

Mr. Al Jaeger
January 25, 1993

**LETTER OPINION
93-L-2**

January 25, 1993

Mr. Al Jaeger
Secretary of State
State Capitol
600 E Boulevard Avenue
Bismarck, ND 58505

Dear Mr. Jaeger:

Thank you for your December 10, 1992, letter requesting an opinion from this office regarding the source of payment to persons who performed services in relationship to a requested recount pursuant to North Dakota Century Code (N.D.C.C.) § 16.1-16-01(2).

N.D.C.C. § 16.1-16-01(2) establishes when an unsuccessful candidate in a primary, general, or special election may demand a recount. Subsection 3 of section 16.1-16-01 provides the manner in which the demand must be made. The demand for a recount must be accompanied by a bond in an amount previously established by the auditor or auditors doing the recount. The demand, together with the bond, must be filed with the Secretary of State when the recount is for a congressional, state, district, or legislative office and with the county auditor when the recount is for a county office. Subsection 9 provides "[t]he expenses incurred in a recount demanded under subsection 2 of section 16.1-16-01 must be paid by the secretary of state or county auditor from the bond submitted by the person requesting the recount."

The Secretary of State's Office is in possession of a check which was given as a bond under section 16.1-16-01. You ask how payment should be made to persons who worked on the recount.

N.D. Const. art. X, 12 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 disbursed only pursuant to appropriation first made by the legislature;

This constitutional provision, however, does not prohibit the dedication or establishment of special funds. Langer v. State, 284 N.W. 238, 248 (N.D. 1939). N.D. Const. art. X, 12 does not contemplate that all moneys are deposited in the general fund or made available for general

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appropriation by the Legislative Assembly. Id.

Additionally, the North Dakota Supreme Court has suggested that "continuing appropriations are a valid 'appropriation first made by the legislature.'" Gange v. Clerk of Burleigh County District Court, 429 N.W.2d 429, 436 (N.D. 1988). The court has further suggested that the wording of legislation may itself constitute the appropriation. Menz v. Coyle, 117 N.W.2d 290, 301 (N.D. 1962). However, to be an effective appropriation, the wording must set "apart . . . a definite sum of money for a specific purpose in such a way that public officials are authorized to spend that sum, and no more, for the specific purpose." Red River Human Services Foundation v. Dept. of Human Services, 477 N.W.2d 225 (N.D. 1991). It is my opinion that the language in subsection 16.1-16-01(2) does not set apart a definite sum of money.

In this case, the Secretary of State's Office is authorized to accept bond moneys and directed to pay the costs associated with the recount from the bond. Although the bond moneys are in the possession of a state agency, the moneys essentially are held in trust to pay the cost of the recount. On May 23, 1988, Attorney General Nicholas Spaeth issued an opinion which discussed the relevance of funds in the hands of the state being impressed with a trust.

The drafters of the N.D. Const. art. X, § 12, recognized the trust fund concept by providing a continuing appropriation for the state hail insurance fund, the state bonding fund, the state fire and tornado fund, the worker's compensation fund, the teachers fund for retirement, state tax refunds, and income of the state institutions derived from permanent trust funds. All of the above-mentioned funds are in some respect impressed with a trust for the benefit of a class of individuals with a recognizable equitable interest in the funds. I do not interpret N.D. Const. art. X, § 12's specific enumeration of the various trust funds as creating a negative implication that other funds similarly impressed with a trust cannot be afforded special consideration when applying the requirements of the constitution.

It is my conclusion that moneys held or used by the state, and subject to an equitable interest, are not on the same constitutional level of scrutiny as are general funds in which the state possesses all legal and equitable rights. This would assuredly include moneys that are granted to an agency for a specific purpose. Grants, by definition, include conditions as to their use. As a result, the money is subject to the equitable interest of the grantor or an intended class of beneficiaries and is not available to general appropriation for other purposes by the Legislature. It is my opinion that the Legislature may constitutionally authorize an agency to accept grant moneys and expend such moneys on a continuing basis in accordance with the conditions of the grant.

Letter from Attorney General Nicholas J. Spaeth to Mr. S.F. Hoffner, May 23, 1988.

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It is therefore my opinion that although N.D.C.C. § 16.1-16-01 is not an appropriation, it does dedicate the funds to the Secretary of State's Office and authorizes him to receive and expend bond moneys used to pay the cost of a recount demanded under subsection 2 of N.D.C.C. § 16.-1-16-01.

A second issue concerns the mechanics of payment. Presently all funds paid by the Secretary of State to others are paid by check issued by the State Treasurer. In this case, no specific fund exists for the deposit of bond moneys to pay recount costs, the payment of the recount costs, or the refund of any excess moneys. The absence of such an account makes the Legislature's direction that the costs be paid from the bond difficult to follow. Accordingly, the State Treasurer's Office should maintain a separate account for the purpose of accepting bond moneys and for paying expenses and making refunds if the bond amount exceeds the cost of the recount.

I hope this adequately addresses your question.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

tca/krb
cc: Kathi Gilmore, State Treasurer