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STATE OF NEBRASKA
OFFICE
JUL 30 1991
DEPT. OF JUSTICE

DATE: July 29, 1991

SUBJECT: Enforcement of the Nebraska Budget Act and Compliance by Political Subdivisions

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 the Attorney General concerning compliance and enforcement issues which may arise from adoption of the budget statement prepared by political subdivisions. You have posed three questions concerning preparation and filing of budget statements with the Auditor of Public Accounts.

I. Filing of Budget Statements With the Auditor of Public Accounts

The first question you have asked is whether the Auditor of Public Accounts may "reject budgets which require correction." For purposes of this Opinion, it is assumed that the term, budgets, means budget statements which are prepared, adopted, and filed by the governing body of a political subdivision required by the provisions of the Nebraska Budget Act. After review of relevant statutes, we conclude that the Auditor of Public Accounts is authorized to refuse to accept for filing budget statements for continued failure to comply with established standards.

Budget statements are the financial reports which include budget information and expenditure detail of the political subdivisions. Neb.Rev.Stat. § 13-508 (1990 Cum.Supp.) requires that a copy of the adopted budget statement be filed with the auditor, and Neb.Rev.Stat. § 13-504(3) (1990 Cum.Supp.) requires correction of any material errors detected by the Auditor of Public

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Accounts. The Auditor of Public Accounts is expressly authorized by statute to refuse to accept for filing a budget statement which does not meet standards established by the auditor. Neb.Rev.Stat. § 84-304.01 (Reissue 1987) in part states:

> It shall be the duty of the Auditor of Public Accounts to establish, by rule and regulation, minimum standards applicable to all audit, financial, or accounting reports or copies of such reports required to be filed with the Auditor of Public Accounts by any political subdivision of the State of Nebraska. . . .

Neb.Rev.Stat. § 84-304.02 (Reissue 1987) in relevant part states: "[t]he Auditor of Public Accounts may, upon continued failure to comply with such standards, refuse to accept for filing an audit, accounting, or financial report or any future report submitted for filing by any political subdivision." Budget statements of political subdivisions are financial reports which are required by statute to be submitted and filed with the Auditor of Public Accounts. Based on these express provisions, it is our opinion that the auditor may reject, refuse to accept for filing, budget statements which include material errors which were not corrected by the political subdivisions.

II. Actions to Correct Material Errors in the Budget Statement

Your related inquiry is what action may be taken by the office of the Auditor of Public Accounts to compel or enforce compliance with standards and, specifically, correction of errors in the budget statement.

Informal actions would, of course, include written communication to the governing body and appropriate criticism and comment concerning the defects in reviews and audit reports. As previously set out in this Opinion, the Auditor of Public Accounts may refuse to accept the filing of a budget statement for failure to comply with established standards. Failure to correct material errors required by the Nebraska Budget Act would constitute failure to comply with standards and a basis for refusal to accept the filing of a budget statement. Our review of the relevant statutes and authorities reflects that this is the only formal action which may be taken by the Auditor of Public Accounts to seek correction.

The auditor possesses only such powers and duties as are vested in him by the Constitution or statutes and must act in accordance with the law. 81 C.J.S. States § 134. Further, it has been held that statutes delegating powers to officials must be strictly construed, and powers conferred upon a public officer can be exercised only in the manner prescribed by law. Garfield v. Pearl, 138 Neb. 810, 295 N.W. 820 (1941). Neither the statutes nor

the Constitution prescribe other means for exercise of powers and duties conferred upon the auditor. Accordingly, we conclude that the Auditor of Public Accounts may not directly institute legal action against governing bodies of political subdivisions to compel compliance with the Nebraska Budget Act.

While remedial action by the auditor is generally limited to refusal to accept the budget document for filing, this is a formidable and effective act. Essentially, if the budget statement were not filed, the budget would not be in compliance with the Nebraska Budget Act and thereby susceptible to legal challenge. A budget statement which fails to comply with the Act, and any associated tax levy, may be set aside in whole or in part.

A taxpayer upon whom a tax would be imposed may bring an action to contest the validity of the budget statement. Under Neb.Rev.Stat. § 13-512 (Reissue 1987), the burden is placed on the governing body to show cause why the budget statement should not be ordered set aside, modified, or changed. In a taxpayer action challenging the validity of a budget of a political subdivision, the court held that substantial compliance is insufficient and that a budget adopted without full compliance is void and may be set aside. Willms v. Nebraska City Airport Authority, 193 Neb. 567, 228 N.W.2d 276 (1975). Accordingly, failure to correct material errors may subject the political subdivision to legal challenge of the validity of the budget by taxpayers.

Other actions depend on the nature of the defects. If the defects would consist of theft, fraud, or conduct of a similar nature, criminal prosecution may result. While the Auditor of Public Accounts directly may not institute the taxpayer action or a criminal prosecution, actions of the auditor may cause these proceedings to be instituted. Information or activity which may constitute the misapplication of public funds or other crime which the auditor becomes aware of should be made available to the appropriate criminal investigative agency.

III. Civil or Criminal Penalties

The third issue you have raised is whether a governing board would be subject to civil or criminal penalties for not correcting a material error in a timely manner. Imposition of sanctions or penalties would be dependent on all the attendant facts and circumstances as well as the nature of the error.

Under the Nebraska Budget Act, expenditures made during any fiscal year in excess of amounts provided in the budget statement, unless specifically authorized by statute, constitute a misdemeanor. Members of a governing body may be subject to prosecution for obligating or expending funds which constitute

excess expenditures (see Neb.Rev.Stat. § 13-510 (Reissue 1987)). This is the only specific sanction of a civil or criminal nature provided under the Act. If the material error consisted of fraud, forgery, or theft, the appropriate criminal penalties would be applicable.

Certain civil penalties are available and may be applicable to members of the governing board of a political subdivision. For example, county officials may be removed from office by judicial proceedings for habitual or willful neglect of duty or official misconduct under the provisions of Neb.Rev.Stat. § 23-2001 (Reissue 1987). Official misconduct occurs when a public official knowingly violates any statute or rule or regulation relating to official duties. Official misconduct is also classified as a Class II misdemeanor in Neb.Rev.Stat. § 28-924 (Reissue 1989). Since correction of material errors is statutorily required, under appropriate facts, the deliberate and knowing refusal to correct the budget defects may constitute official misconduct.

In summary, it is our opinion that the Auditor of Public Accounts may refuse to accept a budget statement for filing because of failure to comply with established standards. The Auditor of Public Accounts is not directly authorized to institute an action against a political subdivision, but the Auditor's actions may be the basis for legal challenge of the budget statement and process adopted by the governing body of a political subdivision.

Sincerely yours,

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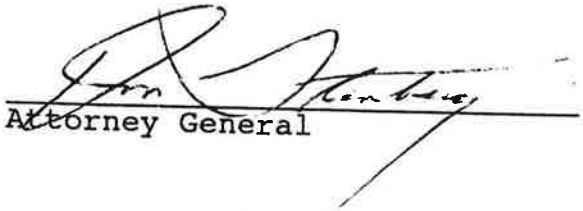
21-01-14.91

APPROVED BY:



Attorney General