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SUBJECT: Whether the State Treasurer may maintain a trust account which is not specifically provided for by statute for the purpose of paying administrative costs associated with the Nebraska Educational Savings Plan Trust, and whether the funds in that trust account, which are derived from fees charged to plan participants, are state funds.

REQUESTED BY: Charlie Janssen, Auditor of Public Accounts
Don Stenberg, Nebraska State Treasurer

WRITTEN BY: Douglas J. Peterson, Attorney General
Natalee J. Hart, Assistant Attorney General

INTRODUCTION

You have jointly requested our opinion on two questions relating to the authority of the Nebraska State Treasurer to maintain an account, which you call the "Fee Account," for the purpose of paying administrative costs related to the Nebraska Educational Savings Plan Trust (NESPT). The funds in the Fee Account come from fees charged of investors in the NESPT plans. The Fee Account established and maintained by the State Treasurer since 2010 has not been specifically provided for by statute, and prior to April 2018 was unknown to the Auditor.

You have posed the following questions:

- (1) Are the funds in the Fee Account public funds (sometimes referred to as money of the state)? and

- (2) Does the State Treasurer have the legal authority to use the Fee Account outside of State Accounting and Depository financial records?

BACKGROUND

In 2000, the Nebraska Legislature granted the State Treasurer duties and responsibilities to implement and administer NESPT, a public trust established for investment by individuals for future educational use. Neb. Rev. Stat. §§ 84-1801 through 85-1814 (2014). The primary duties and responsibilities of the State Treasurer relating to NESPT are found in Neb. Rev. Stat. § 85-1804 (2014), which states, in pertinent part:

The Nebraska educational savings plan trust is created. The State Treasurer is the trustee of the trust and as such is responsible for the administration, operation, and maintenance of the program and has all powers necessary to carry out and effectuate the purposes, objectives, and provisions of sections 85-1801 to 85-1814 pertaining to the administration, operation, and maintenance of the trust and program, except that the state investment officer shall have fiduciary responsibility to make all decisions regarding the investment of the money in the administrative fund, expense fund, and program fund, including the selection of all investment options and the approval of all fees and other costs charged to trust assets except costs for administration, operation, and maintenance of the trust as appropriated by the Legislature, pursuant to the directions, guidelines, and policies established by the Nebraska Investment Council. . . . The State Treasurer or his or her designee shall have the power to:

- (1) Enter into agreements with any eligible educational institution, the state, any federal or other state agency, or any other entity to implement sections 85-1801 to 85-1814, except agreements which pertain to the investment of money in the administrative fund, expense fund, or program fund;
- (2) Carry out the duties and obligations of the trust;

* * *

(9) Contract for goods and services and engage personnel as necessary, including consultants, actuaries, managers, legal counsels, and auditors for the purpose of rendering professional, managerial, and technical assistance and advice regarding trust administration and operation, except contracts which pertain to the investment of the administrative, expense, or program funds; and

(10) Establish, impose, and collect administrative fees and charges in connection with transactions of the trust, and provide for reasonable service charges, including penalties for cancellations and late payments with respect to participation agreements.

The Legislature established three separate funds for the State Treasurer to administer in relation to NESPT: (1) The College Savings Plan Program Fund ("Program Fund"), (2) the College Savings Plan Expense Fund ("Expense Fund"), and (3) the College Savings Plan Administrative Fund ("Administrative Fund"). Neb. Rev. Stat. § 85-1807.

Program Fund

The Program Fund receives and keeps all cash contributions from participants who wish to invest in one of the plans under NESPT, and all investment income earned on those investments. Neb. Rev. Stat. § 85-1807(2). This fund is held in trust by the State Treasurer for the participants and beneficiaries and the State has no property rights in the money held in the Program Fund. Neb. Rev. Stat. §§ 85-1804, 85-1813. NESPT participants retain ownership of the contributions made to the Program Fund "up to the date of utilization for payment of qualified higher education expenses for the beneficiary." Neb. Rev. Stat. § 85-1809(1). All investment income derived from investment of contributions is held in trust for the benefit of the beneficiary. *Id.* In addition, "the Program Fund is the source of any administrative fees charged by the State Treasurer pursuant to § 85-1804(10)." Auditor of Public Accounts ["APA"] Request Letter to Attorney General dated June 1, 2018 at 3 [hereinafter "APA Letter"].

Expense Fund

With respect to the Expense Fund, Neb. Rev. Stat. § 85-1807(4) expressly provides that

[t]he expense fund shall be used to pay costs associated with the Nebraska educational savings plan trust and shall be funded with fees assessed to the program fund. The State Treasurer shall transfer from the expense fund to the State Investment Officer's Cash Fund an amount equal to the pro rata share of the budget appropriated to the Nebraska Investment Council as permitted in section 72-1249.02, to cover reasonable expenses incurred for investment management of the Nebraska educational savings plan trust. Annually and prior to such transfer to the State Investment Officer's Cash Fund, the State Treasurer shall report to the budget division of the Department of Administrative Services and to the Legislative Fiscal Analyst the amounts transferred during the previous fiscal year. The report submitted to the Legislative Fiscal Analyst shall be submitted electronically. Transfers may be made from the expense fund to the General Fund at the direction of the Legislature. Any money in the expense fund available for investment shall be invested by the state investment officer pursuant to the Nebraska Capital Expansion Act and the Nebraska State Funds Investment Act. (Emphasis added.)

Administrative Fund

The Administrative Fund contains money transferred from the Program Fund to the Expense Fund “in an amount authorized by an appropriation from the Legislature . . . to pay for the costs of administering, operating, and maintaining the trust . . .” Neb. Rev. Stat. § 85-1807(3). Money in the Administrative Fund is expressly limited to legislative appropriations and any interest income earned on the fund’s balances. *Id.*

Neb. Rev. Stat. § 85-1807(1) requires “[t]he State Treasurer [to] deposit money received by the trust into the appropriate fund” and the funds “shall be separately administered.” No General Fund appropriations shall be used to operate NESPT. *Id.* Money in each of the funds is to be invested by the State Investment Officer when such funds are available. Neb. Rev. Stat. § 85-1807(2)-(4). Neb. Rev. Stat. § 85-1813 provides that the assets of the Program Fund are to be held in trust for the participants and beneficiaries and no property rights exist in the State to this fund, but expressly excludes the Administrative Fund and the Expense Fund from these qualifications:

The assets of the Nebraska educational savings plan trust, including the program fund and excluding the administrative fund and the expense fund, shall at all times be preserved, invested, and expended solely and only for the purposes of the trust and shall be held in trust for the participants and beneficiaries. No property rights in the trust shall exist in favor of the state. Such assets of the trust shall not be transferred or used by the state for any purposes other than the purposes of the trust.

Fee Account

According to Mr. Stenberg, in 2010 former State Treasurer Shane Osborn entered into a contract with the First National Bank of Omaha (“FNBO”), as program manager, and the Nebraska Investment Council. The contract contained the following provision:

First National Bank will charge Account Owners an asset-based State Administrative Services fee of 0.03% of total First National managed plan assets. This fee will be paid quarterly and deposited into a trust account at First National Bank for the Treasurer to use in connection with the marketing and operation of the program.

The 0.03% administrative fee is generally applied to three investment plans, i.e., the Nebraska Educational Savings Trust (NEST) Direct Plan; NEST Advisor Plan; and TD Ameritrade. Participants in a fourth plan, State Farm, are assessed a fee of 0.05%. However, FNBO does not handle the administrative fees for the State Farm plan, which are fully transferred to the Expense Fund.¹ Since 2012, the State Treasurer has

¹ In his letter to this office, the Auditor points out the incongruity in the State Treasurer's handling of the two sets of fees “since they are all collected through the same program and pursuant to the same statutory authority.” APA Letter at 10.

transferred, on a quarterly basis, \$150,000 from the Fee Account into the Expense Fund, an amount considerably less than the total balance in the Fee Account. As of December 31, 2017, the Auditor advises that the Fee Account contained \$2,632,111.

The State Treasurer states that “[i]n the exercise of his fiduciary duties, the Trustee also has made expenditures from the Fee Account for legal fees, promotional activities and other lawful expenses in connection with the operation and promotion of the Trust.”² State Treasurer Request Letter to Attorney General dated June 1, 2018 at 2 [hereinafter “Treasurer Letter”]. The State Treasurer credits the use of these funds in successfully doubling the assets invested in the Program Fund to \$4.9 billion, and allowing fees charged to plan participants to be reduced. The State Treasurer also notes that the State Investment Officer, on behalf of the Nebraska Investment Council, agreed to and signed the contract with FNBO which contained the Fee Account provision, suggesting that the State Investment Officer was in agreement with the ability of the State Treasurer to create and maintain this account.

However, the Auditor makes clear that his office, the Department of Administrative Services, and likely the Legislature have been unaware of the existence of this account since its creation in 2010. It has been wholly off the official books of the State and has never been subject to reporting or audit. Your two offices dispute whether the State Treasurer is authorized to maintain the Fee Account. The Auditor believes that the Fee Account is unlawful. The State Treasurer argues that the monies contained in that account are not “state funds” and, consequently, are not required to be deposited into the Expense Fund for appropriation by the Legislature into the Administrative Fund. You have jointly sought our opinion to assist in resolving this disagreement. Our responses to your questions are set out below, and we will consider your second question first.

ANALYSIS

Whether the State Treasurer has the legal authority to establish and use the Fee Account outside of State Accounting and Depository financial records.

The first question to be answered is whether the State Treasurer has the authority to utilize the Fee Account outside of state accounting and depository financial records, which necessarily requires us to also answer whether the State Treasurer had the authority to establish this account.

We are guided in the examination of this question by certain principles of statutory construction. The language in statutes should be given its plain and ordinary meaning. *In re Interest of Jeremy T.*, 257 Neb. 736, 600 N.W.2d 747 (1999). Where the words of a

² The Auditor’s letter references a May 2, 2018 email from the State Treasurer’s office, which indicates that the appropriation in the Administrative Fund is insufficient to cover all of the costs relating to the financial literacy program and scholarships. In addition, the email states that “legal fees are unpredictable based on changes that occur in the plans. At times we’re concerned about existing appropriation covering all legal fees, we opt to pay the legal fees from this [Fee Account].” APA Letter at 7.

statute are plain, direct, and unambiguous, no interpretation is necessary to ascertain their meaning. *Governors of Knights of Ak-Sar-Ben v. Dep't of Revenue*, 217 Neb. 518, 349 N.W.2d 385 (1984); *Garreans v. City of Omaha*, 216 Neb. 487, 345 N.W.2d 309 (1984). A court will not read meaning into a statute that is not warranted by the legislative language, and it will not read anything plain, direct, and unambiguous out of a statute. *State ex rel. Douglas v. Herrington*, 206 Neb. 516, 294 N.W.2d 330 (1980). Effect must be given to every word of a statute, since the Legislature is presumed to have intended every provision of a statute to have a meaning. *Iske v. Papio Nat. Resources Dist.*, 218 Neb. 39, 352 N.W.2d 172 (1984). Different provisions of a statute must be reconciled to make them logical, harmonious, and sensible. *Ledwith v. Bankers Life Ins. Co.*, 156 Neb. 107, 54 N.W.2d 409 (1952). In determining legislative intent, it is necessary to examine the statute as a whole, in light of its objects and purposes. See *Sorensen v. Meyer*, 220 Neb. 457, 370 N.W.2d 173 (1985); *Adkisson v. City of Columbus*, 214 Neb. 129, 333 N.W.2d 661 (1983).

Neb. Rev. Stat. § 85-1804 provides that the State Treasurer "has all powers necessary to carry out and effectuate the purposes, objectives, and provisions" of NESPT, "pertaining to the administration, operation, and maintenance of the trust and program" However, that power is not unlimited. The statutes creating NESPT must be read as a whole, with meaning given to each one. Where the Legislature has provided specific guidance with respect to the administration of NESPT funds, the State Treasurer is bound to follow those statutes, over the general grant of authority in § 85-1804.

The Legislature specifically created three separate funds for the State Treasurer to administer with respect to NESPT: the Program Fund, the Expense Fund, and the Administrative Fund. The plain language of Neb. Rev. Stat. § 85-1807 creates these three specific accounts in which to deposit program funds, which controls over the State Treasurer's general authority arising out of § 85-1804, and which necessarily excludes the ability to establish additional funds for the same purposes.³ "The legal principle of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of the others) recognizes the general principle of statutory construction that an expressed object of a statute's operation excludes the statute's operation on all other objects unmentioned by the statute." *Pfizer Inc. v. Lancaster Cty. Bd. of Equal.*, 260 Neb. 265, 272, 616 N.W.2d 326, 335 (2000). See also *A & D Technical Supply Co. v. Nebraska Dep't of Revenue*, 259 Neb. 24, 31, 607 N.W.2d 857, 863 (2000). "[W]here a statute or ordinance enumerates the things upon which it is to operate, or forbids certain things, it is to be construed as excluding from its effect all those not expressly mentioned, unless the legislative body has plainly indicated a contrary purpose or intention." *Nebraska City Ed.*

³ While the State Treasurer appears to believe that the signature of the State Investment Officer on the FNBO contract containing the Fee Account provision somehow sanctions the establishment of the Fee Account, it is not persuasive to us that the State Investment Officer signed the FNBO contract. The State Investment Officer is not legal counsel for the State Treasurer and the agreement of the Nebraska Investment Council to the FNBO contract as a whole does not imply that this agency was aware that the State Treasurer would be maintaining the Fee Account outside of the legislative grant of authority of the State Treasurer and outside of state accounting and auditing procedures.

Ass'n v. School Dist. of Nebraska City, in Otoe Cty., 201 Neb. 303, 306, 267 N.W.2d 530, 532 (1978) (citing *Starman v. Shirley*, 162 Neb. 613, 76 N.W.2d 749 (1956)). Consequently, we believe that all assessed administrative fees must be deposited in the Program Fund, for transfer to the Expense Fund, and that the State Treasurer lacks the legal authority to establish any other account relating to the administration of NESPT, which operates outside of State Accounting and Depository financial records.

Whether the funds in the Fee Account are public funds, or monies of the state.

Your remaining question is whether the funds in the Fee Account are public funds or monies of the state. The State Treasurer's position is that these are not public funds and therefore are permitted to be held in the Fee Account.

Neb. Rev. Stat. § 84-602 provides, in pertinent part, that "[i]t shall be the duty of the State Treasurer: (1) To receive and keep all money of the state not expressly required to be received and kept by some other person" The phrase "money of the state" is not defined for purposes of § 84-602(1). However, we have indicated previously that similar language such as "state funds" involves monies which are generated by the operation of general state law such as state fees and state taxes. Op. Att'y Gen. No. 07016 (September 24, 2007); Op. Att'y Gen. No. 87114 (December 9, 1987); Op. Att'y Gen. No. 87001 (January 6, 1987). The Auditor strongly believes that the monies in the Fee Account are public funds; the State Treasurer equally strongly disagrees.

In support of his position that the monies in the Fee Account are not public funds, the State Treasurer relies on *Allen v. City of Omaha*, 136 Neb, 620, 286 N.W. 916 (1939) and *Sherard v. State of Nebraska*, 244 Neb. 743, 509 N.W.2d 194 (1993).⁴ In *Allen*, the court considered whether a city pension fund for police officers was a "public fund" for purposes of awarding attorney's fees to the prevailing party. The court discussed only the fund which contained participant contributions and investment income, and discussed other similar trust funds, each of which are akin to the Program Fund of NESPT, in holding that the pension fund was not a public fund. The court stated:

⁴ The State Treasurer also cites to an informal opinion of this office issued in 2013 concerning the University of Nebraska Group Health Trust Fund. The question raised in that opinion was whether those funds, which were to be used to pay University employee health care obligations, and which was funded by employee and employer health plan contributions, must be deposited with the State Treasurer. We determined that the University Trust Fund did not contain money of the state once that money was paid into the trust, as the money belonged to the health plan for the sole purpose of paying employee health claims. However, that opinion is inapplicable to the questions at issue herein. First, there was no express statutory provision requiring the University to deposit the funds with the State Treasurer. In the present instance, the Nebraska Legislature has chosen a specific statutory scheme that requires the fees paid by NESPT participants to be deposited in the Expense Fund. Second, the primary analysis related to whether the University had a legal obligation to make the health plan payments and whether the employees who participated in the plan had a legal right to the payments. Our analysis depended on the Nebraska Wage Payment and Collection Act, which has no application here.

“The term ‘public funds’ means funds belonging to the state or to any county or political subdivision of the state; more specifically taxes, customs, moneys, etc., raised by the operation of some general law, and appropriated by the government to the discharge of its obligations, or for some public or governmental purpose; and in this sense it applies to the funds of every political division of the state wherein taxes are levied for public purposes. The term does not apply to special funds, which are collected or voluntarily contributed, for the sole benefit of the contributors, and of which the state is merely the custodian.” In conformity therewith it has been held that a state hail insurance fund raised from hail insurance premiums was not a public fund. A state bonding fund raised from the collection of bond premiums was not a public fund. A state compensation fund maintained by contributions of employers is a special and not a public fund. Funds paid to the state forester for fire protection by those whose property was benefited are not state funds.

Allen, 136 Neb. at 625, 286 N.W. at 919 (internal citations omitted). The characteristics of the pension fund contributed to this holding: the pension fund was not raised by taxation but by employee and employer contributions, the pension fund was statutorily segregated for a specific use and could not be used for any other purpose, and the money in the pension fund was held in trust by the city treasurer. *Id.* However, there is no mention of fees charged to participants for administration of the fund, and whether those fees constitute public funds.

In *Sherard*, the court dealt with the Second Injury Fund, which provided compensation in certain workers’ compensation cases, and whether a writ of execution could issue against the fund. Because state property is not subject to execution, the issue was whether the money held in the fund was state money. The statutes which established the fund made the State Treasurer the custodian of the fund and specifically provided that the funds were to be held in trust and were not money of the state. Again, the money in this fund is congruous to the money held in trust by the State Treasurer in the Program Fund of NESPT. *Sherard* also makes no mention of fees or administrative costs charged to participants of the fund; rather, administrative expenses are paid directly out of this fund pursuant to statute and not by a separate fund. See *Sherard*, 244 Neb. at 749, 509 N.W.2d at 199.

The State Treasurer asserts that applying the tests in *Allen* and *Sherard* “to the money in the Fee Account clearly demonstrate that the money is not public funds.” Treasurer Letter at 4. Mr. Stenberg states that the fees (1) are charged to participants and are not raised by taxation; (2) constitute special funds collected solely for the benefit of the contributors; and (3) are segregated by operation of Neb. Rev. Stat. § 85-1813, which expressly states the State shall have no property rights in the trust, and that trust assets shall only be used for purposes of the trust. Mr. Stenberg also notes that language in § 85-1807(4), which authorizes transfers from the Expense Fund to the General Fund “would constitute taking of Trust property without just compensation and hence would be unconstitutional.” Treasurer Letter at 5. Mr. Stenberg further argues that “[s]ince money in

the Fee Account is not public funds, there is no requirement that it be placed in the state treasury and may be held outside the state treasury just as the money in the Program Fund is held outside the state treasury." Treasurer Letter at 5.

However, the funds in *Allen* and *Sherard* are distinguishable from the Fee Account at issue here. As noted above, neither case dealt with administrative fees assessed on fund participants or assessed on the actual funds. Under the present circumstances, under Neb. Rev. Stat. § 85-1804(10), fees are charged to each participant in the plan at a rate set by the State Treasurer. The fees are not "voluntary" as the State Treasurer suggests, but required of all plan participants in order to fund the administrative costs of the program. The State Treasurer is not merely the "custodian" of the fees. Once appropriated to the Administrative Fund, the fees are used "to pay for the costs of administering, operating, and maintaining the trust . . ." Neb. Rev. Stat. § 85-1807(3). Those costs include, in part, marketing activities to increase participation in the trust—a purpose which is not solely for the benefit of investors and beneficiaries.

In light of our conclusion that the State Treasurer must deposit assessed administrative fees into the Expense Fund in accordance with Neb. Rev. Stat. § 85-1807, it is unnecessary to determine if these are public funds in order to ascertain where the funds at issue must be deposited. However, the plain language in § 85-1813 states that the assets of the Program Fund, but *not* the Administrative Fund and Expense Fund, "shall at all times be preserved, invested, and expended solely and only for the purposes of the trust and shall be held in trust for the participants and the beneficiaries." This evinces a legislative intent to recognize a difference between assets of the Program Fund as trust funds held solely for the benefit of plan participants, and monies held in the Administrative and Expense Funds. This is further demonstrated by the authorization of transfers from the Expense Fund to the General Fund in § 85-1807(4). In light of this statutory language, a court could well conclude that monies in the Expense Fund are public funds.

Your request letter does not assert that the funds are to be utilized for any purpose other than to pay the administrative expenses related to NESPT. Should there be any question in the future as to whether the monies deposited into the Expense Fund could be used for another purpose, our office can review the nature of these funds at that juncture.

CONCLUSION

For the reasons set forth above, we conclude that the State Treasurer does not have the requisite legal authority to establish, maintain and use the Fee Account to hold a portion of assessed administrative fees outside of the State Treasury and the State of Nebraska's official accounting system. We further conclude that the fees paid by program participants must be deposited in accordance with the requirements of Neb. Rev. Stat. § 85-1807(4) into the Expense Fund, subject to appropriation by the Legislature into the Administrative Fund, and transfers to the State Investment Officer's Cash Fund and General Fund. While it is unnecessary to determine at this time if fees deposited in the Expense Fund are "public funds," we note a court could well reach this conclusion, given

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the express language of § 85-1813, which excludes assets of the Administrative and Expense Funds from the trust imposed for the benefit of plan participants and beneficiaries on assets of the Program Fund, and § 85-1807(4), which authorizes transfers from the Expense Fund to the State Investment Officer's Cash Fund and the General Fund. As there is presently no plan to utilize monies in the Expense Fund for any purpose other than to pay expenses related to NESPT, we need not definitively answer this question.

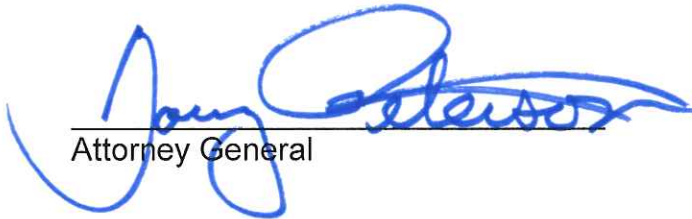
Sincerely,

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Approved:



Attorney General

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