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#97042
NO.
STATE OF NEBRASKA
OFFICIAL
AUG 25 1997
DEPT. OF JUSTICE

DATE: August 20, 1997

SUBJECT: Approval by the Governor of Assessments for the Nebraska Power Review Fund in Light of Existing Legislative Appropriations and Neb. Rev. Stat. § 70-1020 (1996)

REQUESTED BY: Gary D. Gustafson, Executive Director
Nebraska Power Review Board

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

During the 1997 legislative session, the Nebraska Legislature appropriated certain amounts from the Nebraska Power Review Fund for the operation of the Nebraska Power Review Board (the "Board"). The monies in that fund are derived from an annual assessment levied against certain Nebraska governmental subdivisions, and the amount of the assessment levied each fiscal year is determined by the Board with the approval of the Governor. The Governor has now indicated that he will not approve an increased assessment proposed by the Board which is needed to totally fund the amounts appropriated by the Legislature during its 1997 session. You wish to know, "[d]oes the Governor have the authority to restrict the Power Review Board from assessing power suppliers of Nebraska for the funds to meet the appropriation granted to the Power Review Board by the Legislature?" We believe that the Governor does have such authority, and our analysis is set out below.

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FACTS

From your opinion request letter, we understand that the Board prepared a budget of $166,493 for fiscal year 1997-1998, and proposed that figure to the Governor for inclusion in the budget which he is required to submit to the Legislature as a part of the biennial state budgeting process. In the budget which he subsequently presented to the Legislature for fiscal year 1997-1998, however, the Governor reduced the amount of the Board's appropriation to $155,778. Thereafter, the Appropriations Committee of the Legislature prepared a budget bill which included $169,320 for the Board for fiscal year 1997-1998.

As the 1997 legislative process proceeded, it was discovered that the Board's reserve fund did not contain sufficient monies to meet the Board's obligations to its Executive Director and his Administrative Assistant for accumulated sick leave and vacation time should either of those individuals take early retirement or die while still employed by the state. Therefore, the Board submitted an amended budget to the Governor and the Appropriations Committee which included an additional $30,000 to cover the potential shortfall. In response, the Appropriations Committee prepared an amended budget bill which included monies for the potential shortfall and monies for increases in staff salaries. Ultimately, the Legislature passed LB 389 and LB 387 which appropriated a total of $199,320 to the Board for fiscal year 1997-1998.

After that appropriation legislation was passed, the Governor vetoed the amount of the budget for the Board set out in LB 387 and LB 389 for fiscal year 1997-1998. The Legislature then passed overrides of the Governor's vetoes so that 1997 Neb. Laws LB 387, § 150 and 1997 Neb. Laws LB 389, § 222 currently appropriate a total of $199,320 to the Board for fiscal year 1997-1998.

As noted above, the Board's program is funded through assessments levied against governmental subdivisions in the State of Nebraska. The Governor has apparently sent a memo to all state agencies, boards, and commissions telling them that he will not approve any increase in fees or charges that would lead to an increased spending authority. In addition, the Governor has notified the Board that he does not intend to approve assessments by the Board necessary to fund the total appropriation granted to the Board by the Legislature. Consequently, you wish to know if the Governor has the authority in this instance to restrict the levy of assessments by the Board necessary to totally fund its appropriation for 1997-1998.

ANALYSIS

Neb. Rev. Stat. § 70-1020 (1996) is the Nebraska statute which pertains directly to the question which you have posed to us. That section provides, as is pertinent:

> In order to defray the expenses of the Nebraska Power Review Board, there shall be imposed upon each public power district, public power and irrigation district, electric membership association, electric cooperative company, and municipality having an electric distribution system or generation and distribution system, and also upon all registered groups of municipalities, an assessment each fiscal year ***in such sum as shall be determined by the board and approved by the Governor.*** The total of such assessments shall not exceed the expenses of the board which may reasonably be anticipated for the fiscal year for which assessment is made and shall be apportioned among the various agencies in proportion to their gross income in the preceding calendar year. The board shall determine and certify such assessment to each supplier after approval of the board's budget by the Legislature and Governor. The supplier shall remit the amount of its assessment to the board within forty-five days after the mailing of the assessment. . . . ***The proceeds of such assessment shall be remitted to the State Treasurer for credit to the Nebraska Power Review Fund, which fund is hereby created and which, when appropriated by the Legislature, shall be used to administer the powers granted to the Nebraska Power Review Board.*** . . .

(Emphasis added).

LB 389, as ultimately passed by the Legislature over the Governor's veto, appropriates $196,548 out of a "cash fund" to the Board for fiscal year 1997-1998. Similarly, LB 387 appropriates $2,772 to the Board out of a "cash fund." Under the Nebraska Accounting System manual, a "cash fund" is defined as "[a] budgetary fund used to account for revenues generated by specific activities from sources outside of State government (other than federal) and the expenditures directly related to the generation of the revenues." Since § 70-1020 creates the Nebraska Power Review Fund which is funded by assessments against power suppliers outside of state government and used to administer the powers granted to the Board, it appears to us that the "cash fund" referenced in both LB 387 and LB 389 is the Nebraska Power Review Fund. As a result, the appropriations to the Board for 1997-1998 do not come out of the state's General Fund, which is the fund made up primarily of tax revenues used for general state operations at the direction of

the Legislature. Instead, the appropriations in LB 387 and LB 389 are authorizations to pay money out of the Nebraska Power Review Fund, a cash fund subject to specific statutory provisions regarding the levy of assessments for accumulation of the fund's proceeds.

The initial portion of § 70-1020 emphasized above states that the amount of the annual assessments against power districts which form the basis for the Nebraska Power Review Fund shall be "determined by the Board and ***approved by the Governor.***" In Nebraska, in the absence of anything indicating to the contrary, statutory language should be given its plain and ordinary meaning, and when the words of a statute are plain and unambiguous, no interpretation is necessary to ascertain its meaning. ***Van Ackeren v. Nebraska State Board of Parole***, 251 Neb. 477, 558 N.W.2d 48 (1997). It seems to us that the plain language of § 70-1020 contemplates that the Governor must "approve" the amount of the annual assessment levied by the Board. "Approve," in turn, generally means "to give one's consent to." WEBSTER'S NEW WORLD DICTIONARY 68 (2nd college ed. 1982). Consequently, we believe that the Governor must consent to the amount of the annual assessment levied by the Board under the plain language of § 70-1020.

In your opinion request letter, however, you ask, "[i]sn't the Legislature's override of the Governor's veto the final action which authorizes the Power Review Board to assess and collect and expend the budget authorized by the Legislature [?]" Our answer to that question is "no," based upon the nature of an "appropriation."

With respect to the appropriation of public funds, "to appropriate" means to set particular funds apart, or to assign funds to a particular person or use to the exclusion of others, or to use funds for a particular purpose. ***State ex rel. Creighton University v. Smith***, 217 Neb. 682, 353 N.W.2d 267 (1984). The purpose of an appropriation bill is to make provision for lawfully taking money out of the state treasury. ***Henry v. Rockey***, 246 Neb. 398, 518 N.W.2d 658 (1994); ***Rein v. Johnson***, 149 Neb. 67, 30 N.W.2d 548 (1947). That purpose is to be distinguished from lawfully putting money into the state treasury to be allocated to a particular fund. ***Rein v. Johnson, supra***.

In the present instance, the Legislature, through the veto override process, appropriated certain monies from the Nebraska Power Review Fund to the Board for its operation for fiscal year 1997-1998. That appropriation constituted authorization for lawfully taking those monies out of that Fund in the state treasury. However, on the basis of the authority cited above, that appropriation and the appropriation process must be distinguished from the process of putting money into the Nebraska Power Review

Fund in the state treasury. The latter process is governed by the provisions of § 70-1020 which, as discussed above, require the Governor's approval of the assessments to be levied by the Board. As a result, while the Legislature authorized the Board to spend the appropriated amounts from the Nebraska Power Review Fund, the accumulation of those monies remains subject to the approval of the Governor under § 70-1020. A different result might well have been obtained had the Legislature chosen to appropriate General Fund monies to the Board or to alter the requirements of § 70-1020 in some fashion.

Sincerely yours,

DON STENBERG
Attorney General

Dale A. Comer
Assistant Attorney General

05-64-14.op

Approved by:

Attorney General