

N.D.A.G. Letter to Mertens (March 16, 1990)

March 16, 1990

Honorable Charles F. Mertens
Chairman
Legislative Council
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505-0183

Dear Representative Mertens:

Thank you for your December 20, 1989, letter requesting my opinion concerning using transfers from the budget stabilization fund to restore budget reductions that were made pursuant to N.D.C.C. § 54-44.1-13.1. I apologize for the delay in responding to your request.

Your first question is whether an agency may spend moneys the Governor transfers from the budget stabilization fund to the general fund if the expenditure of those funds is within the limits of the legislative appropriation for that agency but in excess of the amount available to that agency after the reductions have been made pursuant to N.D. Sess. Laws ch. 3, §§ 13, 14, and N.D.C.C. § 54-44.1-13.1. Your second question is whether the director of the budget has the authority to restore the availability of funds to agencies after he has made, and the Budget Section of the Legislative Council has approved, budget reductions pursuant to N.D.C.C. § 54-44.1-13.1. If the answer to your second question is yes, you also ask whether the director of the budget may restore funds in selected areas only or whether he must restore funds uniformly to all affected agencies.

In answer to your first question, it is my opinion that an agency may spend moneys the Governor transfers from the budget stabilization fund to the general fund if the expenditure of those funds is within the limits of the legislative appropriation for that agency but in excess of the amount available to that agency after the reductions have been made pursuant to N.D. Sess. Laws ch. 3, §§ 13, 14, and N.D.C.C. § 54-44.1-13.1.

Pursuant to the North Dakota Constitution, the Legislature has the authority to appropriate state moneys. N.D. Const. art. X, § 12. An appropriation is "the setting apart of a definite sum of money for a specific purpose in such a way that public officials may use the amount appropriated, and no more than the amount appropriated for that purpose." American Fed. of State County, and Municipal Employees v. Olson, 338 N.W.2d 97, 103 (N.D. 1983). Therefore, a general fund appropriation established by the Legislature may not be increased by the executive branch through the use of the budget stabilization fund moneys.

Although the establishment of an appropriation is a legislative function, the execution of

the budget and the control of the expenditure of funds pursuant to an appropriation is an executive function. See Bowsher v. Synar, 478 U.S. 714, 732-34 (1986). The Legislature has given the director of the budget the authority to exercise control over the executive branch's expenditure of funds pursuant to legislative appropriations through a system of allotments. N.D.C.C. § 54-44.1-03(5). The Legislature has also given the director of the budget the authority to reduce the funds available to affected agencies when moneys in the general fund or any special fund will be reduced due to an initiative or referendum action. N.D.C.C. § 54-44.1-13.1.

Thus, to the extent that the executive branch is given the authority to transfer budget stabilization funds to the general fund for use by an agency, those funds may be made available to an agency for expenditure so long as the expenditure of those funds does not exceed the agency's appropriation for the biennium. The agency may expend those moneys even though they are in excess of the amount remaining for the agency after the budget reductions were made pursuant to N.D.C.C. § 54-44.1-13.1.

In answer to your second question, it is my opinion that the budget stabilization funds may be used to restore budget reductions that have been made pursuant to N.D.C.C. § 54-44.1-13.1. It is my further opinion that the funds transferred from the budget stabilization fund may be used for particular areas and that funds transferred from the budget stabilization fund do not need to be given to all affected agencies on a uniform basis.

On December 20, 1989, I issued an opinion to Governor Sinner on the issue of whether he was authorized to order that the moneys transferred from the budget stabilization fund be used for particular purposes of state government within the limits of legislative appropriations. Letter from Nicholas J. Spaeth to Governor George A. Sinner dated December 20, 1989. In that opinion, I noted:

N.D.C.C. § 54-27.2-03 provides that any money transferred from the budget stabilization fund is to "be expended within the limits of legislative guidelines and general fund appropriations." The statute does not contain any additional restrictions on how the transferred money may be expended.

Id. Therefore, it was my opinion "that the Governor may order that moneys transferred from the budget stabilization fund be expended for particular purposes provided that the expenditure neither exceeds a budget unit's legislative appropriation authority nor contravenes a legislative guideline." Id.

Based on the opinion I issued on December 20, 1989, it is my opinion that moneys in the budget stabilization fund may be transferred to the general fund for use by one agency without increasing the funds available to other agencies by a similar amount or percentage, provided that the agency's expenditure of those funds neither exceeds the agency's appropriation nor contravenes a legislative guideline.

I hope I have adequately answered your questions.

Sincerely,

Nicholas J. Spaeth

dfm