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Please respond to the Concord office

RECEIVED
JUN 20 2016
SELECTMENS OFFICE

June 17, 2016

Alan Phair, Town Administrator
Town of Atkinson
21 Academy Avenue
Atkinson, NH 03811-2204

Re: Atkinson - Fire Department

Dear Alan:

You have asked my opinion relative to what authority, if any, the Board of Selectmen has over the spending by the Town of Atkinson Fire Department. More specifically, you have inquired whether the Fire Department may expend in excess of a line item in the Department's budget, and unilaterally transfer funds from one line item to another within the Fire Department budget. The Board of Selectmen has instituted a policy that if a department head wishes to expend in excess of a line item, he or she must first seek the approval of the Board of Selectmen. See RSA 42:9,VI ("the Selectmen shall be responsible for establishing and maintaining appropriate internal control procedures to ensure the safeguarding of all assets and properties."). The Fire Chief insists that policy does not apply to the Fire Department based upon a vote at a Town Meeting in 1944.

In 1944, the Town Meeting voted in the affirmative on the following warrant articles:

- The firemen will manage the Fire Department, providing the firemen form an association, keep a record of all finances and expenditures, same to be audited annually by the Town auditors and printed in the Annual Town Report.

- The association to elect a chief and all other officers of the Fire Department, also all new members of the association.

- All bills against the Fire Department shall be subject to the approval of a majority of the Board of Engineers before payment, and in order for payment of same shall by singed by a majority of the Board Engineers and presented to the

> Board of Selectmen for payment. Expenditures not to exceed the appropriations at a regular or special town meeting.

Since that date, the Fire Department has operated under the terms of those articles. It may be argued that the article authorizing "the firemen to manage the Fire Department and control all finances raised by the Town for a said department" would allow the Fire Chief to transfer funds, without the oversight of the Board of Selectmen.

Unfortunately, the situation is not so clear in 2016. In the past 72 years, many laws have changed, with which the 1944 votes are in conflict. The Municipal Budget Act, enacted in 1935, was optional and provided for the creation of a budget committee. It since has been comprehensively revised to apply many provisions to all municipalities. Under RSA 32:8 no official may "agree to pay any money, for any purpose, in excess of the amount appropriated by the legislative body for that purpose." Transferring funds from one line item to another indicates that someone has agreed to pay money for a purpose in excess of the amount appropriated. RSA 32:10 now vests in the Board of Selectmen the authority to transfer funds. This power cannot be limited nor taken away by the town meeting. See, McDonnell v. Derry, 116 N.H. 3 (1976) (court invalidated warrant article which required "good cause" and approval of budget committee to deviate from the line item budget).

In 1993, the legislature undertook a comprehensive revision of the statutes governing fire departments. Laws 1993, Chapter 28 (copy attached). The purpose of these revisions was to clearly distinguish private associations from municipal departments:

> The General Court finds that there are many New Hampshire municipalities in which the organizational relationships between the municipality, its governing body, and its fire department are unclear. It is the purpose of this Act to clarify the distinction between municipal fire departments and private firefighting units, to establish clear lines of authority between the municipality and its firefighters and units which are municipal fire departments, to clarify the liability of the municipalities for acts of firefighters and the ability of the municipality to manage its potential risks of liability, and to accomplish these goals with minimum disruption to existing fire departments, either paid or volunteer, which are the backbone of public safety in New Hampshire.

Laws, 1993, Chapter 28:2. "Municipalities, fire departments, and prior firefighting units shall have until January 1, 1996, to comply with the organizational or certification requirements of RSA 154:1 and 154:1-c, as inserted by sections 4 and 5 of this Act." Laws, 1993, Chapter 28:12. The Town of Atkinson does not appear to be in compliance with the law, as I have received no information that the Town has voted to reorganize the fire department since 1993.

Section 4 of the Act amended RSA 154:1, by setting forth the various forms of governance of a fire department. Although the goal of the legislature appeared to be to establish some uniformity in the governance of fire departments, paragraph III of that section does allow that "[a] municipality may choose a form of fire department organization different from those set forth in paragraph I." It is important to note that under section 5 of the Act, the legislature makes it clear that firefighter associations are separate and distinct entities from municipal fire departments; the latter being responsible for the operation of governmental affairs. See, RSA 154:1-b. Also of considerable significance is RSA 154:1-a, which requires that "all municipal funds appropriated for fire department purposes shall be held by the municipal treasurer and shall be subject to the municipality's normal budgeting, appropriation and disbursement authorization requirements." Certainly, this language would be entirely inconsistent with the 1944 town meeting vote. Unfortunately, even that proposition is rendered somewhat ambiguous by RSA 154:1-bb, enacted in 1994, which allows "[t]he legislative body of a municipality may vote to choose any form of financing and property ownership different than those in RSA154:1-a and RSA 154:1-b.

This much remains clear. The Town of Atkinson is not in compliance with the laws of 1993, Chapter 28, by failing to formally vote to establish the proper organizational structure for the department. That failure raises questions about the continuing vitality of the 1944 vote. The Board could take the position that fire department funds will be held by the treasurer and any transfer of funds will require Board approval, so as to conform to current law, until the matter is taken up at the next town meeting. However, I am unaware of any case that has addressed the implications of the Town's failure, and whether the 1944 vote is rendered invalid. Thus, while I believe the 1944 vote is not consistent with current law and the budgeting process under RSA Chapter 32, I cannot say whether the courts would rule it invalid and order that transfers of appropriations can only be undertaken by the Board of Selectmen. Nor can I say whether the courts would rule that all funds must be held by the treasurer, rather than being turned over to the fire department.

I recommend that the Board of Selectmen develop a warrant article for the 2017 town meeting which establishes the form of governance of the fire department. This article should insure that there are proper checks and balances, which is a hallmark of our American system. I am persuaded that the best system would be one in which the Board of Selectmen appoint a fire chief, and the fire chief is responsible for nominating firefighters, whom the Board of Selectmen could consider for appointment as members of the department. There needs to be a separation of the association and the municipal government. Furthermore, the fire department's budget should be treated no differently than any other department budget. The treasurer should hold the funds, and the Board of Selectmen should retain its full authority under RSA Chapter 32.

If the Board of Selectmen asserts its authority this may generate litigation, which probably would not be resolved before the next town meeting. Consequently, I am persuaded the best approach might be to wait until the next town meeting and develop a structure for the fire department which is consistent with the spirit and intent of the laws adopted in 1993.

If you have any additional questions or would like to discuss this matter further, please do not hesitate to contact me.

Sincerely,

Barton L. Mayer
bmayer@uptonhatfield.com

BLM/cac
Enclosure(s)