Opinion No. 67-49

March 17, 1967

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Honorable Aubrey L. Dunn State Senator Legislative-Executive Building Santa Fe, New Mexico

QUESTION

QUESTIONS

1. In Section 11 of House Bill No. 300, do the paragraphs relating to "Instructional personnel non-matching distribution," "Instructional personnel matching distribution," and the last paragraph of the section (lines 19 through 21 on page 45) violate the provisions of Article IV, Section 16, of the New Mexico Constitution?

2. Can a general appropriation act alter existing, substantive law to the extent proposed in Section 11 of House Bill No. 300?

3. Do the provisions of Article IV, Section 16 of the New Mexico Constitution prohibit the legislature from exercising control by language in the general appropriations act over funds not appropriated by the general appropriations act?

4. Does House Bill No. 300, on page 45, lines 19, 20, and 21, attempt to control the expenditure of funds which are not appropriated by House Bill No. 300?

5. Would the receipt of federal funds be jeopardized in those federal programs which, as a condition of the federal grant, prohibit the reduction of state and local contributions to the school program, by the restrictions in House Bill No. 300 at lines 31 and 32 on page 44 and lines 7 through 9 on page 45, which say "No distribution shall be made for personnel employed for special programs funded entirely from the non-state funds"?

6. Will continuation of New Mexico's receipt of Public Law 874 and Johnson-O'Malley funds be jeopardized by passage of this law as worded?

CONCLUSION

1. See analysis.

2. See analysis.

3. See analysis.

4. See analysis.

5. See analysis.

6. See analysis.

OPINION

*{*66}* **ANALYSIS**

Section 16 of Article IV of the New Mexico Constitution provides in part as follows:

General appropriation bills shall embrace nothing but appropriations for the expense of the executive, legislative and judiciary departments, interest, sinking fund payments on the public debt, public schools, and other expenses required by existing laws; but if any such bill contain any other matter, only so much thereof as is hereby forbidden to be placed therein shall be void. All other appropriations shall be made by separate bills. (Emphasis added)

*{*67}* This section of our Constitution has been the subject of several New Mexico Supreme Court decisions before we attempt to answer the question asked, we feel that it is necessary to discuss some of the decisions of the Supreme Court interpreting this section of the New Mexico Constitution.

The first decision of the New Mexico Supreme Court was the decision in **State v. Marron,** 17 N.M. 304, 128 P. 485 (1912). The legislature in its first session passed an appropriations act which appropriated various sums of money for the payment of deficiencies incurred during the change from a territorial government to a state government and appropriated money for the construction of school buildings. To provide funds for these appropriations the general appropriations act provided for the issuance of certificates of indebtedness along with the form, amount and rates of interest of said certificates. In the **Marron** case it was argued that the authorization of the certificates of indebtedness in the general appropriations acts violated the prohibition contained in the above quoted language from Article IV, Section 16 of our Constitution. It was contended that this section allowed only direct appropriations of money. The Supreme Court conceded that a strict construction of this section would seem to indicate that this is true. However, the Court held that before interpreting this section of the New Mexico Constitution we must look to its history. The Court found that the primary object of this section was to prevent legislative raids by the insertion of special appropriations for new purposes in a general appropriations bill. It was also designed to prevent general legislation in the appropriations bill which is in no way related to providing for the expenses of government. In **dicta** the Supreme Court indicated that not only may the method of raising the money be included in the general appropriations act, but also provisions for expanding the money and accounting for the money could also be included in the general appropriations act.

The next decision of our Supreme Court was **State v. Sargent.** 18 N.M. 13, 134 P.218 (1913). The **Sargent** case involved an action brought by the treasurer of the Santa Fe

Fire Department against the State Auditor to compel the payment of $ 1,200.00. The facts reveal that in 1897 the legislature passed an act providing for a 2% tax on all foreign insurance companies on policies sold in this state. The proceeds of this tax were to be paid to the fire departments of the various communities in the territory in which the premiums were collected. In 1905 an Insurance Department was created by our territorial legislature. Under this 1905 act the 2% was paid to the Superintendent of Insurance and then distributed back to the various communities. In 1909 the legislature enacted legislation which made an annual and continuing appropriation of specific amounts of insurance funds created by the 1905 act to the various fire departments of the communities of the territory. Then in 1912 the general appropriations bill provided that all receipts of the Insurance Department, including surplus money in the Insurance Fund, had to be paid to the State Salary Fund. The Supreme Court held that this provision in the 1912 general appropriations act was unconstitutional. The following reasons were given:

That the paragraph is general legislation of a permanent character seems to be clear. It provides for a certain disposition of monies collected by the Insurance department which disposition of the said monies is to continue indefinitely. It bears some relation to the appropriations made in the act out of the Salary fund, but it goes further and provides a permanent policy thereafter to be pursued which can bear no relation to the appropriations made in that act. **Had the paragraph limited the *{*68}* transfer of the funds to that year and to meet the appropriations made in the act a different proposition would be presented.** In such case the paragraph might well be held to be germane to the appropriation act and allowable, under the doctrine announced in State v. Marron, 128 Pac. 485. But the permanent character of the provision takes it out of the doctrine of the Marron case and clearly renders it violative of the Constitution. (Emphasis added)

In 1923, our Supreme Court again had occasion to construe Article IV, Section 16 of the New Mexico Constitution. **State v. Safford,** 28 N.M. 531, 214 Pac. 899 (1923). In this case the acting traveling auditor, appointed by the governor, presented a per diem voucher to the acting state auditor in the amount of $ 6.50. The acting state auditor refused to pay this voucher as it exceeded the $ 5.00 a day allowed in the general appropriations act. It was again contended that the term "general appropriation bills shall embrace nothing but appropriations" should be given a strict construction and therefore the general appropriations act's limitation on the per diem expenditure was unconstitutional. The Supreme Court again rejected this contention setting forth the following rule:

To sustain appellant's contention would result in holding that nothing but bare appropriations shall be incorporated in such general appropriation bill. This is neither the purpose nor spirit of the constitutional provisions under consideration. **The details of expending the money so appropriated, which are necessarily connected with and related to the matter of providing the expenses of the government, are so related, connected with, and incidental to the subject of appropriations that they do not violate the Constitution if incorporated in such general appropriation bill. It**

is only such matters as are foreign, not related, to, nor connected with such subject, that are forbidden. Matters which are germane to and naturally and logically connected with the expenditure of the moneys provided in the bill, being in the nature of detail, may be incorporated therein. Otherwise everything connected with the expenditure of money provided in the general appropriation bill would have to be provided in separate and special acts of the Legislature -- a condition which was never intended. (Emphasis added)

Later decisions of our Supreme Court indicate that the earlier decisions are still to be followed. See for example, **State v. State Board of Finance,** 59 N.M. 121, 279 P.2d 1042 (1955); and **State v. State Board of Finance,** 69 N.M. 430, 367 P.2d 925 (1961). We therefore must conclude that the rule today is that if the provision in the general appropriations act is so related, connected with, and incidental to the subject of the appropriation and does not attempt to go beyond the current appropriation, the provision is constitutional. We must now see whether the particular provisions referred to in the questions asked this office come within this rule.

First of all we are asked if the paragraphs in Section 11 relating to "Instructional Personnel Nonmatching Distribution" and "Instructional Personnel Matching Distribution," violate Article IV, Section 16 of the New Mexico Constitution. It appears that these sections are related and incidental to the subject of the appropriation and do not attempt to go beyond the current appropriation and therefore we believe that these sections are probably constitutional.

In question one we are also asked if lines 19 through 21 on page 45 violate the provisions of Article IV, Section 16 of the New Mexico Constitution. We find that lines 19 through 21 on page 45 provide as follows:

*{*69}* "Nothwithstanding the provisions of Section 77-6-45 (Laws of 1967), a school district may budget and expend cash balances forward for operational expenses."

This provision does not appear to be limited to the current appropriation, but rather attempts to amend a section of an act passed by this session of the legislature. We believe that lines 19 through 21 on page 45 are general legislation within the appropriations act and therefore are void under Article IV, Section 16 of the New Mexico Constitution.

Your second question asks if a general appropriation act can alter existing substantive law to the extent proposed in Section 11 of the House Bill No. 300? We have already pointed out that under our Supreme Court's interpretation of Article IV, Section 16 of the New Mexico Constitution existing substantive law can be altered, if, and only if, it is germane to and naturally and logically connected with the expenditure of the moneys provided in the bill and in addition if the change does not appear to go beyond the current appropriation. This rule is applicable to every provision in the appropriations bill.

Your third question asks if the legislature can exercise control by language in the general appropriations act over funds not appropriated by the general appropriations act? It is our opinion that under the rule announced in the decisions discussed above that any attempt to control funds not appropriated by the general appropriations act would be in violation of Article IV, Section 16 of the New Mexico Constitution. As stated above, matters incidental to or related to an appropriation may be included within the appropriations act. Provisions which attempt to control funds not appropriated by the general appropriations act are not related, connected with nor incidental to any appropriation contained in the act.

Your fourth question asks if lines 19 through 21 on page 45 of House Bill No. 300 attempt to control the expenditure of funds which are not appropriated by House Bill No. 300? It is our opinion that in line with the answer to your third question the provisions contained in the above lines are void as an attempt to exercise control over funds not appropriated under the general appropriations act. This is even clearer as the funds discussed in lines 19-21 are not an appropriation, but are funds remaining in cash balances of the school districts.

Question five asks if the receipt of federal funds will be jeopardized by the restrictions in House Bill No. 300 at lines 31 and 32 on page 44 and lines 7 through 9 on page 45, which provide that "No distribution shall be made for personnel employed for special programs funded entirely from non-state funds"? Of course this office cannot predict what action the federal government will take because of the above provisions in the appropriations act, but we can give our opinion as to what federal law is applicable and whether House Bill 300 may jeopardize receipt of federal funds.

We have been referred to two federal acts, the Johnson-O'Malley Act and the Elementary and Secondary Education Act. Section 33.5 (d) of the regulations promulgated under the Johnson-O'Malley Act, provides as follows:

(d) UNIFORM APPLICATION OF STATE LAW. States entering into a contract under the provisions of this part shall agree that schools receiving Indian children, including those coming from Indian reservations, shall receive all aid from the State, and other proper sources other than this contract, which other similar schools of the State are entitled to receive. In no instance shall there be discrimination by the State or subdivision thereof against Indians or in the support of *{*70}* schools receiving such Indians, and such schools shall receive State and other non-Indian Bureau funds or aid to which schools are entitled. 25 C.F.R. Section 33.5(d).

We interpret this provision as prohibiting discrimination in appropriations to schools supported under the Johnson-O'Malley Act. If this program is supported entirely from non-state funds we feel that federal funds are in jeopardy under Section 11 of the appropriations act.

Section 207 (a) (2) c (1) of the Elementary and Secondary Education Act provides as follows:

"No payments shall be made under this title for any fiscal year to a state which has taken into consideration payments under this title in determining the eligibility of any local education agency in that state for state aid, or the amount of that aid, with respect to the free public education of children during that year or the preceeding fiscal year."

It is our best information that the Elementary and Secondary Education Program is a program that is entirely supported by non-state funds. Lines 31 and 32 on page 44 and lines 7 through 9 on page 45 discriminate against a program that is supported wholly by federal funds. It is therefore our opinion that federal funds have probably been jeopardized by the limitation that "No distribution shall be made for personnel employed for special programs funded entirely from nonstate funds".

Last of all this office has noted that many provisions in other sections of the appropriations act which can only be considered as general legislation in violation of Article IV, Section 16 of the New Mexico Constitution. In addition we have found that there is another provision of Article IV, Section 16 of the New Mexico Constitution that has been repeatedly violated by House Bill No. 300; that is, the first sentence of Section 16 which provides that "The subject of every bill shall be clearly expressed in its title."

An example of a title problem in the appropriations act is found on page 37, lines 15 through 24 which provides for the transfer of the highway department personnel section to the state personnel department. Nothing is contained in the title of the appropriations act which indicates such a transfer is being made in the appropriations act. Of course these lines also violate the provision against general legislation in an appropriation act as discussed above. In addition lines 15 through 24 on page 37 may well violate Article V, Section 14 D of the New Mexico Constitution. If time permitted we could cite a number of other examples of title problems in House Bill No. 300.

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