

OPINION
75-56

March 13, 1975 (OPINION)

The Honorable Arthur A. Link
Governor
State Capitol
Bismarck, ND 58505

Dear Governor Link:

This is in reply to your letter of March 5, 1975, in which you state the following facts and questions:

"Requests have come into my office asking that I call a meeting of the Emergency Commission.

"Questions have arisen as to whether the Emergency Commission can meet while the Legislature is in session. If they can meet, are there any limitations as to what the Commission can authorize?"

The various provisions governing the authority of the Emergency Commission are set forth in Chapter 54-16-01 of the N.D.C.C. An examination of the pertinent provisions thereof are necessary to determine the authority of the Commission. These provisions read, in part:

54-16-01. "Whenever during the biennium, all allocation or allocations out of the state contingency fund, a transfer of money between funds and line items, or an approval to spend federal funds in excess of ten thousand dollars is to be made to any institution or department of government, the chairman of the senate appropriations committee and the chairman of the house of representatives appropriations committee shall be members of the commission."

54-16-04. "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 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 therefor. 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."
(Emphasis ours)

54-16-04.1. "The emergency commission with the advice and counsel of the executive office of the budget may authorize the state treasurer to receive, between legislative sessions any

moneys for new programs not appropriated by the legislative assembly that are made available by the federal government, or by any agency thereof, which the legislative assembly has not indicated an intent to reject. The emergency commission may authorize any state agency, department, board, or institution to expend such moneys from the date such moneys become available until July first following the next regular legislative session; provided such expenditures must be consistent with state law and with the terms of the grant, and provided further that the program shall not commit the legislative assembly for matching funds for future bienniums unless the program has first been approved by the legislative assembly." (Emphasis ours)

54-16-10. "No moneys appropriated by the legislative assembly to be used for emergency purposes by any state department, state officer, employee, board, commission, bureau, or institution, . . . shall be expended until such moneys so appropriated or so much thereof as may be necessary for such appropriation, shall have been transferred to the subdivision of the regular appropriation in which the emergency exists. No such transfer of emergency funds, hereinbefore referred to, shall be made until an itemized, verified petition, setting forth the facts by virtue of which such emergency exists and the necessity for such expenditure shall have been presented to the state emergency commission, by the department, state officer, board, commission, bureau, or institution desiring such transfer, and shall have been approved in writing by a majority of such commission."

54-16-12. "Whenever it is made to appear to the satisfaction of the state emergency commission upon application by the board of higher education that real property is available. . . the emergency commission may approve the acquisition of such property, and if requested and found necessary may make funds available from the state contingency fund to the board of higher education for the purpose of acquiring such property if the following shall appear:

3. The legislative assembly has not previously rejected a similar request, and the time during which such purchase must be consummated does not permit the obtaining of a legislative appropriation." (Emphasis ours)

We find no provision in these statutes which specifically states the Emergency Commission may not meet while the Legislature is in session. However the above-cited statutes provide the Commission with various functions. In some instances action by the Commission during the Legislative Session might be subject to question for that reason. In other instances it would appear there would be no restrictions.

The present biennium time period is in the 1973-75 biennium ending June 30, 1975. Section 54-16-04 applies to transfer between line items of an appropriation or to allocation of moneys from the State contingency fund. The statute provides the Commission with his power

"until such time as the legislative assembly can make an appropriation available therefor." While the Emergency Commission can meet and consider requests for transfer of funds or allocation of funds from the contingency fund even though the Legislature is in session, one of the items the Commission would necessarily have to consider is when the Legislative Assembly could make an appropriation to take care of the emergency. It is conceivable the present Legislative Assembly could do so and that any action by the Commission would be only to provide for immediate emergencies. It is obvious the facts of the applications would have to be considered.

A different result accrues under the provisions of Section 54-16-04.1 with respect to authorizing the expenditure of federal moneys for new programs since that statute uses the term "between legislative sessions." When the Legislature is actually in session, the State cannot be said to be "between Legislative sessions" and therefore, we do not believe the Commission can act upon requests pursuant to Section 54-16-04.1 when the Legislature actually is in session.

Under Section 54-16-12, the fact the Legislature is in session would prohibit granting moneys for the purchase of land by the Board of Higher Education unless the time during which the purchase must be consummated did not permit the obtaining of a legislative appropriation in which case the Commission could grant the funds even though the Legislature were in session. This would be a question of fact for the Commission to determine.

The fact the Legislature is in session may be a factor in determining whether an emergency actually exists which requires action by the Commission. As noted above, there are certain implied and express limitations upon the power of the Commission to meet and take certain action because of such fact. We also note that in those instances in which the statutes use the term "if the legislative assembly has not rejected a similar request" or "which the legislative assembly has not indicated an intent to reject", action by the current Legislative Assembly as well as the past sessions should be considered.

In summary, we believe the fact the Legislature is in session does not prevent the Emergency Commission from meeting and taking action if the facts fit the particular statute under which application for action by the Emergency Commission is made. We have no specific factual situations before us and cannot comment on same. The limitations contained in the various statutes are discussed above and we would note that in enacting such statutes, the Legislature did not use identical criteria in each instance, i.e., the various types of applications upon which the Commission is authorized to act are governed by various standards contained in the statutes.

Sincerely,

ALLEN I. OLSON

Attorney General