

Opinion No. 53-5739

April 21, 1953

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. C. O. Erwin Chief Highway Engineer Santa Fe, New Mexico

{*138} You have asked our opinion as to whether the Highway Commission must be limited in its expenditures from the State Road Fund to those items or amounts set forth in an annual budget, submitted to and approved by the State Board of Finance as provided in Sec. 19, Chapter 156, Laws of 1953, known as the General Appropriations Act.

Section 19 reads as follows:

"There shall be appropriated from the State Road Fund such amounts as may be necessary for the operation of the State Highway Department as determined by annual budgets submitted to and approved by the State Board of Finance; provided that the State Board of Finance shall increase any appropriations to the extent of available funds if such additional amounts are needed to insure full participation in federal matching moneys."

You inquire as to the duty of the State Highway Commission in complying with this act in view of Article 5, Sec. 14 of the Constitution which reads in part:

"The state highway commission is empowered and charged with the duty of determining all matters of policy relating to state highways and public roads. * * * It shall have complete charge of all matters pertaining to the expenditure of state funds for the construction, improvement and maintenance of public roads and bridges."

The State Road Fund is the fund into which the state Treasurer places the moneys received from the United States for federal aid, as well as the proceeds from the sale of highway debentures, but the larger part of the fund is made up from the proceeds of the Motor Fuels Tax (68-1214 N.M.S.A. 1941), Motor Vehicle Registration Fees (68-231) and the Mileage Tax (68-1536).

{*139} An appropriation has been defined as the setting apart of moneys formally and officially for a special use or purpose in a duly enacted law. *Edwards v. Childers* (Okla.) 228 P. 472. And since these laws do just this, it would seem that that part of the road fund provided by said laws is an appropriation, and might be defined as a "continuing appropriation." *Dorman v. Sargent* 20 N.M. 413.

The Legislature apparently having some doubt as to whether the laws were themselves appropriations, in 1939 and again in 1947 passed special continuing appropriations (58-251 N.M.S.A. 1941, and 58-264 Sup.) covering the same purposes as were set forth in

the laws above mentioned. A reading of these acts can only lead to the conclusion, however, that at the time Article 5, Sec. 14 was adopted, September 20, 1949, all state funds for the construction, improvement and maintenance of public roads and bridges were either in the State Road Fund or on the way to it.

There can be little doubt that the Legislature could repeal or amend any of these laws making an appropriation, except those pledging funds for the payment of outstanding indebtednesses in the form of bonds or debentures. Sec. 19, however, neither repeals nor amends these earlier laws, but on the contrary specifically recognizes the State Road Fund which can only exist by virtue of these earlier laws.

Sec. 19, actually, merely attaches another condition to the use of these funds. It states that the earlier appropriations shall not be appropriated except "as determined by annual budgets submitted to and approved by the State Board of Finance". If the Legislature can repeal or amend, it can also add conditions; but the conditions, as in the case of all laws, must not conflict with the Constitution.

In construing Sec. 19 with Article 5, Sec. 14 of the Constitution, can we escape the conclusion that the people intended to give the Highway Commission complete charge, over the same funds that the Legislature (by subjecting its budget to the approval of the Board of Finance) actually attempts to place in another agency?

In *State Board of Agriculture v. Auditor General* (Mich.) 197 N.W. 160, the Court said:

"Clearly, in saying that the Legislature can attach to an appropriation any condition which it may deem expedient and wise, the court had in mind only such a condition as the Legislature had power to make. It did not mean that a condition could be imposed that would be an invasion of the constitutional rights and powers of the governing board of the college. It did not mean to say that in order to avail itself of the money appropriated, the state board of agriculture must turn over to the Legislature management and control of the college, or of any of its activities."

Had the 1953 Legislature enacted a law providing that the State Board of Finance would have charge of those state funds provided for the construction, improvement and maintenance of public roads instead of the Highway Commission, is there any question but that such a law would be unconstitutional? Yet, is not Sec. 19 to the same effect?

It is well established that "the Legislature may not do indirectly what it is prohibited from doing directly." *Caldwell v. Board of Regents* {*140} of U. of Arizona 96 P. 2d 401, *Macallen Co. v. Massachusetts* 279 U.S. 620, *Rainey v. Michel* (Cal.) 57 P. 2d 932. In *Moore v. Humboldt County* (Nev.) 210 P. 401 the Court had held that a law abolishing the office of constable was invalid so a law reducing his salary was passed. As to this the Court said:

"This court has repeatedly held that what cannot be done directly cannot be done by indirection.

Let us see if the situation confronting us brings the case within the rule. Prior to the enactment of the statute in question, the plaintiff was getting a salary of \$ 150 per month, or \$ 1,800 per year. Under the statute in question it is provided that he shall receive a salary of \$ 5 per year, or 41 8/12 cents per month. This is a princely salary. It is surprising that the Legislature did not make plaintiff a "dollar a year" man. Whatever may have been the reason prompting the legislative act, can it be doubted what the purpose was?"

We cannot say that the Board of Finance will demand a change in a single item or in any amount in the budget submitted by the Highway Department, but "it is not what will be done under a law, but what can be done, that is the test of its constitutionality." Thompson v. Scheier 40 N.M. 199.

In the case of Civil Service Commission v. Auditor General (Mich.) 5 N.W. 2d 536, by a constitutional amendment the Civil Service Commission was created and given the duty of classifying and fixing the salaries of state employees. The next session of the Legislature provided by Sec. 3 in its appropriations bill that no warrants would be drawn on sums appropriated by that bill for any salary increases. The Michigan court held:

"" * * * In construing a statute which is alleged to be unconstitutional, it should be scrutinized very carefully, and no matter what its form, if its true purpose and probable effect is to violate a constitutional provision, it will be held void.""

"In view of the foregoing and in accordance with the plain intent and meaning of the amendment, we hold that Section 3 of the appropriation bill is unconstitutional and void, and shall be disregarded by the Auditor General. The interposition of this section into the act in question, not impliedly, but in express terms undertakes to usurp the authority vested in the Civil Service Commission by the constitutional amendment to fix rates of compensation of employees of the state who are under civil service classification. As the act specifically contains a 'severability clause', the remainder of the law is valid."

Article 5, Sec. 14 has been the subject of three former opinions of this office, Nos. 5588, 5589 and 6691. In view of these opinions, the history and present setting of Sec. 19 of the Appropriations Act, the above authorities seem to us too clear and convincing to escape, and we can only hold that that portion of Sec. 19, Chapter 156 is unconstitutional in so far as it limits expenditures of money from the State Road Fund to amounts approved by the State Board of Finance.

In this connection it should be noted that at no time have we stated that the biennium budget of the Highway Commission should not be submitted under the provisions of { *141 } Sec. 7-402, 7-408 N.M.S.A., 1941. Certainly the Legislature must be informed of the operational requirements of the Commission in order to provide the necessary funds consistent with the long range plans so essential to successful operation of your Department.

In our opinion, therefore, the Commission will not be limited in its expenditures from the State Road Fund to any items or amounts set forth on an annual budget submitted to or approved by the State Board of Finance as provided by Sec. 19, Chapter 156, Laws of 1935.