

**OPINION  
68-343**

July 16, 1968 (OPINION)

Honorable Walter Christensen

State Treasurer

RE: State - Institutions Benefit Fund - Disposition

This is in response to your letter of July 2, 1968, in which you state the following:

Currently the State Treasurer has a balance of \$1,850.45 deposited to the credit of fund No. 382, titled, 'Institutional Benefit Fund', as referred to in Section 12-45-07 of the North Dakota Century Code.

Since the law is very vague as to the purpose and use for which these funds are intended, we respectfully request your opinion as to what disposition should be made of these funds and what action should be taken on the part of the State Treasurer to insure full compliance with Section 12-45-07 and other sections pertaining to this fund."

The "benefit fund for penal institutions" as found in Section 12-45-07 of the North Dakota Century Code apparently has its roots in Chapter 166 of the 1917 Session Laws. Pursuant to the provisions of said chapter, the State Treasurer was to place the money received to the credit of the general benefit fund of the penitentiary or reform school, as the case may be. The present language is, to a degree, the result of the revision accomplished by the Code Commission of 1943. The revisor's note states as follows:

Revised for clarity without change in meaning, except that the phrase 'to the credit of the general benefit fund of the penitentiary or reform school, as the case may be' has been changed to 'to the credit of the benefit fund for penal institutions.' The state treasurer has set up a fund known as the benefit fund for penal institutions and all moneys described in this section go into such fund."

In checking the pertinent indexes and other statutory provisions, we are unable to find any law which created the benefit fund for penal institutions. Nor are we able to find any law creating a general benefit fund of the penitentiary or the reform school. According to the revisor's note we can assume that the State Treasurer, at that time or some time prior, merely used such designation for bookkeeping purposes and the name given to such fund has been carried forward. We are also cognizant that such might have been a practice prior to the adoption of Section 186 of the North Dakota Constitution as presently found.

Our research has not disclosed any legislation on the disposition of such fund.

The North Dakota Legislature in 1963, through Chapter 372, enacted what is now Section 56-01-18, as found in the 1967 Supplement to the North Dakota Century Code, which provides as follows:

56-01-18. DISPOSITION OF ESCHEATED PROPERTY. The proceeds of all property which shall fall to the state by escheat shall be deposited in the permanent fund of the common schools of the state. All funds in the state treasury in the escheated estate fund on the effective date of this section shall be transferred to the permanent fund of the common schools."

This section, however, is predicated on the presumption that the funds in question have escheated to the State. We cannot as a matter of law conclude that the funds you refer to have, in fact, or by law, escheated to the State. Nor do we believe that an escheat can be accomplished without further action on the part of some State official.

On the basis of the foregoing, we would recommend that legislation be introduced providing for the disposition of the funds in question. The legislation could provide that funds which have been held for a certain period of time without any claim being submitted against same can be dispersed or transferred in a certain manner. If the Legislature so desired, it could make those funds available to the institutions for certain purposes. At this point we are entering an area which permits discretion and exercising of judgment, which we believe should be left to either the administrators of the fund or the Legislature.

HELGI JOHANNESON

Attorney General