

**LETTER OPINION
2002-L-36**

June 20, 2002

Mr. Jim W. Smith
Legislative Budget Analyst and Auditor
North Dakota Legislative Council
600 E Boulevard Ave
Bismarck, ND 58505-0360

Dear Mr. Smith:

Thank you for your letter forwarding a request for my opinion from the Legislative Council Budget Section concerning the provision in N.D.C.C. §54-27-08. That section requires the State Treasurer to utilize the services provided by the Information Technology Department (ITD) concerning electronic records and electronic signatures.

Section 54-27-08, N.D.C.C., addresses how money is paid from the state treasury and the requirements for a valid warrant. Under this statute, a warrant or order is prepared by the Office of Management and Budget to be drawn on the State Treasurer. Id. The warrant must be signed by the State Auditor before the State Treasurer accepts the warrant. The State Treasurer accepts the warrant by signature, making it negotiable. Id. This section was amended in the 2001 Legislative Session to add an additional requirement that “[w]ith respect to electronic records and electronic signatures, the state treasurer shall utilize the services provided by the information technology department.” 2001 N.D. Sess. Laws ch. 5, §4. The meaning of this requirement is unclear because N.D.C.C. §54-27-08 appears to require the State Treasurer’s signature to be placed upon a state warrant which is a paper document, yet the amendment speaks of electronic records and electronic signatures rather than paper documents. If the language of a statute is ambiguous or of doubtful meaning, extrinsic aids may be used to interpret the statute. Kim-Go v. J.P. Furlong Enterprises, Inc., 460 N.W.2d 694, 696 (N.D. 1990). One extrinsic aid available to construe an ambiguous statute is the legislative history. N.D.C.C. § 1-02-39.

The requirement for the Treasurer to utilize ITD regarding electronic signatures is contained in the appropriation bill for the State Treasurer’s office. 2001 N.D. Sess. Laws ch. 5. State Treasurer Kathi Gilmore requested funds to lease a new check signing machine as part of the appropriation for her office. Hearing on H.B. 1005 Before the House Appropriations Committee Government Operations Division, 2001 N.D. Leg.

(Jan. 18). Representative Rex Byerly proposed an amendment addressing “the problem with the old check writing machine and the requested check writing machine” by requiring ITD to apply an electronic signature on checks from the Treasurer’s office. Hearing on H.B. 1005 Before the House Appropriations Committee Government Operations Division, 2001 N.D. Leg. (Jan. 25) (Statement of Rep. Byerly). At a later hearing, Representative Byerly’s amendment was explained by Representative Blair Thoreson:

[A]t the present time the treasurer has the responsibility of printing on the checks or warrants that the state issues with signature, and from what we heard in committee they have a machine that does this that currently is out of date or is aging, and should it break down it would have a cost to replace it at approximately \$55,000. What this amendment would do is, currently ITD prints everything else on that check and then they are taken to the treasurers [sic] office and she has the responsibility for printing that on there. With the amendment, the signature would also be placed on with ITD. They have the capability of doing this and it would save us from having to replace that piece of equipment should it break down in the near future.¹

Hearing on H.B. 1005 Before the House Appropriations Committee, 2001 N.D. Leg. (Jan. 31) (Statement of Rep. Thoreson). Representative Byerly further explained that the warrants are presently printed in ITD “with other people’s signatures on them, that it was reasonable for the treasurer to also have checks printed in that manner” rather than have the warrants printed in ITD, forwarded to the Treasurer’s office for affixation of the Treasurer’s signature, and returned to ITD for further processing and mailing.² Id.

¹ Although isolated statements in the legislative history may imply that the amendment to N.D.C.C. § 54-27-08 would apply only if the current check signing machine in the State Treasurer’s office were to break down, the language of the amendment itself uses the mandatory term “shall.” Further, it appears that the Legislature specifically intended the amendment to be mandatory. At the hearing at which the amendment was adopted, Representative Glassheim moved to replace the word “shall” with “may,” but this motion failed. Hearing on H.B. 1005 Before the House Appropriations Committee Government Operations Division, 2001 N.D. Leg. (Jan. 25). The few statements in the legislative history which imply that the amendment to N.D.C.C. § 54-27-08 is conditional upon the nonfunctioning of the present check signing machine in the Treasurer’s office are not consistent with the statutory language, which contains no such contingency, nor the specific intentional use of mandatory language. Therefore these scattered statements are of little value in determining the meaning of this amendment. See Little v. Tracy, 497 N.W.2d 700, 705 (N.D. 1993).

² It is my understanding that the State Auditor already permits ITD to place the Auditor’s signature on state warrants, therefore the Legislature would have had no reason to apply the language in the amendment to the State Auditor.

Representative Byerly explained that the process involves "having the checks electronically signed as they come off the printer." Id. Therefore, it is my opinion that the requirement in N.D.C.C. § 54-27-08 requires the State Treasurer to allow ITD to apply the Treasurer's signature electronically to warrants drawn on the state treasury and printed by ITD.

However, this statutory requirement must be read in light of the State Treasurer's inherent constitutional duties. The office of State Treasurer is a constitutionally created position. N.D. Const. art. V, § 2. The State Treasurer is to receive all public moneys from whatever source derived and may pay these moneys out and disburse them only pursuant to appropriation. N.D. Const. art. X, §12. No amounts may be drawn from the State Treasury except upon warrant drawn upon the Treasurer. Id., "The legislature cannot substitute some other method of collection and disbursement." Campbell v. Towner County, 3 N.W.2d 822, 825 (N.D. 1941). Constitutional officers whose duties are "embedded in the constitution" may not be stripped of their powers by the legislature, including the inherent common law powers and duties which go along with their office. State v. Hagerty, 580 N.W.2d 139, 145-47 (N.D. 1998) (citation omitted).

There is no North Dakota case directly on point, but a case from Minnesota sheds light on the inherent duties of the Treasurer's office. In 1985, the Minnesota Legislature removed various powers from the State Treasurer, including authority over the disbursement of some state funds, and transferred them to an appointive position. State ex rel. Mattson v. Kiedrowski, 391 N.W.2d 777, 778-9 (Minn. 1986). This legislation was declared unconstitutional and the power over disbursement of state funds, a core function of the office, was restored to the Treasurer. Id. at 783. Although the North Dakota Constitution provides that the powers of the Treasurer "must be prescribed by law," N.D. Const. art. V, § 2, a similar provision in the Minnesota Constitution was determined to "not allow a state legislature to transfer inherent or core functions of executive officers to appointed officials." Id. at 780.

The North Dakota Supreme Court is in agreement with this concept.

If the offices . . . "are embedded in the Constitution," it inevitably follows that they cannot be stripped by the Legislature of the important duties inherently connected therewith, for if this can be done, then these offices were "embedded in the Constitution" for no purpose. We do not deny the power of the Legislature to prescribe duties for these officers, which power carries with it by implication the right to change such duties from time to time, as the public welfare may demand; but we deny its power to strip such offices, even temporarily, of a portion of their inherent functions and transfer them to officers appointed by central authority.

Ex Parte Corliss, 114 N.W. 962, 965 (N.D. 1907). The Supreme Courts of other states have held similarly.³ Therefore, it is my further opinion that the Legislative Assembly may address the powers and duties of the Office of State Treasurer in statute, but may not strip that office of its inherent constitutional powers and duties concerning the drawing of warrants on the state treasury.⁴

State statutes are presumed to be constitutional and, to the extent possible, are to be interpreted together with constitutional provisions in a way to make them effective. Paluck v. Board of Cty. Comm'rs, Stark Cty, 307 N.W.2d 852, 856 (N.D. 1981) ("if a statute is susceptible of two constructions, one of which will be compatible with constitutional provisions or one which will render the statute unconstitutional, we must adopt the construction which will make the statute valid."). Further, it is presumed that the Legislature intended to comply with the North Dakota and United States constitutions when enacting a statute, and any doubt must be resolved in favor of the statute's validity. N.D.C.C. § 1-02-38(1); State ex rel. Johnson v. Baker, 21 N.W.2d 355, 357 (N.D. 1945). This presumption is conclusive unless the statute clearly contravenes the state or federal constitutions. State v. Hegg, 410 N.W.2d 152, 154 (N.D. 1987). A statute may be declared unconstitutional only upon concurrence of four out of five justices of the North Dakota Supreme Court. N.D. Const. art. VI, § 4. Because the opinion of the North Dakota Attorney General is not binding on the judiciary, it has been this office's policy to refrain from questioning the constitutionality of a statute unless it is clearly and patently unconstitutional. 1995 N.D. Op. Att'y Gen. L-133, 1994 N.D. Op. Att'y Gen. L-314. Further, it is a duty of this office to defend the constitutionality of statutory enactments. N.D.C.C. § 32-23-11.

While inherent constitutional duties may not be transferred from a constitutional office, ministerial duties may be transferred to a different agency. Preece v. Rampton, 492 P.2d 1355 (Ut. 1972). In Utah, the auditor has the constitutional duty to draw all warrants for the expenditure of state funds and to present them for payment to the treasurer. Id. at 1357. A law was passed transferring these duties to the Department of Finance, an agency answering to the governor, leaving the auditor only with the power to verify the accounts after the payment was made. Id. at 1356-57. The Utah Supreme Court held:

³ See, for example, Hudson v. Kelly, 263 P.2d 362 (Ariz. 1953), American Legion Post No. 279 v. Barrett, 20 N.E.2d 45 (Ill. 1939), Love v. Baehr, 47 Cal. 364 (1874).

⁴ Even where "the Treasurer was effectively stripped of everything but ministerial duties, . . . nothing . . . extinguishes [the treasurer's] obligation to function under the Constitution and in conforming with [the] constitutional oath of office." Raney v. Stovall, 361 S.W.2d 518, 520-21 (Ky. App. 1962).

The actual typing of the warrants is ministerial in nature, and there is no basis for the auditor to complain if that work is done by the department of finance. However, the presenting of those warrants to the state treasurer calls for discretion, and the auditor should be the one to decide if a warrant is to be presented for payment. It was, and is, the duty of the state auditor to verify the correctness of accounts before they are paid.

Id. at 1357 (emphasis in original). A law transferring a ministerial duty such as printing from a constitutional office will be upheld so long as the law does not interfere with the inherent constitutional duties of that office.

The legislative history concerning the amendment requiring the State Treasurer to utilize ITD for electronically signing state warrants shows that the Legislature was concerned about how the Treasurer would continue to fulfill the duties of that office while the Treasurer's signature would no longer be printed on the warrants by employees of that office. State Treasurer Gilmore said that the signature plate remains in the vault in the State Treasurer's office at all times, and it is her responsibility to see that the plate is taken care of properly. Hearing on H.B. 1005 Before the House Appropriations Committee Government Operation Division, 2001 N.D. Leg. (Jan. 18) (Statement of State Treasurer Kathi Gilmore). Concerns were raised about this amendment's impact on the Treasurer's duties at a hearing before the House Appropriations Committee,. Representative Glassheim questioned whether requiring the Treasurer to use another agency to affix her signature would be a serious problem or would violate the duties of her office. Hearing on H.B. 1005 Before the House Appropriations Committee 2001 N.D. Leg. (Jan. 31). Representative Aarsvold questioned whether the duties regarding state warrants needed to be divided between different people in order to have a "check and balance system" protecting the state's interest. Id. Representative Kerzman noted that political subdivisions require two signatures and they do so even though it is difficult sometimes to get the extra signatures. Id.

In response, Representative Byerly explained that the only item being changed is that ITD will be printing the State Treasurer's signature on warrants that ITD was already printing, saving time and allowing the state to get its checks out in a more timely manner. Hearing on H.B. 1005 Before the House Appropriations Committee, 2001 N.D. Leg. (Jan. 31). He also noted that the Treasurer will continue to get all of the information she currently receives in order to review and verify that state warrants are being paid properly. Id. Representative Kempenich noted that financial tracking is still available and the Treasurer will still receive a printout to examine and preserve the security of the state's finances. Id. Representative Byerly explained that it was reasonable for the Treasurer to have warrants printed in ITD with her signature on them given the "significant increase in the number of checks that the state has had to write . . . that we didn't do in the past," and noted that some evidence suggested that it was taking the Treasurer's Office up to three hours a day to stamp checks which would take only a matter of minutes to print in ITD. Hearing on

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H.B. 1005 Before the House Appropriations Committee 2001 N.D. Leg. (Jan. 31) (Statement of Representative Byerly). He also noted that other agents of the State of North Dakota are also signing checks electronically as they come off the printer. Id.

The Legislature appears to have fully considered the duties of the Treasurer to oversee the safety and security of disbursements from the state treasury and the needs of the state as a whole to timely print and distribute checks by mandating that the Treasurer's signature be applied by ITD instead of using a separate machine in the Treasurer's office. The State Treasurer's constitutional oversight duties remain with her office, only the printing has been shifted to a source outside of the Treasurer's office. Therefore, it is my opinion that the amendment to N.D.C.C. § 54-27-08 requiring the State Treasurer to utilize ITD to apply her signature electronically to state warrants is facially constitutional. However, different concerns may be found in the practical application of this statute which could implicate its constitutionality.⁵

Under the amendment, ITD would perform the physical acts regarding check signing while the Treasurer would still be constitutionally responsible for these duties. Just as the Treasurer delegated the duty of check signing to employees in her office, now ITD receives the delegation of these duties by statute. With these duties, ITD owes a responsibility to the State Treasurer concerning the safety and security of the check signing system and preserving her authority to approve state warrants. If the State Treasurer has no means of controlling or supervising the application of her signature to warrants drawn on the state treasury, the situation would not be functionally different from the transfer of this power from the elected Treasurer to an appointed official that was declared unconstitutional in State ex rel. Mattson, supra.

It is my further opinion that the Treasurer, in fulfillment of the constitutional duties of her office, may require ITD to provide reasonable assurances and procedures regarding the safety and security of the check signing system and preserving her discretion in approving state warrants.⁶ A member of my staff interviewed officials from ITD concerning the measures that are available to meet these concerns, which would preserve the security of the Treasurer's signature and keep in place her discretion to approve state warrants.

⁵ A statute may be constitutional on its face, but yet be unconstitutional when applied to specific circumstances. See Traynor v. Leclerc, 561 N.W.2d 644, (N.D. 1997); Glaspie v. Little, 564 N.W.2d 651, 654 (N.D. 1997); Quist v. Best Western Intern., Inc., 354 N.W.2d 656, 665 (N.D. 1984).

⁶ What steps would be reasonable to require is a question of fact, not a matter of legal analysis. This office has a long-standing policy not to determine factual matters in legal opinions, 1997 N.D. Op. Att'y Gen. L-71; 1999 N.D. Op. Att'y Gen. F-02, unless it is an area where the Attorney General serves in a regulatory capacity with authority to conduct factual investigations. 2001 N.D. Op. Att'y Gen. L-38.

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For example, one proposal calls for securing the Treasurer's signature through a software program stored on a disk that the Treasurer could keep secure except when she allows its use by ITD and software that would allow her to approve or disapprove items before they are printed as warrants or made payable by the Bank of North Dakota.⁷ It is my further opinion that the proposals made by ITD would reasonably protect the Treasurer's constitutional oversight duties if they are implemented.⁸

Sincerely,

Wayne Stenehjem
Attorney General

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⁷ Further, ITD presently physically secures the printer and the computer system that generates printing orders, maintains firewall and other protection of the printer and computer system, and conducts background checks and bonds its employees.

⁸ The specific means of implementing these proposals has not been developed, and I do not opine whether any specific proposal is constitutionally required.