

**OPINION
75-74**

July 31, 1975 (OPINION)

Mr. Robert W. Peterson
State Auditor
State Capitol
Bismarck, ND 58505

Dear Mr. Peterson:

This is in reply to your request for an opinion dated July 18, 1975, in which you have asked the following questions:

We request an opinion to determine the legality of paying refunds from other than appropriated refund accounts or line items within department appropriations. In our audits of various departments we have found that departments, generally involved in licensing or registration functions, have made refunds for overpayments of amounts prescribed by law from either clearing accounts or the departmental appropriations.

Would the payment of refunds from the individual departmental appropriation, which makes no reference to refunds, be correct?

Would the payment of refunds from these clearing accounts before the monthly transfer to the State Treasurer be consistent with 54-06-08.1 and Section 186? It appears inconsistent in that not all public moneys are paid over monthly to the State Treasurer and the clearing accounts are used for more than clearing or cashing checks and making change.

Section 186, Subsection (1) of the Constitution of the State of North Dakota, insofar as is relevant to the matter presented, reads as follows:

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 quoted constitutional provision indicates that once public moneys are paid over to the state treasurer and deposited to the credit of the State, the officer or agency from where the moneys originated is no longer in a position to withdraw those moneys or any portion of them. From that point, as the constitutional provision explicitly states, those moneys can be paid out only by legislative appropriation (except for those funds specifically appropriated by the Constitution, but not relevant in the context of this opinion). Therefore, once a fee, for example, has been paid over to the state treasurer by the agency receiving same, and is deposited with the general fund of the state, it cannot be withdrawn by that agency and refunded to the party who paid the fee.

Therefore, in answer to your first question, unless a legislative appropriation to an agency or department contains a provision for payment of refunds, it would not appear that payment of refunds would be possible from that appropriation. This conclusion is amplified by the fact that the Legislative Assembly enacted Senate Bill 2006, compiled as Chapter 30 of the Session Laws of 1975, and provided at subdivision 8 thereof an appropriation for "miscellaneous refunds" in the amount of \$30,000.00. This appropriation is controlled by the Department of Accounts and Purchases, and it is our understanding that it is intended to be used in part for the payment of refunds of fees which have been deposited to the credit of the general fund by receiving agencies.

Your second question relates to the payment of refunds from clearing accounts. Section 54-06-08.1, N.D.C.C. pertains to the establishment of clearing accounts, and reads as follows:

Cash balances maintained by state agencies collecting money - Petty cash funds - Bank accounts. All departments, institutions or agencies of the state that collect money which is required to be paid over to the state treasurer may, subject to approval of the director of the department of accounts and purchases, the state auditor, and the state treasurer, maintain such reasonable minimum balance as may be necessary for clearing or cashing of checks and making change. Such departments are hereby authorized, subject to approval of director of the department of accounts and purchases, the state auditor and the state treasurer, to maintain minimum petty cash funds and may establish bank accounts in the Bank of North Dakota. It is not the intent thereof to deny to any state institution or agency located outside of Bismarck the right to establish bank accounts in other state or federally chartered banks.

While the general import of this section is to provide for the maintenance of a "reasonable minimum balance as may be necessary" for clearing and cashing checks and making change, with the approval of the director of accounts and purchases, state treasurer and state auditor, said section also provides that such agencies may establish "bank accounts" with the approval of all three state officers. Such accounts, nevertheless, are subject to the constitutional requirement that funds be paid over monthly to the state treasurer. Hence, while the apparent intent of section 54-06-08.1 is to allow the maintenance of a reasonable minimum balance in a bank account only for clearing and cashing checks and making change, a construction could possibly be given to it that would permit the payment of refunds from a banking account, provided that the establishment of such an account by a state agency was first approved by the director of accounts and purchases, the state auditor and the state treasurer, and provided that refunds were made within the one-month period provided by the Constitution.

It should be pointed out that the state auditor has been given certain specified authority relative to keeping of financial accounts by state agencies. Section 54-10-19, N.D.C.C. provides, in this respect, as follows:

54-10-19. Supervision of books and accounts of public institutions and private institutions with which state has dealings. The state auditor shall assume and exercise constant supervision over the books and financial accounts of the several public offices and institutions which he is authorized to examine. He shall prescribe and enforce a correct and uniform method of keeping financial accounts in such offices and institutions shall recommend a form for warrants or for order-checks of all local units of government except school districts which shall conform so far as consistent with statutory requirements and shall instruct the proper officer of each of said institutions in the due performance of his duties concerning the same. He shall have authority to examine the books and accounts of all private institutions with which the state has any dealings so far only as the same relate to such dealings. If any public officer having control of any such office or institutions shall fail or refuse to comply with the directions of the state auditor, the auditor shall report the facts to the governor and to the manager of the state bonding fund, and such refusal shall constitute grounds for removal from office and cancellation of the bond of such officer. (Emphasis added)

In connection with the authority to prescribe a uniform method of keeping accounts, and to instruct officers concerning their duties in that regard, your office has provided us with a copy of certain standards relating to internal control on cash receipts. Requirements enumerated (2) and (3) provide that:

2. All checks received must be restrictively endorsed immediately upon receipt.
3. All receipts must be deposited intact daily.

In practice, then, it would appear that an agency would be required to endorse and deposit fees received daily, either with the state treasurer or with an account permitted by the state treasurer, state auditor and director of accounts and purchases in accordance with the limitations imposed by those officers and the provisions of section 54-06-08.1, N.D.C.C. Unless refunds are permitted from an account established by the agency by the officers referred to above, or unless a particular agency appropriation provides for refunds to be made therefrom, it would be our opinion that a refund could be made only from the appropriation for miscellaneous refunds provided by subsection 8 of Chapter 30 of the Session Laws of 1975.

Sincerely,

ALLEN I. OLSON

Attorney General