

Opinion No. 69-25

April 9, 1969

BY: OPINION OF JAMES A. MALONEY, Attorney General Gary O'Dowd, Deputy Attorney General

TO: Maralyn S. Budke, Director, Legislative Finance Committee, State Capitol, Santa Fe, N.M. 87501

QUESTIONS

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Under the Governor's authority to execute item vetoes in bills carrying appropriations pursuant to Article IV, Section 22 of the New Mexico Constitution:

1. May the Governor strike entire items including both amounts of money and accompanying language, if any, to nullify the proposed appropriation?
2. May the Governor strike qualifying language such as "To be used only for the purpose of carrying out the provisions of Senate Bill 1000, Twenty-Ninth Legislature, First Session, if it becomes law." and thereby leave the use of the funds appropriated unrestricted.
3. May the Governor strike language in a line item appropriation which specifies the purpose for which the appropriation is made leaving the amount appropriated to an unallocated purpose?
4. May the Governor strike qualifying language restricting the use of appropriated funds in such a manner as to change the legislative intent of the appropriation?

CONCLUSIONS

1. Yes.
2. No.
3. No, but see analysis.
4. See analysis.

OPINION

{*36} ANALYSIS

Article IV, Section 22 of the New Mexico Constitution grants to the Governor the power to make item vetoes in bills appropriating money as follows:

The governor may in like manner approve or disapprove any part or parts, item or items, of any bill appropriating money, and such parts or items approved shall become a law, and such as are disapproved shall be void unless passed over his veto, as herein provided.

In most states which permit a partial veto by the Governor in bills appropriating money, the language commonly used in the constitutional provision authorizing the exercise of such executive disapproval is limited to one or more items. See **State ex rel Wisconsin Tel. Co. v. Henry**, 260 N.W. 486 (Wisc. 1935). A few states have constitutional provisions as broad as New Mexico's in that they permit a partial veto by the Governor in bills appropriating money of any "part or parts," "item or items" found in the bill. The phrase "part or parts" has been construed to grant broader powers to the Governor than the phrase "item or items." However, we will discuss each of these phrases in this opinion in order to establish the limits of the Governor's power in this area.

In **State of New Mexico ex rel Dickson v. Saiz**, 62 N.M. 227, 308 P.2d 205 (1957), the New Mexico Supreme Court had occasion to discuss the Governor's partial veto power in bills appropriating money. In the **Dickson** case the Supreme Court was confronted with a veto of all language related to the sale of liquor on Sunday in an act regulating and controlling liquor. The veto was described by the Supreme Court on rehearing as follows:

"He (the Governor) went through the bill before him with meticulous care, lifting from it, whenever found, the part or parts germane to the subject about to be proscribed, and which together, made up a rounded whole, and took such part or parts from the bill. **It mattered not where in the bill they rested if they constituted an integral part of the subject being partially vetoed -- out they came!**" (Emphasis added.) Id at 237

The Supreme Court upheld the partial veto stating that the Governor was acting strictly within his quasi-legislative capacity in exercising his power of partial veto. In so holding the New Mexico Supreme Court relied on decisions of the Washington and Wisconsin Supreme Courts.

The Wisconsin Supreme Court decision relied upon by the New Mexico Supreme Court is **State ex rel Wisconsin Tel. Co. v. Henry**, supra. Among the parts vetoed in this case were provisions which provided specific directions as to the manner and purposes of distribution of moneys appropriated in a particular section of the appropriation act. It was contended that these parts were inseparably connected to the appropriation and therefore the Governor could not veto them. The Supreme Court of Wisconsin disagreed with this contention, however, it is not quite clear why it disagreed. In reaching the conclusion that the veto was proper the Wisconsin Supreme Court relied upon Webster's New International Dictionary for the definition of what constitutes "a part" of an appropriation act as follows:

"One of the portion, equal or unequal, into which anything is divided, or regarded as divided; {*37} something less than a whole; a number, quantity, mass, or the like, regarded as going to make up, with others or another, a large number, quantity, mass, etc., whether actually separate or not; **a piece, fragment, fraction, member; or constituent.**" (Emphasis added.)

The Court concluded that under the above definition the items vetoed by the governor were not provisos or conditions upon which the appropriation in the approved portions was made dependent or contingent. Thus it appears that the Governor may veto part or parts of the general appropriations act under the **Wisconsin Telephone Company** decision if the vetoed parts are not provisos or conditions upon which the appropriation in the approved portions is made dependent or contingent. Expressions of intent of the legislature may be vetoed.

The Washington decision relied upon by the New Mexico Supreme Court in **Dickson v. Saiz**, supra, is **Cascade Telephone Co. v. Tax Commission**, 30 P.2d 976 (1934). First of all, it is interesting to note that the Washington Constitution is quite obviously distinguishable from the New Mexico Constitution insofar as it relates to the power granted to the Governor in vetoing parts of appropriation bills. In Washington, the Governor had the power to veto "sections or items" in an appropriation bill. Nevertheless, our Supreme Court found reasoning in this Washington case applicable to the facts in the **Dickson** case. The vetoed section in the **Cascade Telephone** case was a section requiring the telephone company to pass the tax levied in the act on to its customers. The Supreme Court of Washington upheld the veto, apparently for two reasons. The first reason given relates to a definition of the words "section or sections" as used in the Washington Constitution. Since our constitution does not contain similar language, we do not find this reasoning to be of much help. The second reason was the governor's veto was purely negative. A dissenting Justice pointed out that the action was not purely negative because it actually creates a result different from that intended and arrived at by the Legislature. What is "affirmative" and what is "negative," when speaking of item vetoes in appropriation acts, is made clear in **Fairfield v. Foster**, 25 Ariz. 146, 214 Pac. 319 (1923). An affirmative veto power is one that allows the Governor to alter the amount specified in the appropriation. Thus the "affirmative-negative" test of the **Cascade Telephone** decision is not particularly helpful in answering the questions raised in this opinion request.

We have found one fairly recent decision, a decision of the Florida Supreme Court, which better sets forth guidelines in this area. That decision is **Green v. Rawls**, 122 So.2d 10 (Fla., 1960). In this case we find that the Governor of Florida vetoed the underlined portions of the following items in the 1959 general appropriations bill of the Florida Legislature:

"13. Corrections, Division Of
'a. General office
'1. Salaries -- including salary
of \$ 12,000 per annum for

the director and salaries
of 25 employees \$ 143,580 \$ 143,580
'2. Expenses 53,739 53,779
'3. Operating capital outlay 12,816 7,100
'4. Special -- discharge pay of
inmates in an amount not
exceeding \$ 15 per inmate and
transportation at not exceed-
ing \$ 25 per inmate, as pro-
vided by law 78,900 85,850

'Subtotal (a) \$ 289,035 \$ 290,309"

(Underscoring added.)

"23. Forestry, Florida Board of

'a. Salaries -- including salary
of \$ 10,000 per annum for the
state forester and salaries

of 890 employees in 1959/60

and 891 employees in 1960/61 \$ 1,014,794 \$ 1,005,004

'b. Expenses 952,013 921,542

'c. Operating capital outlay 466,704 216,774

'Total of Item no. 23 \$ 2,433,511 \$ 2,143,320"

(Underscoring added.)

{*38} The State Budget Commission then adopted a motion fixing the salary of the Director of the Division of Corrections at \$ 13,000 per year and fixing the salary of the State Forester at \$ 12,000 per year. This certainly altered legislative intent, however, the Supreme Court of Florida held that such a veto was constitutional in spite of the objection that the veto constituted a veto of a part of an item and not an "item."

In reaching its conclusion the Supreme Court of Florida stated that the Supreme Court of Arizona's decision in **Fairfield v. Foster**, supra, strongly supported its conclusion. The Supreme Court of Florida relied on a quote from the **Fairfield** decision in defining what an "item" is for purposes of an item veto by the Governor as follows:

"The International Dictionary gives 'item' as a 'separate particular in an enumeration, account or total.'"

We agree with the Supreme Court of Florida that this is the most helpful definition of the term "item" found in the numerous decisions on this subject. The Supreme Court of Florida went on to point out that to be an "item" two factors are essential, there must be a specified purpose and the amount to be used therefor designated. Thus, as pointed

out in **Green v. Rawls**, supra, there may be "items" within "items" in a general appropriations act.

Before leaving our discussion of the Supreme Court of Florida's decision in **Green v. Rawls**, supra, it should be pointed out that this Court did discuss the effect of the item veto of the Governor on the total appropriation. It was pointed out that the veto of the specific salary items did not have the effect of reducing the total appropriation for salaries. This follows the general rule that the Governor has only the power to approve or disapprove the amounts appropriated and has no power to insert his figures as a substitute for the amounts set in the appropriations act by the legislature. This is an "affirmative" veto. See Attorney General Opinion 5738, issued April 17, 1953 and the cases cited therein.

In **Fairfield v. Foster**, supra, relied upon by the Supreme Court of Florida in **Green v. Rawls**, supra, the Supreme Court of Arizona was confronted with an "item" veto by the Governor of the State of Arizona. The Arizona legislature had appropriated \$ 72,880 for the Corporation Commission. Of this amount \$ 53,880 was {*39} appropriated for salaries as follows:

"For the following positions not to exceed the annual rates herein specified:

* * *

1 rate clerk ___ \$ 2,100 per annum."

The Governor vetoed the portion of the Corporation Commission's appropriation which set the salary of the rate clerk at \$ 2,100 by striking the underlined portion of the above quote. The Supreme Court of Arizona held that the veto of the above underlined provision of the Arizona general appropriations act was a proper "item" veto. In so holding the Supreme Court of Arizona pointed out that the framers of the Arizona Constitution

"wished the Governor to have the right to object to the expenditure of money **for a specified purpose and amount**, without being under the necessity of at the same time refusing to agree to another expenditure which met his entire approval." (Emphasis added.)

Thus, the Court pointed out, the Governor need not veto the whole appropriation of the Corporation Commission or even the subdivision of "For salaries and wages" in order to properly exercise his power to make an item veto.

A simple conclusion can be reached from the above decisions, that is, the legislature cannot by putting purpose, subject, and amount inseparably together and calling it an "item," coerce the Governor to approve all of the appropriation of an agency or nothing.

From the foregoing it also may be concluded that the Governor's power to veto "part or parts" of an appropriation bill allows him to veto specific directions as to the manner and purpose of distribution of an appropriation found in the general appropriation act so long as the appropriation in the approved portions of the act was not made dependent or contingent on the vetoed provision. **State ex rel Wisconsin Tel. Co. v. Henry**, supra. The Governor also has the power to veto an "item or items" within the appropriation act, but in so doing he must veto both the specified purpose and the amount to be used for that purpose. This includes an item within an item. **Green v. Rawls**, supra, and **Fairfield v. Foster**, supra. If only one of these parts is vetoed, the veto would constitute a prohibited veto of part of an item. With this summary in mind, we now turn to the questions asked.

The first and third questions are answered by the decisions of the Supreme Court of Florida and Arizona. The Governor may strike entire items which includes both the amount of money designated and the accompanying language pursuant to Article IV, Section 22 of the New Mexico Constitution. However, if he wishes to veto either the amount of money or the accompanying language, he must veto both.

It should be pointed out, that if the Governor were to veto a line item for "salaries" in a state agency's appropriation, vetoing both amount and purpose, the total amount appropriated to the agency would not change, however, the agency would be left without an appropriation for any salaries.

In question two, we are asked if the Governor may constitutionally strike the qualifying language of a contingent appropriation. Under authority of the decision of the Supreme Court of Wisconsin in **State ex rel Wisconsin Tel. Co. v. Henry**, supra, cited with approval of the New Mexico Supreme Court in **State ex rel Dickson v. Saiz**, supra, the Governor cannot constitutionally veto provisos or conditions upon which the appropriation in the approved portions of the appropriation act was {40} made dependent or contingent. The answer to the second question, then, is no.

Last of all, we are asked if the Governor may constitutionally strike "qualifying language restricting the use of appropriated funds in such a manner as to change the legislative intent of the appropriation." If the language merely expresses the intent of the legislature, it may be constitutionally vetoed. However, if the appropriation is dependent or contingent on the qualifying language, such language may not be constitutionally vetoed without vetoing the amount appropriated.