hand.

The department of accounts and purchases shall not issue any warrant during the first eighteen months of each biennium in excess of the seventy-five percent of any item appropriated for maintenance of any state official or state agency in the executive branch of government nor shall the state treasurer pay such warrant. The duties and limitations imposed upon the department of accounts and purchases and state treasurer shall apply only to the total amount appropriated for the biennium but not to separate items appropriated for maintenance for all penal and charitable institutions of this state and all institutions under the jurisdiction and supervision of the state board of higher education. The administrative department, office, or board shall keep a record showing the amount, equal to seventy-five and twenty-five percent, respectively, of the total amount and of

each separate item appropriated for maintenance for all such institutions under its control and shall be responsible for the enforcement of the restrictions upon the disbursement of all moneys appropriated to such institutions for maintenance purposes."

It is noted that under the above statute and section 54-27-10 the State Board of Higher Education is exempt.

As to the State Board of Higher Education it is observed that Article 54, 6 (e) which provides that the State Board of Higher Education has the control of the expenditure of the funds belonging to, and allocated to such institutions and also those appropriated by the legislature to the institutions of higher education in the state also provides, "that funds appropriated by the legislature and specifically designated for any one or more of such institutions shall not be used for any other institution." This constitutional provision gives the Board of Higher Education control of the funds appropriated to it. Having imposed a limitation it strongly suggests that except for the limitation imposed, the Board of Higher Education has the control of the expenditure of funds appropriated.

Under the current provisions of section 54-27-10 and 54-27-11 the transfer limitations do not appear to apply to the funds appropriated to institutions of higher learning. This would be in complete harmony with Article 54 (e).

Even though the Board of Higher Education by Article 54 is given constitutional control of funds appropriated, it does not grant any authority to the board to incur obligations or financial liabilities in excess of the funds appropriated. The Board of Higher Education may not force the hand of the legislature or compel the legislature to appropriate any specific sums of money for any purposes. In this respect we note the statutory provision of section 54-27-12 and the penalty provisions found in section 54-27-13. The net effect of the two statutes mentioned in removal from office by the governor and the impeachment of an elected official for expending funds for the erection or improvement of public buildings in excess of the appropriation made by the legislative assembly for such purposes.

The emergency commission under the provisions of section 54-16-04 as amended, may authorize transfers but the commission may not create a situation resulting in a financial obligation or liability in excess of funds appropriated or resulting from the transfer of funds from one line of item to another. The emergency commission does not have authority to compel the legislature to make any appropriation. The making of an appropriation is by our constitution, solely a function of the legislature.

The term deficiency appropriation or emergency appropriation, as frequently used, implies or is understood to mean that the department or agency will not be able to maintain its office or function for the fourth quarter (last six months) of the biennium. Any action which creates an absolute need for a deficiency or emergency appropriation is the equivalent of creating a financial obligation or liability or in the alternative the department, agency, or office will not be able to maintain its function as required by law.

We believe it also necessary with reference to the twenty-five percent discussed earlier to establish the figure on which the twenty-five percent will be appropriated. We believe the twenty-five percent, as it applies to wages and salaries, should be applied to the initial appropriation and not to the augmentation of the line item for salaries and wages as a result of transfers from other funds.

The provisions of section 54-16-03 as amended need also to be examined. It provides as follows: "No state officer, or board, commissioners, directors, or other officers having the control or management of any public institution of the state, or any state activity or enterprise, or having the responsibility of disbursing or expending any money appropriated by the state, shall expend, or agree or contract to expend in connection therewith any amount in excess of the sum appropriated therefor, or use an amount appropriated for any specific purpose or fund or for any other purpose without first having secured from the emergency commission an order duly made and entered authorizing such use of the fund. The emergency commission shall receive information from the department of accounts and purchases with respect to all emergency request. Any debt or deficit created shall be absolutely void. The emergency commission shall not approve an expenditure of institutional income, other than gifts or grants in excess of the institution income appropriated by the institution by the legislative assembly."

The provision consists of two items. One, in spending more than is appropriated and the other in spending funds for a purpose other than for which it was appropriated without first securing the approval of the emergency commission. The penalty for violating this provision is set out in section 54-16-05 and constitutes a misdemeanor punishable by a fine of not less than \$10 nor more than \$100 or by imprisonment in the county jail for not less than 10 days nor more than 30 days or both such fine and imprisonment.

The creation of a situation requiring a deficiency or emergency appropriation borders or approaches the prohibition set out in section 54-16-03. It would constitute a violation if actual financial obligation or liabilities are incurred.

If, however, the department or office as a result of the transfer of funds would be merely required to reduce its services and functions provided it could continue to perform its basic functions and duties, a different situation or result can be reached. This is basically a question of fact for the Emergency Commission to determine in each case and any further discussion in this direction would be speculative and would not serve any useful purpose at this time.

In direct response to question number one, it is our opinion that the emergency commission has authority to transfer from one budget category to another except in the category of wages and salaries. As to this item, the statutory twenty-five percent requirement for the last quarter cannot be altered. The twenty-five percent of the initial basic appropriation must be retained and will not be available until the last quarter of the biennium. This would not prevent transfers into the category of wages and salaries but it would prevent a transfer out of such category since the transfer

would result in a reduction below the twenty-five percent for the fourth quarter. It is our further opinion that any transfer is limited or predicated upon the supposition that the office or department will not be deprived of maintaining itself for the last quarter of the biennium. This is basically a question of fact to be determined by the commission.

In response to question number two, it is our opinion that the emergency commission does not have the legal authority to create financial liabilities or obligations beyond the appropriations made. The emergency commission may not legally compel the legislature to make appropriations.

As to question number three, the State Board of Higher Education has the authority to transfer funds from one line item to another in the appropriations made to the respective institutions of higher learning. It may not transfer funds from one institution to another. While there may be a serious question whether or not funds may be transferred to a building project thereby increasing the building projects funds beyond the limits of the appropriation, this opinion without a factual base does not attempt to answer this question at this time. The authority of the emergency commission acting in conjunction or in concert with Board of Higher Education is limited in the same degree as the Board of Higher Education is limited as explained above.

In response to question number four, it is our opinion that the Board of Higher Education and the emergency commission either jointly or severally does not have the authority to create financial liabilities or obligations beyond the appropriations made. A discussion at this time as to what constitutes an appropriation is not warranted because we do not have any specific legislation under consideration, and to discuss it in the abstract would merely require a lengthy treatise which may not have any value or direct bearing on the question under consideration or to the questions which might arise.

I trust this answers your inquiry.

Sincerely yours,

Allen I. Olson

Attorney General