

**LETTER OPINION  
2004-L-42**

June 17, 2004

The Honorable Kathi Gilmore  
State Treasurer  
State Capitol  
600 E Boulevard Ave  
Bismarck, ND 58505-0600

Dear Ms. Gilmore:

Thank you for your letter asking whether overpayments and underpayments made in error from certain fund distributions to political subdivisions may be corrected by setting off the overpayment or underpayment against future distributions from these funds. It is my opinion that the State Treasurer has the authority to make adjustments to future payments from the identified funds in order to correct the overpayments and underpayments.

**ANALYSIS**

The audit of the Office of State Treasurer for the biennium ending June 30, 2003, identified five fund distributions to political subdivisions that were made in error. They are:

- (1) the coal conversion tax distribution, N.D.C.C. § 57-60-15;
- (2) the coal severance tax distribution, N.D.C.C. § 57-62-02;
- (3) the state aid distribution, N.D.C.C. § 57-39.2-26.1;
- (4) the oil and gas production tax distribution, N.D.C.C. § 57-51-15(3); and
- (5) the highway tax distribution, N.D.C.C. § 54-27-19(2).

The errors, which are more fully detailed in the audit report, principally involve overpayments or underpayments of funds to political subdivisions because incorrect data was used to calculate the distributions. The proposed method of correcting these errors is to setoff the overpayment or underpayment against future distributions from each of these funds.

While some statutes give specific authority to refund overpayments or otherwise make adjustments to ensure proper payments are made,<sup>1</sup> there is neither case law nor statutory authority in North Dakota addressing this specific situation. This office previously determined that the Department of Public Instruction could not correct a computer programming error that caused six school districts to receive incorrect foundation aid payments because the funds were subject to biennial appropriations that were cancelled at the end of that biennium. N.D.A.G. 96-L-21. There was no appropriation allowing funds from the then-current biennium to be used to correct the error. Id.

In this instance, three of the distributions are subject to continuing appropriations. N.D.C.C. § 57-60-14 (coal conversion tax distribution); N.D.C.C. § 57-62-03.1 (coal severance tax distribution); N.D.C.C. § 57-39.2-26.1 (state aid distribution). As such, the appropriation is not cancelled at the end of the biennium, and the funds may be expended according to law. State v. Sorlie, 219 N.W. 105, 108 (N.D. 1928). Therefore, the lack of an appropriation does not prevent the State Treasurer from setting off the amounts incorrectly distributed under these provisions against amounts to be paid in the future.

Two of the distributions do not contain a specific “continuing appropriation,” but instead contain an “apportionment,” N.D.C.C. § 57-51-15 (oil and gas production tax distribution), or an “allocation,” N.D.C.C. §§ 57-51-15(2), 54-27-19 (highway tax distribution), of funds. While the language used in these statutes would appear to be consistent with that which is necessary to constitute a continuing appropriation,<sup>2</sup> the North Dakota Supreme Court in SunBehm Gas, Inc. v. Conrad, 310 N.W.2d 766, 769-770 (N.D. 1981) held that an initiated measure containing the term “allocated” did not constitute an appropriation of the monies collected pursuant to the tax imposed by the measure. The initiated measure in that case, however, specifically required the legislature to “make any appropriation of money that may be necessary to accomplish the purposes of” the measure. Id. at 769.

In contrast, the provisions in N.D.C.C. §§ 54-27-19 and 57-51-15 do not contain a requirement for a separate legislative appropriation in order to distribute the funds. To this office’s knowledge, in the twenty-three years since SunBehm the Legislative Assembly has not determined that a specific appropriation is necessary in order to distribute the funds acquired pursuant to these statutes. It appears that with regard to N.D.C.C. §§ 54-27-19 and 57-51-15, the Legislative Assembly intended the language in these statutes to

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<sup>1</sup> See e.g. N.D.C.C. §§ 57-39.2-24, 57-39.2-25 (addressing a refund to taxpayers for the overpayment of sales tax), N.D.C.C. § 57-51-19 (in the event a taxpayer receives a refund or credit for the oil and gas production tax, the amount returned to the taxpayer is reduced pro rata from the county that had been entitled to share in the tax).

<sup>2</sup> As used in the North Dakota Constitution, an appropriation “is the setting apart from the public revenue of a definite sum of money for the specified object in such a manner that the officials of the government are authorized to use the amount so set apart, and no more, for the object.” State v. Holmes, 123 N.W. 884, 886-87 (N.D. 1909); Campbell v. Towner County, 3 N.W.2d 822, 825 (N.D. 1942); Menz v. Coyle, 117 N.W.2d 290 (N.D. 1962). N.D. Const. art. X, § 12(1).

constitute a continuing appropriation. Under the circumstances in this case, it is my opinion the provisions of N.D.C.C. §§ 54-27-19 and 57-51-15 do constitute continuing appropriations. As such, the issue of a lapse of a biennial appropriation is inapplicable to correcting mistakes in the distribution of funds under these statutes.

Another possible impediment to the State Treasurer's ability to correct these errors is the lack of specific statutory authority to do so. In 1987, this office issued an opinion addressing whether the State Treasurer could correct an underpayment to a township under N.D.C.C. § 54-57-19.1. N.D.A.G. Letter to Hanson (July 8, 1987). The opinion stated the State Treasurer could not correct that underpayment in part because of a lack of statutory authority to do so. Id.

Although state law does not provide specific statutory authority for the State Treasurer to correct errors in money paid out, the North Dakota Supreme Court has held that officers have implied powers in addition to statutorily granted powers:

[I]n addition to their statutory powers, this court long ago held that officers have implied powers as well. "The power of officers, implied and incidental, is . . . 'that, in addition to the powers expressly given by statute to an officer or board of officers, he or it has, by implication, such additional powers as are necessary for the due and efficient exercise of the powers expressly granted, or as may be fairly implied from the statute granting the express powers.'" State ex rel. Miller v. District Ct., 19 N.D. 819, 834, 124 N.W. 417, 428 (1910) (citation omitted).

State ex rel. Heitkamp v. Hagerty, 580 N.W.2d 139, 147 (N.D. 1998). The conclusion that one of the implied powers of a state officer is to correct a mistake made in executing a specific statutory or constitutional power in order to cause their actions to conform to statutory or constitutional requirements is a reasonable conclusion.

Other states have addressed similar issues and determined that government agencies charged with a statutory duty have inherent authority to correct errors made when distributing funds so that the distributions can be brought back into compliance with law. "[W]here an agency or other government body has the responsibility to take in or disburse moneys, the common law . . . has typically held that the entity has the inherent power to correct its mistakes." Playmates Toys, Inc. v. Director, Division of Taxation, 720 A.2d 655, 658 (N.J. App. Div. 1998). The New Jersey Supreme Court has held that when public money is paid out in excess of that permitted by law, the receipt of such money can be said to create an obligation for the recipient to repay. Redding v. Burlington County Welfare Board, 323 A.2d 477, 480 (N.J. 1974). Unless specifically prohibited, the right and power to recoup overpayments is inherent in the delegation of authority to make the initial payments, and it is unnecessary for the Legislature to specify that the government agency which paid the excess money in error has a right to recover the funds. Id.

Further, the Alaska Attorney General noted that where funds had been misallocated, the misallocations may be corrected administratively by adjusting future payments. 1987 Alaska Op. Att'y Gen. 453. The Alaska Attorney General explained:

It is the executive branch's responsibility to execute the laws, as passed by the legislature, in a manner which effectuates the legislature's intent. Administrative reallocation of the required amounts will result in the [various funds] all being in the position intended by the legislature (and required by the various provisions of both federal and state law).

Id.

Even without specific statutory authorization to correct errors, the State Treasurer has general authorities which imply that she has authority to correct errors, including the duty to "[k]eep and disburse all moneys belonging to the state in the manner provided by law." N.D.C.C. § 54-11-01(14). The North Dakota Supreme Court has held that the State Treasurer is entitled to allocate or apportion moneys as authorized and required by law, and has the jurisdiction, authority, and duty to do so. See SunBehm Gas, Inc. v. Lesmeister, 308 N.W.2d 555, 558 (N.D. 1981). This office has also determined that the State Treasurer may refund money erroneously paid by counties into the general fund without a specific appropriation authorizing the refund because there was no authority to place the money into the general fund in the first instance. N.D.A.G. 98-L-142.

Accordingly, it is my opinion that the State Treasurer has the implied authority to make adjustments to future payments from the five identified funds in order to correct the overpayments and underpayments identified in the audit report. To the extent that N.D.A.G. Letter to Hanson (July 8, 1987) conflicts with this opinion because it relied on a lack of specific statutory authority to correct an underpayment, it is overruled.

Sincerely,

Wayne Stenehjem  
Attorney General

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This opinion is issued pursuant to N.D.C.C. §54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).