

N.D.A.G. Letter to Sperry (Sep. 25, 1990)

September 25, 1990

Mr. James Sperry
State Historical Society
State Heritage Center
612 East Boulevard Avenue
Bismarck, ND 58505

Dear Mr. Sperry:

Thank you for your letter of May 16, 1990, in which you request my opinion on whether the State Historical Society may be required by the State Auditor to pay audit fees of a private accounting firm retained by the State Auditor to conduct the audit of the State Historical Society. I apologize for the delay in responding.

N.D.C.C. § 54-10-01(2) provides, in part, that the State Auditor shall "[b]e vested with the duties, powers, and responsibilities involved in making a complete examination once every two years of the books, records, accounting methods, and internal controls of any and all state agencies," To interpret this section and the discretion it grants to the State Auditor, the statute, judicial opinions concerning duties of public officials, the practical construction given the statute by the State Auditor, and the reliance thereon by the Legislature, must be considered.

"[P]ublic officials have only such authority as is expressly given them by the constitution and statutes together with those powers and duties which are necessarily implied from the express grant of authority." AFSCME, Council No. 95 v. Olson, et al., 338 N.W. 97, 100 (N.D. 1983). The State Auditor's authority is interpreted not only in light of the express grant of authority, but also in light of the powers and duties which are necessarily implied from that express grant. Weight is also given "to the long-continued, practical construction placed thereon by the officers charged with the duty of executing and applying the statute." Horst v. Guy, 219 N.W.2d 153, 159 (N.D. 1974). N.D.C.C. § 1-02-39(6).

The State Auditor's office has employed the services of outside auditors to perform audits for some time. In fact, but for the employment of outside auditing services, it is my understanding that it would be virtually impossible for the State Auditor to perform timely audits of the large number of agencies, institutions, and boards which are statutorily required to be audited.

Furthermore, in addition to reliance on a reading of the statute and the Auditor's interpretation thereof, the Legislature itself has acquiesced in the long standing practice of the State Auditor employing the services of outside auditors.

In dealing with the subject of the State Auditor's access to information from the agencies required to be audited, the Legislative Assembly included not only the State Auditor but

"persons employed by him." N.D.C.C. § 54-10-22.1. Also, when the Legislature dealt with the subject of the examination of the records of the Tax Commissioner as part of an audit, the Legislature permitted the State Auditor "and persons employed by him" to review those tax records. N.D.C.C. § 54-10-24. Finally, when the Legislature dealt with required secrecy of certain records of the Tax Commissioner, the Legislature required that confidentiality of the "state auditor and his employees, including any person employed by him to perform the examination of any return." N.D.C.C. § 54-10-25.

It is therefore my opinion that the powers and responsibilities of the State Auditor outlined in N.D.C.C. § 54-10-01(2), necessarily include the authority of the State Auditor to employ the services of outside auditors for the performance of audits.

When employing others to perform audits the State Auditor must "charge an amount equal to the fair value of the audit and other services rendered plus actual costs incurred by the state auditor to all agencies that receive and expend moneys from other than the general fund." N.D.C.C. § 54-10-01(2). The ability to waive these fees was removed by the 1989 Legislative Assembly. 1989 N.D. Sess. Laws ch. 637, § 1.

The State Auditor awards outside audit service contracts on a competitive bidding basis. It is reasonable that the administrative determination of "fair value" made by the State Auditor is the bid price of the services rendered.

I can certainly sympathize with your budgetary concerns. Like many of the budgets, your agency budget was likely prepared based on the best estimates available which may or may not coincide with actual costs. While the Historical Society appropriation is from other than general fund money, its budget as authorized by the 1989 Legislative Assembly, does not provide a specific line item for paying for the services provided by the State Auditor. Thus, the audit fees budgeted are included in a line item appropriation representing the aggregate of several other estimated expenditures. I can only suggest that if your agency requires additional funding for the line item containing your audit fees that it request the Emergency Commission to authorize a transfer under N.D.C.C. § 54-16-04. Alternatively the Society could request a deficiency appropriation from the 1991 Legislative Assembly.

In summary, it is my opinion that the State Auditor may employ the services of an outside auditing firm for the conduct of required audits, that the auditor may charge the State Historical Society for those services and the Society is bound to pay the costs of the performance of the audit.

Sincerely,

Nicholas J. Spaeth

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