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NO.
STATE OF NEBRASKA
OFFICIAL
APR 15 1996
DEPT. OF JUSTICE

DATE: April 11, 1996

SUBJECT: Proper State Fund for Payment of Audit Fees Incurred in Connection With Outside Audits Under the Unclaimed Property Act

REQUESTED BY: John Breslow
State Auditor

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

The Nebraska version of the Uniform Disposition of Unclaimed Property Act (the "Unclaimed Property Act") is found at ***Neb. Rev. Stat.*** §§ 69-1301 through 69-1329 (1990, Cum. Supp. 1994, Supp. 1995). Generally, that Act provides that various forms of property such as bank deposits, monies, stock certificates, dividends, utility deposits, and other forms of intangible personal property held by entities such as corporations, banks, and insurance companies doing business in Nebraska must be reported and remitted to the Nebraska State Treasurer when the property remains unclaimed by its true owner after a set period of time. The Treasurer holds the property in a custodial capacity, and the true owner can come forward at any time to reclaim his or her property by presenting proper proof of ownership. Property which remains unclaimed over time ultimately goes to the Permanent School Fund. Under § 69-1317(a), all funds received as a result of the unclaimed property process are initially placed in a separate Unclaimed Property Trust Fund. Section 69-1317(c) also establishes an Unclaimed Property Cash Fund which contains monies deducted for costs incurred in the return of unclaimed property and reasonable service charges.

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For some years, the various Nebraska State Treasurers have entered into contractual arrangements with several different organizations under which those organizations have conducted unclaimed property audits of companies in other states for a fee, and then reported and remitted the unclaimed property due the State of Nebraska in the possession of those out-of-state companies to the State Treasurer. In 1988, a question arose as to the proper procedures for payment of the fees due to those organizations for performing unclaimed property audits on behalf of the State of Nebraska. At that time, then-Treasurer Frank Marsh asked us whether organizations conducting unclaimed property audits for the State of Nebraska could deduct their audit fees before remitting unclaimed property funds to the State, or whether those organizations should remit all unclaimed property funds owing to State of Nebraska to the State Treasurer, and then bill the State separately for their fees. In an informal memorandum dated December 6, 1988, we concluded:

> When these statutes [§§ 69-1317 and 69-1312] are read together, it seems . . . that the proper procedure should be that the Clearinghouse should remit all sums to your office and then bill your office for the appropriate fees. You can then deduct the appropriate service charges under the authority of § 69-1317 prior to placing those monies in the Unclaimed Property Cash Fund.

It is our understanding that, based upon our informal memorandum in 1988, Mr. Marsh and subsequent State Treasurers have required companies performing unclaimed property audits for the State of Nebraska to remit all monies owing to the State without the deduction of contractual audit fees. It has then, apparently, been the practice to pay such audit fees out of the Unclaimed Property Trust Fund upon the subsequent submission of fee statements by the companies performing the audits. It is that latter practice which led to your opinion request. You have now asked us whether payments for unclaimed property audits conducted for the State Treasurer by outside organizations should be paid from the Unclaimed Property Trust Fund or the Unclaimed Property Cash Fund.

There are no Nebraska cases which deal with the issue raised in your opinion request. Nor has this office issued previous opinions which deal with the proper fund for payment of unclaimed property audit fees.[1] As a result, we must turn to the language

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[1] Our 1988 informal memorandum to Treasurer Marsh was not a formal Opinion of the Attorney General. Moreover, that memorandum focused on the issue of whether outside auditing companies could deduct their fees from unclaimed property proceeds prior to remitting those monies to the State Treasurer. We did not

of the statute which deals with the payment of audit fees and the creation of the Unclaimed Property Trust and Cash Funds.

The statute pertinent to your inquiry is ***Neb. Rev. Stat.*** § 69-1307 (Supp. 1995), which states, as is relevant:

> (a)(1) ***All funds received under the Uniform Disposition of Unclaimed Property Act . . . shall be deposited by the State Treasurer in a separate trust fund from which he or she shall make prompt payment of claims allowed pursuant to the act. . . .***
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> * * * *
>
> (b)(1) On or after October 6, 1992, the State Treasurer shall periodically transfer any balance in excess of an amount not to exceed five hundred thousand dollars from the separate trust fund to the General Fund no less frequently than on or before November 1 and May 1 of each year, except that the total amount of all such transfers shall not exceed five million dollars.
>
> (2)(i) On the next succeeding November 1 after five million dollars has been transferred to the General Fund in the manner described in subdivision (b)(1) of this section or (ii) on November 1, 1996, whichever comes first, and on or before November 1 of each year thereafter, the State Treasurer shall transfer any balance in excess of an amount not to exceed five hundred thousand dollars from the separate trust fund to the permanent school fund.
>
> (c) ***Before making any deposit to the credit of the permanent school fund or the General Fund, the State Treasurer may deduce [sic] (1) any costs in connection with sale of abandoned property, (2) any costs of mailing and publication in connection with any abandoned property, and (3) reasonable service charges and place such funds in the Unclaimed Property Cash Fund which is hereby created. . . .***

(Emphasis added).

In Nebraska, statutes are not open to construction as a matter of course, and in the absence of any contrary indication, statutory language is generally to be given its plain and ordinary meaning.

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specifically consider what fund should be used for the payment of auditing fees.

Weiner v. State ex rel. State Real Estate Commission, 214 Neb. 404, 333 N.W.2d 915 (1983). On that basis, it seems to us that the initial portion of § 69-1307(a)(1) emphasized above states clearly that the Unclaimed Property Trust Fund should be used for the payment of unclaimed property claims. That is, that trust fund should be used to pay those true owners who file claims and are reunited with their unclaimed property under the Unclaimed Property Act. On the other hand, the portion of § 69-1307 emphasized above at subsection (c) seems to contemplate that the costs for administration of the Unclaimed Property Act should be paid out of the Unclaimed Property Cash Fund and then be reimbursed to that fund at the time of the annual transfer of excess unclaimed property monies to the Permanent School Fund. Therefore, we believe that the unclaimed property audit fees for outside companies which are the subject of your inquiry, as a form of "service charge," should be paid out of the Unclaimed Property Cash Fund as they are incurred. Each year, funds expended for those fees from the Unclaimed Property Cash Fund for the preceding year can then be recouped from the Trust Fund prior to the transfer of monies to the Permanent School Fund, and in that way, funds can be obtained for administration of the program for the next year.

Our view of the requirements of § 69-1307 is supported in two respects. First of all, the Nebraska Accounting System Manual, which forms the basis for the State's accounting system, contains definitions which are routinely adopted by the Legislature for purposes of appropriations bills. ***See*** 1995 Neb. Laws LB 392, § 5. That manual defines a Cash Fund as an account "for revenues generated by specific activities from sources outside of state government and the expenditures directly related to the generation of the revenues." In contrast, a Trust Fund is an account "held by the state in a trustee capacity," from which "[e]xpenditures are made in accordance with the terms of the trust." It seems to us that, under those definitions of the funds involved, the audit fees or service charges submitted to the Treasurer by outside companies are "expenditures directly related to the generation of" unclaimed property rather than "expenditures made in accordance with the terms of the [unclaimed property] trust." Therefore, those expenditures should be made from the Cash Fund.

Second, the meager legislative history of the bills which created and initially funded the Unclaimed Property Cash Fund supports our conclusion. The Unclaimed Property Cash Fund was created by an addition to § 69-1307 which was provided by LB 648 in 1971. LB 648 in 1971 was accompanied through the legislative process by LB 648A, an appropriations measure to place some $57,000 in the Unclaimed Property Cash Fund to establish that Fund. Since the Legislature felt it necessary to initially place money in the Unclaimed Property Cash Fund for unclaimed property operations, it obviously intended that the Fund be used for that purpose, with

reimbursement of the monies expended at the time of the next unclaimed property transfer to the Permanent School Fund. In addition, Senator Carstens, the Introducer of LB 648, stated in floor debate that:

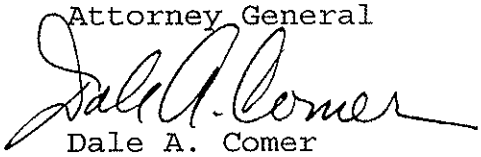
> This [LB 648A] is necessary the fiscal analyst tells me because the last session of the Legislature we attached the [unclaimed] property act and we did not provide for funding it. This is a self-paying proposition. It comes out of the funds that are generated from the abandoned property and is of no costs, there's no tax funds involved at all.

Floor Debate on LB 648A, 82nd Neb. Leg., 1st Sess. 2700 (May 13, 1971) (Statement of Sen. Carstens).

Therefore, for the various reasons stated above, we believe that unclaimed property audit fees for outside companies should be paid out of the Unclaimed Property Cash Fund as they are incurred. Each year, funds expended for those fees from the Unclaimed Property Cash Fund can then be recouped from the Unclaimed Property Trust Fund prior to the transfer of excess monies to the Permanent School Fund.

Sincerely yours,

DON STENBERG
Attorney General



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