

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 93-F-24

Date issued: December 29, 1993

Requested by: Henry C. Wessman, Executive Director, North
Dakota Department of Human Services

- QUESTION PRESENTED -

Whether any mechanism exists under the North Dakota Constitution or North Dakota laws for appropriating additional funds required by amendments to Section 13971 of Public Law 103-66 (Omnibus Budget Reconciliation Act of 1993) before the next legislative session.

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It is my opinion that no mechanism exists under the North Dakota Constitution or North Dakota laws for appropriating additional funds required by amendments to Section 13971 of Public Law 103-66 (Omnibus Budget Reconciliation Act of 1993) before the next legislative session.

- ANALYSIS -

The Omnibus Budget Reconciliation Act of 1993 (Public Law 103-66), amended the Food Stamp Act to eliminate some provisions which allowed states to receive more than 50% of their administrative reimbursement in some cases. In doing so, Congress recognized that not every state's legislature meets annually. As a result Congress provided a procedure to allow a delay in implementation for those states where the state's attorney general certifies that there is no mechanism for appropriating additional funds before the next regular legislative session as follows:

In the case of a State whose legislature meets biennially, and does not have a regular session scheduled in calendar year 1994, and that demonstrates to the satisfaction of the Secretary of Agriculture that there is no mechanism, under the constitution and laws of the State, for appropriating the additional funds required by the amendments made by this section before the next such regular legislative session, the Secretary may delay the

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effective date of all or part of the amendments made by section 13961 until the beginning date of a calendar quarter that is not later than the first calendar quarter beginning after the close of the first regular session of the State legislature after the date of enactment of this Act.

Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, ? 13971(b)(2)(B), 107 Stat. 312, 680 (1993). (Emphasis supplied.)

This provision requires the Department to satisfy the Secretary that there is "no mechanism, under the constitution and laws of the State, for appropriating" additional funds. The House Report discussing the legislation states that the reductions apply to payments to states for expenditures at the end of the state fiscal year that ends during 1995 "in the case of a state with a State legislature which is not scheduled to have a regular legislative session in calendar year 1994." H. R. Rep. No. 111, 103rd. Cong. 1st Sess., at 56 (1993). However, the comments do not address what type of information is necessary to meet the statutory requirement that the Secretary be satisfied that no mechanism exists for appropriating additional funds. In an October 29, 1993, memorandum to State Food Stamp Program Directors, the Regional Director for the Food Stamp Program requested the Department to provide him with the following information to meet this requirement:

- a. Documentation showing that the State legislature meets only biennially;
- b. Documentation showing that the State legislature does not meet in FY 1994;
- c. Certification of the State's Attorney General, along with any supporting documentation, that there is no mechanism under the State constitution and laws for appropriating funding prior to the next regular legislative session;
- d. Information as to when the next regular legislative session is scheduled to start and, if available, is expected to end.

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The purpose of this exception is to prevent the interruption of the food stamp program when federal financial participation rates are lowered.

In North Dakota only the people or the Legislature may appropriate money. See, State ex rel. Walker v. Link, 232 N.W.2d 823, 826-827 (N.D. 1975)(Initiated measure referring appropriation for University of North Dakota ineffective as effecting a refusal to fund a constitutional function); and Langer v. State, 284 N.W. 238, 254 (N.D. 1939)(People may provide for appropriation through constitutional amendment.) The North Dakota Constitution provides, in part:

All public moneys, from whatever source derived, shall be paid over monthly by the public official, employee, agent, director, manager, board, bureau, or institution of the state receiving the same, to the state treasurer, and deposited by him to the credit of the state, and shall be paid out and dispersed only pursuant to appropriation first made by the legislature. . . .

N.D. Const. art. X, ? 12(1). "[A]n appropriation, in the sense that word is used in our Constitution, 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 amounts so set apart, and no more, for that object." State ex rel. McDonald v. Holmes, 123 N.W. 884, 886-87 (N.D. 1909). See also Campbell v. Towner County, 3 N.W.2d 822, 825 (N.D. 1941). This definition of appropriation has been consistently used when interpreting North Dakota Constitution Article X, Section 12(1) and its predecessors. See Sunbehm Gas, Inc. v. Conrad, 310 N.W.2d 766, 769 (N.D. 1981).

"All expenditures of the state and of its budget units of moneys drawn from the state treasury must be made under authority of biennial appropriations acts, which must be based upon a budget as provided by law, and no money may be drawn from the treasury, except by appropriation made by law as required by section 12, article X of the Constitution of North Dakota." N.D.C.C. ? 54-44.1-09. There is no provision, aside from the requirement of a biennial appropriation act under N.D.C.C. ? 54-44.1-09, requiring the Legislature to make an appropriation for a non-constitutionally required government

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function. Cf. State ex rel Walker v. Link, 232 N.W.2d at 826-827. The provision of food stamps is not a constitutionally mandated government function and therefore the Legislature may refuse to fund it or may decrease its funding as it chooses.

No agency head may expend more money than the Legislature has appropriated or use money appropriated for one purpose for another without having secured beforehand an order from the Emergency Commission authorizing such use of funds. N.D.C.C. ? 54-16-03. Although the Legislature has established the Emergency Commission under N.D.C.C. ch. 54-16 which can authorize an agency to spend more money than was appropriated for a given purpose in an emergency, use of this procedure does not actually appropriate additional funds.

N.D.C.C. ? 54-16-04 provides that the State Emergency Commission "in an extremity may authorize money to be drawn from the state treasury to meet the emergency until such time as the legislative assembly can make an appropriation available therefore." The appropriation of additional funds is not made until the next regular legislative session under this law. Therefore, resort to the Emergency Commission under N.D.C.C. ch. 54-16 is not a mechanism for appropriation of additional funds before the next regular legislative session.

Therefore, it is my opinion that neither the constitution nor laws of North Dakota presently provide a mechanism for the appropriation of additional funds to the Department of Human Services beyond those contained in the most recent biennial appropriation act for the Department of Human Services, 1993 N.D. Sess. Laws, ch. 2.

- EFFECT -

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.

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Assistant Attorney General

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