

## **N.D.A.G. Letter to Elkin (Feb. 5, 1988)**

February 5, 1988

Ms. Janet A. Elkin  
Commission Secretary  
Public Service Commission  
State Capitol  
Bismarck, ND 58505

Dear Ms. Elkin:

Thank you for your letter of December 29, 1987, in which you request my opinion as to whether the director of the Office of Management and Budget is required to transfer state contingency funds to the Public Service Commission (PSC) in accordance with the Emergency Commission's decision of October 26, 1987. On that date, the Emergency Commission approved the transfer of \$35,729.97 from the state's contingency fund to the PSC for the costs involved in its gas price intervention.

N.D.C.C. ch. 54-16 authorizes the Emergency Commission to transfer moneys from the state's contingency fund to state agencies upon a finding that an emergency justifies the desired expenditure. The Office of Management and Budget's responsibility in implementing the Emergency Commission's decision is set forth in N.D.C.C. § 54-16-08 which states as follows:

54-16-08. State contingency fund. There shall be maintained in the office of the state treasurer a fund to be known as the state contingency fund, consisting of such moneys as may be appropriated thereto by the legislative assembly. The Office of Management and Budget shall prepare, and the state auditor shall sign, warrants upon such fund at the direction of the emergency commission as provided in this chapter.

(Emphasis supplied.)

The powers and duties of public officers are generally classified as ministerial or discretionary. The North Dakota Supreme Court has defined a "ministerial act" as one which "a person performs on a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the act being done."

State ex rel. Dakota Trust Co. v. Stutsman, 139 N.W. 83, 89 (N.D. 1912) (quoting Flourney v. City, 17 Ind. 169). Discretionary acts have been defined as those "not controlled by the judgment or conscience of others." Arrow Express Forwarding Co. v. Iowa State Commerce Commission, 130 N.W.2d 451, 453 (Iowa 1964). When the matter

in question falls within the "ministerial" category, the public officer is required to follow the mandate of the law and lacks discretion in deciding whether to execute the act.

An issue similar to that raised in your letter was presented to the supreme court of Louisiana in Jefferson Lake Sulphur Co. v. Kolb, 76 So.2d 546 (La. 1954). That case was a mandamus proceeding in which the defending officers, the state treasurer and state auditor, pleaded the pendency of a taxpayer's suit in justification of their refusal to pay a claim which had been judicially recognized in a previous suit and the payment of which had been provided for by the Legislature. In the taxpayer's suit, the appropriation for payment of the claim was attacked as unconstitutional but no injunctive relief had been granted preventing the payment. A writ of mandamus to compel the payment of the claim was granted notwithstanding the pending taxpayer's suit challenging the legality of the appropriation.

Although classifying a person's acts as "ministerial" or "discretionary" is often difficult and dependant on the facts of any particular situation, it is clear that the Office of Management and Budget's duty under N.D.C.C. ch. 54-16 to implement the orders of the Emergency Commission is "ministerial" in nature. Although the Emergency Commission's actions in this matter are being challenged in court, the Office of Management and Budget is still required to comply with its ministerial duties under N.D.C.C. ch. 54-16 relative to implementing the orders of the Emergency Commission. It is my opinion, therefore, that the Office of Management and Budget is required to effectuate the transfer of funds from the state's contingency fund to the PSC pursuant to the Emergency Commission's order of October 26, 1987.

Sincerely,

Nicholas J. Spaeth

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