

**OPINION
59-18**

October 28, 1959 (OPINION)

AGRICULTURE

RE: State Wheat Commission - Regulation - Revenue and Expenditures

This is in reply to your request for an opinion on the following questions:

1. Is the commission created by this legislative Act an administrative agency becoming a part of the state government, thereby subject to any regulatory statutes pertaining to state agencies found elsewhere in the 1943 Revised Code of North Dakota and amendments thereto, not conflicting with the provisions of said act?
2. Under section 8 of the above mentioned Act, does the revenue obtained through the provisions of said Act, upon deposit within the state treasurer's office, become public monies, thereby being controlled by section 186 of the Constitution of the State of North Dakota?
3. If the answers to questions 1 and 2 are in the affirmative, how does section 54-1404 of the 1957 Supplement to the North Dakota Revised Code of 1943 apply to expenditures authorized in section 8 of said act?
4. Is the special fund aforementioned to be kept in the state treasurer's office?

As to question No. 1, the wheat commission was created by chapter 95 of the 1959 Session Laws. It was not created pursuant to a law permitting the creation of such commission, but was actually created by this chapter. The members of the commission are initially appointed by the Governor from a list of nominees of the respective districts.

Under subsection 11 of section 6, it is noted that the wheat commission is:

To prosecute in the name of the state of North Dakota any suit or action to enforce collection or assure payment of the tax or assessment authorized by the provisions of this Act, and to sue and be sued in the name of the commission."

The commission uses the name of the state to enforce collection of a tax or assessment. From these provisions and the general operation of the commission, the North Dakota State Wheat Commission is considered a state agency and is subject to regulatory statutes pertaining to state agencies.

As to question No. 2, the funds (assessments and tax money) are in one sense not public money or a public fund, but are in a sense a

special fund. They are, however, public funds or money as compared to private money, but as compared to general tax money or money in the general fund they are not considered public funds or public money. In this respect it is noted that the Supreme Court in 43 N.D. 619 State of North Dakota ex rel Chas. A. Stearns vs Obert Olson held that moneys in the Workmens' Compensation Fund are not public moneys and are not public funds but are a special fund. The court rationalized that the fund is derived from certain individuals, corporations, and associations of the state engaged in conducting certain occupations and employment specified in the Act, and that the fund was not derived from all of the people of the state as a tax and on that basis was not public money. The court in this instance was considering section 186 of the North Dakota Constitution before the 1939 amendment.

In dealing a related question after the amendment to section 186 of the Constitution, the North Dakota Supreme Court in 69 N.D. 129, wm. Langer et al vs State of North Dakota, held that while a fund which is not considered a state fund, or general fund, or public moneys, but is a special fund, the new provisions of section would apply. The new provision of section 186 pertinent hereto is as follows:

Section 186. (1) 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;"

The Court discussed the phrase, "deposited by him to the credit of the state." and pointed out that while such special funds are not public moneys in the sense that they are not derived from general taxation, they must still be deposited with the State Treasurer. The mere fact that they are deposited with the State Treasurer does not credit such to the state to the effect that such money would be available for general appropriation. The special funds would still retain their characteristics of being a special fund and would not be available for general appropriation without further legislative action.

Thus, while the Court recognized that funds derived out of a special project or operation are not in a sense a public fund, or part of the general fund, or public moneys, they must still be deposited with the State Treasurer and earmarked for the purpose for which they are intended.

Aside from the constitutional provisions, we have the statutory provision in section 8 of chapter 95, which provides:

. . . . The commission shall transmit all such payments to the state treasurer to be deposited in the state treasury to the credit of a fund to be known as the 'state wheat commission fund.'"

The Legislature then appropriated out of such fund \$400,000.00 for the period beginning with the effective date of the Act and ending

July 1, 1961. In this connection it is also observed that the Legislature specifically provided that 54-2710 of the North Dakota Revised Code of 1943 does not apply. The inference to be drawn from this provision is that the other provisions relating to the fiscal administration as found in chapter 54-27 as amended do apply unless otherwise provided for. In direct response to your question it is our opinion that section 186 is applicable to this fund. However, such fund does not become part of the general fund. The fund still remains a special fund and is earmarked for the purposes outlined in chapter 95 of the 1959 Session Laws and remains so until the Legislature otherwise provides.

As to question No. 3, the provisions of section 54-1404 of the 1957 Supplement to the North Dakota Revised Code of 1943 do not apply. It is noted that the provisions of this section amongst other things provided that:

No bill, claim, account, or demand against the state shall be audited, allowed, or paid until the full itemized statement in writing has been filed with the state auditing board, unless such bill, claim, account or demand is:

1. For a salary fixed by law;
2. Against a state owned utility, enterprise, or business project; or
3. Specifically exempt by law. . . ." (underscoring ours)

The claim, account, or demand for expenditure of money under the wheat commission program is not a claim or demand against the State of North Dakota as such. It is a claim against the wheat commission fund which is an agency of the state, but is not the state itself. It is not concerned with the governmental function.

In this respect we must give recognition to the last phrase of subsection 11 of section 6 where it provides that the wheat commission is authorized "to sue and be sued in the name of the commission." Thus, while it is in one respect an arm or agency of the state, a claim against it is not a claim against the state. See 68 N.D. 311, 47 N.D. 567, 56 N.D. 866 for comparable funds.

The language in section 8,

". . . . Expenditures from such funds, may be made by the commission in carrying out the provisions of this Act upon vouchers signed by the chairman of the commission."

is an indication that the commission through its chairman approves the expenditures and as such he acts in lieu of the auditing board. It is regretful that the Act didn't specify more specifically what was to be accomplished by having the chairman sign the voucher. In this respect it could be argued that the signing of the voucher by the chairman was merely to be an act which is normally performed by the head of any department or agency. However, being that the wheat commission consists of several members it is a strong indication that the expenditures of the fund are to be governed by the commission and

that the commission acts through its chairman. Considering these factors, we are of the opinion that the Legislature intended the signing of the vouchers to constitute approval of such expenditures and as such would not require that the vouchers be submitted to the auditing board for its approval before payment as required by section 54-1404. While we arrive at this conclusion we cannot lose sight of the provision of section 54-2708 which as is material here provides in part as follows:

Except as otherwise provided, moneys shall be paid from the state treasury only upon the warrant or order of the state auditor"

It is noted that the Act provides unless otherwise provided. In examining the Wheat Commission Act we are unable to find any provision which provides otherwise. The only language that might possibly be construed to apply on the matter is the provision relating to the signing of vouchers mentioned above. That provision, however, in our opinion, only refers to approval of the expenditure. In checking other special funds we found that such funds usually contained the provision that the State Treasurer is to be custodian of the fund and disbursements therefrom are to be paid by him upon vouchers authorized by a certain person designated in each fund. We find no such provision in this Act. We are also mindful that the constitutional provision of 186 as amended makes certain exceptions to certain special funds. There is no exception for this fund in that respect. Therefore, in the absence of a special provision in the Act, we must conclude that section 54-2708 is applicable to the state wheat commission fund.

As to question No. 4, the special fund must be maintained by the State Treasurer in the same manner as other special funds except as other wise noted herein. The State Treasurer while being the custodian of the same in his office but uses the Bank of North Dakota as a depository.

What has been said with reference to the wheat commission applies equally well to the Dairy Products Promotion Commission as created by chapter 93 of the 1959 Session Laws, except under the daily commission the treasurer of the commission is apparently held accountable for the commission's funds. The dairy commission provides for a treasurer who is to be bonded in a penal sum of at least \$10,000.00 conditioned on the faithful performance of his duties and strict accounting of all funds of the commission. The Act of the dairy commission also provides that the books, records, and accounts shall be audited annually by the State Board of Auditors, the cost of such audit to be paid from the North Dakota Dairy Products Promotion Commission. The other commission having no provision as to who is to audit its records, books, accounts, etc., it is assumed that the audit will be performed by the State Examiner.

As to your question whether the State Treasurer's office or Auditor's office has the right to bill said commission for additional expenses in said offices in the handling of commission funds, we wish to advise that such is permissible only where the statute so authorizes. Neither of the two accounts involved contains any such provision. Therefore, we must conclude that neither the treasurer nor the

auditor may charge the wheat commission fund or the dairy products promotion fund for any services rendered to such program.

LESLIE R. BURGUM

Attorney General