

**OPINION  
47-32**

June 11, 1947           (OPINION)

CITIES

RE: Insurance Tax Paid to Cities and Villages

This will acknowledge your letter of June 10, 1947, in which you seek an interpretation of chapter 18-04 of the North Dakota Revised Code of 1943, providing for payment of two percent insurance tax to cities and villages.

The legislative assembly of 1945 provided an appropriation of \$70,000.00 for the payment of the two percent insurance tax for the biennium beginning July 1, 1945, and ending June 30, 1947. (See chapter 84 of the 1945 Session Laws). There is a discrepancy in chapter 84. You will note that it refers to chapter 18-08 of the North Dakota Revised Code of 1943, relating to the payment of premiums for received upon policies issued upon property to various fire departments for the biennium. Chapter 18-08 of the 1943 Revised Code does not deal with that subject, but chapter 18-04 does. That this is an error is obvious in view of the fact that House Bill No. 114 of the 30th legislative assembly of 1947 increased the appropriation provided for this purpose by \$20,000.00. This is a deficiency appropriation and there a proper reference is made to chapter 18-04 of the 1943 Revised Code.

You state that as a result of unexpected increases in insurance premiums, the total appropriation of \$90,000.00 is not now sufficient to make the payments required under chapter 18-04 of the 1943 Revised Code. There now remains in the fund \$51,459.90. The unpaid obligations of the fund are in the amount of \$60,142.46. This leaves a deficit of \$8,682.56 which has not been provided for by legislative appropriation.

The question arises: Is it the duty of the state auditor to make payment of two percent of the premiums received from insurance companies regardless of the available appropriation, or must the state auditor confine the payments to the amount of legislative appropriations for this purpose?

Chapter 18-04 deals with distribution of insurance tax to fire departments and insofar as pertinent to the question before us states:

"The amount due to a city or village entitled to benefits under the provisions of this chapter shall be two percent of the premium received by insurance companies on fire insurance policies issued on property within such city or village. The commissioner of insurance shall compute the amounts due to the several cities and villages and shall certify such amounts to the state auditor on or before June first in each year."  
(Section 18-0405 of the 1943 Revised Code.).

Section 18-0406 of the 1943 Revised Code provides:

"On or before the first day of June of each year, the state auditor shall issue and deliver to the treasurer of each municipality having an organized fire department entitled to the benefits of this chapter, his warrant upon the state treasurer for the amount certified by the commissioner of insurance. \* \* \*"

It might appear that on the basis of the statutes just quoted it would seem to be the duty of the state auditor to make the payment of two percent of the premiums received by insurance companies on fire insurance policies issued on property within any city or village regardless of appropriation available in view of the wording of the statute which says, "the state auditor shall issue and deliver to the treasurer of each municipality having an organized fire department entitled to the benefits of this chapter, his warrant upon the state treasurer for the amount certified by the commissioner of insurance." However, the above quoted provisions of the statutes must be interpreted in connection with section 186 of the Constitution of the State of North Dakota, effective July 1, 1939. So far as applicable, said section reads:

"All public moneys, from whatever source derived, shall be paid 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; \* \* \*"

Under the terms of section 18-0404 of the 1943 Revised Code, it is the duty of each and every insurance company writing insurance within the state to complete a form furnished by the insurance commissioner showing thereon the amount of all premiums received by such company upon policies issued within the corporate limits of each city or village during the year ending on the preceding thirty-first day of December, and to file the same as a part of its annual statement. The payments due from the insurance companies under the provisions of chapter 18-04 are paid to the insurance commissioner annually. It would, therefore, appear that in compliance with section 186 of the Constitution, it becomes his duty as insurance commissioner to pay the amounts so received from the insurance companies to the state treasurer. This he does. Then under the provisions of section 186 of the Constitution, the same may be disbursed only pursuant to appropriation made by the legislative assembly, and since it is the duty of the state auditor, under chapter 18-04, to make the disbursements and draw her warrant on the state treasurer, she is bound by the limits of the appropriation provided for this purpose by the legislative assembly.

If this were not so, it would be within the power of the state auditor to, in effect, nullify the specific provisions of section 186 of the Constitution. That section, however, is mandatory.

It is, therefore, the opinion of this office that the state auditor is bound by the amount of money appropriated for the payment of the two percent insurance premium tax, and that if the same is insufficient to meet the total payments required as computed by the

insurance commissioner, she cannot go beyond the amount appropriated therefor.

It is further the opinion of this office that if no funds are available to pay the total amount due as computed by the insurance commissioner of the two percent insurance premium tax to cities and villages, the state auditor should pro rate such payments to the cities and villages entitled thereto, until such times as funds are provided by appropriation for the payment of the balance due as computed. However, it may be possible that the funds needed to make the total payments can be procured from the state contingency fund. (Chapter 116 of the 1945 Session Laws.)

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