

Ledger 5 Expenditure Review and Approval Standard

Summary

Article III, Section 24 of the Pennsylvania Constitution ordinarily prohibits the State Treasurer from authorizing the payment of any public funds, without appropriations expenditure authority. If presented with a requisition for the expenditure of public funds in the absence of or exceeds an appropriation (termed a “Ledger 5 expenditure”), the Treasurer may approve the issuance of a warrant for payment only if the expenditure request, at the time of its submission, is:

- 1) pursuant to a prior fiscal year appropriation unaffected by any lack of a current appropriation;
- 2) mandated pursuant to state or federal authority, independent of an appropriation;
or,
- 3) necessary to maintain public health, safety and welfare pursuant to the police powers of the Commonwealth.

Ledger 5 Expenditures

State budget expenditures are recorded in real time within a general account ledger, maintained by the Governor’s Office to categorize types of expenditures for accounting purposes. Ledger 5 is the mechanism through which expenditures that lack or exceed state appropriations authority, but are otherwise incurred, are identified and accounted. To be clear, Ledger 5 is an accounting mechanism, it is not a legal authority for the expenditure of public funds that lack or exceed a budgetary appropriation.

In practice, the request to process and pay the operational expenses of any governmental agency is typically initiated / authorized by the comptroller of the particular branch of government in which the governmental entity resides (legislative, judicial or executive). As is common practice, the comptroller presents to Treasury a requisition identifying the expense to be paid, listing vendor or service provider’s address or depository account information, amount of payment and such other information necessary to complete payment.¹

Under circumstances in which an appropriation does not exist (*e.g.*, late budget, extended budget impasse, unforeseen emergency) or exceeds an appropriation limit (*e.g.*, unanticipated cost increases, emergency expenditures requirement) the presentment of a requisition for the payment of the expenses would correspond with an “Expenditure Symbol Notification Number” memorandum issued by the Secretary of the Budget to the Treasurer specifically identifying the circumstances for necessitating the expenditure. The purpose of the ESN memorandum is to provide the Treasurer instructions by which the expenditures are to be accounted during and until the enactment of a current fiscal year or supplemental budget. The ESN memorandum functions

¹ 72 P.S. § 1501 (“Requisitions for payment may be presented to the Treasury Department by electronic transmission which shall evidence the approval of the comptroller . . .”) (Emphasis added).

as an important mechanism to properly account for funds expended pursuant to independent legal authority separate from a legislatively enacted appropriation.

Treasury's Responsibility

Pursuant to the Pennsylvania Fiscal Code, the Treasurer may issue a warrant for the payment of a requisition only if it “appear[s] to be lawful and correct.”² The statutory standard employed by the Treasurer is subjective in nature - if the requested expenditure “appears” to the Treasurer, in his or her sole discretion, to be “lawful and correct.” The presence of the term “appears” within the Fiscal Code is significant, acknowledging the myriad of circumstances in which expenditure requisitions are presented to the Treasurer that may lack legal certainty or absolute clarity. As a consequence, the Fiscal Code permits the Treasurer to exercise independent discretionary judgment when considering the legality of an expenditure requisition and to approve the payment of an expenditure if it “appears” lawful under the particular circumstances.

It is within this statutory framework that Treasury, subject to generally accepted auditing standards, reviews and, if deemed to be lawful and correct, approves expenditure requests submitted by the Comptroller for the Secretary of the Budget, the judiciary and the legislature. As part of its review, Treasury considers all supporting documentation submitted by the particular government agency characterizing the expenditure as “lawful and correct,” justifying the issuance of the Treasurer’s warrant releasing public funds for the payment of the expenditure request. Within this context, it is both appropriate and occasionally necessary for the Treasurer to request the submitting governmental agency to provide legal justification, independent of an enacted appropriation, to support the expenditure payment request to demonstrate that the expenditure is “lawful and correct.”

Treasury's Fiscal Review

In general, absent an application appropriation (or in excess of an appropriation) Pennsylvania constitutional restrictions within Article III, Section 24 provide that:

“No money shall be paid out of the treasury, except on appropriations made by law and on warrant issued by the proper officers . . .”

Additionally, Section 3422 of the Pennsylvania Fiscal Code provides:

“[I]f the state treasurer shall pay out of any appropriations named in an appropriation bill, a greater sum than is named therein for each appropriation. . . [he] shall be deemed guilty of a misdemeanor, punishable by a fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, for each and every offense.” 72 P.S. §3422.

Collectively, these two provisions create the general rule that public funds under the custodial care of the state Treasurer are not to be disbursed without (or in excess of) an appropriation. However, there are several legal exceptions to the strict application of the Article III Section 24

² 72 P.S. § 1502.

prohibition, including, federal expenditure mandates that supersede the state constitution, and conflicting state constitutional provisions.³ These exceptions include:

1) Prior Fiscal Year Appropriation

Several categories of requisitions associated with expenditure authority, involving a prior fiscal year appropriation, are unaffected by a delay or budgetary impasse in adopting a new fiscal year appropriation. For example, the following would ordinarily be approved for payment in the absence of a current fiscal year appropriations:

- Requisitions for the payment of goods or services received in the prior fiscal year, but not invoiced until after June 30th;
- Requisitions of funds subject to a proper lapse waiver; and,
- Requisitions of funds pursuant to a continuing appropriation (*e.g.*, highway and flood control projects).

2) Independent Expenditure Authority

Several different categories of expenditures are authorized pursuant to separate act of the legislature outside of the annual General fund budget and therefore would be unaffected by a delayed or budgetary impasse. Examples would include:

- Restricted receipt funds that are continuously appropriated pursuant to an act of the General Assembly (*e.g.*, SWIF payments from Labor & Industry);
- Restricted revenue funds that are continuously appropriated pursuant to an act of the General Assembly (*e.g.*, Crime Victim payments);
- Expenditures eligible to be made pursuant to statute authorizing executive approval of payments (*e.g.*, PLCB liquor purchases, Lottery payments); and,
- Appropriations made by separate act of the General Assembly (*e.g.*, payments to Pennsylvania College of Technology, payments for Rural Education Outreach).

3) State or Federal Constitutional Mandates

In addition to funds that are statutorily appropriated by the legislature, independently of the annual budget, there are additional expenditures that are directly authorized under state or federal constitutional law.⁴ Such authorizations would include:

- Federally funded programs for which federal funds are mandated to be expended, such as medical assistance, cash assistance and WIC account replenishments;
- General Obligation debt service payments (Pa. Const. art. VIII, § 7.); or,
- Tax refunds (Pa. Const. art III, § 24.).

³ See, *e.g.*, Attorney General Opinion Letter to Pennsylvania Treasury (February 25, 2016) (Opinion of Attorney General that Article III, Section 24 and 92 P.S. § 3422 were superseded to the extent that state law directly conflicted with the U.S Constitution and federal statutes.)

⁴ See, *e.g.*, *Knoll v. White*, 141 Pa. Cmwlth. 188, 595 A.2d 665 (1991).

- Separation of Powers Doctrine ensuring the non-impairment, independent functioning of the legislative, executive and judicial branches of government (Pa. Const. art. II, Section 1; art. IV, Section 1; art. V, Section 1).

4) Federal Fair Labor Standards Act

Pennsylvania Courts have consistently held that public employees, who are covered by the Federal Fair Labor Standards Act and not furloughed, are to be paid notwithstanding the Article III, Section 24 prohibition against the expenditure of public funds without an appropriation.⁵ In addition, the Federal Department of Labor regulations under the Fair Labor Standards Act provide that even those employees who are classified as covered by the Act and are not furloughed must be paid a minimum salary of not less than \$455 per week.⁶ (amount of salary required). If an exempt employee is not paid a minimum salary, the employee becomes subject to the compensation requirements imposed by the Fair Labor Standards Act and therefore may risk the Commonwealth to federal penalties and sanctions if salaries are not timely paid. As a consequence, if an exempt employee remains on the job, federal law requires them to be timely paid a minimum salary, notwithstanding any state constitutional prohibition.

5) State Police Powers (necessary to maintain public health, safety and welfare)

Pennsylvania courts have determined that it is an inherent obligation of the state to preserve the public health, safety and welfare and is therefore mandated to provide the critical and necessary operations required to facilitate this responsibility. Consequently, the Commonwealth cannot abandon its responsibility under the police power and is required to continuously and consistently carry out this obligation.⁷ Without sufficient (or the lack thereof) spending authority, the Commonwealth is unable to fulfill its constitutional obligation to “maintain order and to preserve the safety and welfare of all citizens.”⁸

The state constitutional necessity to provide critical and essential governmental services, that cannot otherwise be deferred (“critical and necessary”) pursuant to the Commonwealth’s police powers is the central legal premise upon which public funding is mandated to continue,

⁵ *Council 13, AFSCME v. Casey*, 156 Pa. Cmwlth. 92, 96, 626 A.2d 683, 686 (1993) (“The duty of the Executive Branch, including the Governor, the Budget Office and the State Treasurer, to make payment for the performance of essential work by state employees is therefore undoubted . . .”); *Council 13, AFSCME v. Rendell*, 604 Pa. 352, 383, 986 A.2d 63, 82 (2009) (“[W]e hold . . . that Section 24 did not prohibit the Commonwealth from continuing to employ and pay all FLSA nonexempt Commonwealth employees in the event that the Pennsylvania General Assembly failed to pass a budget . . .”).

⁶ 29 CFR 541.660.

⁷ *See, e.g., Coatesville Borough v. Coatesville Electric Light, Heat & Power Co.*, 32 Pa. Super. 513 (1907) (“a municipality cannot bargain away its right to exercise at all times its police power...”); *See also Pa. Human Rels. Comm’n v. Sch. Dist. Of Philadelphia*, 681 A.2d 1366, 1383 (Pa. Cmwlth. 1996) (“Where the Commonwealth has delegated a particular obligation to one of its political subdivisions and the political subdivision proves that its resources are inadequate to carry out its functions, the Commonwealth is obligated to adequately fund the political subdivision to satisfy its legally delegated obligations.”).

⁸ *County of Allegheny v. Commonwealth*, 507 Pa. 360, 490 A.2d 402, 410 (1985) (emphasis added).

notwithstanding the absence or in excess of an appropriation. Such authorizations would include:

- the continued operation of the prison system and the associated employee salaries;⁹
- the completion of bridge safety and road maintenance;¹⁰
- the processing and delivery of critical public records;
- and most other necessary law enforcement, health and safety activities.

Treasury's Approval Requirements

Future Ledger 5 expenditures requisitions will be reviewed by Treasury to ensure any payment approval is "lawful and correct" pursuant to the Fiscal Code. In so doing, Treasury will require the submission of any future Ledger 5 requisition to include the following:

- 1) A current fiscal year ESN memo for each Ledger 5 identified expenditure requisition for each federal or state appropriation where spending authority has either been exceeded or expired as a consequence of a delayed appropriation enactment;
- 2) Individual Ledger 5 symbols that correspond directly to the state and/or federal appropriation to which the expenditure exceeds or is otherwise anticipated to be reconciled against (revision allows multiple symbols on one ESN); and,
- 3) Written certification from the originating agency (applicable to each branch of state government) that the expenditure is legally necessary and authorized specifically describing the circumstances and necessity of the expenditure and identifying the applicable state or federal legal authority.

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⁹ *County of Allegheny v. Commonwealth*, 507 Pa. 360, 376, 490 A.2d 402, 410 (1985) ("[I]t is the State's obligation to maintain order and to preserve the safety and welfare of all citizens. That responsibility requires the governmental unit to provide adequate and secure facilities for the housing of those individuals who have demonstrated by their conduct that they pose a danger to the other members of society.").

¹⁰ *Mikulan*, 504 Pa. 244, 247, 470 A.2d 1339, 1340 (1983) ("[T]he police powers of the Commonwealth are particularly broad in matters pertaining to the safe and efficient functioning of the highways . . .").