Opinion No. 53-5738

April 17, 1953

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. Robert D. Castner State Auditor Santa Fe, New Mexico

*{*135}* On March 27, 1953, you addressed a request to this office concerning the power of the Governor to reduce amounts in the General Appropriations Bill. You state that in House Bill No. 196, as amended, the Governor allegedly reduced an appropriation for your office from $ 50,000.00 for the 42nd and 43rd Fiscal Years to $ 47,600.00 for each year. Your request is directed to the question of the legality of this reduction under the Governor's power to veto and disapprove bills passed by the Legislature.

The Constitution of the State of New Mexico in Article 4, Section 22, reads as follows:

"Sec. 22. (Governor's approval or veto.) -- Every bill passed by the legislature shall, before it becomes a law, be presented to the governor for approval. If he approve, he shall sign it, and deposit it with the secretary of state; otherwise, he shall return it to the house in which it originated, with his objections, which shall be entered at large upon the journal; and such bill shall not become a law unless thereafter approved by two-thirds of the members present and voting in each house by yea and nay vote entered upon its journal. Any bill not returned by the governor within three days, Sundays excepted, after being presented to him, shall become a law, whether signed by him or not, unless the legislature by adjournment prevent such return. Every bill presented to the governor during the last three days of the session shall be approved or disapproved by him within six days after the adjournment, and shall be by him immediately deposited with the secretary of state. Unless so approved and signed by him such bill shall not become a law. **The governor may in like manner approve or disapprove any *{*136}* part or parts, item or items, of any bill appropriating money, and such parts or items approved shall become a law, and as such as are disapproved shall be void unless passed over his veto, as herein provided."**

The underlined portion of the above cited constitutional provision is the portion questioned by you in your request.

There is no question that the Governor may disapprove all of any distinct item or all of any section in a bill which appropriates money. The sole question is directed to the ability of the Governor to reduce an item in the appropriations bill.

This matter has been the subject of many court decisions. In each case the constitution of the state wherein the decision was rendered differs from the constitution of our state in some particular. The vast majority of the constitutional provisions involved in the litigation reads somewhat as follows:

"The governor shall have the power to approve or disapprove of any item or items of any bill making appropriations of money, embracing distinct items, and the part or parts approved shall become a law, and the item or items disapproved shall be void unless . . . ."

The only two cases in which a reduction of an appropriation has come before an appellate court where the words "part or parts" are used are State ex rel. Teachers and Officers v. older, 76 Miss, 158, 23 So. 643 and State ex rel. Jamison v. Forsyth, 21 Wyo. 359, 133 P. 521. The constitutional provision in Mississippi provided that the governor might veto **parts** of any appropriation bill and approve **parts** of the same. The court held in that case that the word "parts" gave to the chief executive the power to approve or disapprove separate amounts appropriated by the legislature in toto but that the word "parts" did not mean **parts of items.** The court further stated:

"And after all, and despite the pragmatic utterances of political doctrinaires, the executive, in every republican form of government, has only a qualified and destructive legislative function, and never creative legislative power. If the governor may select, dissent, and dissever, where is the limit of his right? Must it be a sentence, or a clause, or a word? Must it be a section, or any part of a section, that may meet with executive disapprobation? May the governor transform a conditional or a contingent appropriation into an absolute one, in disregard and defiance of the legislative will? That would be the enactment of law by executive authority without the concurrence of the legislative will, and in the face of it."

In the case of State ex rel. Jamison v. Forsyth, 21 Wyo. 359, 133 P. 521, the court did not decide whether the power of the governor under a constitution which stated that the governor had the power to disapprove of any item or items, or part or parts, of any bill embracing distinct items, and provided that the part or parts approved should be law and the item or items and part or parts approved should be void unless enacted in accordance with a certain procedure, was capable of being reduced. The entire case law on the subject was discussed in this case, but the court refused, expressly, to rule upon the point.

The only other case which has *{*137}* been discovered by this office which permitted an item to be reduced was in Commonwealth ex rel. Elkin v. Barnett, 199 Pa. 161, 55 L.R.A. 882, 48 A. 976. The constitutional provision in Pennsylvania was not similar to ours and is more nearly comparable to the provision cited above and found generally in the constitutions of other states. This case contained a dissent which followed the majority rule and stated that the legislature alone had the **power to fix the amount** of an item in an appropriation bill, and that, if the governor should be allowed to scale an item, the legislature's right to determine its amount would be taken away, particularly in view of the fact that, as most of the appropriation bills are not passed upon by the governor until after the legislature is adjourned, it would have no opportunity to repass such bills over his veto.

The Constitution of California is the only constitution which has a provision expressly allowing the reduction of an item by the governor.

The weight of authority, however, is overwhelmingly to the effect that the governor has the power only to approve or disapprove the total amounts appropriated and cannot insert his figures as a substitute for the determination of the amounts in the appropriation determined by the legislature, Peebly v. Childers, 95 Okla. 40, 217 P. 1049; Mills v. Porter, 222 P. 428, 35 A.L.R. 592; Fergus v. Russel, 270 Ill. 304, 110 NE 130; Strong v. People, 74 Colo. 283, 220 P. 999; Nowell v. Harrington, 122 Md. 487, 89 A. 1098; Wheeler v. Gallet, 43 Ida. 175, 249 P. 1067; Wood v. State Administrative Board, 255 Mich. 220, 238 NW 16.

A Wisconsin case, State ex rel. Wisconsin Telephone Company v. Henry, 260 NW 486, 99 A.L.R. 1267, states as follows:

"The constitutional grant of power to the governor of a state to approve any appropriation bill in part only authorizes him to disapprove parts thereof which are not an appropriation, such as parts declaring the intent of the legislature in enacting the bill and creating a new agency for the distribution of the money appropriated."

By reason of the cases cited above and by reason of the decisions in those cases most closely paralleling the form in which our constitutional provision on the subject appears, and despite the fact that the action taken by the Governor in reducing certain appropriations appearing in House Bill No. 196, as amended, after that bill was submitted to him at the close of the legislative session, has been done by previous governors in this state dating from the General Appropriations Act of 1931, it is the opinion of this office that such action taken by the Governor is not within the contemplation of Article 4, Section 22 of the Constitution of the State of New Mexico, and that such Article and Section gives the chief executive only the power to veto distinct items or parts of the bill in appropriating money, and that to give the governor power to reduce an item that such language as "shall have the power to disapprove item or items, part or parts, **or parts of items"** would be necessary. In no place does such language or the intent appear that such was the purpose of the language actually contained in our constitutional provision.

The fact that the reduction was not a qualified approval does not in any way affect the General Appropriations Bill as such. The attempted *{*138}* reduction is held under the authorities cited above as ineffective in the nullification of the complete item, and was particularly discussed in the case of Wood v. State Administrative Board, 255 Mich. 220, 238 NW 16, which held that the attempted qualified approval was a complete nullity and did not affect the bill in any way either as an approval or disapproval of any such items. See also Wheeler v. Gallet, 43 Ida. 175, 249 P. 167.

Therefore, it is the opinion of this office that the attempted reduction by the Governor of any appropriations, where that reduction was not full disapproval of such an item, is ineffective and was a nullity. The act of the Governor had absolutely no effect upon the

bill as passed by the two Houses of the Legislature and as signed by the Governor and should be treated as though no attempted reduction was ever noted on that bill.

We sincerely hope that this answers your inquiry concerning the problem cited above.

By: Fred M. Standley

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