

Opinion No. 59-181

November 3, 1959

BY: HILTON A. DICKSON, JR., Attorney General

TO: Honorable R. C. Morgan State Senator, Roosevelt County 223 South Main Street
Portales, New Mexico

{*282} This is in response to your recent request for an opinion on the following questions:

1. What appropriation was made by the Legislature for the operations of the Bureau of Revenue of the 48th and 49th Fiscal Years?
2. Has an emergency arisen such as would authorize the Director of the Department of Finance and Administration to allow budgetary increases to the Bureau of Revenue for the forty-eighth fiscal year (1959-60)?
3. If fraud is evident in the road building project at Lordsburg, in what county would the Grand Jury convene?

In answer to your first question, it is our opinion that the appropriations made for the operations of the Bureau of Revenue are in the amount of six (6%) percent of the total collections of certain taxes and five (5%) percent of others, all as specified in the Appropriations Act.

For our response to the second question, see the analysis in the opinion.

For our response to your third question, see the analysis pertinent thereto.

You will note that we have taken the liberty to rephrase the questions suggested by you. This was necessary in order that we might discuss the points inherent therein.

The answer to your first question involves an analysis of Section 7, Chapter 288, Laws of 1959, which is the General Appropriations Act of 1959. It reads in pertinent part as follows:

"Section 7. AGENCIES OPERATING WITH DEDICATED FUNDS. -- For each of the forty-eighth and forty-ninth fiscal years, appropriations are made for the departments and agencies shown in this section from revenue available for the administrative costs of each department as provided by law. No department or agency in this section shall exceed the amounts designated for administration costs either by incumbrances or by cash expenditures and detailed budgets shall be submitted annually for the approval of the department of finance and administration. The department of finance and administration may readjust the budget items when necessary for more efficient or

effective administration and **may allow emergency budgetary increases within available revenues designated by law for administrative purposes, the emergency to be established by the department of finance and administration**, but the total amount appropriated shall not be increased. Balances in the funds included in this section, unless otherwise provided, shall not revert to the general fund.

There is appropriated to the:

* * *

BUREAU OR REVENUE, six percent of total collections of the following taxes and fees: compensating tax, luxury tax, income tax, liquor tax, motor transportation (mileage) tax, [* municipal sales taxes,] emergency school tax, and severance tax, and five percent of total collections of motor fuel taxes. All prior acts fixing percentages to be used {**283*} by the bureau of revenue for costs of collection are hereby amended to conform to this act. **The above amounts deducted from gross collections of the named taxes and fees shall be placed in the bureau of revenue administrative fund.** There may be expended from this fund for the years indicated the sum of ____ for the following purposes:" (Emphasis Supplied)

* * *

Article IV, Section 30 of the Constitution of New Mexico prohibits the expenditure of public funds which have not been appropriated by the Legislature. In order to meet the constitutional requirements for appropriations, the appropriation must distinctly specify the sum appropriated and the object to which it is to be applied, **McAdoo Petroleum Corporation v. Pankey**, 35 N.M. 246. However, the fact that the sum appropriated must be distinctly specified does not intend that the sum to be expended must be accurately determined in advance. It is only necessary that a maximum amount or limit be fixed. **Gamble v. Velarde**, 36 N.M. 262.

The language of Section 7 as quoted above is clear in its intent that there was and "is appropriated to the Bureau of Revenue, six percent of total collections of" certain taxes and "five percent of total collections of" certain other taxes. The language employed by the legislature leaves no room for doubt as to what was the appropriation intended.

There remains some question as to the language "there may be expended from this fund for the years indicated the sum of" certain specified sums of money. There may be some contention that this indicates the limits of the appropriations to the Bureau of Revenue. However, a close analysis of the language employed by the legislature in setting up the appropriations for the agencies operating with dedicated funds discloses that the sums delineated are the budgets approved and for which funds were carved out of the general fund for expenditure, with further justification or authorization unnecessary. It was recognized however that "emergency" conditions might arise for which additional funds would be needed and, in that event, the Department of Finance and Administration, upon establishing that emergency, could under Section 7, quoted

above, "allow emergency budgetary increases **within available revenues designated by law for administrative purposes.**"

It is a principle of law so well recognized that authority need not be cited that a legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. **U.S. v. Grimaud**, 220 U.S. 506.

It has been repeatedly held by the courts of New Mexico, that a legislature, in a general appropriations Act, may set forth details of expending funds appropriated. In fact, the Court has stated that "to sustain the contention that the general appropriation bill should contain nothing, save the bare appropriations of money, and that provisions for the expenditure of the money, or its accounting, could not be included therein . . . would lead to results so incongruous that it must be presumed that the framers of the constitution had no such intent in the adoption of the restrictions referred to." **State ex rel Lucero v. Marron**, 17 N.M. 304; c.f. **State ex rel Whittier v. Safford**, 28 N.M. 531.

It is our opinion that the legislature appropriated for the operations of the Bureau of Revenue the full amount of the Administrative Fund as therein defined, but that it limited that Bureau's expenditures to the amounts set forth in the line items unless the approval, after appropriate findings of emergency conditions existing, *{*284}* of the Department of Finance and Administration is first obtained.

In answer to your second question we should point out that this office, in an earlier opinion this year, had occasion to consider the definition of the word "emergency", as used by the Legislature. See Opinion No. 59-79, dated July 22, 1959, a copy of which is enclosed. Among those definitions suggested was the following from the case of *LeFebvre v. Callaghan*, 263 Pac. 589 (Ariz. 1928):

"An unforeseen occurrence or combination of circumstances which calls for immediate action or remedy'."

There are, of course, numerous other judicial definitions of the word "emergency" when used in the same sense as used in the 1959 Appropriations Act.

The Appropriations Act has vested the Department of Finance and Administration with **authority to determine** the emergency conditions upon which the appropriations in excess of those designated in the line items could be used.

The Department of Finance and Administration has made its determination that these emergency conditions exist. This is an administrative decision and it is a well established legal principle that the office of the Attorney General is not the reviewing authority to which such administrative decisions may be appealed. In proper instances, where the administrative decisions may be questioned, it is for the Courts to determine the validity of the administrator's action. Therefore, we feel that we are not in a position

to render an opinion as to the propriety of the administrative determination that an emergency existed.

The answer to your third question depends upon whom is to be charged with the alleged offense and where the offense occurred. Under our constitutional and statutory provisions, a grand jury can only indict for offenses committed within the county in which it is convened. Therefore, if the alleged fraud to which you refer was committed in Hidalgo County, that is the county in which the grand jury should be called. If the alleged offense occurred in Santa Fe County, then that is the proper county to convene the grand jury.

Thomas O. Olson

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