

Opinion No. 81-12

June 24, 1981

OPINION OF: Jeff Bingaman, Attorney General

BY: Jill Z. Cooper, Deputy Attorney General

TO: Ms. Maralyn Budke, Director, Legislative Finance Committee, State Capitol Building, Santa Fe, New Mexico 87503

PUBLIC FINANCES; CONSTITUTION - NEW MEXICO

Synopsis: 1. The Governor's partial veto of a bill appropriating money to the "low income utility assistance fund" effectively deletes all references to the income support division of the human services department.

2. The legislature could insure that an appropriation to that fund be used by that department or not at all.

FACTS

House Appropriations and Finance Committee Substitute for House Bill 167 [being Laws 1981, Chapter 168], was enacted to provide:

"Section 1. APPROPRIATION -- CONTINGENCY. --

A. One million dollars (\$1,000,000) is appropriated from the general fund to the low income utility assistance fund for use by the income support division of the human services department for expenditure in the seventieth fiscal year for the purpose of carrying out the provisions of the Low Income Utility Assistance Act. Any unexpended or unencumbered balance at the end of the seventieth fiscal year shall revert to the general fund.

B. Expenditures from the low income utility assistance fund to eligible recipients shall be made in compliance with the Low Income Utility Assistance Act contingent upon the administration and disbursement of federal funds intended for the low income utility assistance program by the income support division of the human services department.

C. The income support division of the human services department shall administer the state low income utility assistance fund and make utility assistance supplement payments on a case-by-case determination of need in compliance with Sections 27-6-14 and 27-6-15 NMSA 1978, except that within thirty days prior to any expenditures from the general fund appropriation authorized in Section 1 of this act, the human services department shall develop a statewide distribution plan for submission to the governor and the legislative finance committee."

By partial veto, the governor deleted the reference to the income support division in paragraph A as well as all of paragraphs B and C.

In his message to the House of Representatives, the governor stated as his reason for the veto that the stricken language

". . . constitutes an unconstitutional attempt to amend Section 27-6-13 NMSA 1978 by reference. Under this section, the Governor is authorized to designate the department to administer the Low Income Utility Assistance Act. Furthermore, the title of this bill provides only for an appropriation to the low income assistance fund. The language vetoed designating the department to administer this program is therefore probably void under Article 4, Section 16 of the New Mexico Constitution."

QUESTIONS

1. Did the governor's partial veto of a bill appropriating money to the "low income utility assistance fund" effectively delete all references to the income support division of the human services department?
2. If so, could the legislature insure that an appropriation to that fund be used by that department or not at all?

CONCLUSIONS

1. Yes.
2. Yes.

ANALYSIS

The authority vested in the governor to exercise a right of partial veto is defined at Article IV, Section 22, N. Mex. Const., which provides, in part, that

"The governor may . . . 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."

OPINION

House Appropriations and Finance Committee Substitute for House Bill 167 (HAFB Sub/HB 167), being a bill which appropriates money, is subject to partial veto. See, **Dickson v. Saiz**, 62 N.M. 227, 308 P.2d 205 (1957). The power of partial veto is not, however, limited to language appropriating money but extends to any part of a bill of general legislation which contains incidental items of appropriation. **Dickson v. Saiz, supra**; **State ex rel. Sego v. Kirkpatrick**, 86 N.M. 359, 524 P.2d 975 (1974).

Nevertheless, the extent of the governor's power to exercise a veto "does not mean that there are no limitations on the partial veto of bills appropriating money." **State ex rel. Sego v. Kirkpatrick**, 86 N.M. at 365. The nature of those limitations were well stated by the Court in the **Sego** case:

"The power of partial veto is the power to disapprove. This is a negative power, or a power to delete or destroy a part or item, and is not a positive power, or a power to alter, enlarge or increase the effect of the remaining parts or items. It is not the power to enact or create new legislation by selective deletions"

Thus, a partial veto must be so exercised that it eliminates or destroys the whole of an item or part and does not distort the legislative intent, and in effect create legislation inconsistent with that enacted by the Legislature, by the careful striking of words, phrases, clauses or sentences. 86 N.M. at 365."

The Court applied these principles to find invalid several partial vetoes of language contained in the General Appropriations Act of 1974. Although the broad reasoning of the **Sego** opinion may, on its face, suggest that the governor's partial veto of HAFB Sub/HB 167 is similarly invalid, in order to properly apply the **Sego** opinion, it is necessary to {233} interpret its reasoning in the context of the legislative language which the Court considered.

For example, where the legislature had provided in the General Appropriations Act of 1974 that

"This contingent appropriation shall be disbursed only upon . . . provided, however, that no funds shall be disbursed from this appropriation which would allow an operating budget greater than \$1,037,000"

The Court held invalid the governor's veto of this language for the reason that

"The Governor may not distort, frustrate or defeat the legislative purpose by a veto of proper legislative conditions, restrictions, limitations or contingencies placed upon an appropriation and permit the appropriation to stand. 86 N.M. at 366."

The Court characterized the vetoed language as being "a very explicitly worded contingency upon the disbursement of this appropriation and a very explicitly worded limiting or restrictive proviso, provision or condition upon the amount of funds from this appropriation which could be disbursed." 86 N.M. at 365.

For essentially the same reasons, the Court invalidated partial vetoes which had deleted language providing that appropriated funds be spent only

"In the event the state scientific laboratory cannot provide"

and language subjecting an appropriation to the limitation that

"None of the above appropriation shall be spent for"

Thus, where the Court in the **Sego** case disallowed vetoes of conditions imposed on appropriations, the conditions were expressed as explicitly worded contingencies or restrictions on the expenditure of the appropriated funds. The **Sego** opinion, therefore, would support a conclusion that a partial veto of HAFC Sub/HB 167 was invalid only to the extent that the vetoed language contained such explicitly worded contingencies or restrictions.

As defined in the **Sego** case, the test of whether a partial veto is valid requires more than a determination that legislative intent has been defeated, for indeed, that would be the result of any partial veto. Rather, the determination must be made that the remaining language is so distorted by the veto as to "create legislation inconsistent with that enacted by the legislature" Notwithstanding the clear intent of the legislature that the fund be used and administered by the income support division of the human services department, the only explicit contingency expressed by the language of HAFC Sub/HB 167 was in that part of paragraph B which stated that the expenditure of the appropriation shall be

". . . contingent upon the administration and disbursement of federal funds intended for the low income utility assistance program by the income support division of the human services department."

That contingency, however, defines a conditions which is outside the scope of legislative authority. The disbursement of federal funds is determined by federal regulation. See, Federal Register, Vol. 45, No. 196 October 7, 1980, P. 66669, which authorizes the governor, not the legislature, to determine the responsible state agency.

{*234} The expenditure of **federal** funds is not subject to legislative control. The **Sego** court cited with approval **Mac Manus v. Love**, 499 P.2d 609 (Colo. 1972), to the effect that "'federal contributions are not the subject of the appropriative power of the legislature' and the Legislature's attempt to do so was '[constitutionally] void as an infringement upon the executive function of administration.'" 86 N.M. at 370. Relying on the **Sego** opinion, this office concluded in Opinion of the Attorney General No. 75-10, dated February 7, 1975, that "the legislature is prevented by the separation of powers doctrine from imposing any conditions on the executive branch's use of federal or non-state money." See, also, Opinion of the Attorney General No. 80-40, dated December 10, 1980. Thus, regardless of the validity of the veto, the language in paragraph B is, in any case, void.

The vetoed language in paragraphs A and C is intended to designate the department responsible for the expenditure of **state** funds. HAFC Sub/HB 167 appropriates one million dollars from the general fund to the "low income utility assistance fund" for the seventieth fiscal year and provides that it be used by the income support division of the human services department in compliance with the Low Income Utility Assistance Act, Sections 27-6-11 to 27-6-16 NMSA 1978. That Act created the "low income utility

assistance fund" and initially provided for its administration by the human services department. Laws 1979, Chapter 290. The Act was later amended to define the department responsible for the administration of the fund as "the agency of the state designated by the governor." Laws 1980, Chapter 118.

Paragraphs A and C of HAFB Sub/HB 167, in effect, attempt to amend the Act for the seventieth fiscal year to re-establish the administration of the fund in the human services department. The language pertaining to the income support division of the human services department was drafted as a provision in addition to the appropriation and not as an expressly worded contingency, the deletion of which would distort legislative intent. An appropriation to the "low income utility assistance fund . . ." for the purpose of carrying out the provision of the Low Income Utility Assistance Act is not inconsistent with an appropriation to the fund to be used **by the income support division** for the same purposes.

Thus, by deleting all references to the income support division and the human services department, the governor may have defeated legislative intent to override his statutory authority to designate the department responsible for the administration of the "low income utility assistance fund," but he has not impermissibly created inconsistent legislation." To paraphrase from **Dickson v. Saiz**, 62 N.M. at 238,

". . . in order to accomplish his purpose [to eliminate all references to the income support division], the Governor was compelled to strike language [making such references] wherever found. As we view the matter, he was acting strictly within his quasi-legislative capacity in exercising, as he did, his power of partial veto. We see in his action no usurpation of the legislative function. There was here present no reducing, nor any scaling, of appropriations . . ."

{*235} The reasoning of the **Sego** case would not, accordingly, apply to find that the governor impermissibly exercised his power of partial veto with respect to the language in paragraphs A and C of HAFB Sub/HB 167. As that language was properly vetoed and is therefore void under Article IV, Section 22, it is not necessary to consider whether it is otherwise void under Article IV, Section 16, Because of an insufficient title.

Having determined that HAFB Sub/HB 167 is to be given effect as vetoed by the governor, consideration may be given to the second question as to whether the legislature could insure that an appropriation to the "low income utility assistance fund" be used by the income support division or not at all. First, as the Court noted in **Dickson v. Saiz**, "[c]ertainly, any legislature, if apprehensive of abuse of power of partial veto could easily forestall the danger by seeing to it that all bills reach the Governor on or prior to the 57th day of the session." 62 N.M. at 236.

Second, in accordance with the opinion of the Court in **State ex rel. Sego v. Kirkpatrick**, if the legislature were to expressly provide that an appropriation made to the "low income utility assistance fund" were to be expended **only in the event that** the governor designates the income support division of the department of human services

as the responsible "department" under the Low Income Utility Assistance Act, an attempted partial veto of such an expressly worded contingency or restriction would, in that particular instance, most likely be invalid.

ATTORNEY GENERAL

Jeff Bingaman, Attorney General