

OFFICIAL OPINION NO. 72-09, Authority to expend federal funds or gifts from private foundations; authority to establish a newspaper for state employees.

STATE OF SOUTH DAKOTA
OFFICE OF
THE ATTORNEY GENERAL

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Robert T. Mullally
Director of Personnel
State Capitol
Pierre, South Dakota 57501

OFFICIAL OPINION NO. 72-09

Authority to expend federal funds or gifts from private foundations; authority to establish a newspaper for state employees.

Dear Mr. Mullally:

You have asked for an opinion on the following factual situation:

The Division of Personnel is in the process of making plans for an employees' newsletter which would be distributed to the work force of state government so that it may be informed of broad issues which directly concern its working conditions and fringe benefits. An editor of the publication has been hired whose salary is being financed by the Federal Emergency Employment Act. The administration of funds to pay the editor works in reimbursement fashion, whereby the journalist will be paid from my budget at which time I will submit the bill to the Employment Security Department who will reimburse me on a monthly basis.

It is expected the paper will be paid for by billing the departments which wish to participate in the publication of it at the rate of five (5) cents per month per employee. These moneys will be placed in an appropriate revolving fund by which to defray publication costs.

Also, the Division has received a grant from a private foundation to hire seven student interns at a rate of \$50 per week during the 1971 Legislature. The total grant is \$1,200.

In connection with this factual situation, the following questions have been raised:

QUESTION No.1 - Can the Personnel Division publish such a newspaper?

QUESTION NO.2 - Can the Personnel Division sell advertising in such a newspaper?

QUESTION NO.3 - Can the Personnel Division sell subscriptions to employees or to departments for such a newspaper?

QUESTION No.4 - If subscriptions can be sold, can the money go into a revolving fund?

QUESTION NO.5 - Can the Personnel Division spend federal money for the purposes outlined above?

QUESTION No.6 - Can the Personnel Division spend money received from a private grant for the purposes outlined above?

Before answering your questions, it would be well to review the principles of administrative law. Administrative law is that branch of public law which deals with, and describes the activity of, the various subdivisions of the sovereign power.

Of primary importance is the rule of law which states that an administrative agency has only such powers as have been conferred upon it by law, expressly or by implication.

Administrative agencies have no general or common law powers, nor can they assume powers unto themselves. Nonexistent powers cannot be exercised by an unchallenged exercise of them. There is no such thing as inherent powers in an administrative agency, although implied powers may sometimes be spoken of as "inherent." An express grant of powers will be deemed to include such implied powers as are necessarily or reasonably incident to the powers granted.

An administrative agency has no discretion as to the recognition of, or obedience to, a statute. An agency must obey any law found upon the statute books until, in a proper proceeding, its constitutionality is judicially passed upon. This includes all general laws, such as fiscal administrative laws, in addition to the agency's own statutes. See Am Jur 2d, Administrative Law; Cooper, State Administrative Law, 1965.

The answer to your Question No. 1 is YES, the Personnel Division may publish a newspaper or newsletter to communicate with state employees.

The duties of the Director of Employment are outlined in SDCL Chap. 3-6 and include classification of state employees' work, establishment of state employees' salary scales, maintaining of personnel records, recording work hours and absences, establishing efficiency ratings, etc. It can reasonably be inferred that the publishing of internal communications to keep state employees aware and abreast of events and decisions affecting their employment is implied in the duties of the Director of Employment. However, such communications must be limited to the purposes for which your department was created. Should the medium cover topics not directly concerned with state employees' working conditions, or should it become an advocate for political change, the State Auditor would be justified in rejecting vouchers for expenses connected with the project.

It is my understanding that the appropriations committee did not contemplate the publishing of a state newspaper or newsletter or the hiring of an editor or personnel to work on such, when it allocated your division's money in the general appropriations bill. However, since the general appropriations bill does not place any restrictions upon the money allocated for your department, you may legally spend your appropriation for any valid purpose authorized by your enabling statutes or which may be inferred from your enabling statutes, including the publishing of internal communications and the hiring of an editor to supervise such a project.

The answer to your Question No. 2 is NO, a state division may not sell advertising in its communications unless it is authorized to do so by the Legislature. The selling of advertising in a state publication would place the state in competition with private business. Such an undertaking would require the approval of the Legislature.

The answer to your Question No. 3 is YES, the division can make its communications available only to those persons or departments which pay subscription costs.

Normally, fees charged by the various state departments are set by the Legislature; however, while a state agency may not expend money without legislative authorization or charge for a service which it is legally obliged to perform for free, there is no legislation which would prohibit an agency from charging for a service which it is not specifically obliged to perform by statute. There are many examples of such valid charges: Subscriptions to the Game, Fish and Parks magazine, SOUTH DAKOTA CONSERVATION DIGEST, charges made to outsiders for copies made on a state agency's copy machine, charges for forms printed at state expense, charges for informational publications, etc.

The answer to your Question No.4, is NO, a division may not set up a revolving fund without legislative authority. Working capital or revolving funds, as they are most commonly known, are authorized by the Legislature under SDCL 4-44(7). It is only where a department or budget unit receives specific authorization from the Legislature to put its receipts into a revolving fund that one may be used. Otherwise, any moneys received by an agency **from any source** must be paid into the state treasury, SDCL 4-3-2, to the credit of the general fund. SDCL 4-44(1) provides that all revenues not restricted or allocated **by law** for a particular purpose shall be credited to the general fund. Even an agency with an authorized revolving fund must have an appropriation to spend money from the fund, and it may not spend more than its appropriation even if it has extra money in its revolving fund. Nor may an agency evade its financial accountability by receiving and depositing moneys in a local bank account. All state public funds must be maintained in the state treasury unless the state treasurer and state auditor shall jointly determine that a justification exists for maintaining funds in a local bank account. SDCL 4-4-3.

In other words, your department can charge for subscriptions to a newspaper, but the money charged cannot be credited to your department without legislative authorization.

The answer to your Question No.5 is YES, a division may spend federal funds if it does so according to the proper statutory procedure.

All expenditures of the state or of any of its budget units must be made under the authority of appropriation acts. SDCL 4-8-1. The appropriation for your department is contained in Chap. 287, Sec. 2(9), 1971 Session Laws, (General Appropriations Act). Without other authority from the Legislature, the amount set therein would be the maximum amount which your department could spend during the current fiscal year. However, SDCL 4-8-17 allows the Governor to accept federal funds and to delegate a state agency to spend them. Sec. 18 of the current Appropriations Act allows a budget unit to spend such federal funds delegated to it, if specific approval is obtained from the state budget officer.

Accordingly, you have the authority to spend federal funds if you have been delegated by the Governor to receive such funds and have the approval of the state budget officer to spend them.

The answer to your Question No.6 is YES, a state division can spend gifts from private foundations if it follows the statutory authority.

The reasoning which applies to the spending of federal funds also applies to the spending of grants from private foundations. An agency is restricted to its appropriated budget, except that Chap. 18 of the current General Appropriations Bill allows it to spend any other funds it may receive. However, before an agency can spend gifts made to it from a private foundation, the gift must be received by the Governor and reported to the State Board of Finance which shall accept or reject it. SDCL 5-24-12. If the gift is received and deposited in the state treasury and the State Board of Finance refuses to accept it, the gift cannot be returned without a special appropriation. 1939-40 AGR 303, 1941-42 AGR 460.

Respectfully submitted,

Gordon Mydland
Attorney General