

**OPINION
71-33**

August 9, 1971 (OPINION)

Mr. Wayne O. Solberg

City Attorney

Fargo, ND

RE: Cities - Budget Review Board - Reductions in Budget

This is in reply to your letter of August 4, 1971, relative to the budget of the City of Fargo. You state the following facts and questions:

"By way of background information, the Board of City Commissioners approved the preliminary budget by a 3-2 vote and this budget was submitted to the Board of Budget Review. The Board of Budget Review made certain revisions in the budget which amounted to a reduction in the mill levy of 2.14 mills or \$74,585.00. These cuts consisted of a reduction in employees' hospitalization insurance benefits from full coverage amounting to \$51.15 per month to a City Contribution of \$30.00 per month; a reduction in four of the City Commissioners' salaries of \$100.00 each; elimination of one-quarter mill appropriation for cancer research amounting to \$9,375.00; and elimination of an item for contractual services for the Central Garage amounting to \$1,275.00. This action by the Board of Budget Review and the validity of the Board itself has been challenged by the three member majority of the Board of City Commissioners and this opinion is being sought with the view towards the possible settlement of this matter without legal proceedings.

"The motion directing me to seek this opinion as passed by the Board of City Commissioners reads as follows:

'Commissioner Schuster moved that the City Attorney be instructed to request the Attorney General of the State of North Dakota to render an opinion on the points as raised--if it is within the determination of the Board of Budget Review as to how many mills are cut; or if they have that power, can they determine where the cuts are to be made; whether or not the City can, under the Home Rule provisions of its charter, change the line items in its budget if it stays within the mill levy as approved by the Board of Budget Review; and that the City Attorney attempt to get the opinion within one week, and that the actual filing of any lawsuit be delayed for one week.'

"My interpretation of this action and the nature of the request is that the Commission is asking whether or not the Board of Budget Review has the power to simply cut a lump sum amount or a certain number of mills from the overall budget or if they have the power to specify where the cuts are to be made. In the event that it is determined that the Board of Budget Review

may make a lump sum cut from the budget of a certain number of mills or a specific dollar amount or cut specific items from the budget, would it then be permissible, under Home Rule Powers, to increase certain budgetary items while decreasing others, provided the overall mill levy limitation is not exceeded."

We note the following statutes which would be of concern in this matter:

Section 40-41-04 of the North Dakota Century Code provides that the governing body of the municipality shall submit to the board of budget review its annual preliminary budget before it finally is adopted. The section further provides:

"The board of budget review shall review and examine in detail the items of each preliminary budget submitted to it by such local boards and shall certify its approval, disapproval, or modification thereof before the time provided in chapter 40-40 for the final adoption of the budgets." (Emphasis ours)

Section 40-41-05 of the North Dakota Century Code provides:

"ACTION TAKEN ON PRELIMINARY BUDGETS BY THE BOARD - ITEMS TAKEN INTO CONSIDERATION. The board of budget review may approve or disapprove any item in any of the preliminary budgets and may lower but not raise any such item or items or the total of any such budget. The action of the board of budget review on any preliminary budget shall be final. In reviewing the preliminary budgets, the board shall take into consideration the combined totals of all the budgets submitted by the taxing districts and the probable tax levies within the municipality, so far as the same can be determined, including levies for sinking funds and interest on bonds, the total combined bonded indebtedness of the taxing districts, and the total warrants, certificates of indebtedness, and other obligations outstanding. Before approving the preliminary budgets, the board shall have due regard for the combined tax levies which shall result from the approval thereof, and shall exercise its supervisory authority in such manner as to protect the taxpayers of the municipality from an undue burden of property taxes. The action of the board of budget review on the budget of each taxing district shall be certified to the county auditor before the tax levy for each such taxing district shall be spread, and he shall not spread such tax levies until he has received such certificate." (Emphasis ours)

The above quoted statute was enacted in 1933 and has not been substantially amended since that time. To our knowledge the Courts of this State have not had occasion to construe the statute. This office has previously considered the statute with regard to a school district. See letter to Mr. D. E. Brandt, Clerk, Hankinson School Board, Hankinson, North Dakota, dated October 21, 1964, attached hereto. This office noted that the board of budget review may approve or disapprove any item in any of the preliminary budgets and might lower but not raise any such item or items or the total of any such budget. We further stated, page 3 of the letter: ". . .we are

not at all convinced that the line items therein restrict the board to expenditure of only those amounts for the specified purposes.* * *"

We further noted that the provision of the statute which requires the board of budget review to take into consideration totals of all the budgets submitted by the taxing districts and stated, page 3 of the letter:

"It would appear to us the last sentence quoted above contains the essential purpose of the budget review board, i.e., to examine into the total levies which will be made upon the property within the territory. It is, therefore, the total amount which will be levied by any given taxing district which is of primary interest to the board of budget review."

We note, however, that the school districts are not limited to expenditure within line items or classifications of their budget as are the cities. Thus there are no statutes governing expenditures within limits of school district budgets as there are with regard to city budgets. See, e.g., chapter 40-40, particularly section 40-40-17. Our reasoning in that letter was also based to a great extent on the decision in *Stinson v. Thorson* 34 N.D. 372, 158 N.W. 351 (1916) which case is concerned with school district budgetary matters as was the letter from this office referred to herein. Therefore, while we believe the primary interest of the board of budget review is in total amount which will be levied by any given taxing district, we cannot ignore the plain wording of the statutes and we believe the board of budget review does have the power to make specific "cuts" in the city budget. The effect of such cuts is another matter. The city may transfer from one item to another in the budget only as provided by statute, see, e.g., sections 40-40-17 and 40-40-18 of the North Dakota Century Code. In this respect cities and school districts are not governed by the same statutes since there are no such statutes limiting expenditures to certain classifications within school district budgets.

Therefore, with respect to cities, we believe the board of budget review may make cuts in specific items of the city budget as well as make a cut in the total budget. If the board of budget review makes cuts in specific items within the budget, the city may nevertheless make expenditures for such items except as prohibited by applicable sections of the statutes such as sections 40-40-17 and 40-40-18 of the North Dakota Century Code. We do not have a copy of the city budget before us. Presumably, however, most, if not all, of the items would appear under group A as prescribed by section 40-40-05 of the North Dakota Century Code. Although the board of budget review might have eliminated certain items within that group, the city governing body may nevertheless make expenditures for that group, the total amount authorized by the board of budget review. We base this conclusion on the fact that the taxes are levied not by items but by funds. Section 40-40-05(2)(a) provides that group A shall cover all maintenance and operation expenses, including all wages, salaries, and other items which comprise the current expenses of the municipality. The statute further provides:

"Although the whole amount paid for wages and salaries may be

stated in one sum in the budget statement, there shall be on file with the governing body and open to public inspection a detailed statement showing the names of all persons receiving salaries or wages and the annual amount paid to each person."

It is obvious that if, for example, all wages were included within one item the board of budget review could reduce such item. Their reason for reducing such item might be to lower or eliminate the salary of a specified official or employee. However such action would not preclude the city governing body from paying that salary since the action of the board of budget review could only extend to a reduction of the total item for that amount. Presumably if the city paid the contemplated salary they would necessarily have to reduce expenditures elsewhere within group "A" since they could not expend in excess of the amount approved by the board of budget review for that group except as specifically authorized by statute. Thus section 40-40-17 provides:

"TRANSFER FROM OTHER ITEMS OF APPROPRIATION WHEN APPROPRIATION INSUFFICIENT. If the appropriation for any particular purpose is found later to be insufficient to meet the necessary expenditures for that purpose, the auditor of the municipality, upon the order of the governing body, shall make a transfer of the required amount from any other item of appropriation. Except as otherwise provided in section 40-40-18, however, no transfers shall be made from a fund within group C to a fund or funds within groups A and B or from a fund or funds within groups A and B to a fund or to funds within group C."

Thus the statute does not prohibit the city from transferring items within one group to other items within the same group or between groups A and B. We do not believe the action of the board of budget review can impose such a restriction on the city governing body. This is in accord with the statement contained in our letter of October 21, 1964, to the effect that the primary interest of the board of budget review is in the total amount levied rather than the individual items which compose the levy. While the board of budget review may reduce a levy (excluding bonded indebtedness levies and those required by law to be made) made for a specific fund, including the general fund levy, in this instance most if not all of the items cut by the board of budget review would be financed from the general fund. Presumably the city governing body in adopting the preliminary budget, has ordered its priorities in the matter it deemed most essential. This does not preclude a reordering of the priorities to permit expenditures from the general fund for those amounts or purposes which were cut or deleted by the board of budget review if the total amount expended from the general fund does not exceed that approved by the board of budget review. Whether the priorities should be reordered to reduce expenditures in one or more areas to permit expenditures cut by the board of budget review is a matter within the sound discretion of the governing body and we do not believe the board of budget review can assume that discretion to the exclusion of the governing body.

The above discussion has been without regard to the matter of the home rule charter. We understand Fargo has adopted a home rule charter. Section 40-05.1-06(2) of the 1971 Supplement to the North

Dakota Century Code provides in part:

"From and after the filing with the secretary of state of a charter framed and approved in reasonable conformity with the provisions of this chapter, such city, and the citizens thereof, shall, if included in the charter and implemented through ordinances, have the following powers set out in this chapter:

* * *

2. To control its finances and fiscal affairs; to appropriate money for its purposes, and make payment of its debts and expenses; to levy and collect taxes, excises, fees, charges and special assessments for benefits conferred, for its public and propriety functions, activities, operations, undertakings and improvements; * * *and to establish debt and mill levy limitations, provided that all real and personal property in order to subject to the assessment provisions of this subsection shall be assessed in a uniform manner as prescribed by the state board of equalization and the state supervisor of assessments.

* * *."

The copy of the home rule charter for the City of Fargo which you enclosed with your letter indicates, at Article 3, that the powers set forth in section 40-05.1-06(2) have been included within the charter. We are not familiar with the ordinances of the City of Fargo. Thus while the authority of the City to control its finances and fiscal affairs has been included in the home rule charter of the City, we do not know what, if any, provisions are contained in the city ordinances which would affect this particular problem. However the above answer is perhaps sufficient for the situation outlined in that, as we have indicated above, it appears the board of budget review cannot direct the specific expenditures of the city regardless of whether it has a home rule charter.

Insofar as the question of whether the board of budget review is at all applicable to cities with home rule charters (if the charter and the ordinances provide to the contrary) is concerned, it would not appear this question is before us nor could we attempt to finally answer same in view of the fact a portion of the answer must depend upon the specific ordinances adopted pursuant to the home rule charter. We do note that McQuillin on Municipal Corporations (Third Edition 1966 Revised Volume), Volume 2, page 231 states: "In cities having a home-rule charter, the legislature has no power to regulate the use of municipal money, contrary to valid provisions in the charter in regard thereto." However we also note that with respect to the authority of the Legislature to control activities within a home-rule city the authorities draw a distinction between matters which are of municipal concern and state concern, the Legislature having the authority to regulate the latter but not the former. See 2 McQuillin 9. Ordinarily we would assume, as noted in the statement from McQuillin, that the use of municipal money is a matter for municipal determination and it might therefore be argued that the board of budget review has no authority over the budget of a city

which has adopted a home rule charter. While we do not discount such an argument, we do note that the board of budget review is not solely a city board. It has members from the school district which may encompass an area larger than the city itself. It also considers school district and park district budgets and bond issues. See section 40-41-01 of the North Dakota Century Code. As such it might be argued that the board of budget review is an agency having more than a local city concern and that the budget of the home-rule city is nevertheless subject to the jurisdiction of such board despite provisions in the charter and the ordinances to the contrary. We would not, in any event, attempt to answer the question of whether the board of budget review has any authority over the budget of a home-rule charter city since we are not familiar with the ordinances of the city. Also in this instance the action by the board of budget review has already been taken and it appears that only the court could finally determine the question. However we believe the effect of such action by the board of budget review, assuming such board does have authority over the budget of a home-rule charter city, is a proper question for this office and the above opinion is given accordingly.

HELGI JOHANNESON

Attorney General