



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2016-016

June 17, 2016

Roger A. Norman, JD, CPA, CFE, CFF
Legislative Auditor
500 Woodlane Street, Suite 172
Little Rock, AR 72201-1099

Dear Mr. Norman:

This is in response to your request for my opinion on the following questions concerning a contract entered into by the State Treasurer:

First: Does the Treasurer have legal authority to enter into a contract concerning the development and marketing of an online “financial literacy” program to Arkansas students? Must the Treasurer have authority in Arkansas Code or legislation to contract concerning this subject?

Second: In securing a transfer of funds between appropriation items without prior review by the Arkansas Legislative Council, did the Treasurer follow the proper procedure to effect the transfer?

As background for these questions, you recite the following language in Act 743 of 2015 (the 2015 appropriation act for the Office of the Treasurer):

After receiving approval from the Chief Fiscal Officer of the State, and prior review by the Arkansas Legislative Council, the Treasurer of State is authorized to transfer appropriation from any line item authorized in Section 3 Appropriation – Operations of the

Treasurer's Office in this Act to any other line item authorized in Section 3.¹

As further background, you state:

On August 7, 2015, the Treasurer contracted with EverFi, Inc. ("EverFI"), a Delaware for-profit corporation. A copy of the contract is attached. Essentially, the Treasurer agreed to pay EverFi \$450,000 over a four-year period in return for EverFi's development and marketing of an online "financial literacy" program to Arkansas students, focusing on grades 4 through 6.

The Treasurer utilized the "Prof. Fees" appropriation of the Act to pay EverFi its first payment of \$75,000. The original amount appropriated under that item was insufficient to cover this—and subsequent—payments. Therefore, working with the Department of Finance and Administration, the Treasurer obtained a transfer of needed appropriation from the "Data Processing Syst/Services" item to the "Prof. Fees" item.² This transfer was not reviewed by the Arkansas Legislative Council prior to being effected, nor was it reviewed subsequently.

RESPONSE

Question 1 - Does the Treasurer have legal authority to enter into a contract concerning the development and marketing of an online "financial literacy" program to Arkansas students? Must the Treasurer have authority in Arkansas Code or legislation to contract concerning this subject?

As this question appears to acknowledge, there is no Arkansas statute authorizing the State Treasurer to enter into the contract that has prompted your request for my opinion. In my opinion, however, the absence of a specific legislative grant of authority does not automatically compel the conclusion that the Treasurer lacked legal authority to enter the contract. The purchase of commodities and services

¹ Acts 2015, No. 743, § 4 (emphasis yours).

² You note that "[u]pon inquiry, the Department of Finance and Administration referred to Ark. Code Ann. § 19-4-525 as authority for this transfer."

with appropriated funds is an executive function.³ And it goes without saying that the Treasurer of State is an officer of the executive branch of government.⁴

It is therefore my opinion that the legality of the contract you have described does not turn merely on the presence or absence of an express legislative grant of authority to the Treasurer to contract concerning the contract's subject. In my opinion, the question instead turns on whether the contract represents a proper exercise of the Treasurer's authority to administer his appropriation consistent with his duties under the constitution and relevant legislation.

Of course, it is the power and duty of the Legislative Auditor, in performing audits of state entities, to: "[c]all attention to any funds which, in his or her opinion, have not been expended in accordance with the law, appropriation, ordinance, regulation, or other legal requirement...."⁵ In my opinion, you are authorized to call attention to the funds at issue if it is your opinion that they have not been properly expended. I believe you are authorized to take this action if you believe it justified, notwithstanding the Treasurer's general authority as a constitutional officer to contract for the purchase of commodities and services.

Question 2 - In securing a transfer of funds between appropriation items without prior review by the Arkansas Legislative Council, did the Treasurer follow the proper procedure to effect the transfer?

It appears that there was no actual "transfer" between appropriation items in connection with the expenditure at issue. If this is accurate, the premise underlying your question would be mistaken.

³ See *Chaffin v. Arkansas Game and Fish Commission*, 296 Ark. 431, 757 S.W.2d 950 (1988) (Legislative Council's practice of giving "review and advice" on professional and consultant services contracts of executive agencies held unconstitutional under the separation of powers doctrine). Under the classic division of powers, the legislature makes the laws and appropriates state revenues, the executive administers the law and expends the appropriations, and the judiciary interprets the law. See *id.* See also, *Fed. Express Corp. v. Skelton*, 265 Ark. 187, 578 S.W.2d 1 (1979); *Hooker v. Parkin*, 235 Ark. 218, 357 S.W.2d 534 (1962).

Moreover, as a constitutional officer, the Treasurer is expressly exempted from the Arkansas Procurement Law. Ark. Code Ann. § 19-11-203(13) (Supp. 2015) (including "the elected constitutional offices of the state" among "exempt agencies.").

⁴ Ark. Const. amend. 73, § 1(a).

⁵ Ark. Code Ann. § 10-4-407(3) (Supp. 2015).

You state in the background for your request for my opinion⁶ that the Department of Finance and Administration (DF&A) “referred to Ark. Code Ann. § 19-4-525 as authority for this transfer.” Section 19-4-525 does not use the term “transfer,” however. Rather, that statute authorizes DF&A to “invoke additional budget control” with respect to the appropriation items, known as “special appropriations,” covered by section 19-4-525:

All other appropriations made by the General Assembly which do not come under any of the classifications mentioned in this section⁷ shall be considered to be special appropriations and shall be used only for the specific purposes for which such appropriations are made. Except as otherwise provided by law, an agency receiving a special appropriation may not expend funds from any appropriation other than from the special appropriation for the special purpose covered by the special appropriation. *However, the state’s financial management system may invoke additional budget control using features of the system that are in addition to the appropriations of the General Assembly.*⁸

The expenditure at issue in your question was from such a “special appropriation” line item of the Treasurer’s appropriation act—specifically, “Item No. (05) Data Processing Syst/Services.”⁹ This line item is separate from the other four appropriation line items in section 3 of the Treasurer’s appropriation act.¹⁰

⁶ See note 2, *supra*.

⁷ The “section” referenced here is the section of the original General Accounting and Budgetary Procedures Law that required the classification of appropriations into headings or groups. See Acts 1973, No. 876, § 12. The required classifications, which have been modified somewhat since the original enactment, include “personal services,” “maintenance and operation,” “grants, assistance, and special aid,” and “construction and permanent improvements.” Ark. Code Ann. §§ 19-4-521 – 524 (Repl. 2007 and Supp. 2015).

⁸ Ark. Code Ann. § 19-4-525(a) (Repl. 2007) (emphasis added).

⁹ Acts 2015, No. 743, § 3.

¹⁰ See *id.* (appropriating item numbers “(01) Regular Salaries,” “(02) Extra Help,” “(03) Personal Services Matching,” and “(04) Maint. & Gen. Operation”).

You state as further background for your question that the Treasurer worked with DF&A and “obtained a transfer of needed appropriation from the ‘Data Processing Syst/Services’ item to the ‘Prof. Fees’ item.” But it seems to me that DF&A acted instead pursuant to section 19-4-525 and re-categorized some portion of the “Data Processing Syst/Services item” as professional fees. It appears that this action was taken for budget control purposes, consistent with section 19-4-525. The funds were only expended from within the broader “Data Processing Syst/Services” item, according to my understanding.

Under the facts as I understand them, therefore, there was no “transfer” between appropriation items in connection with the payment under the contract you have described. Accordingly, under these facts, Legislative Council review was not required. As you have noted, a section of the Treasurer’s appropriation act authorizes the Treasurer to “transfer appropriation from any line item authorized in Section 3 ... to any other line item authorized in Section 3,” subject to (1) approval by the Chief Fiscal Officer and (2) review by the Legislative Council.¹¹ Because there was no such transfer with respect to the expenditure in this case, however, the requirement to obtain Legislative Council review did not apply.

My opinion is based on the facts as I understand them. But I am not a factfinder for purposes of Attorney General opinions. I note that additional factual development could lead to a different conclusion.

Sincerely,



LESLIE RUTLEDGE
Attorney General

¹¹ Acts 2015, No. 743, § 4. This authority to transfer between appropriation items (subject to the applicable review and approval procedure) echoes language in the General Accounting and Budgetary Procedures Law regarding transfers between appropriation-item classifications. Specifically, when the “maintenance and general operation” appropriation item is sub-classified, transfers between the classifications may be made subject to certain procedures—including review by the Legislative Council, depending upon the particular transfer request. Ark. Code Ann. § 19-4-522(c) (Supp. 2015).