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January 23, 2001

To: Patrick Flahaven
Secretary of the Senate

Edward Burdick
Chief Clerk of the House

From: Pamela Wheelock
Commissioner

Re: Report on Trunk Highway Expenditures

Pursuant to Laws of Minnesota 2000, Chapter 479, Article 2, Section 1, the Department of Finance and the Attorney General have completed a study of Trunk Highway expenditures, which the legislature declared do not serve a highway purpose.

Specifically, the law stated that:

"At the time of submission of the biennial budget proposal to the legislature, the Commissioner of Finance and the Attorney General shall report to the Senate and House of Representatives Transportation Committees concerning any expenditure that is proposed to be appropriated from the Trunk Highway Fund, if that expenditure is similar to those reduced or eliminated in sections 5 to 20. The report must also explain the highway purpose of the proposed expenditure."

Eight expenditure areas were declared by the 2000 legislature to not serve a highway purpose. Reinstatement of Trunk Highway funding is recommended for two of the expenditure areas whose appropriations were eliminated for FY 2002-03 last session. They are tort claims and partial restoration of Trunk Highway funding for the BCA Laboratory. As required, the report explains the rationale for restoring these appropriations.

We hope you will find this report useful in your budget deliberations.

cc: Senator Dean Johnson
Senator Randy Kelly
David Jensen, Fiscal Analyst
Legislative Reference Library (6 copies)

Representative Carol Molnau
Representative Tom Workman
John Walz, Fiscal Analyst

AN EQUAL OPPORTUNITY EMPLOYER

REPORT CONCERNING
RECOMMENDATIONS
TO RETURN
CERTAIN
EXPENDITURE AREAS
TO THE
TRUNK HIGHWAY FUND

PREPARED BY:

MINNESOTA DEPARTMENT OF FINANCE
AND
OFFICE OF THE ATTORNEY GENERAL

JANUARY 2001

INTRODUCTION

This report explains the highway purpose of certain proposed appropriations from the Trunk Highway Fund for payment of tort claims and Bureau of Criminal Apprehension (BCA) laboratory expenses. The report is required by Minn. Laws 2000, ch. 479, art. 2, § 1, which provides as follows:

At the time of submission of the biennial budget proposal to the legislature, the commissioner of finance and the attorney general shall report to the senate and house of representatives transportation committees concerning any expenditure that is proposed to be appropriated from the trunk highway fund, if that expenditure is similar to those reduced or eliminated in sections 5 to 20. The report must explain the highway purpose of the proposed expenditure.

BACKGROUND

Prior to the 2000 legislative amendments, Minn. Stat. 168.20, subd. 3 [APPROPRIATIONS] stated: "The Commissioner [of transportation] may expend trunk highway funds only for trunk highway purposes." The 2000 legislature amended this section by adding: "*Payment of expenses related to sales tax, bureau of criminal apprehension laboratory, office of tourism kiosks, Minnesota safety council, tort claims, driver education programs, emergency medical services board, and Mississippi River parkway commission do not further a highway purpose and do not aid in the construction, improvement, or maintenance of the highway system.*" Minn. Laws 2000 ch. 479, art. 2, § 4.

Eight expenditure areas were declared by the 2000 legislature to be for non-highway purposes and ineligible for highway funding. The legislature asserted that the following expenditures do not further a highway purpose and do not aid in the construction, improvement, or maintenance of the highway system:

- Sales tax,
- Bureau of Criminal Apprehension laboratory,
- Office of Tourism Travel Information Centers (TICs),
- Minnesota Safety Council,
- Tort Claims,
- CFL - Driver education programs,
- Emergency Medical Services Board, and
- The Mississippi River Parkway Commission.

For fiscal year 2001, the legislature converted the source of appropriations for each of these expenditure areas from the Trunk Highway Fund to the General Fund. These are the appropriations "reduced or eliminated by sections 5 to 20" of Minn. Laws 2000,

ch. 479, art. 2. The general fund appropriations were for one-time only, leaving these areas with no permanent funding source for fiscal year 2002 and beyond.

RECOMMENDATION

The Governor's budget recommends that trunk highway funding be appropriated for expenditures in two of the eight categories previously disallowed by the legislature:

1. State highway systems-related tort claims, and
2. BCA forensic laboratory services.

TORT CLAIMS

The recommended Trunk Highway Fund appropriations for tort claims are for compensation to parties harmed due to tortious acts of the Department of Transportation (Mn/DOT) and the Department of Public Safety (DPS) in carrying out responsibilities related to the state trunk highway system. Prior to fiscal year 2001, tort claims were paid from the Trunk Highway Fund when state employees engaged in *highway purpose* activities were determined to be responsible for the damages requiring compensation.

It has long been recognized that liability for tort claims arising from the activities of an entity's employees is a "cost of engaging in that business" in furtherance of which the tortious acts were committed. *See, e.g., Fahrendorff v. North Homes, Inc.*, 597 N.W.2d 905, 910 (Minn. 1999); *Lange v. National Biscuit Co.*, 297 Minn. 399, 403, 211 N.W.2d 783, 785 (1973). However, the payment of tort claims from the Trunk Highway Fund has come into question primarily because of a 1930 court case. In that case, *Wharton v. Babcock*, 181 Minn. 409, 232 N.W. 718 (1930), the court held unconstitutional a law directing the Commissioner of Highways to pay certain named persons from the Trunk Highway Fund for injuries that had been caused through negligence of highway department employees. In reaching its decision, the court emphasized the absence of actual legal liability of the state for negligence stating:

It has always been the law here that the state is not legally liable for the negligence of any official or agent in the maintenance of highways. To hold that, in adopting article 16, the people intended that the subsequent Legislatures might use the trunk highway fund to pay damages for injuries to persons and property upon such highways, *where there was no legal liability*, however laudable the purpose, would be going far afield.

Id. at 412, 232 N.W. at 719 (emphasis added).

That decision was made during the era of judicially recognized sovereign immunity for tort claims. The court recognized; however, that payments related to highway and construction maintenance for which the state was legally liable, such as employee salaries

and workers' compensation benefits, could be considered highway related and properly payable from the highway fund. *Id.* at 414, 232 N.W. at 720.

The concept of state sovereign immunity referred to by the *Wharton* court case was prospectively abolished as a general rule of tort law by the Minnesota Supreme Court in *Nieting v. Blondell*, 306 Minn. 122, 235 N.W. 2d 597 (1975), subject to appropriate action taken by the legislature. That case involved a claim of negligence in the design, construction, and maintenance of a median barrier on an interstate highway. In response, the legislature enacted M.S. 3.3736, authorizing tort claims against the state while retaining certain more narrowly defined governmental immunities. Following the effective date specified in *Nieting*, it was clear that the state could be legally liable in some circumstances for negligence in highway design, construction, operation, and maintenance. Thus, unlike the circumstances in which *Wharton* was decided, payment of tort damages in certain circumstances is a cost directly associated with design, construction, operation, and maintenance of a highway system for which the state is liable.

The state Tort Claims Act provides, as a general rule, that payment of tort claims is to be made from appropriations to the agency whose activities generated the costs and from dedicated receipts, where the claims arise from activities paid for by those receipts. *See* Minn. Stat. § 3.73, subd. 7. The Department of Finance believes that the funding of tort claims arising from trunk highway activities from the Trunk Highway Fund is consistent with that general principle. The Governor's budget recommends restoration of the \$600 thousand annual Trunk Highway Fund appropriation for tort claims.

BUREAU OF CRIMINAL APPREHENSION LABORATORY

A proposed Trunk Highway Fund appropriation provides funding for forensic laboratory services associated with state patrol arrests for alcohol-related driving offenses. This activity provides physical evidence of alcohol or controlled substances for both implied consent and criminal DWI cases. The issue is whether this activity contributes to the improvement or maintenance of the trunk highway system.

The issue of funding for the activities related to implementation of the Implied Consent Statute has been raised previously. In 1967, State Auditor Stafford King requested an Attorney General opinion to determine whether the Commissioner of Highways may expend trunk highway funds to train staff of the Bureau of Criminal Apprehension in the use and handling of breathalyzer equipment. Attorney General Douglas Head affirmed that the Commissioner of Transportation may expend trunk highway funds to ensure full implementation of the Implied Consent Statute. *See* Op. Atty. Gen. 229-a, July 27, 1967 (copy attached).

The Attorney General opinion noted that in *Cory v. King*, 214 Minn. 535, 543, 8 N.W.2d 614 (1943) the Minnesota Supreme Court declared:

The true test is whether the charge upon the highway fund accurately reflects highway expenses. It is essential to validity of an appropriation from the highway fund that no more money be taken than is necessary to defray the expenses properly attributable to highway matters.

Id. at 543, 8 N.W.2d at 618.

The Attorney General also noted that the Minnesota court, in construing the Commissioner's duties, referred to *Burnquist v. Cook*, 220 Minn. 48, 62, 19 N.W.2d 394, (1945), in which the court held that the commissioner's obligations to improve and maintain the highways placed upon him the responsibility of maintaining and regulating highways to lessen or eliminate traffic hazards. The court declared that the phrase to "improve and maintain such highways," as used in statute, was intended to give the person responsible for construction and maintenance the general supervision, upkeep, and regulation of the system. The purpose for which was to provide a uniform system familiar to the traveling public, thereby rendering traffic less hazardous.

Therefore, the Attorney General acknowledged that expenditures necessary for highway safety fall within the commissioner's authority to maintain the public highway system and are proper charges against the Trunk Highway Fund. The close relationship of the expenses for fully implementing the Implied Consent Law to highway safety supports the conclusion that implied consent charges were valid charges for the Trunk Highway Fund.

The Governor's budget recommends that a portion of the funding for BCA laboratory services be restored from the Trunk Highway Fund. Similar to the situations described above, the administration believes that this function serves a highway purpose by contributing to the safe operation of the state's highways. The Trunk Highway funding proposed would fund evidence costs for State Patrol arrests for alcohol-related offenses.

State patrol statistics indicate that 21 percent of all DWI arrests are made by the patrol. Therefore the Department of Finance believes it is appropriate to allocate 21 percent of DWI laboratory costs to the Trunk Highway Fund, which is the general source of funding for State Patrol activities. Funding for the remaining 79 percent is recommended from the General Fund. The Department recommends that the Department of Public Safety should account separately for state patrol cases and those generated by local law enforcement to assure that the trunk highway funds are expended for the intended trunk highway-related purposes.

HIGHWAY: POWER OF COMMISSIONER: TRUNK HIGHWAY FUND. Commissioner of Highways may expend Trunk Highway Funds to train members of the Bureau of Criminal Apprehension in the use and handling of breath-testing equipment to insure full implementation of the Implied Consent Statute, M.S. 1961, Section 169.123.

July 27, 1967

Honorable Stafford King
State Auditor
State Capitol
St. Paul, Minnesota 55101

Dear Mr. King:

In your letter of July 20, 1967, to Attorney General Douglas M. Head, you present the following

FACTS

There has been submitted to the State Auditor for processing a proposed expenditure of \$967.00 for travel, tuition and board and room of two employees of the Bureau of Criminal Apprehension at a special four-day school at the Indiana University Center of Police Training where these two employees of the Bureau of Criminal Apprehension are to be instructed in the use and handling of certain breath-testing equipment.

This request is for the use of \$967.00 of Trunk Highway money for the purpose of providing this additional specialized training for two members of the Bureau of Criminal Apprehension.

Upon these facts you submit the following

QUESTION

"Under the limitations of the Constitution, Article XVI, Sections 2 and 6, can Trunk Highway money be used for this purpose."

OPINION

Under the Minnesota Constitution, expenditures from the Trunk Highway Fund are limited to highway purposes. Article XVI, Section 6, provides for the creation of the fund "which shall be used solely for the purposes specified in Section 2 of that Article." Section 2 provides:

"There is hereby created a trunk highway system which shall be established, located, constructed, reconstructed, improved and maintained as public highways by the state. * * *"

July 27, 1967

The Minnesota Supreme Court in Minneapolis Gas Co. v. Zimmerman, 253 Minn. 164, 31 N.W.2d 642 (1958) held that Article XVI is to be given a broad construction, and further that the test for determining a valid highway purpose is whether the expenditure is reasonably related to the construction and maintenance of highways. The Court further declared in Cory v. King, 214 Minn. 535, 543, 8 N.W.2d 614, (1943)

"The true test is whether the charge upon the highway fund accurately reflects highway expenses * * *. It is essential to validity of an appropriation from the highway fund that no more money be taken than is necessary to defray the expenses properly attributable to highway matters."

We are of the opinion that the expenses in question are within the Court's definition of expenses reasonably related to highway purposes.

The Commissioner of Highways has responsibility for safety on the state highways. The Minnesota Court in construing the Commissioner's duties, stated in Burnquist v. Cook, 220 Minn. 48, 62, 19 N.W.2d 394, (1945):

"We have held that the commissioner's obligations to improve and maintain the highways places upon him the responsibility of maintaining and regulating such highways so as to lessen or eliminate traffic hazards. Thus in Automatic Signal Advertising Co. v. Babcock, 166 Minn. 416, 420, 208 N.W. 132, 133 in discussing the powers of the commissioner of highways and his duties with respect thereto, we stated:

" . . . the phrase to improve and maintain such trunk highways as used in the statute was meant and intended to give the same officer or tribunal, having charge of the construction and maintenance the general supervision, upkeep and regulation of the traveled portion of the system throughout its entire length. The evident purpose was to establish and maintain as nearly as practicable, a uniform system so as to better acquaint and familiarize the traveling public with the system and thereby render traffic less hazardous."

Therefore, expenditures necessary for highway safety fall within the Commissioner's authority to maintain the public highways and are proper charges against the Trunk Highway Fund. See Att. Gen. Op. 229-A, December 31, 1957.

July 27, 1967

The proposed expenses are a necessary part of the highway safety program. The Implied Consent Law M.S. 1961, Section 169.123, Subd. 2, provides:

"Any person who drives or operates a motor vehicle upon the public highways of this state shall be deemed to have given consent subject to the provisions of Laws 1961, Chapter 454, to a chemical test of his blood, breath, saliva or urine for the purposes of determining the alcoholic content of his blood. . . Any person may elect to take a breath, saliva or urine test in lieu of a direct blood test; and no action shall be taken for declining a test unless either a breath, saliva or urine test was available. . ."

The 1961 legislature directed the Commissioner of Highways by statute to designate and assign responsibility for the certification of those making breath tests. This responsibility was assigned to the Bureau of Criminal Apprehension. Certified breathalyzer operators are necessary to full operation of the Implied Consent Statute. The proposed expenses would train two members of the Bureau of Criminal Apprehension at a special four-day school at Indiana University Center of Police Training in the use and handling of breathalyzer equipment. These two trained operators would then be capable of certifying breathalyzer operators in the state, thereby securing full implementation of the legislative mandate in the Implied Consent Law.

We are further of the opinion that the legislative directive to the Commissioner of Highways in M.S. 1961, Sec. 169.123, Subd. 3:

". . . The person administering such test at the request and direction of such peace officer shall be fully trained in the administration and interpretation of such tests pursuant to standards promulgated by rule by the commissioner of highways."

places the ultimate responsibility for adequate training upon the Commissioner and by implication gives him the authority to provide the necessary training facilities. Since the Commissioner could institute the necessary training program within the state, we feel it is within his discretion to use facilities already established without the state. Further, since the charge to the Trunk Highway Fund for the proposed expenses

Honorable Stafford King

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July 27, 1967

ould be made by the Commissioner, we see no reason why the services could not be provided for the Commissioner by another department, that is, the Bureau of Criminal Apprehension, with the Commissioner reimbursing that department for the expenses incurred, from the Trunk Highway Fund. Cory v. King, 209 Minn. 431, 296 N.W. 508, (1941).

In view of the close relationship of the proposed expenses to insure the full implementation of the Implied Consent Law to the highway safety program in general, we would conclude the proposed expenses are valid charges against the Trunk Highway Fund. Accordingly, your question is answered in the affirmative.

Very truly yours,

NORMAN R. CARPENTER
Deputy Attorney General