

OPINION NO. 75-087

Syllabus:

Section 115.31, Revised Code, may not constitutionally be construed so as to permit transfers to the General Revenue Fund of any moneys in the Vietnam Conflict Compensation Fund derived from the sale of bonds authorized by Section 2j of Article VIII of the Ohio Constitution. The voters required that the proceeds of the Vietnam bonds could be used only for the purposes of paying Vietnam veterans' bonuses and related administrative expenses. (1930 Op. Atty. Gen. No. 2407, p. 1952 Overruled in part.)

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: William J. Brown, Attorney General, December 8, 1975

You have asked my legal opinion as to whether Ohio can seek to overcome its immediate "cash flow" problem by transferring money specifically earmarked by a vote of the people for Vietnam veterans' bonuses to the General Revenue Fund to pay the general operating expenses of the state. Future tax receipts would be used to repay the money transferred from the Vietnam bonus fund.

Because your question raises issues vital to the continued fiscal strength and integrity of Ohio, I have devoted special attention to this response. The Director of Budget and Management has proposed a continual use of money in special purpose funds to cope with the severe cash-flow problems he predicts throughout the next fiscal year. The Director himself in his public statement of October 20, 1975, described his proposed solution as "budgetary gimmicks". I believe Ohio should not take even a first step, however small, down the disastrous road of budgetary gimmickry taken by New York City.

Your request for my opinion asks specifically:

"Can the Auditor of State lawfully invoke the provisions of R.C. 115.31 in order to effect a temporary transfer of funds into the general revenue fund from the Vietnam Conflict Compensation Fund in the event that a deficit occurs in the general revenue fund as recently projected by the Office of Budget and Management?"

This question arises because of the present condition of State fiscal affairs. An understanding of this condition is essential before your question can be analysed.

On October 16, and October 28, 1975, the Director of Budget and Management (OBM) wrote you and other state officials describing the cash-flow problems of the state. The only solution to these problems suggested by the Director was a "temporary transfer" among funds under R.C. 115.31. Such transfers can only be made at your request and with the approval of the Controlling Board. The Director predicted a shortage in the General Revenue Fund (GRF) of \$100 million in December and January, 1976, and proposed transfers of "surpluses" in other funds, including \$60 million from Vietnam

Conflict Compensation Fund, into the GRF. Based upon projected receipt of taxes, he contended that these temporary transfers could be repaid in February, 1976.

The Vietnam Conflict Compensation Fund was created when the voters approved an amendment to the Ohio Constitution, Section 2j, of Article VIII, on November 6, 1973. This amendment permitted the State to issue bonds and use the moneys raised by the sale of bonds to pay Vietnam veterans bonuses and the expenses of administering the bonus program. The voters pledged to the purchasers of the bonds the full faith and credit of the State.

Your question is significant to the State's finances not only this winter but throughout the remainder of this biennium ending June 30, 1977. The Director has provided figures indicating a projected deficit in the GRF during all of the next fiscal year with the exception of the final month. These projected cash deficits range from \$43 to \$236 million. The Director further stated that temporary transfers of funds under R.C. 115.31 will be "commonplace in FY77" and that "a series of transfers will be required throughout the year [FY 1977]."

The cash-flow problem in the GRF is caused by an uneven flow of revenues into the GRF throughout the year because corporate franchise tax payments, which constitute over 12% of Ohio tax revenue, are received primarily in February--April of each year. GRF disbursements exceed revenues during the autumn months. As a result, the GRF balance continually declines from the beginning of the fiscal year on July 1 through the end of January. After that time, revenues exceed disbursements with the payment of the corporate franchise tax.

The cash-flow problems of this biennium result from the progressive exhaustion of the State's working capital during the three years ending June 30, 1977. The experience of recent years has shown that the State needs a cash balance of at least \$300 million on hand at the beginning of each fiscal year to cover the excess of disbursements over revenues during autumn months.

However, during last fiscal year ending June 30, 1975, the State spent over \$110 million more than it received in GRF moneys and thereby reduced its working capital from \$327 million on July 1, 1974 to only \$212 million on June 30, 1975. The Director of OBM projects the State will again spend over \$156 million more GRF dollars this fiscal year than it receives and will have a projected cash balance of only \$55 million next July. During the next fiscal year, the state will again spend more than it receives in GRF revenues, will reduce its working capital by a projected \$26 million and will have a cash balance on June 30, 1977 of only \$29 million. The Director of OBM projects a GRF cash-flow deficit (expenditures exceeding tax receipts) of over \$236 million in January, 1977.

For the reasons discussed below, I believe that the R.C. 115.31 is not intended to permit the transfer of any money from the Vietnam Conflict Compensation Fund to the GRF. In the absence of any Ohio court decisions interpreting this law, I believe the money in the Vietnam Conflict Compensation Fund may be used only for those special purposes specified in the constitutional amendment, which the citizens of Ohio approved creating this bond fund. I am bolstered in this conclusion by considering the potential adverse impact of transferring the proceeds of a special-purpose

bond issue upon the excellent credit rating of the State. The State presently enjoys the highest credit rating on these general obligation bonds (AAA), and therefore pays the lowest interest rates. New York City used various financial gimmicks over the years, some of which involved funding general current operating expenses out of money other than current tax revenues. In light of the disastrous results of such a policy, I believe a conservative, fiscally prudent interpretation of R.C. 115.31 is warranted. The State should not spend more GRF dollars than it receives in taxes.

The fact that transfers cannot be made from the Vietnam Conflict Compensation Fund does not, of course, mean that the State's cash-flow problems are unsolvable.

There are three basic types of remedies to the cash-flow problem--all require the State to live within its means. Expenditures could be reduced, income could be increased, and/or the timing of expenditures and receipts of taxes could be better synchronized. The plain truth shown in the director of OBM's figures is that the State will spend during the two years ending June 30, 1976 over \$270 million more from the GRF than it receives and will deplete its working capital. The State cannot by law go into debt to obtain working capital.

One solution to this "cash-flow" problem was proposed by the Director of OBM and adopted by the General Assembly in Section 51 of the general appropriation act for this biennium, Amended Substitute House Bill No. 155. This provision required advance payment on or before September 15, 1975 (and again in 1976) of one-fourth of the estimated total corporate franchise tax due for tax year 1976, increasing GRF revenues during the low-revenue period of time with a consequent easing of the December-January cash-flow problem and lessening of the amount of working capital needed at the beginning of any given fiscal year. However, Section 51 was the subject of a line-item veto by the Governor.

Another possible solution to the problem remains in Amended Substitute House Bill No. 155 in Section 47, where the General Assembly has given the Director of OBM, subject to Controlling Board approval, the responsibility for making adjustments in the distributions of subsidies so as to avoid incurring debt, prohibited by Sections 1 and 3 of Article VIII of our Constitution, when actual revenues are less than projected expenditures during some period of time within the biennium.

Revised Code 115.31 which the Director of Budget and Management has proposed to you as a solution to this cash-flow problem, reads as follows:

"Whenever a deficit exists in the general revenue fund or any other fund of the state, by reason of which the general operating expenses of the state cannot be paid from appropriations made from such fund, an emergency exists and the auditor of state may, with the approval of the controlling board, make temporary transfers to such fund of any surplus moneys in any other fund available for state purposes. Any fund from which moneys are so transferred shall be reimbursed from the first moneys accruing and available for such purpose. The auditor of state may make the necessary transfers to reimburse funds from which

moneys have been transferred, and he shall certify such action to the treasurer of state."

This provision has apparently never been construed by a court of law in Ohio, although enacted in 1927 as Section 249-1, General Code, in Senate Bill No. 289.

The two critical questions of statutory construction are whether or not the Vietnam Conflict Compensation Fund is a fund "available for state purposes" and, if so, whether it contains "surplus moneys."

Interestingly enough, virtually the same questions were presented to one of my predecessors during the Depression. 1930 Op. Atty. Gen. No. 2407, p. 1952. Attorney General Gilbert Bettman was also asked by the Auditor of State whether a temporary transfer, pursuant to the General Code predecessor of R.C. 115.31, to the Highway Maintenance and Repair Fund in the amount of \$1.3 million from the World War Compensation Fund was lawful. The World War Compensation Fund had been created in Section 2a, Article VIII, Ohio Constitution (now repealed), to receive the proceeds of the sale of bonds which proceeds were to be used to pay bonuses to veterans of the first world war. In a short opinion without citing any judicial authority, Attorney General Bettman ruled that the transfer was lawful.

Attorney General Bettman in construing the word "surplus" as used in this statute stated that it "does not mean an excess of moneys requisite to meet the entire liabilities, both present and future, of a fund, but merely more than sufficient moneys for present needs. In other words, it means a temporary surplus, hence the requirement to reimburse the fund." *Id.* at p. 1543. I am in agreement with my predecessor's construction of the word "surplus" since the reimbursement provisions of the statute would make no sense if the term meant anything other than moneys which are currently not needed (but may be needed in the future) for the authorized purposes of the transferor fund. Your letter to me does not indicate whether or not the Vietnam Conflict Compensation Fund has in it "surplus moneys" as defined in this manner.

My predecessor also concluded that the World War Compensation Fund was a fund "available for state purposes" as the term is used in the General Code predecessor of Section 115.31, since "payment of the world war adjusted compensation is clearly a state purpose, made so specifically by the terms of the constitutional amendment referred to." *Id.* at pp. 1543-44. My predecessor's opinion contains no discussion of the constitutional implications of construing the language "any other fund available for state purposes" in R.C. 115.31 to include the proceeds of a special purpose fund created by constitutional amendment. Mindful of the rule of statutory construction in R.C. 1.47 that where possible statutes are to be interpreted to be constitutional, I feel it necessary to address myself to certain critical questions of constitutional law not explicitly addressed by my predecessor.

The first constitutional issue is whether a transfer under R.C. 115.31 would create a "debt" in violation of Section 3 of Article VIII, Ohio Constitution, which reads as follows:

"Except the debts above specified in sections one and two of this article, no debt whatever

shall hereafter be created by, or on behalf of the State."

Section 1 of this article authorizes debts "to supply casual deficits or failures in revenues, or to meet expenses not otherwise provided for" but it contains a ceiling in the amount of \$750,000 on the amount of any such debt. Section 2 of this article authorizes debt "to repel invasion, suppress insurrection, defend the state in war, or to redeem the present outstanding indebtedness of the State," and the various lettered paragraphs added to Section 2 as constitutional amendments throughout the years authorize the issuance of bonds for various specified purposes, none of which include an interfund transfer of moneys to protect against a deficit in the General Revenue Fund. Thus, it can be seen that R.C. 115.31 might be found to be unconstitutionally applied if it were to authorize a transfer which would create a "debt" within the meaning of Section 3, Article VIII.

There is a trilogy of Ohio Supreme Court cases construing the word "debt" within the meaning of Section 3 of Article VIII. One could argue from the classic case of State v. Medbery, 7 Ohio St. 522 (1857), that where sufficient funds are appropriated and receivable in the General Revenue Fund during the biennium to repay interfund transfers, no "debt" is created. Medbery holds that "debt" must be read with reference to the two-year period for which the General Assembly is authorized to make appropriations. The fact that there is an interval of time between incurring the obligation and payment is not in and of itself sufficient to create "debt" as long as appropriations have been made and revenue provided to fund the payment. State v. Medbery, *supra* at 529. However, the Medbery case points out that "debt" might be created if funds were insufficient to meet appropriations. *Id.* at 530.

The case of State ex rel. Preston v. Ferguson, 170 Ohio St. 450, 166 N.E.2d 365 (1960), interpreted a statute empowering the School Employees Retirement Board to use its pension funds to purchase real property for the purpose of resale to the Department of Highways. A statutory obligation was placed upon the Director of Highways to re-purchase this property from the pension fund at a certain point in time pursuant to an agreement entered into between the retirement board and the Department of Highways. At issue was whether or not a "debt" as prohibited by Section 3 of Article VIII, was created by this obligation of the Department of Highways to re-purchase the property. In holding no such debt to have been created, the court emphasized the fact that the agreement to re-purchase the property was always supported by an existing appropriation, adopting Medbery philosophy that the term "debt" must be defined with reference to the two-year appropriation period so that if funds have been currently appropriated to pay an obligation, no debt is created as long as the obligation is satisfied within the biennium.

Preston can be distinguished from this proposed temporary transfer of funds from the Vietnam Conflict Compensation Fund to the GRF. The pension fund in the Preston case held more than simply a legal right for repayment--it held the land which had been purchased with those funds so that one asset (cash) had simply been replaced with another (land) of equivalent value. However, the Vietnam Conflict Compensation Fund would obtain no similar security for the obligation of the General Revenue Fund to repay.

It is entirely possible that the Ohio Supreme Court might find "debt" to have been created by the type of temporary transfer being proposed where the obligation to repay is one on paper only. A majority of four justices would have found the creation of such a paper obligation unconstitutional in State ex rel. Lynch v. Rhodes, 2 Ohio St.2d 259, 208 N.E.2d 906 (1965) (however, Section 2 of Article IV of the Constitution required a six-justice majority to hold a statute unconstitutional), where certificates of obligation were sold by the Commissioners of the Sinking Fund to finance the purchase of highway land, even though the certificates were to be repaid from highway funds already appropriated.

I need not reach a decision, however, in this opinion as to whether an unconstitutional "debt" would be created by the proposed temporary transfer because I find the other constitutional question raised by the Director of OBM's proposal dispositive of the question as to whether the transfer is permitted.

The other constitutional question is whether the purposes for which the Vietnam Conflict Compensation Fund may be used make it "available for state purposes" as that phrase is used in R.C. 115.31. Section 2j of Article VIII, Ohio Constitution, creates the Vietnam Conflict Compensation Fund and authorizes the sale of bonds, the proceeds of which are to go into this fund. The seventh paragraph of this constitutional provision reads in part as follows:

"The Vietnam conflict compensation fund shall be paid out upon order of the commissioners, without appropriation by the General Assembly, in payment of the expenses of administering this section, and as compensation as follows: ...[veteran eligibility is described]"

Thus, the moneys in this constitutionally created fund may be paid out only upon order of the Commissioners of the Sinking Fund and only for specified purposes approved by the voters. Furthermore, the bond resolutions authorizing the sale of the bonds, the proceeds of which go into this fund, indicate that any surplus remaining in the Vietnam Conflict Compensation Fund after all disbursements have been made pursuant to Section 2j "shall be transferred" to the Vietnam Conflict Compensation Bond Retirement Fund. Although Section 2j itself makes this transfer discretionary with the Commissioners, the bond resolution has the effect of binding the Commissioners, since their Regulation VC cf-1-15 provides that the bond resolution constitutes a contract between bondholders and the State of Ohio. The Commissioners' Regulation VC cf-1-10 provides that all investment interest earned by the Vietnam Conflict Compensation Fund is to be credited to that fund. Thus, it appears that the entire Vietnam Conflict Compensation Fund, including any surplus and investment interest, is available only for specified purposes--bonuses, administrative expenses, and security of bondholders.

Ohio courts do not appear to have considered the question of whether a "temporary" transfer from a special-purpose bond fund would be constitutionally permissible. Those Ohio decisions which do appear to prohibit expenditures or transfers from funds for purposes which are not in accordance with the stated purposes of such funds involve moneys which are irrevocably lost to the transferor fund. See, City of Lakewood v. Rees, 132 Ohio St. 399, 8 N.E.2d 250 (1937); Hartwig Realty Co.

v. City of Cleveland, 128 Ohio St. 583, 192 N.E. 880 (1934); City of Cincinnati v. Roettinger, 105 Ohio St. 145, 137 N.E. 6 (1922); Ohio Power Co. v. Craig, 50 Ohio App. 239, 197 N.E. 820 (Coshocton Co. 1935). See also 1933 Op. Atty. Gen. No. 706, p. 601 and 1951 Op. Atty. Gen. No. 933, p. 706. In 1957, one of my predecessors ruled that proceeds obtained pursuant to issuance of bonds as authorized by Section 2e of Article VIII could not be used to repair steam lines and boilers in state office buildings because such use was not authorized by Section 2e. 1957 Op. Atty. Gen. No. 1154. However, this again was a decision that funds could not be permanently expended for purposes not authorized by the law creating the fund. Here, of course, the issue of whether any money transferred from the Vietnam Conflict Compensation Fund would be permanently lost would depend upon whether it was or could be reimbursed.

Those few courts in other states which have addressed the problem of temporary transfer of funds for uses not permitted in the transferor fund are split. However, two of the more recent decisions in Illinois hold such temporary transfers improper.

In People ex rel. Redfern v. Penn Central Company, 47 Ill. 2d 412, 266 N.E.2d 334 (1971), the Illinois Supreme Court held improper a temporary transfer of idle funds from a school district's educational fund to a municipal retirement fund. The court found such a transfer to be "impliedly prohibited" because not an expressly authorized use of the educational fund. Similarly, in People ex rel. Bronza v. Gilbert, 409 Ill. 29, 97 N.E.2d 793 (1951), the same court held improper a temporary transfer of funds from a county's "working cash fund" to the county highway fund in the face of statutory language specifically defining the purposes for which the working cash fund could be used. The court held that the enumerated uses of the working cash fund created an "implied prohibition" against its use for any purpose, such as a temporary loan, not expressly authorized. These cases both distinguish an earlier Depression-era case, Gates v. Sweitzer, 347 Ill. 353, 179 N.E. 837 (1932), which held no wrongful diversion of funds to occur when idle funds are temporarily borrowed for a fund having "a stated and sufficient income" to make repayment. However, Gates arose on an appeal from sustaining of a demurrer and, therefore, did not discuss the actual facts surrounding the transfer and did not discuss any purpose restrictions which might be placed upon a transferor fund.

The Alabama Supreme Court held in City of Florala v. Matthews, 223 Ala. 31, 134 So. 627 (1931), that a temporary transfer of moneys in special funds (primarily bond proceeds) for general fund purposes was unlawful because it violated a statute which prohibited using public moneys collected for any special purpose in any way other than for such purpose. It made no difference that repayment was to occur, as the court noted "the risk" that funds once taken from such special purpose funds may never be returned. No one can say a similar risk does not exist here. See also Miller v. City of Milwaukee, 182 Wisc. 549, 196 N.W. 235 (1923); Wick v. City of Wausau, 143 Wisc. 645, 128 N.W. 429 (1910).

On the other hand, a few courts have permitted temporary transfer of funds. In addition to Gates v. Sweitzer, supra, the Supreme Court of Washington has allowed such transfers in a couple of old cases. Von Herberg v. City of Seattle, 157 Wash. 141, 288 P. 646 (1930), also a Depression-era case,

approved a temporary transfer of bond proceed moneys from the city's municipal light and power plant fund and the water fund to the street railway fund. It is not clear from that opinion what sort of purpose restrictions, if any, were placed upon use of the moneys in the transferor fund. That court was following an earlier decision, Griffin v. City of Tacoma, 49 Wash. 524, 95 P. 1107 (1908), in which a temporary transfer had been allowed from the city's general fund to a special fund. Both of these cases emphasize the importance of the solvency of the transferee fund so as to assure repayment.

Thus, we clearly have a situation in which Ohio courts have not been confronted with the precise issue, and those states which have been confronted with the issue are split on the proper result to be reached. In the absence of any Ohio court decision directly permitting a "temporary" transfer of moneys for uses not authorized by the constitutional amendment creating the fund, I believe that a temporary transfer from the Vietnam Conflict Compensation Fund would be in violation of Section 2j of Article VIII of the Constitution.

I recognize that in so advising you, I am in disagreement with my predecessor on a proper construction of the statutory language in R.C. 115.31 referring to funds "available for state purposes." I believe this language, consistent with R.C. 1.47, must be construed, if possible, so as to render the statute constitutional. It is my feeling that the absence of Ohio case law and the split in authority in other states necessitates a conservative construction of Section 2j of Article VIII. Such a strict construction is especially appropriate when the subject of concern is a constitutional amendment approved by vote of the people of the State. I do not believe that the people voting for this amendment had any expectation that the proceeds of the bonds might be used to fund the general operating expenses of state government, even temporarily. Nor did the purchasers of these bonds agree to assume the risk that there would be insufficient GRF revenue for quick and easy repayment of any such transfer. With the anxiety in the municipal bond market created by the fiscal problems of New York and New York City, this is not the time for holders of Ohio's bonds to learn that they are deemed to have assumed greater risks than they reasonably expected. This State enjoys a very good credit rating and R.C. 115.31 should be interpreted to avoid risking this good rating and thereby increasing the state's cost of borrowing.

Based upon the foregoing, it is my opinion, and you are so advised, that Section 115.31, Revised Code, may not constitutionally be construed so as to permit transfers to the General Revenue Fund of any moneys in the Vietnam Conflict Compensation Fund derived from the sale of bonds authorized by Section 2j of Article VIII of the Ohio Constitution. The voters required that the proceeds of the Vietnam bonds could be used only for the purposes of paying Vietnam bonuses and the related administrative expenses. (1930 Op. Atty. Gen. No. 2407, p. 1952 overruled in part.)