

**LETTER OPINION
2008-L-10**

June 11, 2008

The Honorable Robin L. Weisz
State Representative
50 Highway 3 S
Hurdsfield, ND 58451-9009

Dear Representative Weisz:

Thank you for your letter asking whether the distribution of moneys from the public transportation fund in N.D.C.C. § 39-04.2-04 is calculated on an annual or biennial basis. For the reasons indicated below, it is my opinion that the base amount for annual distribution from the public transportation fund under N.D.C.C. § 39-04.2-04 is to be calculated based on the total biennial appropriation.

ANALYSIS

A public transportation fund is created under N.D.C.C. ch. 39-04.2 in order to raise money to support public transportation providers in each county. The director of the Department of Transportation administers the public transportation fund.¹ The fund is supported by an additional \$3 fee paid by the owner of each motor vehicle subject to registration under N.D.C.C. § 39-04-19.² The \$3 "fee must be deposited with the state treasurer, who shall credit the fee to the public transportation fund."³ These fees are paid on an annual basis.⁴ The public transportation fund includes a separate general fund appropriation of \$1 million "for the biennium beginning July 1, 2007, and ending June 30, 2009."⁵

¹ N.D.C.C. § 39-04.2-02.

² N.D.C.C. § 39-04.2-03.

³ Id.

⁴ N.D.C.C. § 39-04-19(2).

⁵ 2007 N.D. Sess. Laws ch. 12, § 14. See also Hearing on H.B. 1012 Before the House Comm. on Appropriations, Gov't Operations Div., 2007 N.D. Leg. (Apr. 17), Hearing on H.B. 1012 Before the House Comm. on Appropriations, Gov't Operations Div., 2007 N.D. Leg. (Apr. 21).

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Money from the public transportation fund is distributed to transportation providers in each county. The distribution is based on a formula in N.D.C.C. § 39-04.2-04(2). This subsection was amended last session as follows:

~~Following authorization of the director, the state treasurer shall pay the public transportation funds to transportation providers in each county. Each county shall receive eighteen thousand three hundred dollars a base amount of four-tenths of one percent of the appropriation for the program plus one dollar and fifty cents per capita of population in the county, based upon the latest regular or special official federal census. Each year the director shall increase or decrease the one dollar and fifty cents per capita amount in order to distribute all funds appropriated for the biennium. If there are multiple transportation providers in one county, then the base amount of eighteen thousand three hundred dollars must be divided equally among the providers and the additional per capita amount must be based upon the percentage of elderly and handicapped ridership provided by each transportation provider within the county.~~⁶

A member of my staff contacted the Department of Transportation and was informed that prior practice had been to distribute the money on a yearly basis, where each county would receive the \$18,300 base amount each year plus the per capita amount during each year.⁷ The Department, however, viewed the recent legislative change in the calculation of the base amount payment to each county, from a specific dollar figure to a percentage of the program's appropriation, to mean that the base amount percentage was to be calculated each year based on only one year of the two-year appropriation.⁸ The practical effect of this change is to decrease the base amount provided to each county and increase the amount distributed on a per capita basis, meaning that larger population counties would receive more funds under the Department's new interpretation.

The distribution formula is arguably ambiguous because the only specific direction to make a yearly calculation and payment from the biennial appropriation occurs in the second sentence of N.D.C.C. § 39-04.2-04(2), which is a direction to vary the per capita payment each year. There is no explicit indication of any timeframe in N.D.C.C. § 39-04.2-04 - monthly, annually, biennially - for calculation and distribution of the base amount.⁹ When a statute is ambiguous, courts give weight to a practical and contemporary construction of

⁶ 2007 N.D. Sess. Laws ch. 12, § 10.

⁷ Memorandum from Special Assistant Attorney General Dreux Kautzmann to Assistant Attorney General Edward Erickson (Feb. 13, 2008).

⁸ *Id.*

⁹ For example, the funds received from motor vehicle license fees do not provide assistance in construing this statute. These funds are derived from an annual fee, but the public pays the fee for motor vehicles that weigh ten thousand pounds or less in different months based on the vehicle's initial registration. N.D.C.C. § 39-04-14.1.

the statute by the Attorney General and the officers charged with administering the statute, giving additional weight when the construction has been implicitly approved by the Legislature.¹⁰ The Supreme Court has held that the Legislature has implicitly approved an administrative construction of a statute when it does not amend the law after becoming aware of the agency's construction.¹¹

The legislative history shows that the Legislature relied on the Department of Transportation's long standing interpretation that the entire base amount in N.D.C.C. § 39-04.2-04(2) is distributed annually with the per capita amount.¹² Moreover, as you note in your letter, the legislative history also indicates that the primary reason for the change from a fixed dollar amount for the base rate to a percentage formula was to allow for future increases in the base rate without the necessity of amending the statute each time. There is nothing in the applicable history to indicate that the Legislature contemplated the amendment would result in a lower base rate payable to the counties.¹³ While an administrative agency may alter its interpretation of a statute to give the statute its correct meaning, it is appropriate to give due consideration to those who may have relied upon the prior interpretation.¹⁴ Department of Transportation officials took part in the committee hearings concerning the distribution of these funds and were aware of the Legislature's reliance on the prior construction given this statute.¹⁵ It would have been appropriate for these officials to have raised any concerns about changing the construction of this statute at that time.

¹⁰ United Hospital v. D'Annunzio, 514 N.W.2d 681, 684 (N.D. 1994).

¹¹ Halldorson v. State School Constr. Fund, 224 N.W.2d 814, 821 (N.D. 1974).

¹² Hearing on H.B. 1012 before the House Comm. on Appropriations, Gov't Operations Div., 2007 N.D. Leg. (Apr. 17), Hearing on H.B. 1012 Before the House Comm. on Appropriations, Gov't Operations Div., 2007 N.D. Leg. (Apr. 21).

¹³ Id.

¹⁴ See Amerada Hess Corp. v. Conrad, 410 N.W.2d 124, 132-135 (N.D. 1987) (Levine, J., holding that Tax Commissioner may alter a previous statutory interpretation to taxpayer's detriment through case-by-case adjudications). See also Id. at 137-139 (VandeWalle J., concurring in part and dissenting in part, arguing that the Tax Commissioner's sudden change in interpretation of a statute should have been through administrative rulemaking in order to provide the affected parties notice and an opportunity for comment).

¹⁵ See note 12, infra.

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Therefore, it is my opinion that the base amount of four-tenths of one percent of the appropriation is calculated based on the entire biennial appropriation even though it is distributed each year.

Sincerely,

Wayne Stenehjem
Attorney General

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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.¹⁶

¹⁶ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).