

**LETTER OPINION
2008-L-15**

November 18, 2008

The Honorable Robert R. Peterson
State Auditor
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Mr. Peterson:

Thank you for your letter asking me to interpret the “reserves plus surplus” balance requirements imposed on the Workforce Safety & Insurance (“WSI”) fund by N.D.C.C. § 65-04-02. For the reasons explained below, it is my opinion that WSI must consider all of its assets when calculating the amount of surplus in the fund. Further, if the State Auditor determines that WSI has refused or neglected to follow the State Auditor’s recommendations regarding an audit finding or recommendation, the State Auditor may request further guidance from this office.

I. BACKGROUND

The State Auditor is required to “perform or provide for” the audit of all state agencies once every two years.¹ The State Auditor’s 2007 financial audit notes that WSI is not in compliance with N.D.C.C. § 65-04-02. This section requires WSI to “maintain adequate financial reserves to ensure the solvency of the fund and the payment of future benefit obligations, based upon actuarially sound principles,” and also sets the minimum and maximum amount of reserves plus surplus that WSI may have in the fund. Specifically, section 65-04-02 provides that “[t]he level of financial reserves plus surplus must be at least one hundred twenty percent but may not exceed one hundred forty percent of the actuarially established discounted reserve.”

According to the State Auditor’s report,² as of June 30, 2007, the fund’s reserves plus surplus balance exceeded the maximum amount allowed by N.D.C.C. § 65-04-02. In order to comply with section 65-04-02, WSI’s fund surplus should have been between

¹ N.D.C.C. § 54-10-01(2).

² Brady, Martz & Assocs., P.C., Workforce Safety & Insurance: Independent Auditor’s Report (Oct. 19, 2007).

\$146.2 and \$292.4 million. The actual surplus was \$466.8 million, resulting in a reserves plus surplus balance equivalent to 163.9% of the discounted reserve.³

Although WSI agrees that the fund's reserves plus surplus balance for fiscal year 2007 exceeded the statutory maximum, it contends that the 62% dividend its board of directors declared in June 2008 brought the amount of reserves plus surplus for fiscal year 2008 within the range provided in N.D.C.C. § 65-04-02.⁴ But, unlike the private accounting firm that conducted the 2007 audit on behalf of the State Auditor, WSI did not include all of its assets when it calculated the amount of surplus in the fund. The agency excluded from the fund's surplus those items that it categorized as "unavailable unrestricted net assets." The items placed in this category were: Safety Education & Grants; Revolving School Loan Fund; Capital Assets; ITTP Update; and Unrealized Gains.⁵ My understanding is that even after the 62% dividend, the fund's reserves plus surplus balance exceeded the maximum amount allowed by section 65-04-02 had WSI included all of its assets when calculating the fund's surplus.

II. ANALYSIS

A. What is the Proper Method for Calculating the Fund's "Surplus"?

Your first question concerns WSI's interpretation of the word "surplus" as used in N.D.C.C. § 65-04-02. Specifically, you ask whether WSI may exclude certain categories of assets when calculating the amount of surplus in the fund. According to WSI, it excluded these assets because it believes the word "surplus," as used in section 65-04-02, means "available surplus," or the amount by which WSI's assets available for a dividend calculation exceed its liabilities.

The primary goal of statutory construction is to determine legislative intent.⁶ In doing so, one must first look at the statutory language, "giving the words their ordinary, plain language meaning."⁷ Ordinarily, an agency's construction of a statute is entitled to some deference if that interpretation does not contradict clear and unambiguous statutory language.⁸ Although WSI believes that the word "surplus," which was added

³ See WSI Financial Statements, Note 19 (June 30, 2007).

⁴ See N.D.C.C. § 65-04-19.3 (WSI has the authority to declare dividends); see also N.D.A.C. § 92-01-02-55 (setting WSI's procedures for declaring a dividend).

⁵ See Memo from Anne Green to Assistant Attorney General Matthew Sagsveen (July 10, 2008). Although WSI and the State Auditor disagree as to whether WSI may categorize assets as "unavailable unrestricted net assets" under generally accepted accounting principles, resolution of that issue is beyond the scope of this opinion.

⁶ Wahl v. Country Mut. Ins. Co., 640 N.W.2d 689, 692 (N.D. 2002).

⁷ Id.

⁸ Teigen v. State, 749 N.W.2d 505, 514 (N.D. 2008); N.D.C.C. § 1-02-39(6) (administrative construction of statute may be considered if statute ambiguous).

to N.D.C.C. § 65-04-02 by the Legislature in 2005⁹ after testimony by WSI, is ambiguous, I disagree.

In the field of accounting, the usual and accepted meaning of “surplus” is the “excess of assets over liabilities.”¹⁰ “Surplus” is ordinarily understood to represent all assets.¹¹ Thus, according to the plain meaning of N.D.C.C. § 65-04-02, the fund’s surplus is the excess of all of its assets over its liabilities.

WSI, however, argues that “surplus” has a technical meaning within the insurance industry that should apply here.¹² WSI relies on insurance laws in several states, including North Dakota, as evidence of this technical meaning. The laws cited by WSI generally prohibit insurance companies from declaring dividends to their shareholders out of surplus arising from certain types of assets.¹³ WSI, however, is not a private insurance company. Thus, this technical meaning of “surplus” does not apply to the

⁹ H.B. 1531, 2005 N.D. Leg.

¹⁰ Bader v. Cox, 701 S.W.2d 677, 681 (Tex. App.1985); County Collector of Cook County v. Franklin, 305 N.E.2d 384, 387 (Ill. App. Ct. 1973) (citing Webster’s New International Dictionary 2539 (2d ed. 1934)); Tupper v. Kroc, 494 P.2d 1275, 1280 (Nev. 1972); see Edwards v. Douglas, 269 U.S. 204, 214, 46 S.Ct. 85, 88 (1925) (“The word ‘surplus’ is a term commonly employed in corporate finance and accounting to designate an account on corporate books” which “represents the net assets of a corporation in excess of all liabilities including its capital stock.”); see also The American Heritage Dictionary 1224 (2d ed. 1991) (defining “surplus” as “[t]otal assets minus the sum of all liabilities”); Dictionary.com, <http://dictionary.reference.com/browse/surplus> (last visited Aug. 11, 2008) (defining “surplus” as “an amount of assets in excess of what is requisite to meet liabilities”).

¹¹ See McCannon v. Lusk-Mitchell Newspapers, 292 N.W. 82, 83 (S.D. 1940) (“the concept of a ‘surplus’ as representing particular assets is foreign to corporate practice and usage”).

¹² See N.D.C.C. § 1-02-03.

¹³ See N.D.C.C. §§ 26.1-10-05.1(1)(b) (“Except in the case of share dividends, surplus for determining whether dividends or other distributions may be declared may not include surplus arising from unrealized appreciation in value, or revaluation of assets, or from unrealized profits upon investments.”); 26.1-10-01(3)(a) (state agencies, such as WSI, are excluded from the definition of “insurance company” and are therefore not subject to N.D.C.C. ch. 26.1-10); Wash. Rev. Code § 48.08.030(1) (“No domestic stock insurer shall pay any cash dividend to stockholders except out of earned surplus. For the purpose of this section, ‘earned surplus’ means that part of its available surplus funds which is derived from any realized net profits on its business, and does not include unrealized capital gains or reevaluation of assets.”); N.Y. Ins. Law § 4105(a) (McKinney 2008) (“[N]o domestic stock property/casualty insurance company shall declare or distribute any dividend to shareholders except out of earned surplus,” which is “the portion of the surplus that represents the net earnings, gains or profits, after deduction of all losses, that have not been distributed to the shareholders as dividends, or transferred to stated capital or capital surplus or applied to other purposes permitted by law but does not include unrealized appreciation of assets.”).

meaning of the term as it is used in N.D.C.C. § 65-04-02.¹⁴ Instead, these laws support the conclusion that “surplus” is understood to include all of an entity’s assets, unless the ordinary meaning of the term is specifically altered or excluded by statute.

WSI also argues that the legislative history of N.D.C.C. § 65-04-02 shows that “surplus” really means “available surplus.” It is inappropriate, however, to look at legislative history where, as here, the statutory language is clear and unambiguous.¹⁵ WSI’s interpretation of section 65-04-02 is not entitled to deference because it contradicts the unambiguous language of the statute.¹⁶

As discussed above, it is my opinion that “surplus,” as used in N.D.C.C. § 65-04-02, includes all of WSI’s assets. The State Auditor, who is certainly qualified to determine whether a particular item is an “asset” under generally accepted accounting principles, believes that the items WSI has labeled as “unavailable unrestricted net assets” and excluded from its calculation of surplus are assets that should be included when calculating the fund’s surplus.¹⁷ And, although WSI has given certain assets this label, it does not dispute that they are “assets.” Therefore, it is my opinion that WSI may not exclude “unavailable unrestricted net assets” when calculating the amount of surplus in the fund under section 65-04-02.

¹⁴ See McCullagh v. Fortune, 38 N.W.2d 771, 777 (N.D. 1949) (citation omitted) (a word used in a statute will be given its popular meaning “unless the very nature of the subject indicates, or the context suggests, that it is used in its technical sense.”); see N.D.A.G. 2001-F-05 (concluding that, although they are different structures from an engineering standpoint, “bridge” may include “culvert” because “from a practical and popular standpoint a culvert is simply another type of bridge . . .”).

¹⁵ State v. Skarsgard, 740 N.W.2d 64, 66 (N.D. 2007) (“Only if the language of a statute is ambiguous will extrinsic aids be used to ascertain the legislature’s intent.”); N.D.C.C. § 1-02-39 (court may consider extrinsic aids when interpreting an ambiguous statute); see also Pryatel v. T.E., 740 N.W.2d 100, 102 (N.D. 2007) (“If statutory language is clear and unambiguous, the letter of the statute cannot be disregarded under the pretext of pursuing its spirit, because the Legislature’s intent is presumed clear from the face of the statute.”).

¹⁶ See Teigen, 749 N.W.2d at 514 (an agency’s “construction of a statute is ordinarily entitled to some deference if that interpretation does not contradict clear and unambiguous statutory language”).

¹⁷ See Or. Op. Atty. Gen. No. OP-6382, 1990 WL 519221 (“The interpretation of [accounting] principles and their application to specific assets ultimately are within the professional competence of accountants, not attorneys.”); see also N.D.C.C. § 54-10-01(2) (State Auditor has the duty to “determine the contents of” state agency’s audits).

B. What Remedy is Available to the State Auditor if the Fund's Reserves Plus Surplus Balance Exceeds the Maximum Amount Allowed by N.D.C.C. § 65-04-02?

As discussed above, the 2007 financial audit report noted WSI was not in compliance with this statute. The State Auditor recommended that the agency "monitor this balance in relation to anticipated future earnings and determine an appropriate means of bringing the [surplus] into compliance with state law."¹⁸ Although WSI's board of directors declared a dividend to reduce the fund's reserves plus surplus balance, it is my understanding that the fund's balance may still exceed the maximum amount allowed by N.D.C.C. § 65-04-02.

Under N.D.C.C. § 54-10-21, the State Auditor "may report to the attorney general the refusal or neglect of any state officer to obey the state auditor's recommendations."¹⁹ Therefore, the State Auditor could request the Attorney General to take other appropriate action if, after this opinion, WSI were to fail to follow the State Auditor's recommendations with respect to reserves plus surplus balance requirements of section 65-04-02.

As you know, however, the downturn in the financial markets has had an adverse effect on many investments, including those of WSI. Information provided by WSI, for example, indicates that the June 30 surplus of \$89 million had dropped to \$22 million by September 30. Legislative direction may be more appropriate than a forced divestiture of assets once the status of the market has been more fully determined and analyzed.

Thus, as you recall, we previously discussed that due to the proximity of the 2009 legislative session, the Legislature should address N.D.C.C. § 65-04-02 to determine the disposition of WSI's remaining surplus.

C. What is a Reasonable Time for WSI to Bring the Fund's Reserves Plus Surplus Balance into Compliance with N.D.C.C. § 65-04-02?

"What constitutes a reasonable time within the facts of a given case is a question of fact."²⁰ Accordingly, determining what is a reasonable time to comply with N.D.C.C. § 65-04-02 is a question of fact. Because this office may only give opinions on legal

¹⁸ Brady, Martz & Assocs., P.C., Workforce Safety & Insurance: Independent Auditor's Report (Oct. 19, 2007).

¹⁹ N.D.C.C. § 54-10-21.

²⁰ Farmers Union Oil Co. of New England v. Maixner, 376 N.W.2d 43, 48 (N.D. 1985) (discussing what constitutes a reasonable time of forbearance in order to be considered adequate consideration for purposes of personal guaranty); Keller v. Hummel, 334 N.W.2d 200, 203 (N.D. 1983) (discussing what constitutes reasonable time for the performance of a contract); Mott Equity Elevator v. Svihovec, 236 N.W.2d 900, 907 (N.D. 1975) (same).

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issues, I cannot respond to your final question.²¹ I would suggest, however, that the Legislature also address the appropriate timeframes for WSI to manage any amount of surplus above the maximum amount allowed by section 65-04-02.

Sincerely,

Wayne Stenehjem
Attorney General

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.²²

²¹ N.D.C.C. § 54-12-01(6), (8) (Attorney General may issue opinions to state agencies and legislators on “legal questions”); N.D.A.G. 2002-L-17 (“this office does not issue opinions on questions of fact.”).

²² See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).