

OPINION NO. 94-093**Syllabus:**

1. No statutory provision authorizes the Auditor of State to delay the determination as to the existence of a fiscal emergency condition described in R.C. 118.03(A)(4), (5), or (6) when the determination is made more than four months following the end of the fiscal year.
2. In determining pursuant to R.C. 118.04 whether fiscal emergency conditions exist, the Auditor of State may exercise reasonable discretion with regard to the manner, means, and time frame for making the determination, provided that there is compliance with statutory provisions, including the portion of R.C. 118.04(A) providing that determinations be set forth in written reports and supplemental reports within thirty days after the request for the determination, and the portion of R.C. 118.04(A) requiring that the Auditor file an initial report immediately upon determining the existence of any fiscal emergency condition.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: Lee Fisher, Attorney General, December 23, 1994

You have requested an opinion concerning the duty of the Auditor of State to determine when a fiscal emergency exists within a municipal corporation. Your question is "whether the power to declare or not declare a fiscal emergency based on Sections 118.03(A)(4), (5) and (6) is a discretionary power when such a determination will be made more than four months after the end of the fiscal year at issue."

Municipal Fiscal Emergencies

The General Assembly enacted R.C. Chapter 118 "to provide a method for dealing with fiscal emergencies of municipal corporations, including provision for the establishment of financial planning and supervision commissions and financial plans to overcome such fiscal

emergencies." 1979-1980 Ohio Laws, Part 1, 1664 (Am. Sub. H.B. 132, eff. Nov. 29, 1979). The importance that the General Assembly attached to the provisions of R.C. Chapter 118 is reflected in the following statement of purpose:

[I]t is hereby declared to be the public policy and a public purpose of the state to require fiscal integrity of municipal corporations so that they may provide for the health, safety, and welfare of their citizens, pay when due principal and interest on their debt obligations, meet financial obligations to their employees, vendors, and suppliers, and provide for proper financial accounting procedures, budgeting, and taxing practices. The failure of a municipal corporation to so act is hereby determined to affect adversely the health, safety, and welfare not only of the people of the municipal corporation but also of other people of the state. It is further determined that the fiscal emergency conditions described in division (A) of section 118.03 of the Revised Code result from and constitute abuses of the powers of a municipal corporation to borrow money, contract debts, and levy taxes, and that such conditions impair and threaten the health, safety, and welfare of the people of the state within and beyond the municipal corporation.

R.C. 118.02(A). *See, e.g., City of Cincinnati v. Budget Commission*, 25 Ohio St. 3d 137, 495 N.E.2d 396 (1986); 1980 Op. Att'y Gen No. 80-013. R.C. 118.03 describes certain conditions that constitute fiscal emergency conditions of a municipal corporation, and R.C. 118.04 makes the Auditor of State responsible for determining whether a fiscal emergency condition exists. Once it is determined that there is a fiscal emergency, a financial planning and supervision commission is created, various steps are taken, and the fiscal emergency period continues until fiscal problems are corrected. *See, e.g.,* R.C. 118.01(S), .05-.06, .12, .13, .27.

Six categories of fiscal emergency conditions are outlined in R.C. 118.03(A): (1) the existence of a default on a debt obligation for more than thirty days; (2) the existence of a failure for lack of funds to make payment of all payroll to employees of the municipal corporation for more than thirty days or beyond an agreed period of extension; (3) an increase in the minimum levy of the municipal corporation that results in a reduction in the minimum levies for one or more other subdivisions or taxing districts; (4) the existence of a condition in which accounts due and payable at the end of the preceding fiscal year, less the year-end balance, exceeded one-twelfth of the available revenues during the preceding fiscal year; (5) the existence of a condition in which the aggregate of deficit amounts of all deficit funds at the end of the preceding fiscal year, less the year-end balance, exceeded one-twelfth of the total of the general fund budget for that year and the receipts to those deficit funds other than from transfers from the general fund; and (6) the existence of a condition in which, at the end of the preceding fiscal year, moneys and marketable investments in or held for the unsegregated treasury of the municipal corporation, minus outstanding checks and warrants, were less than the aggregate of the positive balances of the general fund and those special funds whose purposes the unsegregated treasury meets, and such deficiency exceeded one-twelfth of the total amount received into the unsegregated treasury during the preceding fiscal year. The fiscal emergency conditions described in R.C. 118.03(A)(4), (5), and (6) are thus based on findings concerning the fiscal status of a municipal corporation at the end of a fiscal year.

R.C. 118.03 permits the Auditor to postpone making a determination that the types of fiscal emergency conditions described in R.C. 118.03(A)(4), (5), or (6) exist, as follows:

Unless the determination by the auditor of state occurs more than four months following the end of such fiscal year, upon the request by and substantial showing

of the municipal corporation that it has taken steps to remove such condition within four months, *the auditor shall postpone a determination as to a condition under division (A)(4), (5), or (6) of this section as to which such substantial showing is made until the expiration of four months following the end of such fiscal year*, but he shall not postpone his determination as to division (A)(1), (2), or (3) of this section.

R.C. 118.03(B) (emphasis added). Thus, if a municipal corporation makes a substantial showing that it has taken steps to remove a fiscal emergency condition described in R.C. 118.03(A)(4), (5), or (6), the Auditor must postpone determining whether the condition exists until the expiration of four months following the end of the fiscal year. Your question is whether the Auditor may exercise his discretion to delay the determination that a fiscal emergency condition exists under R.C. 118.03(A)(4), (5), or (6) when the determination will be made more than four months after the end of the fiscal year at issue. You state your question in these words:

The Auditor of State ... would like to know whether the power to declare or not declare a fiscal emergency based on Sections 118.03(A)(4), (5) and (6) is a discretionary power when such a determination will be made more than four months after the end of the fiscal year at issue. For example, when a municipal corporation is shown to fall under O.R.C. 118.03(A)(4), (5) or (6) but has made a substantial showing that it is taking steps to remedy the situation, may the Auditor of State in his discretion, in order to avoid the considerable expense of declaring the existence of a fiscal emergency, postpone the determination as to the condition even after the four months following the end of the fiscal year at issue have elapsed?

Determination that a Fiscal Emergency Condition Exists

The procedure for making a determination as to whether a fiscal emergency condition exists is set forth in R.C. 118.04, as follows:

The existence of a fiscal emergency condition constitutes a fiscal emergency. The existence of fiscal emergency conditions shall be determined by the auditor of state. Such determination, for purposes of this chapter, may be made only upon the filing with the auditor of state of a written request for such a determination by the governor, by the county budget commission, by the mayor of the municipal corporation, or by the presiding officer of the legislative authority of the municipal corporation when authorized by a majority of the members of such legislative authority, or upon initiation by the auditor of state. The request may designate in general or specific terms, but without thereby limiting the determination thereto, the condition or conditions to be examined to determine whether they constitute fiscal emergency conditions. Promptly upon receipt of such written request, or upon initiation by the auditor of state, the auditor of state shall transmit copies of such request or a written notice of such initiation to the mayor and the presiding officer of the legislative authority of the municipal corporation by personal service or certified mail. Such determinations shall be set forth in written reports and supplemental reports, which shall be filed with the mayor, fiscal officer, and presiding officer of the legislative authority of the municipal corporation, and with the treasurer of state, secretary of state, governor, director of budget and management, and county budget commission, within thirty days after the request. The auditor of state shall so file an initial

report immediately upon determining the existence of any fiscal emergency condition.

R.C. 118.04(A) (emphasis added). R.C. 118.04 states directly that "[t]he existence of a fiscal emergency condition constitutes a fiscal emergency." R.C. 118.04(A). Thus, once it is determined that a fiscal emergency condition exists, the existence of a fiscal emergency follows immediately and automatically.

The determination as to whether a fiscal emergency condition exists is made by the Auditor of State, upon his own initiation or upon the request of the governor, the county budget commission, or the mayor or legislative authority of the municipal corporation. Determinations made by the Auditor are set forth in written reports and supplemental reports, which are filed with the appropriate officials, within thirty days after the request. R.C. 118.04(A). The Auditor is required to file an initial report "immediately upon determining the existence of any fiscal emergency condition." *Id.* The thirty-day provision by its terms applies to determinations based upon a request and does not expressly apply to determinations initiated by the Auditor. Nonetheless, the existence of the thirty-day provision and the use of the word "immediately" indicate that there is an urgency to the Auditor's duty to determine whether fiscal emergency conditions exist, regardless of how the issue is raised in a particular instance.

As discussed above, R.C. 118.03(B) requires the Auditor to postpone making a determination until four months have passed from the end of the fiscal year, when a municipal corporation so requests and makes a substantial showing that it has taken steps to remove the fiscal emergency condition. The General Assembly has thus granted each municipal corporation an opportunity to avoid the determination of a fiscal emergency condition under R.C. 118.03(A)(4), (5), or (6) by taking appropriate action. R.C. 118.03(B) also states:

Any year-end condition described in division (A)(4), (5), or (6) of this section shall not constitute a fiscal emergency condition if the municipal corporation clearly demonstrates to the satisfaction of the auditor of state prior to the time of his determination that such condition no longer exists at the time of the determination pursuant to section 118.04 of the Revised Code.

The statute specifies the information that should be included in such a demonstration. *See* R.C. 118.03(B). The Auditor is thus authorized to consider information demonstrating that a fiscal emergency condition described in R.C. 118.03(A)(4), (5), or (6) no longer exists and to base his determination as to whether a fiscal emergency exists on such demonstration. This information can be provided at any time and can affect the Auditor's decision whether or not to make such a determination, even where that determination might be issued more than four months after the close of the fiscal year.

Discretion of the Auditor of State

The Auditor has discretion to carry out his duties under R.C. 118.03-.04 as he sees fit, provided that the manner of performance is reasonable and there is compliance with statutory requirements. *See, e.g., State ex rel. Preston v. Ferguson*, 170 Ohio St. 450, 459, 166 N.E.2d 365, 372 (1960) ("[w]here a statute clearly confers power to do a certain thing without placing any limitation as to the manner or means of doing it, and no statute can be found prescribing the exact mode of performing that duty or thing, the presumption is that it should be performed in a reasonable manner *not in conflict with any law of the state*"): 1989 Op. Att'y Gen. No. 89-

055. The Auditor may, for example, determine which of his staff members will work on a particular determination, which types of information will be considered, and which procedures will be followed, within the limitations established by statute. *See, e.g.*, R.C. 118.04(B). Various of the discretionary decisions properly exercised under R.C. 118.03-.04 may affect the date on which the determination is made. The Auditor is required, however, to exercise his statutory discretion with due consideration for the thirty-day provision and the mandate that an initial report be filed "immediately" upon determining the existence of a fiscal emergency condition. R.C. 118.04(A).

Your letter indicates that the declaration of the existence of a fiscal emergency results in a considerable amount of expense. A representative of your office suggested that it would be desirable to avoid the expense and effort of a formal procedure under R.C. Chapter 118 in instances in which a municipal corporation may be able to resolve its financial problems by itself within a period of several months following the four-month period permitted under R.C. 118.03(B). It does not appear, however, that the General Assembly has granted the Auditor discretion to postpone making a determination in such circumstances. On the contrary, it appears that the General Assembly chose instead to require a more strict urgency in the Auditor's response to fiscal emergency conditions, and not to allow the possibility of further delays that might lead just as readily to further exacerbation of any such conditions rather than to their resolution.

The provisions of R.C. 118.03(B) expressly authorize the postponement of a determination as to a condition under R.C. 118.03(A)(4), (5), or (6) for four months after the end of the fiscal year, but no statutory provision authorizes the postponement of a determination in any other circumstances. Rather, R.C. 118.03(B) states that such a postponement may occur "[u]nless the determination by the auditor of state occurs more than four months following the end of such fiscal year," thereby indicating that the authority to postpone a determination pursuant to R.C. 118.03(B) does not exist if the determination occurs more than four months following the end of the fiscal year. Further, R.C. 118.04 states that "[t]he existence of a fiscal emergency condition constitutes a fiscal emergency," thus establishing that the Auditor has no discretion to determine that a fiscal emergency does not exist if in fact a fiscal emergency condition exists. R.C. Chapter 118 mandates the procedures that are to be followed to determine if a fiscal emergency condition exists. Apart from the four-month period covered by R.C. 118.03(B), there is no statutory authority for the Auditor to delay a determination that a fiscal emergency condition exists to wait and see if conditions improve. The Auditor may exercise discretion in making a determination as to whether a fiscal emergency condition exists only within the limitations imposed by statute. Those limitations include the thirty-day provision of R.C. 118.04 and the requirement that an initial report be filed immediately upon determining the existence of a fiscal emergency condition.

Conclusion

For the reasons discussed above, it is my opinion and you are advised:

1. No statutory provision authorizes the Auditor of State to delay the determination as to the existence of a fiscal emergency condition described in R.C. 118.03(A)(4), (5), or (6) when the determination is made more than four months following the end of the fiscal year.

2. In determining pursuant to R.C. 118.04 whether fiscal emergency conditions exist, the Auditor of State may exercise reasonable discretion with regard to the manner, means, and time frame for making the determination, provided that there is compliance with statutory provisions, including the portion of R.C. 118.04(A) providing that determinations be set forth in written reports and supplemental reports within thirty days after the request for the determination, and the portion of R.C. 118.04(A) requiring that the Auditor file an initial report immediately upon determining the existence of any fiscal emergency condition.