



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

April 7, 1981

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 81- 82

The Honorable Paul Hess, Chairman
Senate Committee on Ways and Means
State Capitol, Room 123-S
BUILDING MAIL

Re: Statutes -- Appropriation Acts -- Line Item Veto

Synopsis: The item veto power granted the governor by Article 2, Section 14(b) of the Kansas Constitution extends only to the disapproval of "items of appropriation of money" in bills containing several such items of appropriation, and such power does not permit the governor to partially veto a bill by disapproving a provision therein effecting a transfer of moneys within the state treasury or imposing conditions, limitations or qualifications on an appropriation or constituting an independent statement of substantive law. Accordingly, Governor Carlin's purported item vetoes of provisions in section 1 of 1980 Senate Bill No. 896 and section 4 of 1980 House Bill No. 2813 were of no force or effect, since neither of the vetoed provisions constituted an item of appropriation. Cited herein: K.S.A. 75-3135; Kan. Const., Art. 2, §§14, 24; L. 1980, ch. 17, §4, L. 1980, ch. 25, §1, 2.

* * *

Dear Senator Hess:

As Chairman of the Senate Committee on Ways and Means, you have inquired on behalf of that Committee as to the governor's authority to veto items of appropriation. Subsequent to submitting your request, you provided us with two specific instances where Governor Carlin had purported to exercise his item veto power during the 1980 legislative session, and you have asked whether the governor's constitutional authority had been validly exercised in these two instances.

Paul Hess
Page Two
April 7, 1981

The power of the governor to veto items of appropriation is provided in Article 2, Section 14(b) of the Kansas Constitution, as follows:

"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."

The foregoing represents the only authority the governor has to veto less than an entire legislative enactment, and it is clear that such authority is limited to the disapproval of one or more items of appropriation among several items of appropriation in a bill. Thus, it is essential to determine the nature of an "item of appropriation" in order to consider the nature and extent of the governor's authority.

The term "appropriation" is defined generally in 63 Am. Jur. 2d Public Funds §47 (1965) as follows:

"In specific terms, an appropriation may be defined as an authority of the legislature, given at the proper time and in legal form to the proper officers, to apply a distinctly specified sum from a designated fund out of the treasury, in a given year, for a specified object or demand against the state. In general terms, an appropriation is the act of setting money apart formally or officially for a special use or purpose by the legislature in clear and unequivocal terms in a duly enacted law."
(Footnotes omitted.)

In Kansas, moneys may not be drawn from the state treasury "except in pursuance of a specific appropriation made by law." (Emphasis added.) Kan. Const., Art.2, §24. The emphasized portion of the foregoing quote of our constitutional requirement was construed in State, ex rel. v. Fadely, 180 Kan. 652 (1957), as meaning

"an authority of the legislature, given at the proper time and in legal form to the proper officials, to apply a distinctly specified sum from out of the state treasury, in a given period, for a specified objective or demand against the state. In general terms a 'specific appropriation made by law' is the act of setting money apart formally or officially for a special use or purpose by the legislature in

Paul Hess
Page Three
April 7, 1981

clear and unequivocal terms in a duly enacted law (42 Am. Jur. Public Funds, §43, p. 747; 81 C.J.S., States, §163, p. 1207, §164b, p. 1215 and §164c, p. 1217). Authorities in support of this statement are Martin v. Francis, Treasurer, 13 Kan. 220, 227, 228; Evans v. McCarthy, 42 Kan. 426, 429, 430, 22 Pac. 631; Henderson v. Hovey, 46 Kan. 691, 692, 27 Pac. 177; State ex rel., v. Stover, 47 Kan. 119, 121, 27 Pac. 850. See, also, State, ex. v. Defenbacher, 158 Ohio St., 268, 91 N.E. 2d 512. Giving the words used in Art. 2, §24 of the constitution their common and ordinary meaning it seems reasonably clear to this court that money belonging to the state and rightfully in the state treasury and over which the legislature has the rightful control, cannot be withdrawn from the treasury except in pursuance of an act passed by the legislature setting apart or assigning such money to a particular public use for a term not longer than two years which must be specific in amount and specific in purpose to indicate, with reasonable exactness, to the public officials who are authorized to withdraw and use, within such period, the sum so appropriated or set apart to the objective, purpose or plan sought to be accomplished by the appropriation, and for no other purpose (Martin v. Francis, Treasurer, supra; Evans v. McCarthy, supra; Henderson v. Hovey, supra; State, ex rel., v. Stover, supra; State, ex. v. Defenbacher, supra). (Emphasis added.) Id. at 661.

It is clear from the foregoing statement in Fadely, and from our review of the Kansas cases cited by the Court therein, that an appropriation is an authorization granted by the legislature to designated public officials to withdraw from the state treasury, within a particular period of time, a stated sum of money for a specific purpose.

Our conclusion as to the meaning of "appropriation" is supported by decisions from other jurisdictions having similar constitutional provisions. For example, in Idaho the pertinent constitutional requirement states: "No money shall be drawn from the treasury, but in pursuance of appropriations made by law." Idaho Const., Art. VII, §13. In summarizing its prior decisions regarding the meaning of "appropriation" in this constitutional provision, the Supreme Court of Idaho stated:

Paul Hess
Page Four
April 7, 1981

"These cases define an appropriation as (1) authority from the legislature, (2) expressly given, (3) in legal form, (4) to proper officers, (5) to pay from public monies, (6) a specified sum, and no more, and (7) for a specified purpose, and no other." Leonardson v. Moon, 92 Idaho 796, 451 P.2d 542, 550 (1969).

Although the Kansas cases cited and discussed herein have all construed the provisions of Article 2, Section 24 of our constitution, we are compelled to the conclusion that such interpretation has application to Article 2, Section 14(b), as well. The general rule is stated thusly:

"Unless it clearly appears, from the context or otherwise, that a different meaning should be applied, the same meaning attaches, or is presumed to attach, to a given word or phrase repeated in a constitution, wherever it occurs therein." (Footnotes omitted.) 16 C.J.S. Constitutional Law §19b.

There being nothing in Article 2, Section 14(b) to indicate that the term "appropriation" used therein should have a meaning different from its meaning in Article 2, Section 24, it follows, then, that the Court's definition of "appropriation" in Fadely applies with equal force in construing the object of the governor's power to veto an item or items of appropriation. However, even though Fadely has prescribed the elements of an appropriation, we are unaware of any Kansas cases defining an "item of appropriation." Thus, seeking assistance from decisions in other jurisdictions, we note that, in People ex rel. State Board of Agriculture v. Brady, 277 Ill. 124, 115 N.E. 204 (1917), an "item" was found to be "a separate particular in an enumeration of a total which is separate and distinct from the other particulars or entries." 115 N.E. at 207. To the same effect is Fairfield v. Foster, 25 Ariz. 146, 214 P.319 (1923), which relied upon a dictionary definition of "item." However, we note that the most widely cited definition is that found in Commonwealth v. Dodson, 176 Va. 281, 11 S.E.2d 120 (1940), where the court stated: "An item in an appropriation bill is an indivisible sum of money dedicated to a stated purpose." 11 S.E.2d at 127.

Considering these judicial definitions in conjunction with Fadely, we believe that an "item of appropriation," subject to the governor's veto power under Article 2, Section 14(b), is an authorization to disburse from the state treasury a stated and indivisible sum of money for a specific purpose.

Paul Hess
Page Five
April 7, 1981

With these principles in mind we have considered the two item vetoes of Governor Carlin about which you have inquired. The first such item veto was exercised with respect to 1980 Senate Bill No. 896 (L. 1980, ch. 25), which contained several items of appropriation. Governor Carlin vetoed section 2 thereof, which appropriated moneys in the University of Kansas Hospital Fund to the University of Kansas Medical Center. However, the governor also exercised his item veto power to excise a portion of section 1 of that bill, which created and specified the purposes of said fund. As it was presented to the governor, section 1(a) of Senate Bill No. 896 read as follows:

"(a) There is hereby created in the state treasury the university of Kansas hospital fund. On July 1, 1981, and quarterly thereafter through April 1, 1986, the director of accounts and reports shall transfer \$500,000 from the hospital revenue fund of the university of Kansas medical center to the university of Kansas hospital fund. On July 1, 1986, and quarterly thereafter, the director of accounts and reports shall transfer \$150,000 from the hospital revenue fund of the university of Kansas medical center to the university of Kansas hospital fund. All expenditures from the university of Kansas hospital fund shall be for renovation, reconstruction and maintenance projects at the university of Kansas medical center at Kansas City, Kansas, and for the acquisition and replacement of equipment at the university of Kansas medical center and shall be made in accordance with appropriation acts upon warrants of the director of accounts and reports issued pursuant to vouchers approved by the chancellor of the university of Kansas or by a person or persons designated by the chancellor." (Emphasis added.)

The emphasized portion of the above quoted provisions was disapproved by Governor Carlin as an item veto. 1980 Session Laws of Kansas at 1398, 1399. In our judgment, however, this was an invalid exercise of the governor's constitutional authority. Although the vetoed portion of this section had the effect of setting aside in the state treasury a specific sum of money for the purposes elsewhere provided in that section, it does not, in our judgment, constitute an item of appropriation of such moneys. The vetoed language required the director of accounts and reports to transfer at specified times moneys in the Hospital Revenue Fund of the University

Paul Hess
Page Six
April 7, 1981

of Kansas Medical Center to the newly-created University of Kansas Hospital Fund. However, such action did not have the effect of authorizing the withdrawal of funds from the state treasury. It merely provided for the transfer of funds within the state treasury. The authorization to withdraw or disburse moneys in this fund was accomplished by section 2 of the bill, and Governor Carlin's veto of that section was, in our judgment, a proper exercise of his constitutional powers.

While we recognize that there is some authority to the effect that the mere legislative action of "setting apart" moneys for a specified purpose constitutes an appropriation, we do not read Fadely or the cases cited therein as supporting that proposition as a definitional statement of our constitutional requirements. In our judgment, these cases require not only that moneys be set apart within the state treasury, but that there also be an authorization to withdraw such moneys, to be used for a specified purpose. A transfer of moneys within the treasury lacks the essential withdrawal authorization and does not, in our judgment, constitute an appropriation. "An 'appropriation' is the legislative sanction for the disbursement of public revenue." City of Reno v. McGowan, 439 P.2d 985, 986 (Nev., 1968).

Therefore, although the governor could preclude the disbursement of moneys from the University of Kansas Hospital Fund by his item veto of the appropriation of these moneys in section 2 of Senate Bill No. 896, he could not, in our opinion, similarly prevent the depletion of the Hospital Revenue Fund of the University of Kansas Medical Center by the required transfer of moneys therefrom into the University of Kansas Hospital Fund, pursuant to section 1 of that bill. Thus, even though moneys in the University of Kansas Hospital Fund could not be expended, the governor's item veto power could not prevent the transfer of moneys into such fund, thereby precluding the expenditure of such moneys for any purpose, unless and until the legislature enacts and the governor approves an appropriation thereof.

The other item veto by Governor Carlin to which you directed our attention affected section 4 of 1980 House Bill No. 2813 (L. 1980, ch. 17, §4), which states:

"STATE BANK COMMISSIONER

"There is appropriated for the above agency from the following special revenue funds all moneys now or hereafter lawfully credited to and available in such funds, except that expenditures other than refunds authorized by law shall not exceed the following:

Paul Hess
Page Seven
April 7, 1981

Bank commissioner fee fund \$1,181,865
'Provided, That expenditures from this fund for
the salary of the state bank commissioner for
1981 shall be not less than \$32,600.'
Bank examination and investigation fund . . .
No limit" (Emphasis added.)

The emphasized portion of the foregoing provisions was disapproved by Governor Carlin as a "line item veto." 1980 Session Laws of Kansas, p. 1392. In order to be subject to the governor's item veto power, the above-emphasized language must be determined to be an "item of appropriation of money." Kan. Const., Art. 2, §14(b). However, on its face, we discern several possible ways of perceiving said emphasized language. First, it might be viewed as an "item of appropriation"; second, it might be considered as a condition or limitation upon the appropriation of moneys from the bank commissioner fee fund; or, third, it might be regarded as an independent statement of substantive law that amends, by implication, the provisions of K.S.A. 75-3135 authorizing the governor to fix the annual salary of the bank commissioner. Of course, if it is found to be the latter, it is immune from the governor's item veto, since Article 2, Section 14(b) limits the exercise of such power to "items of appropriation of money." Thus, if the language in question is found to constitute nothing more than a substantive law prescribing the minimum salary of the bank commissioner, the govern's item veto was improperly exercised.

Similarly, if the language does nothing more than prescribe a condition or restriction on the appropriation of moneys in the bank commissioner fee fund, such interpretation also would render the governor's veto inoperative. In Attorney General Opinion No. 76-168, Attorney General Curt Schneider concluded that the item veto power of the governor does not extend to a condition, qualification or limitation upon the expenditure of moneys. We concur in that opinion, which was predicated in part on a decision to that effect in Bengzon v. Secretary of Justice, 299 U.S. 410, 57 S.Ct. 252, 81 L.Ed. 312 (1937). In Bengzon, the court quoted with approval from Fulmore v. Lane, 104 Tex. 499, 140 S.W. 405 (1911) as follows:

"'Nowhere in the Constitution . . . is the authority given the Governor to approve in part and disapprove in part a bill. The only additional authority to disapproving a bill in whole is that given to object to an item or items where a bill contains several items of appropriation. It follows conclusively that where the veto power is attempted to be exercised to object to a paragraph or portion of a bill other than

Paul Hess
Page Eight
April 7, 1981

an item or items, or to language qualifying an appropriation or directing the method of its uses, he exceeds the constitutional authority vested in him, and his objection to such paragraph, or portion of a bill, or language qualifying an appropriation, or directing the method of its use, becomes non-effective.'" (Emphasis added.) 299 U.S. at 413, 414.

Of similar import is the following statement in Commonwealth v. Dodson, supra:

"We think it is plain that the veto power does not carry with it power to strike out conditions or restrictions. That would be legislation. Plainly, money devoted to one purpose can not be used for another, and it is equally plain that power to impose conditions before it can become available is legislation.

"An item in an appropriation bill is an indivisible sum of money dedicated to a stated purpose. It is something different from a provision or condition, and where conditions are attached, they must be observed; where none are attached, none may be added." 11 S.E.2d at 127.

See, also, an opinion which dissented, in part, with the majority opinion in State ex rel. Brotherton v. Blankenship, 207 S.E.2d 421 (W. Va., 1973), but which quoted the foregoing with approval.

Thus, absent any pertinent Kansas case law, we believe the preceding judicial statements from other jurisdictions provide an appropriate basis for concluding that conditions, restrictions or other qualifications placed on an appropriation by the legislature may not be subjected to the governor's item veto. Of pertinence here is the statement in State ex rel., v. Bennett, 222 Kan. 12 (1977):

"As pointed out in State, ex rel., (Anderson) v. Fadely, supra, except as is restricted by the constitution, the legislature has the exclusive power to direct how, when, and for what purpose the public funds shall be applied in carrying out the objects of the state government." Id. at 18, 19.

Paul Hess
Page Nine
April 7, 1981

Accordingly, it is our opinion that, while the governor may disapprove an item of appropriation, he may not, through the use of item veto, reject the legislature's determination as to the manner or conditions under which an item of appropriation may be expended.

However, in this instance, it is appropriate to note the following statement of General Schneider in Opinion No. 76-168:

"Where an appropriation enumerates lesser sums included therein to be paid to designated officers or classes of employees, the lesser sums have generally been held to be separate items of appropriation subject to veto. See, e.g., Green v. Rawls, 122 So.2d 10 (Fla. 1960); Fairfield v. Foster, 214 Pac. 319 (Ariz. 1923)."

Therefore, only if the language excised by Governor Carlin from House Bill No. 2813 can be characterized as an "item of appropriation" was his item veto proper. In our judgment, however, the language disapproved by the governor cannot be so characterized. It lacks at least one of the essential elements of an item of appropriation, in that the limitation imposed on the bank commissioner's salary is not expressed as a specific sum of money. As previously discussed herein, an appropriation must limit the moneys to be withdrawn from the treasury. The money appropriated for use by a public officer must be a specified sum, and no more.

In this instance, the sum specified for the bank commissioner's salary does not limit the amount which can be withdrawn from the state treasury for such purpose; it states only a minimum. Thus, it did not restrict the governor from fixing the bank commissioner's salary in excess of the specified sum, pursuant to K.S.A. 75-3135, as long as the salary so fixed remained within the limitations of the appropriations from the bank commissioner fee fund.

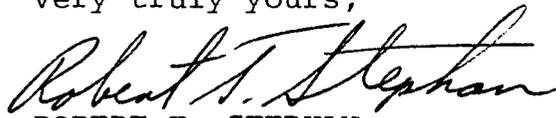
Having concluded that the language excised by Governor Carlin from 1980 House Bill No. 2813 was not an "item of appropriation" and, thus, not subject to his item veto, it is unnecessary to consider whether such language constituted an independent provision of substantive law or a condition, limitation or qualification of the appropriation to which it is appended, since we have previously concluded that neither would be subject to an item veto.

In summary, therefore, it is our opinion that the item veto power granted the governor by Article 2, Section 14(b) of the Kansas Constitution extends only to the disapproval of "items of

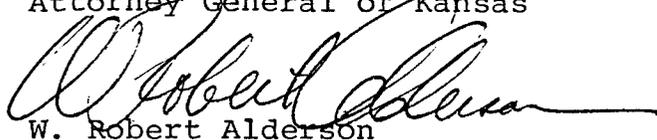
Paul Hess
Page Ten
April 7, 1981

appropriation of money" in bills containing several such items of appropriation, and such power does not permit the governor to partially veto a bill by disapproving a provision therein effecting a transfer of moneys within the state treasury or imposing conditions, limitations or qualifications on an appropriation or constituting an independent statement of substantive law. Accordingly, Governor Carlin's purported item vetoes of provisions in section 1 of 1980 Senate Bill No. 896 and section 4 of 1980 House Bill No. 2813 were of no force or effect, since neither of the vetoed provisions constituted an item of appropriation.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



W. Robert Alderson
First Deputy Attorney General

RTS:WRA:he:jm