

REQUEST FOR DISTRICT ATTORNEY LEGAL SERVICES

#6608

#6609

THIS FORM IS TO BE USED TO REQUEST ADVICE AND/OR REPRESENTATION FROM THE DISTRICT ATTORNEY'S OFFICE REGARDING THE COUNTY OF OKLAHOMA, COUNTY OFFICIALS AND EMPLOYEES AS REQUIRED BY SECTIONS 215.4, 215.5, 215.25 AND 215.26 OF TITLE 19 OF THE OKLAHOMA STATUTES.

IF ADVICE IS SOUGHT, THE REQUEST MUST BE SIGNED BY AN ELECTED COUNTY OFFICER. THIS FORM MUST BE FILLED OUT AND SUBMITTED TO THE CIVIL DIVISION OF THE OKLAHOMA COUNTY DISTRICT ATTORNEY'S OFFICE IN A TIMELY MANNER. ALL RESPONSES TO REQUESTS FOR ADVICE WILL BE IN WRITING.

IF THE REQUEST IS FOR LEGAL REPRESENTATION UNDER 19 O. S. SECTION 215.25, THE REQUEST MUST BE SUBMITTED IN WRITING EARLY ENOUGH TO PERMIT THE DISTRICT ATTORNEY'S OFFICE ADEQUATE TIME TO COMPLETE A THOROUGH "GOOD-FAITH-AND-COURSE-OF-EMPLOYMENT" INVESTIGATION AS CONTEMPLATED BY 19 O.S. SECTION 215.26.

DATE OF REQUEST: September 11, 2020

COUNTY DEPARTMENT MAKING REQUEST: Sheriff's Office

STATE WITH SPECIFICITY, WHAT THE REQUEST IS AND WHY THE ASSISTANCE OF THE DISTRICT ATTORNEY'S OFFICE IS NEEDED:

The Oklahoma County Sheriff's Office is seeking your office's assistance in determining if the general fund budget for FY 20-21 can be removed from the control of this office and replaced with CARES funds to fulfill the obligations of the Sheriff's Office. If the answer is yes, are the CARES funds limited to salary and benefits or are operational expenses allowed?

ATTACH ADDITIONAL DOCUMENTS AS APPROPRIATE. (NOTE: Advice, reviews and approvals as to "form and legality" are based on the documentation and information provided to the District Attorney's Office. Please provide all relevant information when requesting an opinion or review from the District Attorney's Office).

P. D. Taylor

COUNTY OFFICER

DATE RECEIVED BY DISTRICT ATTORNEY: _____

REPLY BY DISTRICT ATTORNEY: _____

See attached

RECEIVED

SEP 11 2020

CIVIL DIVISION
DISTRICT ATTORNEY

Revised 2003

DAVID PRATER
DISTRICT ATTORNEY

By: *David Prater* 9/16/2020

M E M O R A N D U M

TO: PD Taylor, Sheriff
CC: All Elected Officials
FROM: Aaron Etherington
DATE: September 16, 2020
RE: Request for Informal Opinion re: Alteration of FY20-21 Budget and Supplantation with CARES Funds.

On September 11, 2020, our office received a Request for Legal Services seeking an informal opinion on the following questions: Can the general fund budget for FY 2020-21 be “removed from the control of the Sheriff’s Office and replaced with CARES funds to fulfil the obligations of the Sheriff’s Office.” If the answer is yes, you ask if CARES funds are limited to being used for salary and benefits or if they may be used for operational expenses.

As presented, we are unsure what is meant by removing funds from the control of the Sheriff, but we interpret the issue to be whether previously appropriated general fund dollars may be decreased and supplanted with CARES funds of an equal amount. Also unclear is what specific salary and/or operational expenses to which you refer as possibly being paid from CARES funds. Accordingly, we have reformulated the issue into three questions: (1) Can the Budget for FY 2020-21 be altered to decrease the amount of general fund dollars appropriated to the Sheriff’s Office after the budget was approved by the Excise Board and no challenge made thereto? (2) Can CARES funds be used for revenue replacement? (3) Can CARES funds be used only for salaries and benefits or may they be used for operating expenses?

To answer your questions, our office takes notice of the following facts: (1) Oklahoma County is a Budget Board County operating under the County Budget Act, Title 19, Section 1401 *et seq.*; (2) on June 11, 2020, the Budget Board approved a budget for fiscal year 2020-21 which appropriated to the Sheriff a total of \$10,149,214.00 in general funds for his law enforcement functions; (3) on June 15, 2020, the Excise Board approved and certified the budget; and (4) no challenge was made by any

taxpayer or county official to the budget as certified by the Excise Board within the time provided therefor.

QUESTION: CAN THE BUDGET FOR FY 2020-21 BE ALTERED TO DECREASE THE AMOUNT OF GENERAL FUND DOLLARS APPROPRIATED TO THE SHERIFF'S OFFICE AFTER THE BUDGET WAS APPROVED BY THE EXCISE BOARD ON JUNE 15, 2020 AND NO TIMELY CHALLENGE THERETO WAS MADE?

The primary issue presented asks whether the general fund appropriations made effective by the FY 2020-21 budget may be decreased and supplanted with CARES funds of an equal amount. This issue presents two distinct questions that are answered separately. We begin by determining whether the budget for FY 2020-21 can be altered to decrease the amount of general fund dollars appropriated to the Sheriff's Office in the first instance. Though every county official is well aware of how the budget is formulated, it is helpful to identify the distinct procedural steps of the process in order to understand the legal issue presented.

The Attorney General has succinctly described the County Budget Act as a procedural code. 1999 OK AG 1, ¶ 22; *see also* 19 O.S.2011, § 1402 (stating "The purpose of the County Budget Act is to provide a budget procedure...."). The Act provides for the Budget Board, with input from county officials, to prepare a budget "for each fund whose activities require funding through appropriation from the budget board." 19 O.S. 2011, § 1408. To this end, each county officer or employee charged with management or control of any department or office must estimate revenues and expenditures of his or her department. 19 O.S. 2011, § 1411. The Board must then "estimate, on the basis of demonstrated need, the expenditures for the budget year after a review of the budget requests and estimates of the department heads, officers, boards or commissions." 19 O.S.2011, § 1411(emphasis added). After notice and public hearing, the Budget Board adopts the budget for each fund and files it with the Excise Board for final approval. 19 O.S.2011, §§ 1412-1413.

In a Budget Board County, the Excise Board plays a limited role. 2012 OK AG 11, ¶ 15. Although the Board's role is primarily limited to examining the budget for conformity with the law, *id.* at ¶ 16, final

approval of the budget is left to the Excise Board. *Id.*; 19 O.S.2011, § 1414. Upon its approval, the budget is filed with the State Auditor and Inspector. 19 O.S.2011, § 1414. Thereafter, any taxpayer or official has fifteen days within which to file any protest to the legality of the budget. If no protest is filed, “**the budget and any appropriation thereof shall be deemed legal and final...**” 19 O.S.2011, § 1415 (emphasis added). This is the “terminal stage” of the budget process that renders appropriations to each fund in the budget both effective and final. *Macy v. Board of County Comm’rs*, 986 P.2d 1130, 1135-36 (Okla. 1999).

Section 1420 of Title 19 governs the circumstances in which the budget, once finally approved and effective, may be altered. Under this provision, the budget may be amended to make supplemental appropriations based upon revenues received that were previously unanticipated. 19 O.S.2011, § 1420(A). However, there is limited power to decrease a final appropriation. In this regard, Section 1420 states:

If at any time during the budget year it appears probable that revenues will be insufficient to meet the amount appropriated, or that due to unforeseen emergencies there is temporarily insufficient money in a particular fund to meet the requirements of appropriation in the fun, the county budget board shall take such action as it deems necessary. For that purpose, it may amend the budget to reduce one or more appropriations or it may amend the budget to transfer money from one fund to another fund, but no appropriation for debt service may be reduced and no appropriation may be reduced by more than the amount of the unexpended and unencumbered balance thereof.

19 O.S.2011, § 1420(B).

These authorities illustrate that once the Excise Board certified and approved the budget on June 15, 2020, and the same was not challenged within the time therefor, the \$10.1 million dollar general fund appropriation to the Sheriff’s Office became final. While supplemental general funds may be added to the original appropriation, absent a probable revenue shortfall, the final appropriation may not be decreased.

ANSWER: THE BUDGET MAY BE AMENDED TO REDUCE ONE OR MORE APPROPRIATIONS ONLY IN THE EVENT IT APPEARS PROBABLE THAT AVAILABLE REVENUES WILL BE INSUFFICIENT TO MEET AMOUNTS PREVIOUSLY APPROPRIATED. ABSENT REVENUE SHORTFALLS, ONLY SUPPLEMENTAL APPROPRIATIONS MAY BE MADE TO INCREASE APPROPRIATIONS ABOVE THOSE MADE IN THE FINAL BUDGET APPROVED BY THE EXCISE BOARD.

QUESTION: CAN CARES FUNDS BE USED TO SUPPLANT THE USE OF COUNTY FUNDS?

Our determination that the FY 2020-21 budget cannot be amended to reduce the general fund appropriations to the Sheriff's Office, without more, may seem to answer the primary question presented, as we are unaware that there exists any potential revenue shortfall. Nevertheless, we proceed to address the secondary issue of whether CARES funds may be used to supplant the use of county funds.

The CARES Act provides that funds distributed to the states and local governments may only be used to cover expenses that: "(1) are necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19); (2) were not accounted for in the budget most recently approved as of the date of enactment of this section for the State or government; and (3) were incurred during the period that begins March 1, 2020, and ends on December 30, 2020." 42 U.S.C. § 801(d). Regarding the requirement that the expenditure be incurred due to the public health emergency, the Treasury Department has said in clear and unequivocal terms:

The requirement that the expenditures be incurred "due to" the public health emergency means that expenditures must be used for actions taken to respond to the public health emergency. These may include expenditures incurred to allow the State, territorial, local, or Tribal government to respond directly to the emergency, such as be addressing medical or public health needs, as well as expenditures incurred to respond to second-order effects of the emergency, such as by providing economic support to those suffering from employment or business interruptions due to COVID-19-

related business closures. Funds may not be used to fill shortfalls in government revenue to cover expenditures that would not otherwise qualify under the statute. ***Although a broad range of uses is allowed, revenue replacement is not a permissible use of Fund payments.***

Dep't of Treasury, Coronavirus Relief Fund Guidance for State, Territorial, Local and Tribal Governments, p. 1 (Sept. 2, 2020).

The statutory language of Section 801 makes clear that, *inter alia*, CARES funds may only be used for expenditures incurred as a result of the COVID-19 pandemic. Implicit in this limitation is an exclusion of expenses that would have been incurred for their ordinary use regardless of the pandemic. Even were this point left ambiguous from the language of Section 801, any doubt is resolved by the express prohibition found in the Guidelines of the Treasury Department. Here, you have posed the question of whether the general fund appropriation to the Sheriff's Office can be decreased and replaced with CARES funds. This is the definition of revenue replacement or supplanting that is expressly prohibited by the Guidelines. As will be addressed below, however, this is not to say that certain individual expenses cannot be paid from CARES funds; rather, CARES funds cannot be used as a wholesale replacement for general fund appropriations to the Sheriff's Office.

Though CARES funds are not a federal grant, the decision of the United States Supreme Court in *Bennett v. Kentucky Department of Education*, 470 U.S. 656 (1985), provides a cautionary warning. In that case, the Commonwealth of Kentucky received federal grant funds to be used to supplement state and local expenditures for education. *Bennett*, 470 U.S. at 658. In order to ensure that federal funds would be used to support additional services that would not otherwise be available, the federal statutes and regulations expressly provided that the federal funds could not be used merely to replace state and local expenditures. *Id.* at 659.

A federal audit concluded that Kentucky improperly used federal funds to supplant state funding in the payment of all instructional salaries and a portion of administrative support costs for "readiness classes" offered to educationally disadvantaged children. *Id.* at 660-61. While the

state funded certain enrichment services, the federal funds, nonetheless, defrayed substantially all the costs of educating the students in the readiness classes. *Id.* at 61. Accordingly, the Secretary of Education issued a letter demanding repayment. *Id.* at 661.

After administrative review, Kentucky appealed to the Sixth Circuit Court of Appeals. There the Commonwealth argued that no supplanting had occurred; they argued that because their expenditures for regular classroom programs remained the same the self-contained readiness classrooms were merely a supplement to existing educational programs. *Id.* at 661-62. The Sixth Circuit acknowledged that the Secretary's interpretation of the supplanting provision was reasonable, but found that the Commonwealth substantially complied with the terms of the statutory requirements in good faith based upon a reasonable interpretation of the law. *Id.* at 662. On this basis, the Circuit Court found Kentucky should not be held liable for misuse of funds.

The United State Supreme Court reversed the Court of Appeals. In so doing, the Court found no statutory support to absolve a recipient of liability for misuse of grant funds based upon good faith or substantial compliance. *Id.* at 664-65.; *see also Wyoming v. Alexander*, 971 F.2d 531 (10th Cir. 1992)(holding that agency determination that the state misused federal funds is accorded deference and a reviewing court has no authority to excuse repayment based upon equity and fairness).

These authorities suggest that the County should err on the side of caution in the use of CARES funds in place of existing general or special funds. A determination by the Treasury Department that any particular use of CARES funds is a revenue replacement for other county monies will be given deference by a reviewing court. That the County acted in good faith will not excuse any liability for misuse of CARES funds.

ANSWER: ACCORDING TO THE MOST RECENTLY APPROVED GUIDELINES OF THE TREASURY DEPARTMENT ISSUED ON SEPTEMBER 2, 2020, REVENUE REPLACEMENT IS NOT A PERMISSIBLE USE OF FUND PAYMENTS.

QUESTION: CAN CARES FUNDS BE USED ONLY FOR SALARY AND BENEFITS OR MAY THEY BE USED FOR OPERATIONAL EXPENSES?

While we have already determined that CARES funds may not be used to supplant the general fund appropriations to the Sheriff's Office in their entirety, this is not to say that certain expenditures of the Sheriff's Office cannot be paid from CARES funds. For this reason, we address the final question.

At the outset, we note that your question refers to salary, benefits, and operational expenses. While Section 1417 of the County Budget Act requires a Budget Board to categorize appropriations into categories such as salaries, benefits, operating expenses, capital outlays, etc., we caution against viewing potential CARES expenditures with the same broad categories. That is to say, the CARES Act does not authorize the payment of all salaries and benefits of the Sheriff's Office without limitation. Nor does it authorize the payment of all operational expenses. Instead, any expense proposed to be paid from CARES funds must be individually analyzed in accordance with the Act; when that expense is a salary/benefit expense, the specific duties performed by each employee must be analyzed as well.

As already noted above, the CARES Act provides that funds distributed to the states and local governments may only be used to cover expenses that: "(1) are necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19); (2) were not accounted for in the budget most recently approved as of the date of enactment of this section for the State or government; and (3) were incurred during the period that begins March 1, 2020, and ends on December 30, 2020." 42 U.S.C. § 801(d). Only if a proposed expenditure meets all three requirements set forth in Section 801(d), may it be considered eligible for payment from CARES funds. Here, however, you have not provided any information regarding specific salary or operational expenditures proposed to be paid from CARES funds. Absent specific information regarding a proposed expenditure, we cannot provide an opinion as to the legality of any payments from CARES funds.

ANSWER: CARES FUNDS MAY BE USED FOR CERTAIN, BUT NOT ALL, SALARY AND OPERATIONAL EXPENSES OF THE SHERIFF'S OFFICE.

TO BE ALLOWABLE, THE SPECIFIC EXPENSE MUST BE ONE THAT MEETS ALL THREE REQUIREMENTS OF SECTION 801(D). WHETHER A PARTICULAR EXPENSE MEETS THIS CRITERIA CANNOT BE ANSWERED BY THIS OPINION, AS INSUFFICIENT INFORMATION HAS BEEN PROVIDED AS TO ANY SPECIFIC SALARY OR OPERATIONAL EXPENSES CONTEMPLATED TO BE PAID BY CARES FUNDS.