

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 88-5

Date issued: February 11, 1988

Requested by: Joseph S. Lamb, President
The Bank of North Dakota

- QUESTIONS PRESENTED -

I.

Whether the standing appropriation language of N. D. C. C. ' 4-02. 1-15, as read in conjunction with the authority of the State Fair Association under N. D. C. C. ' 4-02. 1-16 to construct a building, constitutes a proper delegation of authority.

II.

Whether the standing appropriation language of N. D. C. C. ' 4-02. 1-15, meets the constitutional requirement of an "appropriation" as defined by the North Dakota Supreme Court.

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I.

It is my opinion that the standing appropriation language of N. D. C. C. ' 4-02. 1-15, as read in conjunction with the authority of the State Fair Association under N. D. C. C. ' 4-02. 1-16 to construct a building, constitutes a proper delegation of authority.

II.

It is my opinion that the standing appropriation language of N. D. C. C. ' 4-02. 1-15 meets the constitutional requirement of an "appropriation" as defined by the North Dakota Supreme Court.

- ANALYSES -

I.

The relevant provision of N. D. C. C. '4-02.1-15 provides as follows:

4-02.1-15. State fair operating fund -- Maintained in state treasury -- Expenditures. . . .The treasurer, or other officer delegated such authority by the office of the budget, shall remit monthly all income, fees, rents, interest, or other moneys received by the state fair association, to the state treasurer who shall credit the same to the state fair operating fund and such moneys credited to the fund are hereby appropriated as a standing appropriation for the purposes provided in this chapter.

The "purposes provided in this chapter" for which moneys in the state fair operating fund are appropriated as a standing appropriation by the above section include the provisions of N. D. C. C. '4-02.1-16, which gives to the state fair association all the rights, privileges, and liabilities of corporations under the corporation laws of the state except as limited or specified by N. D. C. C. ch. 4-02.1, and which specifically authorizes the association to purchase, hold, lease, exchange, trade, or sell real estate for the purpose of promoting and conducting a state fair.

For the purpose of this opinion, the authority to purchase real estate will be presumed to include the authority to construct a building.

The following general rule with regard to the delegation of legislative authority was quoted with approval by the North Dakota Supreme Court in State v. Budge, 105 N. W. 724, 726 (N. D. 1905):

One of the settled maxims in constitutional law is that the power conferred upon the Legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the state has located the authority, there it must remain; and by the constitutional agency alone, the laws must be made until the Constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been entrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust. (Citations omitted.)

In Wilder v. Murphy, 218 N. W. 156, 158 (N. D. 1928), the supreme court acknowledged that "[i]t is difficult, if not impossible, to lay down exactly

the line that marks the distinction between administration and legislative functions. "

Over the years, and from time to time, the North Dakota Legislative Assembly has seen fit to empower certain state agencies, boards, and commissions with the authority to do those things which a corporation may do in this state, except as specifically prohibited by law. For example, the North Dakota Mill and Elevator Association may engage in "anything that any private individual or corporation lawfully may do in conducting a similar business except as restricted by the provisions of [N. D. C. C. ch. 54-18]"; the board of public employees retirement system has "the powers and privileges of a corporation" (N. D. C. C. ' 54-52-04(1)); business of The Bank of North Dakota "may include anything that any bank lawfully may do, except as it is restricted by the provisions of [N. D. C. C. Ch. 6-09-01]" (N. D. C. C. ' 6-09-02); the director of institutions and the warden of the State Penitentiary are authorized to establish, and engage in, prison industries, and in so doing, may "make all rules and regulations and do all things necessary or incidental to the establishing and maintaining of such industries" (N. D. C. C. ' 12-48-03.1); and, as set out above, the State Fair Association has been given "all the rights, privileges, and liabilities pertaining to corporations under the corporation laws of this state" (N. D. C. C. ' 4-02.1-16).

These statutory delegations of authority by the Legislative Assembly are consistent with, and necessarily follow from, N. D. Const. art. X, ' 18, which provides that the state may engage in any industry, enterprise, or business.

In all of the above listed examples, the Legislative Assembly has established or created an industry, an enterprise, or a business. Further, a review of the sections and chapters cited above shows that the Legislative Assembly has clearly set out the goals and purposes of these industries, enterprises, and businesses.

The broad delegations of authority which have been granted to these industries, enterprises, and businesses are consistent with the holding of the North Dakota Supreme Court in a very recent decision concerning the question of the delegation of authority.

In Trinity Med. Center v. N. D. Bd. of Nursing, 399 N. W. 2d 835, 845 n. 6 (N. D. 1987), in quoting with approval from a recent Minnesota Supreme Court decision, the North Dakota Supreme Court included the following statement:

The modern view of the delegation doctrine is that clear legislative standards are no longer required to avoid an unconstitutional delegation where the rights of the public are protected against an abuse of administrative power by (1) adequate "procedural safeguards" or (2) "adequate administrative standards," which have been established by the agency pursuant to a grant of rulemaking authority. " (Citations omitted.)

The Supreme Court concluded its discussion of the issue of the delegation of authority in Trinity Med. Center with this statement:

These statutes do provide standards albeit broad in nature. Because of the nature of the subject matter, however, they, of necessity, must be quite broad.

Id. at 847.

The North Dakota state fair association has been created by the Legislative Assembly for the purpose of conducting an annual state fair and exhibiting the agricultural, stock breeding, horticultural, mining, mechanical, industrial, and other products and resources of this state. N. D. C. C. ' 4-02.1-01. The authority given to the association to accomplish these purposes is quite broad and includes those powers granted to it by N. D. C. C. ' 4-02.1-16, set out earlier in this opinion. Further, as a safeguard against arbitrary action by the association, N. D. C. C. ' 4-02.1-18 provides that the state auditor must biennially audit the general fund moneys appropriated to the association and submit a report to the Governor and to the Legislative Audit and Fiscal Review Committee, and the association must annually submit to the Governor and the Legislative Audit and Fiscal Review Committee an audit report of its records and accounts prepared by a certified public accountant.

Therefore, it is my opinion that the standing appropriation language of N. D. C. C. ' 4-02.1-15, as read in conjunction with the authority of the State Fair Association under N. D. C. C. ' 4-02.1-16 to construct a building, constitutes a proper delegation of authority.

II.

N. D. C. C. ' 4-02.1-15, quoted above in part, provides in its entirety as follows:

4-02.1-15. State fair operating fund -- Maintained in state treasury -- Expenditures. A special fund for the North Dakota state fair association to be known as the state fair operating fund must be maintained in the state treasury, and all income, fees, rents, interest, moneys which may be appropriated by the legislative assembly from time to time, and any other moneys, from whatever source derived by the state fair association, shall be placed in such fund for the use of the North Dakota state fair association; provided, however, that moneys which may be appropriated by the legislative assembly must only be transferred from the general fund appropriation, and placed in the state fair operating fund by the state treasurer, upon order of the office of management and budget whenever the balance in such fund falls so low as to require supplementation. Any moneys or income in the

state fair operating fund shall not revert or be canceled according to the provisions of section 54-44.1-11. All expenditures of the state fair association from the state fair operating fund must be made upon vouchers signed by the secretary, or other person authorized by the board of directors, and approved by the office of the budget, upon warrant-checks prepared by the office of management and budget. The directors of the North Dakota state fair association may, not more than fifteen days in advance of the opening of any state fair, submit to the office of the budget a proposed budget of expenditures for operating the state fair, together with a signed voucher or vouchers for the withdrawal from the state fair operating fund the total amount of the proposed expenditures. Upon approval of such proposed budget of expenditures by the office of the budget, the director of the office of management and budget shall prepare and issue a warrant-check or checks in such approved amount payable to the state fair association. Such warrant-checks must be deposited to the account of the North Dakota state fair association in the Bank of North Dakota or a Minot area bank selected by a majority vote of the state fair board of directors and qualifying in accordance with law as a public depository, and are subject to being withdrawn by check for the payment of prizes and costs of operation of the state fair. Not later than sixty days after the closing day of the state fair, the association shall file with the office of the budget a detailed and itemized statement of expenditures together with copies of all checks issued, and shall immediately close such account at the Bank of North Dakota or Minot area bank and transfer any remaining balance to the state treasurer for deposit in the state fair operating fund. The treasurer, or other officer delegated such authority by the office of the budget, shall remit monthly all income, fees, rents, interest, or other moneys received by the state fair association, to the state treasurer who shall credit the same to the state fair operating fund and such moneys credited to the fund are hereby appropriated as a standing appropriation for the purposes provided in this chapter.

As a starting point, the general rule of law concerning the expenditure of money is that all public moneys, from whatever source derived, must be paid to the State Treasurer and held by that officer in the name of the state, and may be expended only pursuant to an appropriation made by the Legislature. N. D. Const. art. X, ' 12(1). There are certain listed exceptions to this general rule which are not relevant for the purpose of this opinion.

An "appropriation," as that term is used in the North Dakota Constitution, "is the setting apart from the public revenue of a definite sum of money for the specified object in such a manner that the officials of the government are authorized to use the amount so set apart, and no more, for the object." State v. Holmes, 123 N. W. 884, 886-87 (N. D. 1909).

The court in Holmes arrived at this definition through a discussion and analysis of N.D. Const. art. IV, ' 36, which provides that the general appropriation bill of the Legislature may embrace only appropriations for the expenses of the executive, legislative, and judicial branches of the state, interest on debt of the state, and for public schools. This section also provides that other appropriations must be made by separate bills, each embracing only one subject. The court in Holmes concluded that this provision, requiring all other appropriations to be by "special" bills embracing but one subject, was equivalent to the use of the term "specific." Id. at 886.

As annotated in the North Dakota Century Code, N.D. Const. art. IV, ' 36 has never been amended and in all earlier reference sources, including those prior to 1909, the date of the Holmes decision, the term "separate" appears in this section and there appears to be no explanation for why the court in Holmes used the term "special" in quoting the language of this section. Regardless of this apparent error by the court, its reasoning in defining the term "appropriation" would seem to be just as sound when the term "separate" is substituted for the term "special" in its decision.

The Holmes decision is based upon this conclusion as stated by the supreme court:

The purpose of limiting by law the amount which may be expended for a definite purpose, and requiring that it be stated in the act relating to the particular subject, is to enable the Legislature and state officials to approximate in advance the total amount of appropriations made so they may be kept within the power of the state to pay. Under the provisions of our Constitution we are forced to conclude . . . that a legislative act, in order to constitute an appropriation authorizing the payment of funds or the drawing of a warrant, must fix a limit on the amount which may be paid out under the subject covered by the act.

Holmes, at 886.

This purpose is satisfied by N.D.C.C. ' 4-02.1-15, which limits the expenditures of the state fair association to only those moneys in the state fair operating fund. In other words, the state fair operating fund, by definition, constitutes "the setting apart from the public revenue of a definite sum of money." Therefore, the "specified object" for which the moneys can be expended has been met by the legislative assembly in stating the purposes for which the state fair association has been created and in setting out the authority given to the association to accomplish those purposes, as discussed more fully in part I of this opinion.

In Menz v. Coyle, 117 N.W.2d 290, 302 (N.D. 1962), the supreme court held that the statute under consideration in that case, 1947 N.D. Sess. Laws ch. 228, ' 7, did not meet the tests of an appropriation as set out in the court's

definition of that term in Holmes:

Even though the requirement that an appropriation must specify the purpose for which it shall be expended is met by the provisions of [1947 N.D. Sess. Laws ch. 228, '7], there is no specific and direct appropriation of a definite sum, and therefore no valid appropriation of the moneys in question.

1947 N.D. Sess. Laws ch. 228 '7, provided as follows:

All funds received by the state bar association of North Dakota as herein provided shall be used for legal research and education, and supervision and improvement of the judicial system of the state of North Dakota.

However, in reaching this decision, the court also stated that the moneys collected for these purposes could be paid out and disbursed "only pursuant to appropriation first made by the legislature" in compliance with N.D. Const. art. X, '12, "unless the wording of the chapter itself constitutes an appropriation or unless these monies come within the exceptions provided for in the statute." (Emphasis supplied.) Menz at 301.

Unlike the statute in question in Menz, the wording of N.D.C.C. '4-02.1-15 does specifically provide that "such moneys credited to the fund are hereby appropriated as a standing appropriation for the purposes provided in this chapter." (Emphasis supplied.)

Therefore, it is my opinion that the standing appropriation language of N.D.C.C. '4-02.1-15 does meet the constitutional requirement of an "appropriation" as defined by the North Dakota Supreme Court.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. '54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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