

Linda Willard

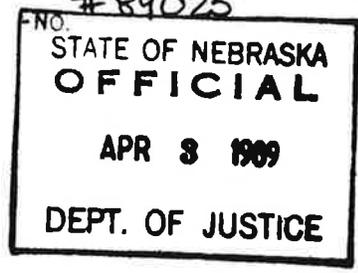
DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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STATE CAPITOL

LINCOLN, NEBRASKA 68509



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DATE: March 30, 1989

SUBJECT: Constitutionality of LB 809 - Property Tax Relief Trust Fund Act

REQUESTED BY: Senator Timothy J. Hall  
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General  
L. Jay Bartel, Assistant Attorney General

You have requested our opinion on several questions relating to LB 809. Generally, LB 809 would create a Property Tax Relief Trust Fund [the "Fund"], which would be based on the amount by which net general fund receipts from state tax revenues exceed projected or forecasted net general fund receipts for the fiscal year. This Fund would be distributed to county treasurers to reimburse local taxing subdivisions for reduced revenues resulting from the percentage credit or reduction provided to all property taxpayers by operation of the Act.

Your initial question concerns whether Section 5 of the bill, which provides that the amount to be certified by the State Tax Commissioner to the State Treasurer for deposit into the Fund shall be based on the amount by which actual net general fund receipts exceed net general fund receipts as forecasted by the Nebraska Economic Forecasting Advisory Board [the "Board"], represents an unconstitutional delegation of legislative power to the Board.

In the case of In re Estate of West, 226 Neb. 813, 415 N.W.2d 769 (1987), the Nebraska Supreme Court addressed a challenge to the constitutionality of the Nebraska estate tax. The personal representative of the West estate contended that the Nebraska Legislature, by adopting a state estate tax determined by reference to the amount of federal estate tax liability, had unconstitutionally delegated the taxing power of the state in contravention of the non-delegation doctrine. Rejecting the argument that the reference to federal estate tax law in specifying the computation of Nebraska estate tax represented an unconstitutional delegation of legislative power, the court stated:

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Whether the Nebraska estate or excise tax, § 77-2101.01, is imposed on the transfer of every Nebraska resident's estate is a matter of legislative prerogative exercisable only by the Nebraska Legislature and not exercisable by any other legislature, such as the U.S. Congress. Although the Nebraska estate tax is correlative in operation with the federal estate tax law, inasmuch as the amount of the Nebraska estate tax is computed, and eventually determined, by reference to the state death tax credit used in fixing federal estate tax liability, the Nebraska estate tax is, nevertheless, authorized and imposed in a statute enacted by the Nebraska Legislature and does not exist independent of such legislative act of the Nebraska Legislature.

\* \* \*

. . . [W]e conclude that § 77-2101.01 specifies a tax which, although referable to federal law for computation of the amount payable to the State of Nebraska, remains subject to the power of the Nebraska Legislature, which determines whether such tax exists or will continue to exist.

Id. at 826-27, 415 N.W.2d at 779.

Analyzing the provisions of LB 809, it is evident that, while the amount of general fund receipts to be transferred to the Fund will depend, in part, on the forecast of general fund receipts made by the Nebraska Economic Forecasting Advisory Board, this does not constitute an impermissible delegation of legislative power to the Board. Under LB 809, no legislative authority would, in fact, be delegated to the Board; rather, the bill simply provides that the advisory forecast of net general fund receipts for the fiscal year computed by the Board in connection with its duties under Neb.Rev.Stat. §§ 77-27,156 to 77-27,159 (Reissue 1986 and Cum. Supp. 1988) shall be used in determining the amount of any general fund revenues to be certified by the Tax Commissioner to the State Treasurer for transfer into the Fund. The Legislature has not delegated any of its legislative power to establish the Fund and to set forth the manner in which the amount to be deposited in the Fund is to be calculated. The mere reference to the amount of forecasted general fund receipts made by the Board in computing the amount to be transferred does not, based on the rationale of the decision in West, represent an unconstitutional delegation of legislative power to the Board.

Your second question concerns whether the Section 6 of the bill, which requires the State Treasurer to distribute to county treasurers the amount of property tax relief available in the Fund,

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violates Article III, Section 25, of the Nebraska Constitution, which prohibits the expenditure of state funds without a specific appropriation.

Article III, Section 25, of the Nebraska Constitution provides, in pertinent part:

No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, and on the presentation of a warrant issued as the Legislature may direct, and no money shall be diverted from any appropriation made for any purpose or taken from any fund whatever by resolution.

With regard to this constitutional provision, the Nebraska Supreme Court has stated the following:

The latter section makes necessary a specific appropriation for a particular purpose, and forbids the drawing of a single dollar from the state treasury unless authorized by an appropriation.

\* \* \*

Under the Constitution it is not within the province of executive or administrative officers to determine the purpose for which the state's funds may be expended. Only the legislative branch of the government may declare for what purpose and within what amounts state funds may be expended. Any other expenditure than that authorized by the Constitution and valid enactments thereunder is unlawful.

Fischer v. Marsh, 113 Neb. 153, 156, 202 N.W. 422, 423 (1925).  
See, also, Rein v. Johnson, 149 Neb. 67, 30 N.W.2d 548 (1947); Ruge v. State, 201 Neb. 391, 267 N.W.2d 748 (1978).

In order to clarify what constitutes a specific appropriation under Article III, Section 25, the Legislature in 1979 enacted a law spelling out the necessary requirements for a valid appropriation under the State Constitution. Laws 1979, LB 232 (codified at Neb.Rev.Stat. §§ 49-804 to 49-805 (Reissue 1988)). Section 49-804 provides as follows:

An appropriation shall only exist when the following criteria have been met:

(1) There shall be included the phrase there is hereby appropriated;

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(2) A specific fund type shall be identified and the fund shall be appropriated;

(3) The amount to be appropriated from such fund shall be identified;

(4) A specific budget program or a specific statement reflecting the purpose for expending such funds shall be identified; and

(5) The time period during which such funds shall be expended shall be identified.

Neb.Rev.Stat. § 49-805 (Reissue 1988) further provides that "Any legislation not meeting the criteria established in section 49-804 shall not be considered a valid appropriation as defined in Article 3, section 22 of the Nebraska Constitution."

Obviously, LB 809 does not contain any language specifically appropriating monies transferred to the Fund. Furthermore, as noted previously, no general fund monies may be distributed from the state treasury in the absence of a valid legislative appropriation. Accordingly, the provisions of Section 6 of the bill alone, providing for distribution of the Fund by the State Treasurer to county treasurers, would not be sufficient to permit actual distribution of the Fund absent the adoption of an appropriations bill meeting the requirements of § 49-804. The adoption of an appropriations bill in compliance with Article III, Section 25, and § 49-804, would eliminate any constitutional question based on the lack of a specific appropriation to permit distribution of the Fund created under LB 809.

Finally, you ask whether it would be permissible under the criteria contained in § 49-804 to provide an appropriation of state funds where the precise amount of state funds to be expended is not ascertainable until the end of the fiscal year.

Assuming that an appropriations bill were to be prepared in accordance with the current provisions of LB 809, it appears that the exact dollar amount to be appropriated could not be included therein by virtue of the fact that the amount of actual net general fund receipts in excess of the amount of net general fund receipts forecasted by the Board could not be determined until the end of the fiscal year, at which time this amount is to be certified by the Tax Commissioner to the State Treasurer for transfer into the Fund. The inability to include a precise dollar amount in such an appropriation, however, does not necessarily render an appropriation of this nature insufficient under §49-804 or Article III, Section 25.

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The general rule regarding constitutional requirements that appropriations must be specific in amount is stated in 81A C.J.S. States § 237 (1977) as follows:

[I]f the statute making an appropriation distinctly sets aside the whole of a special fund thereby created, and no other funds, for a designated purpose, the appropriation complies sufficiently with the constitutional requirements and is valid.

\* \* \*

Even where specification of the amount is required, it is sufficient if the amount of the appropriation is ascertainable by a mathematical calculation. It is not essential or vital to an appropriation that it should be for an amount definitely ascertained prior to the appropriation; and an appropriation, the amount of which will be made certain by a mere mathematical computation, if the provisions of the act are carried into effect, sufficiently complies with this requirement.

In Cox v. Bates, 237 S.C. 198, 116 S.E.2d 828 (1960), the Supreme Court of South Carolina upheld the constitutionality of a statute providing for the creation and maintenance of a fund from excess state revenues to be distributed to counties for general public school purposes against a challenge that the appropriation of the surplus was indefinite in amount and thus did not comply with the state constitutional requirement of specificity in appropriations. In this regard, the court stated:

Complaint is made that the appropriation of the surplus to the counties is in indefinite amount. But it is as definite as it could have been made when the law was enacted. It is of all of the surplus, if any, when ascertained, after the setting aside of the fixed reserve fund. Simply arithmetic makes it definite and certain.

Id. at \_\_\_\_\_, 116 S.E.2d at 837.

Similarly, in Black v. Oklahoma Funding Bond Commission, 193 Okla. 1, 140 P.2d 740 (1943), the Supreme Court of Oklahoma dealt with a challenge to the constitutionality of an act transferring and appropriating the amount of revenues accruing in the state general fund in excess of total legislative appropriations into the State Bond Retirement Fund. In upholding the constitutionality of the act against the contention that the appropriation of the general fund surplus in this manner failed to satisfy the specific appropriation requirement in the Oklahoma Constitution, the court stated:

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Of the fifth ground of attack we observe that the act became law before the end of the fiscal year 1942-43 and therefore the amount of surplus which would accrue in the fund could not be stated in a definite amount when same was passed. As to the suggestion that the act does not distinctly specify the sums appropriated, we observe that the act devotes the entire surplus, whatever it may be when capable of ascertainment, to the purposes therein specified. The case of *Edwards v. Childers*, 102 Okl. 158, 228 P. 472, is controlling in that regard. Therein we held in paragraph three of the syllabus as follows: "A legislative act creating a special fund, all of which is, by the terms of the act, appropriated and directed to be expended for a special purpose and in an express manner amounts to an appropriation of the entire fund so created, and where the amount accruing to and paid into said fund is capable of being definitely ascertained, it is sufficiently definite and certain to comply with the provisions of article 5, § 55, of the Constitution."

In this act the Legislature created a special fund of this surplus which was capable of specific ascertainment by ordinary bookkeeping methods and calculations at a time previous to the time when the law should be first administered.

Id. at \_\_\_\_\_, 140 P.2d at 745.

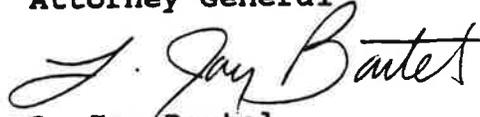
See also, State v. Moore, 50 Neb. 88, 99, 69 N.W. 373, 377 (1896) ("An appropriation may be specific. . . when its amount is to be ascertained in the future from the collection of the revenue.").

On the basis of the foregoing, we believe that it would be possible to adopt appropriation language permitting distribution of the Fund created under LB 809 which would be sufficient to satisfy the specific appropriation requirement in Article III, Section 25, as well as the requirements of § 49-804. The amount of excess or surplus net general fund receipts to be transferred into the Fund for distribution to the counties may be determined by a simple mathematical calculation. Accordingly, appropriation language adopted on this basis would not render the amount indefinite or uncertain, in contravention of Nebraska constitutional and statutory requirements governing the validity of legislative appropriations.

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Very truly yours,

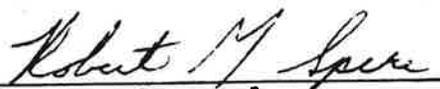
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cc: Patrick J. O'Donnell  
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APPROVED:

  
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7-105-13