

February 28, 1992

Honorable Kitty Gurnsey
Chair, House Appropriations Committee
Co-Chair, Joint Finance and Appropriations Committee
Idaho House of Representatives
STATEHOUSE MAIL

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: (1) Non-Cognizable Funds Pursuant to I.C. § 67-3516; and
(2) Transfer of Appropriations Between Departments

Dear Representative Gurnsey:

You have asked our office to address two issues. First, you have asked for a legal interpretation of the status of non-cognizable funds under Idaho Code § 67-3516. Second, you have asked a series of questions concerning the statutory authority of inter-departmental transfers of money.

1. Non-Cognizable Funds

Section 67-3516 states in pertinent part as follows:

(1) Appropriation acts when passed by the legislature of the state of Idaho, and allotments made thereunder, whether the appropriation is fixed or continuing, are fixed budgets beyond which state officers, departments, bureaus and institutions may not expend. It is assumed that the rate of expenditure from said appropriations, as a general rule, should not exceed approximately fifty percent (50%) of such appropriations each six (6) months of the fiscal year.

(2) Funds available to any agency from sources other than state funds, if not cognizable at the time when appropriations were made whether state fiscal liability is increased or not, must have prior approval of the administrator of the division of financial management and the board of examiners in order that funds may be expended, except those funds received under such conditions that preclude approval by the administrator of the division and/or the board of examiners.

(Emphasis added.)

Sub-paragraph (1) of the above-quoted section clearly delineates that appropriations when passed by the legislature of the state and allotments made pursuant to the appropriation are fixed budgets from which officers, departments or bureaus may not overspend. There are certain statutorily provided exceptions to the requirements of § 67-3516(1). One of those exceptions is provided in sub-paragraph (2) of the same section. This section allows an agency to spend funds which were not appropriated or allotted to it if the following three-part test is met:

1. The funds are from other than state funds;
2. The funds were not cognizable at the time when the appropriation to the agency was made;
3. The agency has the prior approval of the administrator of the Division of Financial Management and the Board of Examiners, unless the funds are received under a condition which precludes approval by the administrator of the Division of Financial Management and/or the Board of Examiners.

Meeting the first step requires a determination that the source of the money is from other than state funds. State funds are not specifically defined in the Idaho Code, however, other jurisdictions have defined state funds as funds in which the equitable as well as the legal title are vested with the state. *See Navajo Tribe v. Arizona Department of Administration*, 111 Ariz 279, 528 P.2d 623 (1974); *Button's Estate v. Anderson*, 112 Vt. 531, 28 A.2d 404 (1942). Therefore, to meet the first prong of this test, the agency must establish that the equitable and legal title to the funds did not rest with the state.

If the funds come directly to the agency from other than a state source, as defined above, it must be established that these funds were "not cognizable" when the legislature made its appropriations. By this, it must be established that the existence of these funds was not known at the time of the appropriation.

Once the first two requirements have been met prior to using the funds, the agency must seek approval from the administrator of the Division of Financial Management and the Board of Examiners unless the agency can prove that the funds were received under such conditions that approval of the administrator of the Division of Financial Management and/or the Board of Examiners was impossible.

If an agency is in need of additional money and does not have funds available to it which would meet the requirements provided in Idaho Code § 67-3516(2), the agency must seek approval for the supplemental allotment from the State Board of Examiners

pursuant to the requirements of Idaho Code § 67-3522 or seek a supplemental appropriation from the legislature.

In addition to addressing the general requirements of Idaho Code § 67-3516(2), you also asked me to address specifically an issue related to an additional allotment over the appropriation of the legislature made by DFM from the dedicated plumbing board account to the Department of Labor and Industrial Services. It would appear that money contained within the dedicated plumbing board account would be "state funds" as defined above. In Attorney General Opinion 85-7, this office previously opined that the amount of revenue which may be expended from the dedicated plumbing board account is controlled by the legislature through the annual appropriation process. The money that comes into the dedicated account would meet the definition of state funds and, as such, the funds within that account would not be available for disbursement pursuant to the provisions of Idaho Code § 67-3516(2).

2. Transfer of Appropriation Between Departments

In the 1991 legislative session, the legislature passed the "Idaho State Council on the Deaf and Hard of Hearing Act." This act provided for the creation of a state council comprised of nine (9) members appointed by the governor to be the "interdepartmental and interagency planning and advisory body for the ... state for programs and services affecting people with a hearing impairment." Idaho Code § 67-7303(1). The governor was given the authority to assign the council to a department or office within the state for budgetary and administrative support purposes. Idaho Code § 67-7303(2). In addition, the council was given statutory authority to "employ such personnel as may be necessary" subject to the provisions of chapter 53, title 67, Idaho Code.

In the same session, the legislature passed an appropriation bill, House Bill 398, which provided a \$6,793,100 appropriation for the Office on Aging. Although not specifically delineated within the body of the appropriation bill, \$51,100 was apparently earmarked as one-time money for operating expenditures for a hearing impaired task force. With reference to the appropriation for the "task force," the appropriation bill states as follows:

SECTION 2. It is legislative intent that, of those moneys appropriated in Section 1 of this act for the Hearing Impaired Task Force, the Office on Aging contract for assistance in planning program development.

In August of 1991, the Division of Financial Management (DFM) transferred the appropriation for the "task force" from the Office on Aging to the Department of Health & Welfare. DFM based its authority to transfer the funds on the previously delineated

provision of Idaho Code § 67-7303(2) providing the governor with discretion to place the council for the deaf and hard of hearing within an office or department of the state.

With reference to the transfer, you have asked three questions. First, in light of the constitutional and statutory authority to appropriate funds granted to the Idaho legislature, did DFM have the authority to transfer an appropriation from the Office on Aging to the Department of Health and Welfare for the purpose of providing budgetary support to the Council for the Deaf? Second, did the executive branch have the authority to place the council created pursuant to chapter 73, title 67, under the Department of Health and Welfare? Third, if the Department of Health and Welfare legally received funding for the council, could some or all of the appropriation be used for personnel costs for support of the purpose of the council?

Addressing the first question, it is clear that the legislature's power to make appropriations is plenary, limited only by the state constitution. David v. Moon, 77 Id. 146, 289 P.2d 614 (1955). Article 7, § 13, of the Idaho Constitution provides that "no money shall be drawn from the treasury but in pursuance of appropriations made by law." An appropriation within the meaning of the above quoted section of the constitution has been defined as: (1) Authority from the legislature; (2) expressly given; (3) in legal form; (4) to proper officers; (5) to pay from public moneys; (6) a specified sum and no more, and (7) for a specified purpose and no other. Jackson v. Gallet, 39 Idaho 382, 228 P. 1068 (1924); McConnel v. Gallet, 51 Idaho 386, 6 P.2d 143 (1931). Leonardson v. Moon, 92 Idaho 796, 451 P.2d 542 (1969).

House Bill 398 meets the required tenets of the definition of appropriation. The first six requirements of the definition need no discussion because they are clearly met. As to requirement no. 7, i.e., for a specified purpose and no other, the purpose of the appropriation was to fund the Office on Aging for the amount specified according to the expenditure classes designated in the bill. Not specifically broken out in the bill, but apparently contained within the appropriation, was an amount for the "Hearing Impaired Task Force." Pursuant to section 2 of House Bill 398, the legislature directed the Office on Aging to expend this portion of the appropriation in a "contract for assistance in planning program development."

The transfer of the appropriation from the Office on Aging to the Department of Health and Welfare was a transfer from one appropriation to another. It has been recognized as a general rule of law that, in the absence of constitutional or statutory authorization, the executive branch is not vested with the right to make or to alter appropriations. Pursuant to the provisions of Idaho Code § 67-3511, officers and agencies within the three branches of state government are allowed a limited amount of authority to transfer money between standard classes and between programs within the

same appropriation. However, there is no authority for any officer or agency, including the governor, to transfer funds from one appropriation to another appropriation.

With reference to the second question, it is clear that pursuant to Idaho Code § 67-7303(2), the governor had the authority to assign the council created by chapter 73, title 67, to any department or office within the state. However, the power to assign the council to a department does not carry with it the concomitant power to direct the appropriation. As previously noted, the appropriation power rests with the legislature.

Finally, in answer to the third question, if an appropriation including an expense classification for personnel had been legally granted to Health and Welfare to fund the provisions of chapter 73, title 67, Idaho Code, staff could be hired to assist the council. Pursuant to Idaho Code § 67-7306, the council has the authority to employ personnel, however, this authority is contingent upon an appropriation to fund those positions. If an appropriation is made, but there is no classification for personnel, the department may seek to transfer appropriations from another expenditure classification within the department pursuant to the requirements delineated in Idaho Code § 67-3511.

I hope this adequately addresses your concerns. If you have any additional questions or concerns, please contact me.

Sincerely,

TERRY B. ANDERSON
Deputy Attorney General
Chief, Business Regulation
and State Finance Division