STATE OF NORTH DAKOTA

OFFICE OF ATTORNEY GENERAL

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LETTER OPINION
2026-L-03

Senator Sean Cleary
District 35
Bismarck, ND
scleary@ndlegis.gov

Representative Mitch Ostlie
District 12
Jamestown, ND
mostlie@ndlegis.gov

Dear Senator Cleary and Representative Ostlie:

Thank you for your email requesting my opinion regarding whether the Retirement and Investment Office (RIO) has legal authority to provide incentive compensation payments to its employees from its existing appropriation authority. It is my opinion that the continuing appropriation in N.D.C.C. § 54-52.5-03[1] authorizes RIO to make the incentive compensation payments.

ANALYSIS

The Legislature created RIO to administratively coordinate the activities of the State Investment Board (SIB), which oversees RIO, and the Teachers' Fund for Retirement (TFFR).[2] The SIB is required by statute to manage the investment of several enumerated state client funds and has executed contracts to manage the funds of other state entity clients.[3] RIO is a special-funded agency that does not receive general fund dollars.[4]

In 2023, the Legislature authorized RIO to create a new incentive compensation program for RIO employees. The legislation, codified at N.D.C.C. § 54-52.5-04, provides:

> The state retirement and investment office may develop an incentive compensation program for full-time equivalent investment and fiscal operations positions necessary for the management of the investment of funds under the control of the

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[1] The State Investment Board has additional continuing appropriation authority under N.D.C.C. §§ 21-10-05, 21-10-06.2. This opinion does not address whether the incentive compensation payments could be made under those statutes because consideration of those statutes is not necessary to answer the question presented.
[2] N.D.C.C. §§ 54-52.5-01, 54-52.5-02.
[3] N.D.C.C. § 21-10-06.
[4] H.B. 1022, 2025 N.D. Leg., § 1; S.B. 2022, 2023 N.D. Leg., § 1.

> state investment board. The program must promote profitability, productivity, and responsible fund management. The provisions of the program must be approved annually by the state investment board. The provisions must ensure that the payouts do not occur unless the risk-based performance of the investments that are internally managed exceed the risk-based performance of policy benchmarks. Any amounts paid under this program must be considered compensation and not personal profit on behalf of the employee. Each interim, the state retirement and investment office shall provide at least one report to the legislative management regarding the status of the program, including the provisions of the program; the total amount of incentives paid out to employees each year; and the minimum, maximum, and average payout per eligible full-time equivalent position.[5]

In the same bill, the Legislature also amended and reenacted RIO's continuing appropriation statute, N.D.C.C. § 54-52.5-03, to add language providing for payment of RIO's administrative expenses from lawfully available earnings.[6] In its current form, with the 2023 amendment language underlined for identification, N.D.C.C. § 54-52.5-03, provides:

> A special fund known as the "state retirement and investment fund" is established for the purpose of defraying administrative expenses of the state retirement and investment office. The actual amount of administrative expenses incurred by the state retirement and investment office must be paid from the respective funds listed under section 21-10-06 and are hereby appropriated to the state retirement and investment fund in proportion to the services rendered for each fund as estimated by the state investment board. The amount necessary to pay all administrative expenses of the state retirement and investment office must be paid from the state retirement and investment fund in accordance with the agency's appropriation authority <u>and earnings lawfully available for such purposes</u>. Any interest income earned on the state retirement and investment fund must be credited to the fund.[7]

While you acknowledge that the Legislature created an incentive compensation program for RIO employees in 2023, you question whether the Legislature provided a method to pay for the program. As part of your request for an Attorney General's opinion, you assert that, during the 2025 Legislative Session, the Legislature did not provide an explicit appropriation for the program and that the existing appropriation in N.D.C.C. § 54-52.5-03 is insufficient to authorize RIO's incentive compensation payments.[8]

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[5] N.D.C.C. § 54-52.5-04.
[6] S.B. 2022, 2023 N.D. Leg., § 4.
[7] N.D.C.C. § 54-52.5-03 (underline added to identify amendment).
[8] Letter from Sen. Sean Cleary, Dist. 35, & Rep. Mitch Ostlie, Dist. 12, N.D. Legis. Assemb., to Drew H. Wrigley, Att'y Gen., Off. of Att'y Gen. (Dec. 29, 2025); H.B. 1022, 2025 N.D. Leg.

Whether the appropriation in N.D.C.C. § 54-52.5-03 authorizes RIO to make the incentive compensation payments permitted under N.D.C.C. § 54-52.5-04 is a question of statutory interpretation.

> [The] primary goal in statutory construction is to ascertain the intent of the Legislature. In ascertaining the Legislature's intent, we first look to the plain language of the statute and give each word of the statute its ordinary meaning. We construe the statute as a whole and give effect to each of its provisions if possible. If the language of the statute is clear and unambiguous when read as a whole, we cannot ignore that language under the pretext of pursuing its spirit because the legislative intent is presumed clear from the face of the statute. If, however, the statute is ambiguous or if adherence to the strict letter of the statute would lead to an absurd or ludicrous result, a court may resort to extrinsic aids, such as legislative history, to interpret the statute. A statute is ambiguous if it is susceptible to meanings that are different, but rational.[9]

In addition, statutes must be construed together and harmonized to give meaning to related provisions and to every word, phrase, and sentence.[10]

"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 that object.'"[11] The Legislature can appropriate funds for a biennium or on a continuing basis.[12] RIO has both biennial and continuing appropriation authority.

In a 2015 opinion, this office concluded that N.D.C.C. § 54-52.5-03, in its then-current form, provided a valid continuing appropriation for the payment of various administrative expenses, even though the statute did not expressly identify them.[13] This office had previously concluded that RIO's "administrative expenses" include salaries and wages,[14] so salaries and wages could be paid pursuant to N.D.C.C. § 54-52.5-03. Without the 2023 amendment to that statute, this authority was

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[9] *Workforce Safety & Ins. v. Avila*, 2020 ND 90, ¶ 7, 942 N.W.2d 811 (quoting *Shiek v. N.D. Workers Comp. Bureau*, 2002 ND 85, ¶ 12, 643 N.W.2d 721).
[10] *State v. Johns*, 2019 ND 227, ¶ 8, 932 N.W.2d 893; *Rocky Mountain Steel Founds., Inc. v. Brockett Co., LLC*, 2018 ND 96, ¶ 5, 909 N.W.2d 671, *citing* N.D.C.C. § 1-02-07.
[11] *N.D. Legis. Assembly v. Burgum*, 2018 ND 189, ¶ 18, 916 N.W.2d 83 (quoting *State ex rel. Link v. Olson*, 286 N.W.2d 262, 268 (N.D. 1979)).
[12] *Gange v. Clerk of Burleigh Cnty. Dist. Ct.*, 429 N.W.2d 429 (N.D. 1988).
[13] N.D.A.G. 2015-L-04.
[14] Letter from Nicholas J. Spaeth, Att'y Gen., to Scott Engmann, Exec. Dir., N.D. Ret. & Inv. Off. (Feb. 20, 1990).

limited to payments made "in accordance with the agency's appropriation authority"[15] and was therefore "[restricted] to an amount established by the Legislature."[16]

In the 2015 opinion, this office also concluded that RIO has implied appropriation authority. Due to RIO's fiduciary obligation to prudently administer the funds with which it is entrusted, the agency must have some implied appropriation authority to pay "wages and operating costs of the individuals necessary to effectuate the continuing appropriations" and to "expend funds for the salaries and associated operating expenses" of the individuals needed to administer those funds.[17] Otherwise RIO's mandate to properly manage the funds could be frustrated by a legislative oversight or legislative inaction.[18]

Since the 2015 opinion was issued, RIO's continuing appropriation authority has expanded through legislation. As noted above, the 2023 amendment to N.D.C.C. § 54-52.5-03 added the phrase "and earnings lawfully available for such purposes" to the end of the sentence authorizing payment of RIO's administrative expenses.[19] By using the word "and," the Legislature unambiguously expressed its intent to increase RIO's authority to pay administrative expenses. As a result, the plain language of N.D.C.C. § 54-52.5-03 now authorizes RIO to pay administrative expenses from the state retirement and investment fund in two circumstances. First, as discussed in the 2015 opinion, RIO can pay administrative expenses "in accordance with the agency's appropriation authority."[20] Expenses paid pursuant to this authority require a separate legislative appropriation.[21] Second, RIO can pay administrative expenses from "earnings lawfully available for such purposes."[22]

In the absence of an explicit appropriation for the incentive compensation payments, we look to the scope of RIO's authority to pay administrative expenses from "earnings lawfully available for such purposes." The plain language of this provision constitutes an appropriation by setting aside a certain sum, specifically the earnings from client funds, for a specified object, the payment of legally authorized administrative expenses.[23] The question therefore is whether the payment of incentive compensation is a legally authorized administrative expense.

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[15] 1991 N.D. Sess. Laws ch. 628, § 1 (codified as amended at N.D.C.C. § 54-52.5-03 (2023)); N.D.A.G. 2015-L-04.
[16] N.D.A.G. 2015-L-04.
[17] *Id.*
[18] *Id.*
[19] S.B. 2022, 2023 N.D. Leg., § 4.
[20] N.D.C.C. § 54-52.5-03.
[21] N.D.A.G. 2015-L-04.
[22] N.D.C.C. § 54-52.5-03.
[23] *Id. See also N.D. Legis. Assembly v. Burgum*, 2018 ND 189, ¶ 18, 916 N.W.2d 83; *State ex rel. Link v. Olson*, 286 N.W.2d 262, 268 (N.D. 1979) (defining an appropriation).

The 2023 legislation that provided the new appropriation language to N.D.C.C. § 54-52.5-03 also increased RIO's administrative expenses by creating the incentive compensation program. It is reasonable, but not indisputable, to infer from this that the additional appropriation authority was intended to provide funding for the new program created in the same bill, even though the connection was not explicitly stated in the bill. That reasonable inference is confirmed by other extrinsic aids for statutory interpretation—including the legislative history, the object sought to be attained, and the circumstances under which the statute was enacted—which clearly demonstrate that the Legislature intended to authorize RIO to pay incentive compensation with client fund earnings when it amended N.D.C.C. § 54-52.5-03 in 2023.[24]

The incentive compensation program is part of a new internal investment strategy intended to increase investment returns while decreasing costs as a result of internal management.[25] In written testimony to Senate and House committees, RIO identified the requirements for the internal investment strategy as: seven new full time employees, "adequate classification of roles,"[26] and "incentive compensation *funded on a continuing basis*."[27] RIO's written testimony also explained

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[24] *See* N.D.C.C. § 1-02-39 (identifying aids in construction of ambiguous statutes).

[25] *Hearing on S.B. 2022 Before the S. Appropriations Comm.*, 2023 N.D. Leg. (Jan. 6, 2023) (Written Testimony of Janilyn Murtha, JD MPAP, Exec. Dir., Chad Roberts, MAc, Deputy Exec. Dir./Chief Ret. Officer, Scott Anderson, CFA, MBA, Chief Inv. Officer, & Ryan Skor, CPA, MBA, Chief Fin. Officer/Chief Operating Officer, N.D. Ret. & Inv. Off.); *Hearing on S.B. 2022 Before the S. Appropriations Comm. – Hum. Res. Div.*, 2023 N.D. Leg. (Jan. 19, 2023) (Written Testimony of Janilyn Murtha, JD MPAP, Exec. Dir., Chad Roberts, MAc, Deputy Exec. Dir./Chief Ret. Officer, Scott Anderson, CFA, MBA, Chief Inv. Officer, & Ryan Skor, CPA, MBA, Chief Fin. Officer/Chief Operating Officer, N.D. Ret. & Inv. Off.); *Hearing on S.B. 2022 Before the H. Appropriations Comm. – Gov't Operations Div.*, 2023 N.D. Leg. (Mar. 9, 2023) (Written Testimony of Janilyn Murtha, JD MPAP, Exec. Dir., Chad Roberts, MAc, Deputy Exec. Dir./Chief Ret. Officer, Scott Anderson, CFA, MBA, Chief Inv. Officer, & Ryan Skor, CPA, MBA, Chief Fin. Officer/Chief Operating Officer, N.D. Ret. & Inv. Off.).

[26] Adequate classification was a reference to a request to exclude RIO employees from the state employee classification system. The bill that authorized the incentive compensation program also amended N.D.C.C. § 54-44.3-20 to exempt from classified service "[i]nvestment and fiscal operations positions of the state retirement and investment office necessary for the management of the investment of funds under the control of the state investment board." S.B. 2022, 2023 N.D. Leg., § 3.

[27] *Hearing on S.B. 2022 Before the S. Appropriations Comm.*, 2023 N.D. Leg. (Jan. 6, 2023) (Written Testimony of Janilyn Murtha, JD MPAP, Exec. Dir., Chad Roberts, MAc, Deputy Exec. Dir./Chief Ret. Officer, Scott Anderson, CFA, MBA, Chief Inv. Officer, & Ryan Skor, CPA, MBA, Chief Fin. Officer/Chief Operating Officer, N.D. Ret. & Inv. Off.) (emphasis added); *Hearing on S.B. 2022 Before the S. Appropriations Comm. – Hum. Res. Div.*, 2023 N.D. Leg. (Jan. 19, 2023) (Written Testimony of Janilyn Murtha, JD MPAP, Exec. Dir., Chad Roberts, MAc, Deputy Exec. Dir./Chief Ret. Officer, Scott Anderson, CFA, MBA, Chief Inv. Officer, & Ryan Skor, CPA, MBA,

the need for amending N.D.C.C. § 54-52.5-03 in particular for those expenses: "[g]enerally, investment management costs fall within the scope of continuing appropriation authority granted by the legislature in NDCC [sic] 21-10-06.2; however, because this proposal involves cost savings achieved by internalizing investment operations through additional permanent FTE's and infrastructure it falls within the scope of NDCC [sic] 54-52.5-03."[28]

Consistent with its written testimony, RIO's oral testimony specified that the expansion of RIO's continuing appropriation authority in the amendment to N.D.C.C. § 54-52.5-03 would be used to pay for incentive compensation. When describing the proposed internal investment strategy at a Senate committee hearing, RIO's Chief Investment Officer stated, "the investment role classification system is different from our typical state classification system so we're asking for an adequate classification of roles and also we're asking for some legislation in addition *for an incentive compensation program funded on a continuing basis from continuing appropriations*."[29] At another Senate committee hearing, RIO's Chief Financial Officer/Chief Operating Officer (CFO/COO) explained that "incentive compensation is a vital part of the investment professional compensation throughout industry, and *this amendment would allow for that to be paid out of earnings of the fund* so the continuing appropriation would be the incentive compensation plan barring, or requiring, approval of the State Investment Board."[30] Later in the testimony, RIO's CFO/COO elaborated:

> The authority to bring the in-house investing already exists. That is already within our authority under the SIB chapter, the 21-10 chapter. We have the ability to do that. *The change that we're asking for in Century Code is solely related to the incentive compensation for the staff* because currently we are under the classified system, which keeps each position in a specified pay range and it doesn't, our appropriation authority covers our salaries, it covers the salaries that we're allowed to pay, it doesn't allow, have room for an incentive compensation plan. The incentive compensation language is what we've included in here to allow for that. One is the declassification, for lack of a better term, *but two is the language that*

Chief Fin. Officer/Chief Operating Officer, N.D. Ret. & Inv. Off.) (emphasis added); *Hearing on S.B. 2022 Before the H. Appropriations Comm. – Gov't Operations Div.*, 2023 N.D. Leg. (Mar. 9, 2023) (Written Testimony of Janilyn Murtha, JD MPAP, Exec. Dir., Chad Roberts, MAc, Deputy Exec. Dir./Chief Ret. Officer, Scott Anderson, CFA, MBA, Chief Inv. Officer, & Ryan Skor, CPA, MBA, Chief Fin. Officer/Chief Operating Officer, N.D. Ret. & Inv. Off.) (emphasis added).

[28] *Id.*

[29] *Hearing on S.B. 2022 Before the S. Appropriations Comm. – Hum. Res. Div.*, 2023 N.D. Leg. (Jan. 19, 2023) (Statement of Scott Anderson, CFA, MBA, Chief Inv. Officer, N.D. Ret. & Inv. Off.) (emphasis added).

[30] *Hearing on S.B. 2022 Before the S. Appropriations Comm. – Hum. Res. Div.*, 2023 N.D. Leg. (Jan. 23, 2023) (Statement of Ryan Skor, CPA, MBA, Chief Fin. Officer/Chief Operating Officer, N.D. Ret. & Inv. Off.) (emphasis added).

> *allows incentive compensation to be paid out of earnings of the fund rather than solely the appropriation of the agency.* So that's the language that we would need changed in Century Code.[31]

The only provision regarding "earnings" in the bill is the amendment to N.D.C.C. § 54-52.5-03. The legislative history is replete with testimony making it clear that the 2023 amendment to that section was intended to provide continuing appropriation authority for RIO's incentive compensation payments to be paid out of fund earnings.

Furthermore, RIO explained in testimony to the House that incentive compensation amounts would not be included in the salaries and wages line item in RIO's budget and would be set by the SIB. At a House committee hearing, in response to a legislator who asked whether the SIB would have oversight over the amounts paid for incentive compensation, RIO's Executive Director responded in the affirmative and explained that if the legislation passed, the SIB would establish a program for determining the incentive compensation amounts.[32] Later in the testimony, when asked by another legislator how much RIO would pay its employees, RIO's Executive Director responded, "We'll pay them a base salary which is in the budget before you . . . and then they would have the opportunity to earn . . . that incentive compensation."[33] Based on RIO's testimony to both legislative bodies, the Legislature clearly understood that the statutory amendments would provide authority for incentive compensation at a level to be determined in the future by the SIB rather than a set amount to be specifically appropriated.

In light of this legislative history, the intended purpose of the amendment to N.D.C.C. § 54-52.5-03, and the circumstances under which the incentive compensation program was created, the use of fund earnings to make the incentive compensation payments is "lawfully authorized." RIO's continuing appropriation statute therefore provides the necessary authority to carry out the incentive compensation program.

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[31] *Id.* (emphasis added).

[32] *Hearing on S.B. 2022 Before the H. Appropriations Comm. – Gov't Operations Div.*, 2023 N.D. Leg. (Mar. 31, 2023) (Statement of Janilyn Murtha, JD MPAP, Exec. Dir., N.D. Ret. & Inv. Off.). The Executive Director's explanation is also consistent with the plain language of N.D.C.C. § 54-52.5-04, which authorizes the SIB to develop and approve annually the incentive compensation program and requires RIO to report at least once each interim to legislative management regarding the status of the program, including the total incentive amounts paid.

> **Representative Meier:** Jan, when you, if this was approved, then would your Board have oversight over the amounts of what would be paid for either a bonus or an incentive salary?
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> **Jan Murtha:** Rep. Meier, Mr. Chairman and members of the Committee, yes . . . it would have to be a program that has clear rules . . . we haven't worked all of those details out.

[33] *Hearing on S.B. 2022 Before the H. Appropriations Comm. – Gov't Operations Div.*, 2023 N.D. Leg. (Mar. 31, 2023) (Statement of Janilyn Murtha, JD MPAP, Exec. Dir., N.D. Ret. & Inv. Off.).

The Legislature could have altered or eliminated that continuing appropriation authority in the 2025 Legislative Session. RIO's testimony regarding its budget during that session included discussion of the continuing appropriation to provide incentive compensation.[34] No amendments to N.D.C.C. § 54-52.5-03 were made in 2025, however, and no other restrictions were placed on the incentive compensation plan.

Although the Legislature did not provide RIO an explicit appropriation for the incentive compensation payments for the current biennium,[35] such an appropriation was unnecessary. RIO has continuing appropriation authority under the amended language of N.D.C.C. § 54-52.5-03 to use earnings to pay incentive compensation. RIO also has implied appropriation authority to compensate its employees within prudent limits in order to carry out its fiduciary obligations. This opinion need not address whether the implied authority separately enables RIO to pay incentive compensation, however, because RIO has the necessary appropriation authority under its continuing appropriations.

SUMMARY

The plain language of N.D.C.C. §§ 54-52.5-03 and 54-52.5-04, the relevant legislative history, and other extrinsic aids of statutory construction all clearly reveal legislative intent to grant RIO continuing appropriation authority to make incentive compensation payments with earnings from client funds. It is my opinion that N.D.C.C. § 54-52.5-03 authorizes RIO to make the incentive compensation payments without a separate, specific legislative appropriation.

Sincerely,

Drew H. Wrigley
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.[36]

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[34] *See e.g., Hearing on H.B. 1022 Before the H. Appropriations Comm. – Gov't Operations Div.*, 2025 N.D. Leg. (Jan. 21, 2025) (Statement of Scott Anderson, CFA, MBA, Chief Inv. Officer, N.D. Ret. & Inv. Off.).
[35] H.B. 1022, 2025 N.D. Leg., § 1; S.B. 2022, 2023 N.D. Leg., § 1.
[36] *See State ex rel. Johnson v. Baker*, 21 N.W.2d 355 (N.D. 1946).