

VOLUME NO. 44

OPINION NO. 43

APPROPRIATIONS - Application of statutory appropriation requirement;
APPROPRIATIONS - Fund transfers between accounts within state treasury;
RETIREMENT SYSTEMS - Fund transfers between accounts within state treasury;
MONTANA CODE ANNOTATED - Sections 17-2-102, 17-7-502, 19-9-1007(3), 19-9-1011;

MONTANA CONSTITUTION - Article VIII, section 14.

HELD: When a statute authorizes a transfer of monies between accounts within the state treasury, a statutory appropriation is not required under either the Montana Constitution or the Montana statutes.

December 3, 1992

Mark Cress, Acting Administrator
Public Employees' Retirement Division
1712 Ninth Avenue
Helena MT 59620-0131

The Honorable Andrea "Andy" Bennett
State Auditor
Room 270, Mitchell Building
Helena MT 59620-0301

Dear Mr. Cress and Ms. Bennett:

You have requested my opinion concerning the following question:

Does a fund transfer from a special revenue account to a pension trust fund account require a statutory appropriation?

The Montana Constitution, Article VIII, section 14, requires that "[e]xcept for interest on the public debt, no money shall be paid out of the treasury unless upon an appropriation made by law and a warrant drawn by the proper officer in pursuance thereof." In 1985, the Legislature enacted section 17-7-502, MCA, which defines a statutory appropriation and also lists the requirements for a valid statutory appropriation. This statute provides that "[a] statutory appropriation is an appropriation made by permanent law that authorizes spending by a state agency." § 17-7-502(1), MCA. It also provides that before a statutory appropriation is effective the law containing the statutory appropriation must be listed in section 17-7-502(3), MCA, and must specifically state that a statutory appropriation is made as provided in section 17-7-502, MCA. § 17-7-502(2)(a) and (b), MCA.

Your question concerns the fund transfer from a special revenue account into a pension trust fund account that occurs as a result of section 19-9-1011, MCA, and whether such a transfer is valid in light of section 17-7-502, MCA. Section 19-9-1011, MCA, specifies the monthly allowance paid to a retired police officer on or after July 1, 1975, or to his surviving spouse or dependent child. Subsection (2) of that section provides:

At the beginning of each fiscal year, the administrator shall request and the state auditor shall pay to the administrator from the premium tax collected from insurance sold in this state to insure against the risks enumerated in 19-11-512(3) an amount sufficient to fund the allowance adjustment provided for in subsection (1).

This section is not listed in section 17-7-502, MCA, nor does it refer to section 17-7-502, MCA, as required for a valid statutory appropriation. However, the Montana Constitution requires a statutory appropriation only when "money shall be paid *out of the treasury*." See Mont. Const. Art. VIII, § 14 (emphasis added). Neither the Montana Constitution nor the Montana statutes require such an appropriation when monies are transferred between accounts *within* the state treasury. See also State ex rel. Gould v. Cooney, 49 St. Rptr. 410, 411, 831 P.2d 593, 595 (1992) ("However, as described in the Attorney General's ballot statement fiscal note, the 'measure redirects coal severance tax from the permanent trust to a treasure state endowment trust.' On its face, this measure is not an appropriation of money").

The state treasury consists of several fund categories and types that are outlined in section 17-2-102, MCA. This fund structure includes three categories: the governmental fund, the proprietary fund, and the fiduciary fund. A special revenue fund is included in the governmental fund category and a pension trust fund is included in the fiduciary fund category. § 17-2-102(1)(a)(ii) and (b)(iii), MCA. Thus, both the special revenue fund and the pension trust fund are part of the state treasury. The Legislature provided for a transfer of funds into the pension trust fund account via section 19-9-1011, MCA, to cure an inequity in the system by ensuring that police officers who retired on or after July 1, 1975, or their surviving spouse or dependent child or children, will receive a cost of living adjustment. See Minutes, House State Administration Committee, February 19, 1985 (consideration of House Bill No. 754). This transfer does not require a statutory appropriation under either the Montana Constitution or the Montana statutes.

I recognize that some of the retirement systems' statutes which transfer monies from one account to another contain the statutory appropriation language. See, e.g., § 19-9-1007(3), MCA. However, this unnecessary language does not alter the fact that the requirements of section 17-5-502, MCA, do not need to be followed when monies are being transferred between accounts within the state treasury.

THEREFORE, IT IS MY OPINION:

When a statute authorizes a transfer of monies between accounts within the state treasury, a statutory appropriation is not required under either the Montana Constitution or the Montana statutes.

Sincerely,

MARC RACICOT
Attorney General