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January 18, 2012

ATTORNEY GENERAL OPINION NO. 2012- 1

The Honorable Bill Feuerborn
State Representative, Fifth District
1600 Park Road
Garnett, Kansas 66032

Re: Constitution of the State of Kansas—Legislative—Approval of Bills;
Veto; Governor's Line-item Veto Power

Synopsis: The Governor's use of the line-item veto to excise the questioned proviso within Section 175 of 2011 Senate Substitute for House Bill 2014 does not exceed the authority granted to the Governor under Article 2, Section 14(b) of the Constitution of the State of Kansas. Cited herein: Kan. Const., Art. 2, Section 14; K.S.A. 45-307; L. 2011, Ch. 118.

* * *

Dear Representative Feuerborn:

As Representative for the Fifth District, you ask for our opinion on whether the Governor's line-item veto of a portion of Section 175 of 2011 Senate Substitute for House Bill 2014¹ exceeds the authority granted to the Governor under Article 2, Section 14(b) of the Constitution of the State of Kansas. The bill was enrolled and presented to the Governor on May 20, 2011.² The Governor approved the bill on June 1, 2011, except for the line-item veto of Sections 26, 108(e), 108(f) & 115(a); and portions of Sections 111(a), 143(a), and 175.³ The bill, absent these provisions, took effect on June 9, 2011.⁴

Section 175 of 2011 Senate Substitute for House Bill 2014 states:

¹ L. 2011, Ch. 118, also known as the Omnibus Appropriations Act of 2011.

² 2011 Journal of the House 1668.

³ 2011 Journal of the House 1662.

⁴ L. 2011, Ch. 118, Section 175; Kan. Reg., Vol. 30, No. 23, 755, 849 (June 9, 2011).

Sec.175. (a) On July 1, 2011, of the amount of each appropriation or reappropriation for a state agency that is budgeted for state operations for the fiscal year ending June 30, 2012, made by this or other appropriation act of the 2011 regular session of the legislature from the state general fund, the sum equal to \$5,900,000 which is not exempt, is hereby lapsed in accordance with this subsection: Provided, That the following are exempt from and shall not be reduced by such lapsing provision: (1) Any item of appropriation or reappropriation for fiscal year 2012 from the state general fund for any state agency for the provision of programmatic services, (2) any item of appropriation or reappropriation for fiscal year 2012 from the state general fund for the legislature or any agency of the legislative branch of state government, (3) any item of appropriation or reappropriation for fiscal year 2012 from the state general fund for the judicial branch or any agency of the judicial branch of state government, (4) any item of appropriation or reappropriation for fiscal year 2012 from the state general fund for the department of transportation, (5) any item of appropriation or reappropriation for fiscal year 2012 from the state general fund for any state school aid program, (6) any item of appropriation or reappropriation for fiscal year 2012 from the state general fund for human services caseloads for the department of social and rehabilitation services, the division of health care finance of the department of health and environment, the juvenile justice authority or the department on aging, (7) any item of appropriation or reappropriation for debt service for contractual bond obligations, including any transfer from the state general fund to the school district capital improvements fund for distribution to school districts pursuant to K.S.A. 75-2319, and amendments thereto, and (8) any item of appropriation or reappropriation for employer contributions for the employers who are eligible employers as specified in subsections (1), (2) and (3) of K.S.A. 74-4931, and amendments thereto, under the Kansas public employees retirement system pursuant to K.S.A. 74-4939, and amendments thereto: *Provided further, That the aggregate amount lapsed in each account of the state general fund of the state agency under this section shall be the amount in the account budgeted for state operations which bears the same relation to \$5,900,000 as the aggregate amount budgeted for state operations from the state general fund for the state agency in the Governor's Budget Report for FY 2012 bears to the aggregate amount budgeted for state operations from the state general fund for all state agencies in the Governor's Budget Report for FY 2012:* And provided further, That the director of the budget, after consultation with the director of legislative research, shall determine the amount to be lapsed under this subsection from each account of the state general fund of each state agency and shall certify such amount to the director of accounts and reports: And provided further, That, at the same time that such certification is made by the director of the budget to the director of accounts and reports under this subsection, the director of the budget

shall deliver a copy of such certification to the director of the legislative research department.⁵

Simply put, Section 175 was intended to implement an across-the-board reduction of \$5.9 million for savings to administrative activities excluding programmatic services, human services caseloads, local school state aid programs, the Judicial Branch, the Legislative Branch, the Department of Transportation, and debt service.

Your question requires an analysis of what the governor is authorized or permitted by the Constitution of the State of Kansas to veto. Article 2, Section 14(b) of the Constitution of the State of Kansas⁶ grants the governor authority in certain, limited circumstances to veto less than an entire legislative enactment. It provides, in pertinent part:

If any bill presented to the governor contains several items of appropriation of money, one or more of such items may be disapproved by the governor while the other portion of the bill is approved by the governor.

In *State v. French*, 133 Kan. 579 (1931), the Kansas Supreme Court held that “the veto power of the executive under our system of government is not inherent in such officer as a legislative function, but is a power confided in him by the supreme authority of the state; and in exercising this function, *while he is not confined to rules of strict construction*, he nevertheless must look to the Constitution for the authority to exercise such power.”⁷

It is generally understood that the purpose underlying the so-called “line-item” veto power is threefold: “the rejection of legislative logrolling; the imposition of fiscal restrictions on the legislature; and the strengthening of the governor’s role in budgetary matters. In other words, the item veto may be said to be at the confluence of the policies underlying the single-subject rule, the balanced budget requirement, and the executive budget.”⁸

In this case the Governor disapproved of a specific proviso within Section 175 and provided a veto message as required by law. The pertinent line-item veto message is as follows:

⁵Emphasis added to show the language stricken by the Governor’s line-item veto.

⁶K.S.A. 45-307 also provides, in pertinent part: “If any enrolled bill presented to the governor contains more than one item of appropriation of money, the governor may disapprove one or more of such items, while approving the other portion of the bill.”

⁷Emphasis added.

⁸Richard Briffault, *The Item Veto in State Courts*, 66 Temp. L. Rev. 1171, 1177 (1993). See also *Washington State Legislature v. Lowry*, 931 P.2d 885, 889-90 (1997); *State ex rel. Coll v. Carruthers*, 759 P.2d 1380, 1383 (N.M. 1988); Attorney General Opinion 2002-47.

Across-the-Board Reduction

That portion of Section 175 that reads as follows has been line-item vetoed: "Provided further, That the aggregate amount lapsed in each account of the state general fund of the state agency under this section shall be the amount in the account budgeted for state operations which bears the same relation to \$5,900,000 as the aggregate amount budgeted for state operations from the state general fund for the state agency in the Governor's Budget Report for FY 2012 bears to the aggregate amount budgeted for state operations from the state general fund for all state agencies in the Governor's Budget Report for FY 2012:"

My administration remains committed to right-sizing the state budget and reducing the likelihood of allotments by maintaining a responsible ending balance. While I fully intend to make these reductions, I must have the flexibility to impose them where I believe they can be made without harming key services. The \$5.9 million reduction is left intact with this veto and the certification of reductions will be made as provided for in the bill. These reductions, however, should not be made on a pro-rata basis, so I have vetoed this proviso.⁹

There is no contention that this proviso is general legislation or an independent statement of substantive law, which would be inappropriate to include in an appropriations bill.¹⁰ We will assume, therefore, that it was properly included by the legislature in this bill. Nor is there before us any dispute that the lapse of an appropriation, which reduces the amount of money to be expended, constitutes an item of appropriation. We will assume, therefore, that a lapse of an appropriation is the same as an appropriation itself from a constitutional perspective.¹¹ Therefore, the precise question before us is whether this particular budget proviso, which directs the manner in which a \$5.9 million lapse in appropriation is to be implemented, is an "item of appropriation" within the meaning of Article 2, Section 14(b), of the Constitution of the State of Kansas.

We begin our analysis where you did because, as you note, this office addressed the application of Article 2, Section 14(b) of the Kansas Constitution on at least two prior occasions in opinions that defined the term "items of appropriation of money" narrowly.¹² However, those two opinions predate *State v. Carlin*,¹³ the 1981 case in

⁹ 2011 Journal of the House 1664.

¹⁰ See *State v. Carlin*, 230 Kan. 252, 258 (1981).

¹¹ The Kansas Supreme Court clarified in *Carlin* that a lapse may lawfully be included in an appropriations bill.

¹² Attorney General Opinion No. 81-82 (governor cannot line-item veto appropriation bill provision effecting a transfer of money within the treasury or imposing conditions, limitations or qualifications on an appropriation or constituting an independent statement of substantive law); Attorney General Opinion No. 76-168 (governor cannot line-item veto appropriation bill provision approving of statewide television system).

which the Kansas Supreme Court provided guidance on this constitutional provision. In describing items that may properly be included in appropriation bills, the Kansas Supreme Court held that "[A]ppropriation bills may direct the amounts of money which may be spent, and for what purposes; *they may express the legislature's direction as to expenditures*; they may transfer funds from one account to another; they may direct that prior unexpended appropriations lapse".¹⁴

Because Attorney General Opinion No. 76-168 and Attorney General Opinion 81-82 were issued before the Kansas Supreme Court clarified the meaning of Article 2, Section 14(b) of the Kansas Constitution, we find those Opinions less persuasive than the more recent Attorney General Opinion on this subject. Attorney General Opinion 2002-47, which examined Article 2, Section 14(b) of the Kansas Constitution, was issued after to the *Carlin* decision.¹⁵ It analyzed the two prior Attorney General Opinions' conclusion that the term "items of appropriation of money" should be narrowly construed and determined that, in light of *Carlin*, an "item of appropriation of money" should be more broadly construed and requires a fact specific case-by-case analysis to balance the legislative and executive constitutional powers.¹⁶ Important to this conclusion is the acknowledgement of the prominent role of the Governor in the State's budgeting process and the lack of a universal definition or agreement as to what the lines of authority are. Ultimately, Attorney General Stovall concluded that if a provision can lawfully be included in an appropriations bill and is indeed a separable item not closely linked to a single appropriation, then it is subject to line-item veto.¹⁷

With these rules in mind, we note that the Governor's line item veto of the questioned proviso in Section 175 of 2011 Senate Substitute for House Bill 2014 appears to comport with the constitutional requirements set forth in Attorney General Opinion 2002-47. In this case, the Governor did not attempt to veto just a word, phrase or sentence of

¹³*State v. Carlin*, 230 Kan. 252 (1981). The issue in *Carlin* was whether the Governor could line-item veto two sections amending school finance statutes in an appropriation act. The court held that the amendatory statutes were not items of appropriation and, further, were not permitted to be included within an appropriation act and could not be item vetoed. The court determined that the statutes were not matters permitted within an appropriation bill as appropriation bills may not include "subjects wholly foreign and unrelated to their primary purpose: Authorizing the expenditure of specific sums of money for specific purposes."

¹⁴230 Kan. at 258. Emphasis added.

¹⁵Attorney General Opinion 2002-47 (The veto before Attorney General Stovall was of a subsection to prohibit the expenditure of moneys, other than donations, appropriated from the treasury for FY 2003 to reinforce the capitol dome).

¹⁶We would call attention to this passage from Attorney General Opinion 2002-47, which we believe properly describes the state of the law after *State v. Carlin*: "Because there is no conclusive authority in this State that expenditure restrictions and limitations are not to be considered 'items of appropriation of money' for purposes of the Article 2, Section 14(b) of the Kansas Constitution, we believe that, should the issue reach them, the Kansas appellate courts would also undertake a more critical and comprehensive review of this issue, taking into account all the case law and scholarly studies, much of which postdates the decision in *Carlin*."

¹⁷Attorney General Opinion 2002-47 concluded: "[W]e believe that the Kansas appellate courts would find persuasive the cases that, in balancing the executive and legislative powers, have held that if a provision can lawfully be included in an appropriations bill and is indeed a separable item not closely linked to a single appropriation, then it is subject to line-item veto."

that section but instead vetoed a stand-alone subsection that is separable from the remainder of Section 175. The proviso is not attached to a single appropriation but to an across-the-board reduction of \$5.9 million for savings to administrative activities with specific exclusions. The practical effect of the line-item veto is that the legislative intent of \$5.9 million savings is still accomplished while the prominent role of the governor in the budget process is preserved. For all of these reasons, it appears to us that the Governor's line item veto in question here complies fully with the constitutional requirements previously identified.

The question remains, however, whether the line item veto in question here must be distinguished from the line item veto reviewed by Attorney General Stovall in Attorney General Opinion 2002-47 because the line-item veto before us leaves the underlying lapse intact while the line-item veto before Attorney General Stovall eliminated entirely the underlying prohibition on funding. On this point, which has not been squarely addressed by the Kansas appellate courts, we find persuasive the reasoning in *Washington State Legislature v. Lowry*,¹⁸ where the Supreme Court of the State of Washington explained its position as follows¹⁹:

"Because the purpose of the Governor's 'line-item' veto is to excise line items in appropriations bills, we should give effect to such a purpose. The Legislature frustrates such a purpose, however, if it drafts budget bills as lump sum appropriations to agencies. The only feature of modern legislative bill drafting in Washington that resembles the traditional budget line item is the budget proviso.

"Consequently, we hold that any budget proviso with a fiscal purpose contained in an omnibus appropriations bill is an 'appropriations item' under article III, Section 12. Thus, so long as the Legislature drafts budget bills as lump sum appropriations to agencies conditioned by provisos as we have defined them here, the Governor's appropriations item veto power extends to each such proviso. (FN8. The budget provisos to which the Governor's line item veto extends include full provisos to an appropriations bill, that is, full subsections of the section of an appropriations bill. We do not believe an 'appropriations item' may be a sentence, phrase, letter, digit, or anything less than the whole proviso.)"²⁰

¹⁸ 931 P.2d 885 (1997). We believe that the overall approach of Attorney General Opinion 2002-47 is to suggest, based upon the Supreme Court's opinion in *Carlin*, that the Kansas appellate courts are inclined to consider the evolving authorities from other states that have wrestled with this question regarding line-item veto powers. Therefore, looking to the similar experience of Washington state seems a reasonable approach.

¹⁹ The Washington Constitution confers upon the Governor general veto authority over legislation and a distinct veto power over "appropriation items": "...If any bill presented to the governor contain several sections or appropriation items, he may object to one or more sections or appropriation items: *Provided*, That he may not object to less than an entire section, except that if the section contain one or more appropriation items he may object to any such appropriation item or items...." Wash. Const., Art. III, Section 12 (amend.62).

²⁰ *Id.* at 893.

Like the matter before the Washington Supreme Court, Section 175 of 2011 Senate Substitute for House Bill 2014 is in the nature of a “lump sum appropriation” that is conditioned by several provisos. It requires a \$5.9 million reduction for savings to administrative activities with specific exclusions but, because of the provisos, did not have the effect of reducing any single fund or account by \$5.9 million. Rather, Section 175 is conditioned by, *inter alia*, the vetoed proviso that the reduction be across-the-board. The vetoed proviso had the practical effect of imposing numerous individual lapses upon specific agency accounts; added together, those individual lapses were to total the \$5.9 million lump-sum amount. In a very real sense, the vetoed proviso had the effect of transforming the single lump-sum lapse into numerous smaller lapses. The fact that the syntax of the bill did not set forth, item-by-item, the specific dollar amount by which each account was to be reduced had the vetoed proviso gone into effect does not render the effect of that provision on any individual account any less specific. We conclude, therefore, that the vetoed proviso was itself legislative language constituting “the designation of specific sums of money which the legislature authorizes may be spent for specific purposes.”²¹ That is the definition of “items of appropriation of money” as recognized by the Kansas Supreme Court.

For the reasons set forth above, we conclude that the vetoed provision is an “item of appropriation of money” within the meaning of Article 2, Section 14(b). Therefore, it is our opinion that the Governor’s use of the line-item veto to excise the questioned proviso within Section 175 of 2011 Senate Substitute for House Bill 2014 does not exceed the authority granted to the Governor under Article 2, Section 14(b) of the Constitution of the State of Kansas.

Sincerely,

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Athena Andaya
Deputy Attorney General

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²¹ *State v. Carlin*, 230 Kan. 242, 256.