

LETTER OPINION
79-6

December 12, 1979 (OPINION)

Honorable Herschel Lashkowitz
State Senator
District 21
P.O. Box 2621
Fargo, North Dakota 58102

Dear Senator Lashkowitz:

This is in response to your letter dated October 8, 1979, requesting an opinion regarding the implementation of Chapter 87 of the 1979 Session Laws (Senate Bill No. 2487) entitled Capital Construction Fund. You state that your inquiry is directed at the so called "triggering mechanism" contained in Section 1 of Chapter 87. You go on to state:

My basic questions are three-fold:

1. An interpretation of Senate Bill No. 2487 and its purposes.
2. An interpretation of the status of the general fund and transfers therein prior to June 30, 1979.
3. Transfer from so called special funds to the general fund after June 30, 1979, by any of the various departments or agencies funded by laws enacted by the 46th Legislative Assembly.

The basic question which we must address ourselves to is whether the "general fund" cash balance exceeded the \$148,600,000.00 specified in Senate Bill No. 2487 by an amount to allow the construction of any of the buildings authorized by that law.

Nowhere in the statutes of the State of North Dakota is there to be found a precise definition of the term "general fund." Apparently it is not defined by any other law nor by the regulations of the Department of Accounts and Purchases or the State Treasurer's office.

Perhaps the term "general fund" might be defined by past practices; however, that has not been consistent with regard to one important item, namely, the operating fund balances of the institutions of higher education, the Agricultural Experiment Station, and the Cooperative Extension Service. In prior biennial periods these operating fund balances have not been included as part of the general fund cash balance at the end of the biennium. However, during the 1979 Legislative Session they were included as part of the general fund cash balance projected for June 30, 1979, and 1980. These projections were made by the Department of Accounts and Purchases and used as the basis for establishing the trigger mechanism or levels specified in Senate Bill No. 2487.

Section 1 of Chapter 87 provides:

SECTION 1. TRANSFER.) In the event that the cash balance in the general fund of the state treasury as of the close of business on June 30, 1979, less outstanding financial obligations for the biennium ending June 30, 1979, to be paid after June 30, 1979, exceeds \$148,600,000.00, the director of the department of accounts and purchases, after approval of the budget section of the legislative council, shall direct the state treasurer to transfer from the general fund to the state capital construction fund the sum of \$10,730,000.00, or so much thereof as may be necessary, or the amount by which the cash balance in the general fund on the close of business on June 30, 1979, less outstanding financial obligations for the biennium ending June 30, 1979, to be paid after June 30, 1979, exceeded \$148,600,000.00 whichever is less. In the event that the cash balance in the general fund of the state treasury on June 30, 1980, exceeds \$110,550,000.00, the director of the department of accounts and purchases, after approval by the budget section of the legislative council, shall direct the state treasurer to transfer from the general fund to the state capital construction fund that amount of funds that were in excess of \$110,550,000.00, or so much thereof as may be necessary, for the projects listed in section 2 of this Act for which funds were not previously transferred from the general fund to the capital construction fund, or the amount by which the cash balance in the general fund on the close of business on June 30, 1980, exceeded \$110,550,000.00 whichever is less. Such funds shall be expended by the various agencies, departments, and institutions for the construction or addition, remodeling, and equipping of buildings in accordance with specific appropriations made by the legislative assembly in section 2 of this Act. (Emphasis added).

The title to Chapter 87 describes the Act as one "for a conditional transfer of funds to a state capital construction fund" for the purpose of the "construction, remodeling, and equipping of, or additions to, buildings of state agencies, departments, and institutions." The facilities to be constructed and the order of priority for their construction are listed in Section 2 of Chapter 87. The condition necessary for the availability of the appropriation made in Section 2 for the commencement of the construction of a facility is the existence in the capital construction fund of an amount sufficient to complete the facility.

The amount, if any, of funds to be available for the capital construction fund from the general fund is determined by that part of Section 1 of Chapter 87 which requires that there be an amount exceeding \$148,600,000 remaining in "the general fund of the state treasury" as of the close of business on June 30, 1979, after "outstanding financial obligations" for the 1977-79 biennium are deducted, before any funds may be transferred to the construction fund.

The basic issue presented by your inquiry is whether or not the "cash balance in the general fund" referred to in Section 1 of Chapter 87

should include the amounts contained in the special or operating fund balances of the institutions of higher education, including the extension division and the experiment stations of the North Dakota State University.

Section 15-10-12 of the North Dakota Century Code creates a special operation fund for each institution under the control of the Board of Higher Education. These funds are to be maintained in the State Treasury and all institutional income and collections are to be deposited therein. All rent or income from property donated or granted by the United States to institutions under the terms of the Enabling Act and the State Constitution must also be deposited in the special operating fund of each institution. Finally, the balance of funds not transferred during a biennium from an institution's general fund appropriation is to be deposited in the special operating fund of each institution "at the beginning of the twenty-fourth month of the biennium."

An Attorney General's opinion dated September 13, 1963, interpreting the constitutional and statutory requirements regarding the depositing of public moneys in the State Treasury, including section 15-10-12, stated:

It is, therefore, our opinion that all income of institutions of higher learning, including income from tuition fees, produce, etc., must be deposited with the State Treasurer. It is our further opinion that the income is to be placed in a special fund by the State Treasurer and that it is to be used only for the purpose for which it was appropriated, raised, or obtained. This conclusion is in harmony with the "Enabling Act" and its provisions relating to educational grants and income for education institutions and Article 54 of the North Dakota Constitution.

Chapter 25 of the 1977 Session Laws makes a series of line item appropriations from income and the general fund for the 1977-79 biennium to defray the expenses of the extension division and the experiment stations of the North Dakota State University. Section 1 of Chapter 25 further provides:

Any additional income including funds from the federal government and gifts and donations from private sources received by the North Dakota main experiment station, branch stations, and the cooperative extension division, except as otherwise provided by law, are hereby appropriated for the purpose designated in the gift, grant, or donation; however, public moneys from local sources, which shall include receipts from sale of grains, personal services, dairy products, livestock, and other agricultural products at the North Dakota main experiment station, branch experiment stations, and cooperative extension division, may be expended in excess of that specifically appropriated through biennial appropriations bills of the legislative assembly only in the event that an authorization has first been received from the subcommittee on budget of the legislative council. The balances of all existing moneys on deposit in the name of the North Dakota state university main experiment station, the branch experiment

stations, and the cooperative extension division, except grants, gifts, and donations from private sources, along with all subsequent receipts of such moneys, shall be deposited in a special fund in the state treasury. Hereafter, this fund shall be referred to as an operating fund and shall also be the depository for transfers from the general fund, and balances therein shall not refer to any other fund under the terms of section 54-44.1-11. All of the moneys in the operating fund shall remain in such fund until expended pursuant to a specific legislative appropriation or an authorization from the subcommittee on budget of the legislative council, and the balances of such moneys except those received from the federal government or as gifts from private sources, shall be used to reduce the amount of moneys to be expended pursuant to the general fund appropriation only to the extent that the encumbered balance in the operating fund on June 30, 1977, exceeds the estimated income for the biennium ending June 30, 1979. The state board of higher education is authorized to approve transfer of funds between categories of expenditures, and will notify the director of the department of accounts and purchases of any such transfers within ten days following such authorization.

In order to attempt to interpret the meaning of this language, a detailed review is necessary. The lengthy first sentence quoted above makes a continuing appropriation of three different kinds of income that might be received by the agencies during the biennium in addition to that already appropriated on a line item basis in the Act. Those three kinds of income are described as "funds from the federal government," "any gifts and donations from private sources," and "public moneys from local sources," although the appropriation of the latter in excess of any specific or line item appropriation is made conditional upon authorization from the Subcommittee on Budget of the Legislative Council.

The next sentence directs that any moneys in the agencies' account at the end of the previous biennium be deposited in their operating fund for the 1977-79 biennium. In other words, any unexpended funds from the 1975-77 biennium were to be carried over into the 1977-79 biennium, rather than being canceled as unexpended appropriations that would otherwise be done in accordance with section 54-44.1-11 of the North Dakota Century Code.

Then the language provides that the same operating fund shall be the depository for general fund appropriations during the biennium, with expenditures to be made only pursuant to legislative appropriations (i.e., the line item appropriations made earlier in the Act) or as authorized by the Budget Subcommittee (as explained in the preceding paragraph).

Finally, the provision allows the carryover balance included in the operating fund to be expended in lieu of general fund appropriations only to the extent necessary to make up for anticipated shortages in income during the biennium. It does this by stating that the carryover balance shall be used to reduce the general fund appropriations only to the extent that the balance in the operating fund at the beginning of the biennium is greater than the estimated

income for the biennium. It is noted that this provision is made inapplicable to federal grants and private gifts, both of which are appropriated on a continuing basis by other language in the Act as explained above.

In other words, funds unexpended by the agencies as of the end of the previous biennium are to be carried over into their current biennial operating fund and not used to decrease their legislative appropriations unless the amount of carryover is so large as to be greater than the agencies' estimated income for the biennium. If their actual income should turn out to be less than estimated, then the carryover funds may be used to make up for the income deficiency.

The apparent purpose of this provision is to ensure the ability of the Agricultural Experiment Station and Cooperative Extension Service to carry out the programs authorized in their budgets even if their income from the sale of agricultural products, etc., should be less than estimated for the biennium. This intent also recognizes the reason for the existence of the carryover balance as being increases in income beyond that estimated for earlier biennial periods, so that the purpose is simply to use income surpluses from the past to offset potential deficits in the future.

The complex nature of this provision (Section 1, Chapter 25) and the funds described therein as well as an attempt such as this to explain them in simple terms means that it is legitimately and easily subject to differing interpretations and understandings.

On the one hand, it sets an amount aside as a "special fund" or "operating fund" which may only be used by the Experiment Station and Extension Service. That obviously could be interpreted as a basis for excluding the amount in the fund on June 30, 1979, from the "general fund" cash balance on that same date.

This office has on one previous occasion given interpretation to the language set forth above from Section 1 of Chapter 25. Our research indicates that this language first appeared in the 1969 appropriation for the extension division and experiment stations (Chapter 2, S.L. 1969). In a letter dated November 24, 1970, addressing this language, we stated:

Section 186 of the North Dakota Constitution requires an appropriation for all expenditures. However, as I view the above provision the money has been appropriated by the Legislature with the added provision that such additional funds, although appropriated, may be expended only upon approval of the subcommittee on budget of the Legislative Research Committee. It still remains an appropriation with one additional requirement added before it may be expended. The wording of the provision may not be as clear and concise as it perhaps should be, but I believe this is the import of the legislation and I believe it meets the constitutional requirements.

On the other hand, the amount so set aside has some important characteristics that make it identifiable with the moneys in the general fund account as it is maintained by the State Treasurer.

Chapter 25 provided for the unexpended balance from the previous biennium to be carried over into this operating fund as of July 1, 1975. It also states the two circumstances under which this carryover balance could have been expended during the biennium -- 1) pursuant to a specific legislative appropriation (e.g., to offset a reduction in estimated income that was appropriated in the Act), and 2) to reduce the amount of line item appropriations from general fund sources (but only to the extent that the balance exceeded the total estimated income appropriated for the biennium).

The moneys in the carryover balance that were not so expended were available at the end of the biennium to be carried over into the next biennium by the succeeding appropriations Act (Chapter 8, S.L. 1979). On June 30, 1979, in other words, the operating fund included some unexpended, unobligated, and unencumbered moneys which could reasonably be interpreted to be a part of the "cash balance of the general fund" as of that same date for the purposes of the Capital Construction Fund Act.

Accordingly, it is our opinion that with respect to public moneys contained in the special funds established by section 15-10-12, that such public moneys have been appropriated pursuant to the requirements of Section 186 of the State Constitution to the respective institutions of higher learning for the use of each such institution; are subject to the control of the Board of Higher Education pursuant to the provisions of Section 6(e) of Article 54 of the Amendments to the State Constitution; and were not a part of or included in the general fund of the State Treasury as of the close of business on June 30, 1979, for purposes of Chapter 87 of the 1979 Session Laws.

However, with respect to public moneys contained in the operating fund balance described in Chapter 25 of the 1977 Session Laws, it is our opinion that neither of the above discussed approaches would be legally objectionable interpretations of the relationship of such operating fund balance to the cash balance in the general fund on June 30, 1979, for the purposes of Chapter 87 of the 1979 Session Laws. The authority provided in Chapter 87 for the Budget Section of the Legislative Council to approve any transfers from the general fund to the Capital Construction Fund would appear broad enough for it to resolve this issue based upon either of the above interpretations. However, as in all such cases, the courts would make the final dispositive determination as to the validity of any resulting action by the Budget Section.

It is hoped that the foregoing will be of assistance.

Sincerely,

ALLEN I. OLSON

Attorney General