

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

COOK V. NEBRASKA UNIFIED SCH. DIST. NO. 1

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

CHARLES A. COOK, APPELLEE,
V.
NEBRASKA UNIFIED SCHOOL DISTRICT NO. 1 ET AL., APPELLANTS.

Filed April 24, 2012. No. A-11-720.

Appeal from the District Court for Antelope County: JAMES G. KUBE, Judge. Affirmed.

John F. Recknor and Susan L. Kirchmann, of Recknor, Wertz & Associates, for appellant.

David E. Copple and Michelle M. Schlecht, of Copple, Rockey, McKeever & Schlecht, P.C., L.L.O., for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

A school district appeals from the district court's decision that the school district failed to correct a material error in its budget statement, thereby violating the Nebraska Budget Act (Act). We conclude that the taxpayer appropriately filed the action under the Act, that the school district did not have the discretion to omit from its budget funds held by the county treasurer or to not correct a material error in the budget as detected by the auditor, and that the relief selected by the district court comported with the law. Accordingly, we affirm.

BACKGROUND

Charles A. Cook is a landowner and taxpayer in the Verdigre school district. In November 2008, the voters of the Verdigre school district--a school district which participates in a unified system--approved a bond issue. In 2009, the board of education for the Verdigre school

district adopted a resolution authorizing and ordering issued bonds in the principal amount of \$3,865,000.

On November 15, 2010, Cook filed an amended complaint against the Nebraska Unified School District No. 1, its school board, and Gordon Shrader, president (collectively the school district). The complaint stated that Cook was proceeding under Neb. Rev. Stat. § 13-512 (Reissue 2007) against the school district for failure to comply with the Act, specifically Neb. Rev. Stat. §§ 13-505 (Reissue 2007) and 13-508 (Cum. Supp. 2010). Cook further stated that he was “protesting the proposed tax levy request for the Verdigre Bond Fund.” Cook alleged that the proposed budget for 2010-11 failed to comply with the Act because (1) the estimated expenditures for 2010-11 were inflated, (2) no cash reserve was required, (3) the actual and estimated personal and real property taxes for 2009-10 were inaccurate, and (4) the ending balance for 2009-10 was inaccurate. Cook alleged that the budget was excessive and “outside the limits” contained in §§ 13-505 and 13-508. For relief, Cook requested that the court “exercise the authority as set out in [§] 13-512 and adjust the Verdigre Bond Fund Budget to protect the taxpayers and to accurately reflect the needs of the [s]chool [d]istrict.” The school district’s answer denied most of the allegations of the complaint. It alleged that the Verdigre bond cash reserve was a “special reserve fund” as provided by the Act.

The parties filed cross-motions for summary judgment. Cook submitted an affidavit to support his motion for summary judgment. However, the court disregarded all hearsay statements in the affidavit, any statement which was not supported by sufficient foundation and which lacked relevance to the issues in controversy, and all but one of the attachments. According to the affidavit of the superintendent of the school district, the school district’s finances are reviewed annually by an independent auditor. The auditor found the ending balance for the Verdigre bond fund for the year which ended on August 31, 2010, to be \$250,503. The adopted budget for 2010-11, which was attached to the superintendent’s affidavit, showed the total available resources before property taxes for the Verdigre bond fund to be \$175,623.

On May 6, 2011, the district court entered an order on the motions for summary judgment. After excluding parts of Cook’s affidavit and attachments, the court noted that it was left “with little to grant [Cook] a summary judgment in his favor. Much of [his] argument is based on numbers and amounts which are derived from documents which lack sufficient foundation, are incorrect . . . or which are not in controversy” The court found that the estimated expenditures were not inflated, that there was no evidence that the school district intended to pay anything other than the annual principal and interest on the outstanding debt, and that the amount of cash reserve did not violate any statute. But the court concluded that “the exclusion of \$75,380 from the total beginning balance of the fiscal year 2010-2011 budget constituted a material error in the budget statement.” The court further found that the school district failed to comply with that portion of the Act requiring it to correct the material errors in its budget statement which were determined by the auditor. Thus, the court sustained Cook’s motion for summary judgment and overruled the school district’s motion to the extent set forth in its order. The court ordered the school district to modify the 2010-11 budget form to reflect (1) a beginning balance of “\$250,203” in column 1--“which [was] equal to the [auditor’s determination of] the ending available cash” and (2) the amended amount of personal and real property taxes to be collected in order to adequately fund the budget of \$269,997 in column 3.

The court further ordered that “[t]he mill levy shall be adjusted so that the tax rate to be applied will sufficiently generate those funds necessary for the expenditures reflected in the 2010-2011 fiscal year budget, as modified by the amounts as noted above.”

The district court subsequently overruled the school district’s motion to alter or amend the judgment, and the school district timely appeals.

ASSIGNMENTS OF ERROR

The school district alleges, consolidated and restated, that the court erred in (1) failing to recognize the action to be a taxpayer refund action and incorrectly framing the issues as a challenge under the Act, (2) failing to recognize the school district’s discretion to set its budget and finding a failure to comply with the Act, and (3) choosing invalid relief and changing the tax levy when justice did not require such action.

STANDARD OF REVIEW

Although this is an appeal from an order denying a motion to alter or amend the judgment following the entry of an order ruling on cross-motions for summary judgment, the school district does not assign error to the denial of the motion to alter or amend nor does it assign or argue that the district court erred in failing to find the existence of a genuine issue of material fact. Thus, our review is limited.

The meaning of a statute is a question of law, which an appellate court resolves independently of the trial court. *Alisha C. v. Jeremy C.*, 283 Neb. 340, 808 N.W.2d 875 (2012).

We find no precedent dictating the standard to be applied by this court in reviewing the district court’s relief under the Act--whether for abuse of discretion, for errors appearing on the record, or de novo on the record. However, under the circumstances of this case, we need not decide what specific standard applies, as our decision would be the same under any of the possible standards of review.

ANALYSIS

Nature of Action.

The school district assigned error to the district court’s failure to recognize the action to be a taxpayer refund action and incorrectly framing the issues as a challenge under the Act. For the first time on appeal, the school district argues that Cook should have filed a claim under Neb. Rev. Stat. § 77-1735 (Reissue 2009) if he believed that his tax levy was too high. That statute provides an avenue to request a refund of a payment of a tax that the taxpayer claims to be illegal. See *id.* The school district contends that “the taxpayer relief statute was [Cook’s] exclusive statutory remedy and he proceeded improperly.” Brief for appellants at 7. We disagree.

Cook’s complaint clearly alleged a violation of the Act. A pleading serves to guide the parties and the court in the conduct of cases, and thus the issues in a given case are limited to those which are pled. *Sarpy Cty. Farm Bureau v. Learning Community*, 283 Neb. 212, 808 N.W.2d 598 (2012). The complaint stated that Cook was proceeding under § 13-512 and explicitly alleged a violation of two statutes contained in the Act. Further, he alleged that the requested amount in the proposed budget for 2010-11 was excessive and not in compliance with

the Act. For relief, Cook asked the court to “exercise the authority as set out in [§] 13-512 and adjust the Verdigre [b]ond [f]und [b]udget.” Section 13-512 states:

A taxpayer upon whom a tax will be imposed as a result of the action of a governing body in adopting a budget statement may contest the validity of the budget statement adopted by the governing body by filing an action in the district court Such action shall be based either upon a violation of or a failure to comply with the provisions and requirements of the Nebraska Budget Act by the governing body. In response to such action, the governing body shall be required to show cause why the budget statement should not be ordered set aside, modified, or changed. . . . If the district court finds that the governing body has violated or failed to comply with the requirements of the act, the court shall, in whole or in part, set aside, modify, or change the adopted budget statement or tax levy as the justice of the case may require.

Thus, § 13-512 provided Cook with an avenue to contest the budget.

The school district relies upon *Rawson v. Harlan County*, 247 Neb. 944, 530 N.W.2d 923 (1995). In that case, a taxpayer and property owner sued Harlan County for injunctive and declaratory relief, alleging that the budget was void for, among other things, failing to comply with the Act. During the public budget hearing, the county board failed to ask if any taxpayer wished to speak about the proposed budget. The taxpayer sought an injunction to set aside the 1993 tax levy and a declaratory judgment to determine that the tax was illegal. The court determined that the taxpayer’s request for injunctive relief was moot because the tax had already been collected and paid by the taxpayer. As to the taxpayer’s request for a declaratory judgment, the court stated that the exclusive remedy for recovering taxes paid was under § 77-1735.

The instant case is distinguishable from *Rawson v. Harlan County, supra*. Cook did not request injunctive or declaratory relief. Instead, he contested the budget statement under § 13-512 and asked the court to adjust the budget. There is no evidence that Cook had paid the tax which would be imposed under the budget at the time of filing his complaint, and thus, he was not in a position to request a refund of a tax that he had not paid. Indeed, § 13-512 allows a taxpayer to contest a tax that “will be imposed.” We conclude that Cook appropriately filed an action under the Act to contest the validity of the budget statement.

Discretion to Set Budget.

The school district next contends that the court erred by failing to recognize the school district’s discretion to set its own budget. Determinations under the Nebraska Budget Act by a legislative body will not be disturbed on appeal unless there has been an abuse of discretion. See *Meyer v. Colin*, 204 Neb. 96, 281 N.W.2d 737 (1979). The school district argues that the \$75,380 divergence that the court found to be a material error was merely an accounting practice dispute.

Proposed budget statements are addressed in Neb. Rev. Stat. § 13-504 (Reissue 2007). Section 13-504(1) sets forth the information that a proposed budget statement shall contain, and the statute further provides:

(2) The actual or estimated unencumbered cash balance required to be included in the budget statement by this section shall include deposits and investments of the political subdivision as well as any funds held by the county treasurer for the political subdivision and shall be accurately stated on the proposed budget statement.

(3) The political subdivision shall correct any material errors in the budget statement detected by the auditor or by other sources.

Significantly, both of the above-quoted subsections use the word “shall.” As a general rule, in the construction of statutes, the word “shall” is considered mandatory and inconsistent with the idea of discretion. *Hendrix v. Sivick*, 19 Neb. App. 140, 803 N.W.2d 525 (2011).

The court did not err in ordering the school district to correct a material error. Under Neb. Rev. Stat. § 13-506(2) (Reissue 2007), “Upon approval by the governing body, the budget shall be filed with the auditor.” The auditor then can review the budget for mathematical errors, improper accounting, and noncompliance with the Act. See *id.* “If the auditor detects such errors, he or she shall immediately notify the governing body of such errors. The governing body shall correct any such error as provided in [Neb. Rev. Stat. §] 13-511 [(Reissue 2007)].” § 13-506(2). While our record does not contain any separate communication from the auditor to the school district, the record does include the auditor’s report. The school district’s 2010-11 budget showed the total available resources before property taxes to be \$175,623, but the auditor’s statement showed “[c]ash” of \$178,883 and “[c]ash with [c]ounty [t]reasurers” of \$71,620, or \$250,503, for the Verdigre bond fund. The district court determined that “the exclusion of \$75,380 from the total beginning balance . . . constituted a material error.” Given the relative amounts involved, we agree that the difference of \$75,380--or 42.9 percent--cannot be considered insignificant. And under § 13-504(3), the school district “shall correct any material errors in the budget statement detected by the auditor.” The school district did not do so. The correction of material errors was not a matter within the school district’s discretion. Accordingly, the district court did not err in finding that the school district failed to comply with the Act in this respect.

Relief.

Finally, the school district argues that justice did not require a change in the tax levy and that the relief selected by the district court was invalid. The district court ordered the school district to modify its adopted budget for 2010-11 so that the total beginning balance equaled the ending available cash as determined by the auditor and so that the amount of personal and real property taxes to be collected to adequately fund the budget be amended to \$269,997. It then ordered that the mill levy be adjusted so that the applicable tax rate will sufficiently generate the necessary funds for the expenditures in the 2010-11 budget, as modified by the court’s order.

The relief selected by the district court is authorized under the Act. The remedy for a violation of the Act is found in § 13-512, which provides: “If the district court finds that the governing body has violated or failed to comply with the requirements of the act, the court shall, in whole or in part, set aside, modify, or change the adopted budget statement or tax levy as the justice of the case may require.” In *Willms v. Nebraska City Airport Authority*, 193 Neb. 567, 228 N.W.2d 276 (1975), a taxpayer requested an airport authority’s budget be set aside as having been adopted in violation of the Act. The district court determined that the budget and the levy under the budget were void and ordered that all moneys received or yet to be received by reason of the levy be distributed as provided by law and the order of the court. On appeal, the Nebraska Supreme Court stated that the airport authority clearly failed to comply with the Act in many respects, and it affirmed the district court’s decision declaring the budget to be void. Here, rather

than declaring the entire budget to be void, the district court merely modified portions containing a material error and ordered that the levy be adjusted accordingly. We find no error by the court in its remedy.

CONCLUSION

We conclude that Cook appropriately filed this action under the Act rather than under the tax refund statute. We further conclude that the school district did not have discretion to omit from its budget funds held by the county treasurer or to not correct a material error in the budget as reflected on the auditor's statement. Because the relief selected by the district court comported with the law, we affirm.

AFFIRMED.