

**LETTER OPINION  
2005-L-11**

March 17, 2005

Ms. Robin Huseby  
Barnes County State's Attorney  
230 4th Street NW  
Valley City, ND 58072-2947

Dear Ms. Huseby:

Thank you for your letter asking whether a city-county health district may expend monies in excess of its budgeted funds and, if not, how may the funds be recovered. For the reasons indicated below, it is my opinion that a city-county health district lacks the authority to expend monies in excess of its budgeted revenues. It is my further opinion that if a city-county health district unlawfully expends money in excess of its budgeted revenues, and if any such shortfall is not otherwise covered from other available sources, members of the district board of health or other public officials who approved or participated in such unlawful expenditures may be personally liable.

ANALYSIS

Your letter concerns reported deficit spending by the Valley City-Barnes County Health District. According to your letter and information provided by the county auditor to a member of my staff, the health district is funded by 2.75 mills, a \$15,000 yearly contribution from the city, and a \$10,000 yearly contribution from the school district. The health district also receives various grant monies and fees for services throughout the year.

You indicate that at the end of 2004, it was discovered that the health district overspent its budget. Although you state the county commission refused to amend the budget to cover the shortfall, according to the county auditor, the commission did provide \$48,000 in county general funds<sup>1</sup> to the health district.<sup>2</sup>

The county auditor stated that he first became aware of a budget shortfall of approximately \$80,000 during the summer of 2004 upon reviewing the treasurer's trial balances. He indicated he contacted the director of the health district to inquire about the deficit and the reasons for it and was informed the health district was anticipating the receipt of grant

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<sup>1</sup> Cf. N.D.C.C. § 11-23-07.

<sup>2</sup> The county auditor indicated that although it may not be reflected in the county commission's minutes or otherwise documented, it was his belief that this money was intended to be repaid from the health district at such time as its financial situation improved.

monies to cover the deficit. The county auditor further indicated the primary reason for the deficit appeared to be overspending for salaries. Some staff of the health district were reportedly given salary increases beyond what the health district had budgeted or what the anticipated revenues could accommodate. At the end of 2004, when the county commission provided the health district the \$48,000 from its general fund, it was represented that the amount covered the deficit for 2004. However, the county auditor later found out there was a \$20,000 bill for vaccine which had accrued in December of 2004 but was carried over into 2005.

A health district formed by combining counties or cities is a separate political subdivision from the member counties or cities. N.D.A.G. 2004-L-05. As a political subdivision, a health district has only those powers which are specifically provided by law or necessarily implied from powers expressly granted. See, e.g., Murphy v. Swanson, 198 N.W. 116, 119 (N.D. 1924); Ebach v. Ralston, 469 N.W.2d 801, 804 (N.D. 1991); cf. N.D.C.C. §§ 11-23-06, 11-23-07 (county may not spend in excess of appropriations but may transfer between funds to cover a deficiency).

“Each health district has a board of health and a local health officer.” N.D.A.G. 2004-L-05. Health districts and their officials have a number of fiscal powers. Section 23-35-08, N.D.C.C., provides, in part:

[E]ach board of health:

....

2. Shall prepare and submit a public health unit budget.
3. Shall audit, allow, and certify for payment expenses incurred by a board of health in carrying into effect this chapter.

....

18. May contract with any person to provide the services necessary to carry out the purposes of the board of health.

Section 23-35-07, N.D.C.C., provides, in part:

1. A district board of health shall prepare a budget for the next fiscal year at the time at which and in the manner in which a county budget is adopted and shall submit this budget to the joint board of county commissioners for approval. . . . The health district fund must be deposited with and disbursed by the treasurer of the district board of health. Each county in a health district quarterly shall remit and make

settlements with the treasurer. Any funds remaining in the fund at the end of any fiscal year may be carried over to the next fiscal year.

2. The district board of health, or the president and secretary of the board when authorized or delegated by the board, shall audit all claims against the health district fund. The treasurer shall pay all claims from the health district fund. The district board of health shall approve or ratify all claims at the board's quarterly meetings.

Finally, N.D.C.C. § 23-35-11 provides, in part, as follows:

A city, county, or health district, as the case may be, shall prepare a county public health unit budget for the next fiscal year at the time and in the manner a county budget is adopted and submit the budget to the board of county commissioners for approval, shall prepare a city public health unit budget for the next fiscal year and submit the budget to the governing body of the city for approval, or shall prepare a district budget as provided under this chapter.

See also N.D.C.C. § 57-15-31.1 (restricting a taxing district's ability to amend its budget).

A health district is a taxing district. See, e.g., N.D.C.C. §§ 23-35-05(3), 23-35-07, 57-02-01(9). While a health district may have some authority to amend its budget, I found no statute that would expressly or by necessary implication permit a health district to engage in deficit spending. Consequently, it is my opinion that a health district has no authority to expend monies in excess of its budgeted revenues.

"Any public officer who wrongfully withholds or misappropriates public funds, or who pays or authorizes the illegal payment of public funds, is personally liable for such misappropriation or illegal payment." 67 C.J.S. Officers § 261 (2002).

A public official who controls public funds may be held personally liable to repay improperly expended funds if he has failed to exercise due care in permitting the expenditure. In this regard, some courts have followed a strict liability rule and hold a public official personally liable whenever he has permitted expenditures which the public entity is not authorized to make; and, similarly, the view has been followed that a public officer is strictly liable for loss of public funds received by virtue of his office, so that a showing of negligence is not required. Other courts, taking a different view, hold that public officials who mispend public funds incur no personal liability so long as they act in good faith, believing that they have authority to expend the money for the purposes for which the issue warrants. Furthermore, other states, in effect applying a due care standard, hold public officials liable if

they spend funds having reasonable cause to suspect that the expenditures might be improper, or if they fail to prevent an improper expenditure because of negligent performance of their official oversight duties.

63C Am. Jur. 2d Public Officers and Employees § 346 (2d ed. 1997) (footnotes omitted).

One noted author has written:

An officer may pay out public money only in the manner prescribed by law. Money disbursed by the officer in an unlawful manner is paid out at his or her peril. Accordingly, where funds are disbursed illegally by public officers or upon their authority, they are personally liable, e.g., unlawful appropriations in bad faith; payments on warrants in excess of appropriations; payments under illegal contracts; unauthorized payments to the officer him or herself . . . .

Even the fact that illegal expenditures were made by officers under the honest belief that they were authorized does not prevent recovery from such officers. Neither does reliance upon advice of counsel. Also, although there is authority that points to a contrary conclusion, the fact that funds expended illegally were expended for a useful purpose is no defense to an action for their recovery against the officer who disbursed them wrongfully.

4 Eugene McQuillin, The Law of Municipal Corporations § 12.217 (2002 rev. vol.) (emphasis added) (footnotes omitted).

Where local government officials make illegal distributions to others, the local government is generally entitled to have them made good by the disbursing officer or his or her surety. . . . However, the Minnesota Court has refused, in a taxpayer's suit, to hold local government officials personally liable for expenditures -- made for public purposes but not in accordance with the law -- so long as the local government had received value for the money expended and the officials did not make personal gains or profits.

4 Antieau on Local Government Law § 67.09 (2d ed. 2004) (citations omitted). Cf. N.D.A.G. 2002-F-09 (no statutory authority for a county to donate money to a nonprofit corporation for a Fourth of July celebration; county state's attorney has the authority to seek recovery of improperly donated money).

Thus, public officials who are charged by law with budgeting and expending funds of a governmental unit may, depending on the particular circumstance, be personally liable for expending such funds improperly or without authority. As I noted above, there is no authority for a health district to engage in deficit spending. Consequently, it is my further

opinion that if a city-county health district unlawfully expends money in excess of its budgeted revenues, and if any such shortfall is not otherwise covered from other available sources, members of the district board of health or other public officials who approved or participated in such unlawful expenditures may be personally liable.<sup>3</sup>

Sincerely,

Wayne Stenehjem  
Attorney General

jjf/pg

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).

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<sup>3</sup> However, in this instance, a majority of the budget shortfall was covered by a transfer from one of the health district's constituent bodies, the county commission, and thus it does not appear necessary to pursue recoupment from the board or the former executive director who engaged in or had oversight over the deficit spending. While, as noted above, there was a \$20,000 bill for vaccine received by the health district in December of 2004, the county auditor has indicated that the health district plans on covering that liability in the current budget year, and if that is accomplished, would obviate any recoupment. Since the main basis for the shortfall, according to the county auditor, was the granting of salary increases to district staff in excess of budget revenues, it is theoretically possible that recoupment of the raises might be sought from those employees. See N.D.A.G. 2003-L-37 (monies paid to a former city employee under an unlawful settlement agreement may theoretically be recovered from that employee). However, there "may be a host of practical and legal problems raised" by such an attempt. Id.