

January 6, 1977

The Honorable Robert Peterson  
State Auditor  
State Capitol  
Bismarck, ND 58505

Dear Mr. Peterson:

This is in reference to the audit report of the University of North Dakota which you submitted to this office pursuant to section 44-08-05.1 of the NDCC. You also refer to "questions of law in other areas" for our consideration and whatever action we may deem necessary.

While your letter did not specify those areas of the report with which we should be concerned (we assume you did not believe that all of the findings and recommendations contained therein should be reviewed by this office) we examined the report and concluded that there were two areas which required further investigation by this office, i.e., the use of discretionary accounts (page 34 of the report) which presumably involves section 44-08-05.1 to which you refer and the land lease, on page 17 of the Report. Our staff CPA reviewed the audit and conducted an independent examination of the matter. His report has been reviewed and we have the following comments:

#### DISCRETIONARY FUNDS

The use of the discretionary funds involved funds other than those appropriated from the State Treasury, i.e., gifts, foundation receipts and indirect costs reimbursed to the University by the Federal government from grants to the University. The report implies that a university official charged personal expenses to the discretionary funds and also submitted a voucher pursuant to section 44-08-04 of the NDCC. The official in question signed "tabs" at a public eating place and charged such "tabs" to the discretionary account under his control. At the same time, he submitted a voucher for expenses. While we may assume that the official was also the recipient of meals charged to the discretionary account, we can find no proof of such fact although we understand that such official did refund a sum which he vouchered for that period of time. Without proof that there was, in fact a "willfully" submitted voucher under section 44-08-05.1 we cannot conclude that a criminal charge of theft as provided in that section is warranted. Thus the section provides in part:

"Any public officer or employee who willfully approves a voucher with knowledge it contains false or unlawful claims or that it does not otherwise meet the requirements of this section for approval, shall be guilty of theft and punishable under the provisions of chapter 12.1-23. Any public officer or employee who shall without the use of ordinary care and diligence negligently approve a voucher for a department, agency, or institution containing false or unlawful claims or which does not otherwise meet the

requirements of this section for approval, shall be personally liable for any funds improperly expended.”

We thus note the statute contains two provisions, one, a criminal action for willfully approving a voucher with knowledge it contains false or unlawful claims and, two, a civil action for an officer who does not use ordinary care and diligence and negligently approves a false or unlawful voucher. In this instance the evidence would not, in our estimation, sustain a criminal action as being “willful” but would only sustain the civil action for negligence. Since any moneys have been repaid the objective of such an action has already been accomplished.

Your report does, however, question not only the “double payment” for the official in question but the entire use of discretionary funds and we believe some comment is appropriate on that general matter. As we have noted the discretionary funds do not come from funds appropriated from the State Treasury. Subsection 6(e) of Article 54 of the Amendments to the North Dakota Constitution provides:

“The said State Board of Higher Education shall have the control of the expenditure of the funds belonging to, and allocated to such institutions and also those appropriated by the Legislature, for the institutions of higher education in this State; provided, however, that funds appropriated by the Legislature and specifically designated for any one or more of such institutions, shall not be used for any -other institution.” (Emphasis ours).

It will be noted that the constitutional provision divides the funds into two sources, i.e., those coming from the State and those coming from other sources. Subsection 5 of the Article states that the Legislature shall provide adequate funds for the proper carrying out of the functions and duties of the State Board of Higher Education. While the Legislature has apparently appropriated all funds to the University, not only those from State sources (see, e.g., Chapter 22, 1973 Session Laws) there would appear to be considerable question under the North Dakota Constitution as to the effect of that appropriation of moneys from other than State sources. See, e.g., Board of Regents of Higher Education v. Judge, 543 P2d 1323 (Mont. 1975); Regents of University of Michigan v. State, 208 NW2d 871 (Mich. 1973); State ex rel. Segó v. Kirkpatrick, 524 P2d 975 (N. Mex. 1974).

In the New Mexico decision the Supreme Court of that state, under a constitutional provision similar to Article 54 of the Amendments to the North Dakota Constitution, stated, page 986:

“As already stated, our Legislature clearly has the power, and perhaps the duty, in appropriating State monies to consider the availability of federal funds for certain purposes, but it has no power to appropriate and thereby endeavor to control the manner and extent of the use of expenditure of federal funds made available to our institutions of higher learning. Control over the expenditure of these funds rests with the federal government and

the Boards of Regents of the respective institutions. Likewise, funds in the form of scholarships, gifts, donations, private endowments or other gratuities granted or given to the institutions, or otherwise received by them from sources other than the State of New Mexico, are not subject to appropriation by the Legislature. These funds belong to the institutions, and these institutions must make full and complete reports thereof to the Governor, who in turn must transmit these reports to the Legislature. \*\*\*However, the fact that these reports and the information contained therein are made available to the Legislature for its information and use in the performance of its proper legislative functions, does not confer on the Legislature the power to appropriate and thereby limit or control the use or disbursement of these funds.”

We therefore do not agree with our legal conclusion that the indirect costs are earned with state funds and should be controlled as any other state funds. However we are in complete agreement with your conclusions that the University does not have the authority to determine the use of these funds. Article 54 of the Amendments to the North Dakota Constitution, quoted above, and the cases cited above very clearly indicate that it is the Board of Higher Education, rather than the individual institution under its jurisdiction and control, which has the authority to determine the use of these funds. In this instance your report indicates that there was no specific policy of the Board with respect to this matter. We are also in complete agreement with your conclusion that discretionary accounts be prohibited unless specifically authorized by the Board of Higher Education. While, as noted above, we are not in agreement with all your legal conclusions in the report of your office concerning this matter because of the authority of the Board of Higher Education over these funds, that does not mean we conclude the University of North Dakota, as opposed to the Board of Higher Education, has this control. Apparently the University determined it had unlimited authority with respect to these funds and we cannot agree with that determination. The control must rest with the Board of Higher Education and absent a policy of that Board the moneys in question are not subject to the unbridled discretion of the University or its representatives.

#### LAND LEASE

The other part of the report further investigated by this office concerned a lease by the University of certain lands from the Board of University and School Lands. Questions raised in your report involved the withdrawal by the University of certain moneys from its appropriated funds for the 1973-1975 biennium after the appropriation had expired. This withdrawal was accomplished by check payable to the Board of University and School Lands, which was then endorsed and deposited by a University employee to the credit of a local University account and a subsequent payment of a part of that sum was made to the Board of University and School Lands as a rental payment. The report indicates, and our findings so substantiate, that none of the funds were used for an individual or personal benefit and that no pecuniary profit to a person or persons arose as a part of the transaction. The situation involved the transfer of state funds from one fund to another, the funds thus remaining the property of the State. We thus find no basis for

prosecution of the individual University employee who endorsed a check made payable to the Board of University and School Lands since it involved a transfer of funds within the University accounts, the check had never been delivered, was not the property of the Board of University and School Lands, and apparently the Board of University and School Lands was not entitled to the face amount of the check. Thus we do not believe the check was fraudulently endorsed within the meaning of the governing statutes.

However we are seriously concerned with the apparent disregard by the responsible University employees of the statutes governing the appropriation of State funds. Although the University has apparently corrected the matter pursuant to the recommendation of your report, the statutes involved were known at the University and this transfer may have been an attempt on the part of the University to prevent a reversion of unexpended appropriated funds but we cannot state that conclusion as a matter of fact or of law. Such practice cannot be condoned in any event. Drawing checks on one account to a payee other than another University account and the endorsement of the name of that payee for purposes of depositing the proceeds of the check into another University account is certainly an unacceptable practice. We would assume the University has sufficient personnel sophisticated in accounting procedures and the applicable statutes of North Dakota to accomplish any necessary transfer of moneys between funds within statutory limitations and accepted accounting procedures.

While we have read the remainder of the Audit Report we do not believe the other areas referred to therein were necessarily meant to be referred to this office for action or review. Therefore the fact such other matters are not specifically referred to herein does not indicate approval or disapproval of the statements in the Audit Report relative thereto, including, but not limited to, the comments relative to special assessments.

Sincerely,

Allen I. Olson  
Attorney General