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91086

NO.
STATE OF NEBRASKA
OFFICIAL
NOV 20 1991
DEPT. OF JUSTICE

DATE: November 19, 1991

SUBJECT: Procedure for Adoption of County Budgets Under the Nebraska and County Budget Acts

REQUESTED BY: John Breslow, Auditor of Public Accounts

WRITTEN BY: Don Stenberg, Attorney General
Fredrick F. Neid, Assistant Attorney General

This is in response to your request for an opinion of this Office concerning procedures for adoption of county budgets under the Nebraska Budget Act, Neb. Rev. Stat. §§ 13-501 et seq. and the County Budget Act, Neb. Rev. Stat. §§ 23-901 et seq. You have posed three questions relating to the adoption of county budgets and application of the provisions of Neb. Rev. Stat. § 23-915 (Reissue 1987).

I. Appropriations for Operation and Administration of County Government.

The first question you have asked is the "exact date for which a county has failed or neglected to make the appropriations for its support, operation and maintenance." You raise this question for purpose of application of the provisions of § 23-915 which states:

> If for any reason the county board fails or neglects in any year to make the appropriation for the support, operation and maintenance of the county government for the fiscal year, then ninety percent of the several amounts appropriated in the last budget for the objects and purposes therein specified, insofar as the same shall relate to the support, operation and maintenance of county government and the administration thereof, shall be deemed to be appropriated for the fiscal year for the

L. Jay Bartel, J. Kirk Brown, Laurie Smith Camp, Elaine A. Chapman, Delores N. Coe-Barbee, Dale A. Comer, Mark L. Ells, James A. Elworth, Lynne R. Fritz, Royce N. Harper, William L. Howland, Marilyn B. Hutchinson, Donald A. Kohtz, Sharon M. Lindgren, Charles E. Lowe, Lisa D. Martin-Price, Lynn A. Melson, Harold I. Mosher, Paul N. Potadle, Marie C. Pawol, Kenneth W. Payne, LeRoy W. Sievers, James H. Spears, Mark D. Starr, Susan M. Ugai, Barry Waid, Terri M. Weeks, Alfonza Whitaker, Melanie J. Whittamore-Mantzios, Linda L. Willard

several objects and purposes as specified in the said last budget.

No specific date or time is specified in the statute when a county board shall have neglected or failed to make the appropriation for operation and administration of county government. Further, we do not find any Nebraska cases which specify a precise date for implementation of these provisions.

It has been held that a budget adopted without full compliance with the Nebraska Budget Act is void and may be set aside. Willms v. Nebraska City Airport Authority, 193 Neb. 567, 228 N.W.2d 276 (1975). In this case, the governing body of the airport authority neglected to comply with the Nebraska Budget Act in many respects. Under the facts, Authority officials were not familiar with the Budget Act nor any law providing budget procedures for an airport authority. The Authority failed to prepare a proposed budget statement and file that document with its secretary. It was further found by the court that the Authority did not provide notice of hearing nor conduct a hearing to give the public an opportunity to participate in the budget process. Under these facts, it was clear that the governing body was dilatory and negligent in the preparation and adoption of its budget.

We do not believe that a court would set aside a budget adopted by a county absent neglect or wilful failure to comply with established budget procedures. It is unlikely that a reviewing court would view the provisions of § 23-915 as a means of punishing counties who, due to delays in the budget process, miss the deadline.

The legislative history[1] of the County Budget Act and § 23-915 has been reviewed and the history does not reflect or indicate a certain time or date for implementation of the ninety percent of appropriations provisions. The purpose of the statute is remedial in nature. By its terms, the statute provides a fail-safe mechanism or safety net for appropriation of funds for the necessary functioning of county government if the appropriation process would fail for any reason. Accordingly, we conclude that no exact time or date is established or prescribed which automatically triggers application of the ninety percent of prior years' appropriations provisions.

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[1]THE STATEMENT OF MAIN PURPOSE, Legislative Bill No. 26, Laws 1939, provides that the purpose of the bill is to strengthen and correct the machinery in the County Budget Act by providing more flexibility in the matter of county expenditures and by providing for uniform budget-making throughout the state.

II. Date for Filing Budget Statements.

You have also inquired as to the date a county must file its adopted budget documents with the Office of the Auditor of Public Accounts. The pertinent statutes included in the Nebraska Budget Act and the County Budget Act provide that the budget be adopted and amounts appropriated during the month of August. Neb. Rev. Stat. § 13-508 (Cum. Supp. 1990) in relevant part states:

> After publication and hearing thereon and within the time prescribed by law, each governing body shall certify to the levying board on or by August 25 and file with the auditor a copy of the adopted budget statement, together with the amount of tax to be levied. . . .

Neb. Rev. Stat. § 23-909 (Reissue 1987) states:

> At the first meeting of the county board in August 1945, after the action of the State Board of Equalization and Assessment shall have been had and certified to the county clerk and prior to the last day of sitting as a county board of equalization and at such meeting in each succeeding year thereafter, the county board shall adopt the budget and appropriate the several amounts specified in said budget for several departments, offices, activities, and funds of the county for the period to which said budget applies as provided hereinbefore.

Neb. Rev. Stat. § 13-508 described the time or date with greater specificity, on or before August 25, for adoption of the budget by a governing body. The statutes are consistent in their provision and the date for completion of adoption of the budget, and appropriation of funds, is on or before August 25.

In addition to adoption of the budget statement, the budget process set forth in the statutes provides that the budget document be filed with the county clerk and the Auditor of Public Accounts. The time for filing with the county clerk is within ten days of adoption of the budget and the time for filing of a copy of the budget document with the Auditor of Public Accounts is within thirty days after adoption. See Neb. Rev. Stat. § 23-915 (Reissue 1987). Based on these express statutory provisions, it is our opinion that the time for adoption of the budget is on or before August 25, and the time for filing a copy of the budget statement with the Auditor would be within thirty days of that date.

III. Refusal to Accept Reports for Filing.

The last question you have asked is whether the Auditor of Public Accounts "must reject a county budget filed in excess of the

90% limit established by Neb. Rev. Stat. § 23-915 (Reissue 1987) if the submitting county failed to file its budget with the Auditor (a) by August 25 (State Statute Section 13-508) or (b) within 30 days after adoption (State Statute Section 23-915)." After review of relevant statutes, it is our conclusion that the Auditor of Public Accounts is not compelled to refuse to accept a budget statement for filing under the circumstance you have described. In our response to your second question, it was concluded that the time for filing the budget statement with the Auditor is within thirty days of its adoption.

In an earlier informal opinion, it was concluded that the Auditor of Public Accounts may reject, refuse to accept for filing, budget statements which include material errors which were not corrected based on the express provisions of Neb. Rev. Stat. § 84-304.02 (Reissue 1987). Opinion of the Attorney General No. 91062, July 30, 1991. The act of the Auditor to not accept a budget document for filing is a discretionary act[2] and that discretion is restricted to the purposes[3] expressed in the statute. Accordingly, a budget statement may be rejected only for repeated failure to comply with minimum standards established by rule and regulation. Further, our Supreme Court has held that officers have only such power and authority conferred by law and that authority may be exercised only in the manner prescribed by law. Garfield County v. Pearl, 138 Neb. 810, 295 N.W. 820 (1941).

The manner prescribed by law for not accepting reports for filing is for repeated failure of the submitting county to comply with minimum standards established by rule and regulation. The rules and regulations promulgated by the Auditor of Public Accounts have been reviewed. Minimum standards are set forth in Chapter 1, Title 1, §§ 1-5, Rules and Regulations, Auditor of Public Accounts. No rule or provision was noted which included a minimum standard describing a time or date for filing the budget statement with the Auditor of Public Accounts.

For these reasons, it is our opinion that the Auditor of Public Accounts may reject a budget statement for filing only for repeated failure of the submitting county to comply with minimum standards established by rule and regulation. However, this act is

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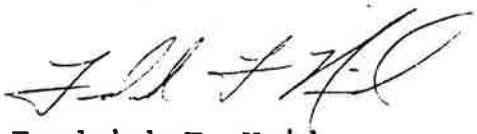
[2]Neb. Rev. Stat. § 49-802 (Reissue 1988) sets forth general rules for statutory construction and provides that when the word "may" appears, permissive or discretionary action is presumed.

[3]Neb. Rev. Stat. § 84-304.01 (Reissue 1987) provides that the Auditor of Public Accounts establish by rule and regulation, minimum standards applicable to all financial reports required to be filed with the Auditor.

discretionary and must be performed in the manner prescribed by law.

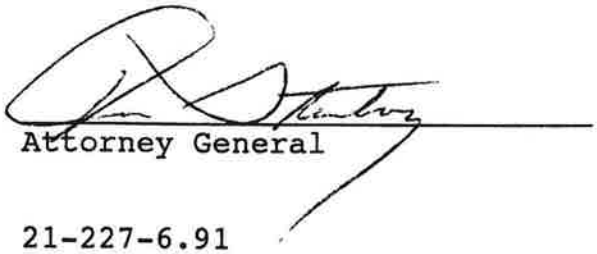
Sincerely yours,

DON STENBERG
Attorney General



Fredrick F. Neid
Assistant Attorney General

Approved By:



Attorney General

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