THE ATTORNEY GENERAL OF TEXAS

AUSTIN, TEXAS 78711

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ATTORNEY GENERAL

March 31, 1977

The Honorable Bill Presnal
Chairman
Committee on Appropriations
House of Representatives
Austin, Texas 78767

Letter Advisory No. 132

Re: Expenditure of fees by licensing boards without appropriation.

Dear Chairman Presnal:

You have requested our opinion regarding the applicability of article 8, section 6 of the Texas Constitution to the expenditure of funds by state agencies which are presently financed outside the legislative appropriation process. Article 8, section 6 provides, in pertinent part:

> No money shall be drawn from the Treasury but in pursuance of specific appropriations made by law; nor shall any appropriation of money be made for a longer term than two years. . . .

A number of agencies, such as the State Board of Morticians, the State Board of Podiatry Examiners, and the State Board of Plumbing Examiners, are funded entirely by licensing fees. See V.T.C.S. arts. 4582b, § 2I; 4568; 4574; 6243-101; § 7. The Legislature currently appropriates no money to these boards, and their funds are not deposited with the State Treasurer. You ask whether this practice violates article 8, section 6 of the Texas Constitution.

The relevant portion of article 8, section 6 has been a part of every Texas Constitution since 1846, and its language has not been altered since the present Constitution was adopted in 1876. Without directly addressing the meaning of "drawn from the Treasury" for purposes of article 8, section 6, a number of Attorney General Opinions have approved various unappropriated expenditures by certain state agencies. An Attorney General's Opinion of 1953, however, sounded a warning about this practice:

> [I]n a closer case in which the Legislature's intent is less clear, the nature of the fund would constitute an important interpretation factor. It is our opinion that the framers of the Texas Constitution never considered the possibility that any public funds of the State would be kept anywhere except "in" the State Treasury where they would be subject to the continuing legislative scrutiny and control guaranteed by Article VIII, Section 6. We have not had the opportunity to give this subject the detailed consideration that it merits but we are satisfied that the practice of permitting various public moneys of the State to be kept "out of" the State Treasury in the "custody" of the Treasurer, or in the custody of other State officers, is a practice that has been conceived and developed after the present Constitution was ratified in 1876.

Attorney General Opinion MS-13 (1953), fn. 3 at 3-4. No court decision, however, has attempted to formulate a precise definition of "drawn from the Treasury" for purposes of article 8, section 6.

The Texas Constitution itself provides several exceptions to the provisions of article 8, section 6, one of them explicit. Section 6(b) of article 16 of the Constitution permits "[s]tate agencies charged with the responsibility of providing services to those who are blind, crippled, or otherwise physically or mentally handicapped" to accept funds from private or federal sources. The amendment states further:

> Notwithstanding any other provision of this Constitution, the state agencies may expend money accepted under this subsection without the necessity of an appropriation, unless the Legislature, by law, requires that the money be expended only on appropriation.

The presence of this language in the amendment indicates that the general rule is that public money may not be expended without an appropriation. It is evident that "notwithstanding any other provision of this Constitution" refers to article 8, section 6.

The Supreme Court has also in a number of instances held that other constitutional provisions permit the Legislature to avoid the requirements of article 8, section 6. In City of Aransas Pass v. Keeling, 247 S.W. 818 (Tex. 1923), the Legislature had by statute appropriated state taxes to be collected in San Patricio County for a period of 20 years. The Court declared that, since article 11, section 8 of the Constitution expressly authorizes the Legislature to grant aid to counties and cities for the construction of sea walls, the Legislature, in exercising this power, is not limited by article 8, section 6's two-year limit on an appropriation. Id. at 820. Likewise, in Brazos County Conservation and Reclamation District v. McCrow, 91 S.W.2d 665 (Tex. 1936), the Supreme Court held that a grant to river conservation and reclamation districts in certain counties for a 20-year period was permitted under article 3, section 51, which authorizes the Legislature to grant "aid in cases of public calamity." Id. at 673-74. A similar grant to the Harris County Flood Control District was upheld in Harris County Flood Control District v. Mann, 140 S.W.2d 1098, 1103, on the ground that it came within the terms of article 16, section 59, the conservation amendment.

Without relying on a specific constitutional exception, the Supreme Court has on three other occasions considered instances in which a statute provided that unappropriated funds might be withdrawn from the State Treasury. In Rogers v. Daniel Oil & Royalty Co., 110 S.W.2d 891 (Tex. 1937), the Supreme Court upheld the constitutionality of a statute which permitted the payment of taxes under protest, and their recovery without an appropriation if the taxpayer's claim was successful. In such a case, the Court said:

> [T]he treasurer does not place the money in the State Treasury, as such, but places it in suspense . . . . Under the statute, since the money does not go into the treasury, as such, no additional legislative enactment is necessary to enable the treasurer to do with it as directed by the statute or the court. Id. at 894.

The Rogers rationale implies that the Treasurer can, in some instances, act as a trustee for funds which, although in the State's possession, do not constitute State property. This view was given a fuller formulation in two subsequent cases.

In Manion v. Lockhart, 114 S.W.2d 216 (Tex. 1938), an escheat statute permitted the heir or devisee of an estate to recover funds already paid to the State Treasurer, who contended that article 8, section 6 prohibited the operation of the statute in the absence of an appropriation. The Supreme Court drew a distinction between money paid to the State Treasurer, as provided by the escheat statute, and money paid into the State Treasury. In the former case, the Court said, the Treasurer acts merely as a custodian or trustee of the funds. Id. at 218.

In Friedman v. American Surety Co. of New York, 151 S.W.2d 570 (Tex. 1941), the Supreme Court was required to deal with a constitutional challenge to the Unemployment Compensation Act. In this instance, the Court reasoned that, although money in the Unemployment Compensation Fund is in the possession of the state, article 8, section 6 is inapplicable because the funds

> are trust funds, and do not belong to the state in its sovereign capacity, but are for the benefit of a group from whose wages, or from whose employers, money is taken, and is compensation in the nature of wages . . . .

Id. at 579. The State Treasurer, the Court declared, merely acts as a trustee for the money. Id.

Thus, over the course of one hundred years under the present Constitution, Texas courts have created a major exception to article 8, section 6, which we may call the trust fund doctrine. It holds that certain money in the possession of the State is not State property, but rather money for which the State Treasurer acts as trustee. Pursuant thereto, the Supreme Court has upheld the validity of the Unemployment Compensation Fund, and two statutes which essentially permitted the payment of particular funds to a rightful claimant without the necessity of an appropriation. In each of these instances, application of the trust fund doctrine was made plausible by the character of the funds

involved. While the Friedman, Manion and Rogers cases indicate that some money held by the State is not required to be in the Treasury, it can be argued that the trust doctrine discussed by the Supreme Court marks the farthest reach of the exception.

A long line of Attorney General Opinions has obscured the meaning of article 8, section 6. These rulings, considered together, do not provide any consistent interpretation of the amendment, and some of them ignore it altogether. In Attorney General Opinion O-3711 (1942), for example, Attorney General Mann, while acknowledging that "public monies" must be deposited in the State Treasury, stated that examination fees collected by the State Board of Medical Examiners "are not collected for the State," are therefore "not 'public funds,'" and, as a result, "do not require a biennial appropriation as a condition precedent to their expenditure." Id. at 2. Likewise, Attorney General Opinion O-6414 (1945) at 2, held that funds collected by the State Board of Pharmacy are not "public moneys," and hence, might be spent by the Board without a legislative appropriation. In both Opinions, the Attorney General apparently considered a statute as determinative of the status of certain fees as public funds, without regard to any constitutional requirement.

Attorney General Shepperd addressed himself to the meaning of article 8, section 6 on at least three occasions. Attorney General Opinion MS-13 (1953) held that the Texas Employment Commission "may not make expenditures from the [Unemployment Compensation] Administration Fund subsequent to August 31, 1953, without an appropriation by the Legislature." In Attorney General Opinion MS-169 (1955), however, Attorney General Shepperd reverted to the position of Attorney General Mann by stating the truism that "money that is not required to be deposited 'in' the State Treasury need not be appropriated by the Legislature in order to be available for expenditure." Id. at 6.

Attorney General Opinion MS-196 (1955) dealt with the constitutional argument, but devised an unusual rationale for holding it inapplicable. After acknowledging that, under the court's decision in Texas Pharmaceutical Ass'n v. Dooley, 90 S.W.2d 328 (Tex. Civ. App. -- Austin 1936, no

writ), money received by licensing or regulatory agencies constitutes State funds, whether deposited in the Treasury or not, the Opinion concluded that, since article 4, section 23 of the Constitution requires that fees collected by the Comptroller, the Treasurer, and the Commissioner of the General Land Office be paid into the Treasury, these are the only fees necessarily subject to the terms of article 8, section 6.

In Attorney General Opinion WW-565 (1959), Attorney General Wilson applied the Friedman doctrine to funds of the Employees Retirement System and the Teachers Retirement System, holding that they are trust funds which need not be deposited in the State Treasury, and, if not so deposited, subject to expenditure by statute without an appropriation. Attorney General Opinion WW-600 (1959) approved the expenditure of Teacher Retirement System trust funds to defray the costs of administration.

Attorney General Opinion C-88 (1963) upheld a statute which required that investigation fees collected by the Regulatory Loan Commissioner be retained by him. The Opinion did not discuss the constitutionality of the statute. Attorney General Opinions M-970 (1971) and M-1041 (1972) dealt with that portion of the real estate broker and salesman license fees dedicated by statute to a particular purpose. The latter Opinion declared that funds dedicated by statute are not "in" the State Treasury and thus, not required to be appropriated prior to their expenditure. Once again, the constitutional issue was not addressed.

In Attorney General Opinion H-138 (1973), we construed an amendment to section 4(a) of article 249a, V.T.C.S. Prior to amendment, the statute had provided that fees collected by the Architectural Examiners Board "shall be deposited in the State Treasury to the credit of a special fund." The amended version of the statute required payment "to the State Treasurer." The Opinion specifically declined to address the constitutional question, but, relying heavily on legislative intent as reflected in the transcript of the committee hearing on the bill, it held that the altered language of the statute did not convert the fund into a trust fund:

> Architects Registration Fund 109 . . . is used for the general administrative expenses of a state agency. It has little, if any, resemblance to

> a trust and, notwithstanding the omission of the language concerning legislative appropriation and the substitution of the word "Treasurer" for the word "Treasury," we do not believe the Legislature intended to establish Fund 109 as a trust fund.

Id. at 3.

Attorney General Opinion H-154 (1973) construed article 5221f, which provided that fees collected by the Performance Certification Board for Mobile Homes "shall be paid to the state treasury and placed in a special account for the use of the department in the administration and enforcement of this Act." The Legislature appropriated to the Board a lesser amount than the income collected from fees, and the Board argued that article 5221f conferred upon it the authority to expend the unappropriated portion of these funds. Opinion H-154, however, held that the fees could not be withdrawn from the Treasury without a specific appropriation, since

> there is nothing about the fees collected under the Act to indicate that they are to be held in trust. . . . .

Id. at 2.

Attorney General Opinion H-674 (1975) reverted to the rationale of Opinion M-1041 (1972), holding that certain funds of the Optometry Board dedicated by statute to another purpose need not be appropriated, so long as the dedication occurs before the money is deposited to the Board's account in the State Treasury.

Finally, Attorney General Opinion H-716 (1975) affirmatively applied to article 8, section 6 the principle that money "drawn from the Treasury" includes all State funds, including special funds, unless exempted by other provisions of the Constitution. The Opinion observed that the only court-sanctioned exceptions to this rule were the trust fund doctrine established by Friedman and the exception for funds of doubtful ownership, as promulgated in Rogers. Opinion H-716 also noted the distinction which must be drawn between the "Treasury" and the General Revenue Fund:

> [I]n our opinion the statutory direction that such receipts should not be deposited

> in the general revenue fund of the state does no more than reiterate the requirement that they be deposited in a special fund.

Thus, a long line of Attorney General Opinions has not provided a clear answer to your inquiry. The Opinions so often fail even to consider the constitutional issue that we must conclude that, taken together, they have little precedential value in squarely addressing your question. They do, however, indicate a long history of approval of certain funds being maintained outside of the Treasury.

This practice is almost as old as our constitution. Our research has revealed at least one fund maintained outside the State Treasury and spent without appropriation shortly after the Constitution was adopted. The "Message Accompanying the Report of the Board of the Agricultural and Mechanical College of the State of Texas 1879-1880" indicates on pages 18 and 19 that:

> There being no legislative appropriation to fall back on, the contingent fund -- that is, the receipts coming in from the students -- had to bear all the burdens. I repeat, that no one cent has ever been appropriated to pay the current expenses of running the college. In this respect the college has had to look to itself, without State aid or private donation of any kind.

The Legislature has been aware of the maintenance of certain funds out of the Treasury [see House Subcommittee on Funds not Subject to Appropriation, "A Survey of Funds Derived from Unappropriated Sources (1972); Legislative Budget Board, "A Survey of Funds Not in the State Treasury" (1975)], yet it has not acted to end the practice. For example, both Senate Bill 275 and House Bill 1233 in the 64th Legislature would have required most funds to be deposited in the Treasury, but neither was enacted.

This long history of administrative and legislative acts and omissions resulting in the maintenance of funds outside the Treasury is helpful in constitutional interpretation. While such administrative and legislative interpretation can never "fritter away" the obvious sense or boundaries of the Constitution, Kimbrough v. Barnett, 55 S.W. 120, 123 (Tex.

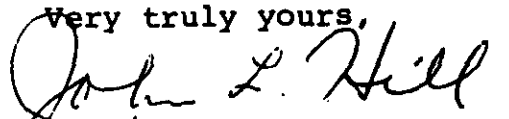
1900), where a construction of the Constitution has been acquiesced in for a long period, particularly where there have been numerous occasions where it could be challenged, it affords a persuasiveness to the construction akin to precedence. Shepherd v. San Jacinto Junior College District, 363 S.W.2d 742 (Tex. 1962), Walker v. Baker, 196 S.W.2d 324 (Tex. 1946). An interpretation made within a few years of the adoption of the Constitution is entitled to great weight. Hill County v. Sheppard, 178 S.W.2d 261 (Tex. 1944).

We also note that the courts of other states have concluded that similar constitutional provisions do not require that all money received by state agencies be appropriated. New Jersey Sports & Exposition Authority v. McCrane, 292 A.2d 545 (N.J., 1972), app. dism'd, 409 U.S. 944 (1972); Gipson v. Ingram, 223 S.W.2d 595 (Ark. 1949). A Missouri case is of particular interest. The Missouri Constitution required that all money collected and received by the State from any source whatsoever must go into the State Treasury. Notwithstanding language this strong, the Supreme Court of Missouri concluded that insurance proceeds due a state college were not required to be deposited in the Treasury to await legislative appropriation. State ex rel. Thompson v. Board of Regents for Northwest Missouri State Teachers' College, 264 S.W. 698 (Mo. 1924) (en banc).

In summary, there appear to be persuasive arguments on both sides of the question you have raised. The question is difficult and is aggravated by decades of inaction and acquiescense. Since the issue is so close and has been ignored for so long, we cannot say with assurance what resolution the courts would ultimately reach. Nevertheless, with this caveat regarding the difficulty of the issue, it is our professional judgment that if the Texas Supreme Court were presented squarely with this issue at the present time, it would rely heavily on the long standing administrative and legislative interpretation and the decisions of courts of other states to conclude that funds, such as those collected as licensing fees, are not required by the Constitution to be maintained in the State Treasury.

By determining that our best legal judgment is that such funds are not required to be deposited in the Treasury and appropriated by the Legislature, we in no way suggest that the Legislature lacks power either to mandate that the funds be placed in the Treasury or to appropriate them. Attorney General Opinions WW-565 (1959), MS-196 (1955), MS-169 (1955) and O-6414 (1945). But see Attorney General Opinion C-88 (1963).

Very truly yours,



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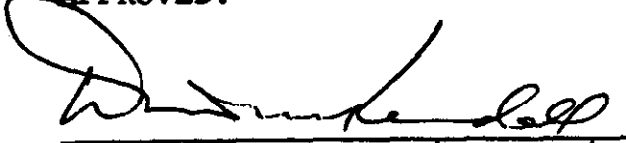

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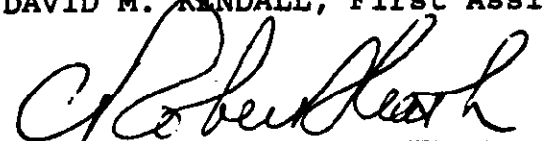

C. ROBERT HEATH, Chairman
Opinion Committee

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