

N.D.A.G. Letter to Lamb (Feb. 12, 1990)

February 12, 1990

Mr. Joseph S. Lamb
President
Bank of North Dakota
P.O. Box 5509
Bismarck, ND 58502-5509

Dear Mr. Lamb:

Thank you for your January 5, 1990, letter requesting my opinion on whether the Bank of North Dakota (BND) is authorized to pay the administrative expenses of Student Loans of North Dakota (SLND) from SLND's program revenues. BND is the state agency designated to administer North Dakota's guarantee loan programs and act as the guarantee agency. N.D.C.C. § 15-62.1-01. BND pays directly all administrative expense and overhead which is attributable to SLND. On a monthly basis, BND is reimbursed from SLND's reserve fund for the payment of these expenses. You state in your letter that the revenues in SLND's reserve fund utilized to reimburse BND are insurance premiums, interest income, loan recovery income, and administrative cost allowances. You ask whether this procedure complies with federal and state law.

Initially, I will review federal law to determine whether BND may expend the program revenues (insurance premiums, interest income, loan recovery income, and administrative cost allowances) for SLND's administrative costs.

Federal regulations require a guarantee agency, such as BND, to follow certain fiscal procedures. Specifically, 34 C.F.R. § 682.410(a)(1) (1988) requires the guarantee agency to establish and maintain a reserve fund and to credit the fund with the following revenues:

- (i) Federal advances obtained under, and matching funds required by, section 422(a) of the Act;
- (ii) Funds appropriated by a State for the agency's loan guarantee program.
- (iii) Federal advances obtained under § 682.403 [to pay guarantee claims];
- (iv) Funds received by the guarantee agency as loan insurance premiums;

- (v) Administrative cost allowances received by the guarantee agency under 682.407;
- (vi) Funds received by the guarantee agency for the agency's loan guarantee program from gift, grant, or other sources;
- (vii) Funds collected on defaulted loans;
- (viii) Death, disability, bankruptcy and reinsurance payments received from the Secretary; and
- (ix) Funds earned from investments [of the reserve fund's assets].

34 C.F.R. § 682.410(a)(3) further provides that the guarantee agency "may . . . use loan insurance premiums, administrative cost allowances, interest or investment earnings, and funds described in paragraph (a)(l)(vi) of this section for payments necessary for the proper administration of the guarantee agency's loan guarantee program." The federal regulations, therefore, specifically authorize BND to expend "insurance premiums," "interest income," and "administrative cost allowances" for SLND's administrative costs.

In addition, 20 U.S.C. § 1078(f)(1)(A) (1988) authorizes the guarantee agency to expend the "administrative cost allowance" for the following expenses:

- (i) the administrative cost of promotion of commercial lender participation;
- (ii) the administrative cost of collection of loans;
- (iii) the administrative costs of preclaims assistance for default prevention;
- (iv) the administrative costs of monitoring the enrollment and repayment status of students; or
- (v) other such costs related to the student loan insurance program subject to such agreement.

See also 34 C.F.R. 682.407(c)(1) (1988) (a guarantee agency "may use the administrative cost allowances only to meet administrative costs related to the GSLP and the PLUS Program.")

20 U.S.C. § 1078(c)(6)(A)(ii) (1988) governs the expenditure of the "loan recovery income" and authorizes the guarantee agency to retain 30% of loan recoveries for

costs related to the student loan insurance program, including the administrative costs of collection of loans reimbursed under this subsection, the administrative costs of preclaims

assistance for default prevention, the administrative costs for supplemental preclaims assistance for default prevention, and the administrative costs of monitoring the enrollment and repayment status of students . . .

Therefore, BND may expend 30% of the loan recoveries for the administrative costs identified in the above statute.

Assuming that SLND's program revenues are expended for administrative costs identified in the foregoing federal statutes and regulations, it is my opinion that BND's fiscal practice conforms with federal law. Even so, as a state agency, BND's expenditure of SLND's program revenues must also comply with the requirements of state law.

The initial question is whether SLND's program revenues are subject to the legislative appropriation process set forth in N.D. Const. art. X, § 12 ("all public monies, from whatever source derived, . . . shall be paid over monthly . . . to the state treasurer . . . and shall be paid out and disbursed only pursuant to appropriation first made by the legislature"). N.D. Const. art. X, § 12 also appropriates certain funds including "the necessary funds required in the financial transactions of the Bank of North Dakota."

The North Dakota Supreme Court has recognized that the term "public monies" does not include all monies in the custody of the state. In State v. Jorgenson, 150 N.W. 565 (N.D. 1915), the North Dakota Supreme Court addressed the question whether the monies in the state hail insurance fund were subject to N.D. Const. art. X, § 12. The court concluded that the fund was comprised of "premiums paid by owners of crops within the state" and did not constitute state funds. Id. at 567. Accordingly, the hail insurance fund was not subject to legislative appropriation.

Similarly, in State v. Bonzer, 279 N.W. 769, 771 (N.D. 1938), the supreme court held that monies in the state bonding fund "are not state monies but are held in trust by the state treasurer for the benefit and protection of those who, under the terms of the act, may become claimants under such fund." Id. at 771.

Other jurisdictions have recognized that monies received by public officials do not necessarily constitute public funds for which a special appropriation is necessary. For example, in Board of Regents of University of Nebraska v. Exon, 256 N.W.2d 330, 334 (Neb. 1977), the Nebraska Supreme Court held that the University of Nebraska could expend funds donated by the federal government to the University without a specific appropriation by the Legislature. See also, Navajo Tribe v. Arizona Department of Administration, 528 P.2d 623, 624-25 (Ariz. 1975); Opinion of the Justices to the Senate, 378 N.E.2d 433, 436 (Mass. 1978); Button's Estate v. Anderson, 28 A.2d 404, 410 (Vt. 1942).

It is my opinion that the term "public monies," as used in N.D. Const. art. X, § 12, refers to unencumbered funds received by the state that are available for legislative appropriation to defray the general expenses of government. Monies received by the state that are not available for legislative appropriation to defray general governmental expenses (e.g.,

certain federal funds, grants, gifts, and trust funds) are not "public monies" as stated in N.D. Const. art. X, § 12 and, therefore, do not require a specific appropriation. See Letter from Attorney General Spaeth to S.F. Hoffner (May 23, 1988). Rather, the Legislature may authorize an agency to expend such monies pursuant to continuing statutory authority. Id. Alternatively, the Legislature can always provide the necessary spending authority for such monies in the agency's biennial appropriation act.

Federal law limits the expenditure of SLND's program revenues for specified purposes and, therefore, such funds are not "public monies" that must be specially appropriated by the Legislature pursuant to N.D. Const. art. X, § 12. Thus, it is my opinion that SLND's program revenues may be expended pursuant to continuing statutory authority.

At this point, I will analyze whether the following spending authority enables BND to expend SLND's program revenues:

1. BND's biennial appropriation act (1989 Sess. Laws ch. 49, 1(2));
2. Continuing statutory authority (N.D.C.C. §§ 15-62.1-01 and 15-62.1-05); and
3. Continuing constitutional authority (N.D. Const. art X, § 12).

The Industrial Commission's Appropriation Act establishes BND's 1989-91 appropriation authority. 1989 N.D. Sess. Laws ch. 49, § 1(2). Any expenditure by BND for SLND's administrative costs may be made within the limits of BND's 1989-91 appropriation authority. It is my understanding that BND's appropriation authority includes an allowance for SLND's administrative expenses.

The second source of spending authority is the continuing statutory authority set forth in N.D.C.C. § 15-62.1-01. This section provides that "[t]he [BND], upon recommendation of the advisory board and subject to the approval of the industrial commission, shall expend monies from the interest earned on the principal balance in the reserve funds established pursuant to this chapter as may be necessary to implement and administer the programs." Id.; see also N.D.C.C. § 15-62.1-05 ("the income from such investments [of the reserve fund] shall be made available for the costs of administering respective guarantee loan programs and income in excess of that required to pay the cost of administering the programs shall be deposited in the reserve funds").

It is my opinion that N.D.C.C. §§ 15-62.1-01 and 15-62.1-05 authorize the payment of SLND's administrative expenses from interest income earned on SLND's reserve fund. There is no continuing statutory authority to expend the other program revenues mentioned in your letter (i.e., insurance premiums, loan recoveries, and administrative cost allowances).

Finally, I will discuss whether the constitutional appropriation of the "necessary funds required in the financial transactions of the Bank of North Dakota," N.D. Const. art. X,

§ 12, authorizes BND to pay SLND's administrative expenses from the program revenues.

The North Dakota judiciary has not interpreted the clause "financial transactions of the Bank of North Dakota." This office has issued one Attorney General's opinion that generally discusses the meaning of "financial transactions of the Bank of North Dakota". See Letter from Attorney General Wefald to Industrial Commission (September 29, 1983).

The question presented in the September 29, 1983, letter was whether the state may statutorily guarantee all deposits in the Bank of North Dakota (N.D.C.C. § 6-09-10) in light of the debt limitations established by N.D. Const. art. X, § 13. The Attorney General interpreted N.D. Const. art. X, § 12 as follows:

[T]he provisions of Article X, Section 12 of the Constitution, as they apply to the Bank of North Dakota, seem clear -- there is a continuing constitutional appropriation of the necessary funds required to meet the obligations incurred by the Bank in its financial transactions. Further, there should be no question that deposits received by the Bank are "financial transactions of the bank."

The Attorney General did not provide further discussion on the meaning of the term "financial transactions of the Bank."

There is no indication that the drafters of N.D. Const. art. X, § 12, intended to provide a continuing appropriation of funds for BND's normal administrative and operating expenses and, historically, BND has requested and received biennial appropriations from the Legislature for its administrative expenses (i.e., salaries, equipment, data processing, and operating) in the same manner as other state agencies. Yet, it is apparent that BND cannot perform the duties associated with disbursing "the necessary funds required in the financial transactions of the Bank of North Dakota" without incurring incidental administrative expenses. If the Legislature could prevent BND from performing this duty by failing to appropriate funds for such incidental expenses, it would render the continuing constitutional appropriation meaningless.

In State ex rel. Byrne v. Baker, 262 N.W. 183 (N.D. 1934), the Legislature failed to appropriate sufficient funds to pay election expenses incurred by the Secretary of State. The State Auditor refused to draw warrants in excess of the amount appropriated by the Legislature for the election expenses. The Secretary of State initiated a mandamus proceeding to compel the State Auditor to issue warrants for the payment of the election expenses. The court's decision turned on the fact that the expenses were incurred by the Secretary of State in the performance of a self-executing, constitutionally mandated function. The court held that the expenses must be paid out of the state treasury even in the absence of an appropriation. See also, State ex rel. Walker v. Link, 232 N.W.2d 823, 826 (N.D. 1975) ("Neither the Legislature nor the people can, without a constitutional amendment, refuse to fund a constitutionally mandated function"). Id.

Based on the above case law, an argument can be made that the costs incidental to BND performing a constitutional mandate (i.e., paying the "necessary funds required in the

financial transactions of the Bank of North Dakota"), must be paid by the state even in the absence of a legislative appropriation. However, I can neither guarantee that this argument would be accepted by the courts nor expressly define which costs are incidental to a "financial transaction" of the Bank. Therefore, I recommend that BND pay its administrative expenses only as authorized by its appropriation act, or continuing statutory authority, and not rely on the constitutional appropriation for these expenditures.

It is my understanding that, for the most part, the Legislature has provided the spending authority necessary to pay SLND's administrative costs. The one exception appears to be the fees paid to the collection lawyers. It is my understanding that this expense is neither incorporated in BND's appropriation act nor covered by continuing statutory authority. Based upon the above conclusion, it is not clear whether BND's payment of the attorneys' fees is authorized by the continuing constitutional appropriation set forth in N.D. Const. art. X, § 12. Therefore, I recommend that BND seek statutory authority to Pay these fees in the future.

If you have any further questions on this matter, please do not hesitate to contact me.

Sincerely,

Nicholas J. Spaeth

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