

Jim Wees

DEPARTMENT OF JUSTICE

STATE OF NEBRASKA
TELEPHONE 402/471-2682 • STATE CAPITOL • LINCOLN, NEBRASKA 68509

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NO.
STATE OF NEBRASKA
OFFICIAL
OCT 30 1985
DEPT. OF JUSTICE

ROBERT M. SPIRE
Attorney General
A. EUGENE CRUMP
Deputy Attorney General

October 30, 1985

Senator Tom Vickers
Nebraska State Legislature
State Capitol
Lincoln, Nebraska 68509

Dear Senator Vickers:

This is in response to your opinion request of October 23, 1985. In that letter you request an opinion on the constitutionality of an amendment you wish to propose which would give "a specified amount of discretion to agency directors to reduce individual programs within their agency's purview." Your question is whether such a lump sum budget reduction is constitutional. You indicate that your proposed amendment would be similar to an amendment previously introduced which provided that:

It is the intent of the Legislature that:

(1) Each agency director allocate the agency General Fund appropriation among the various programs of the agency;

(2) Each agency shall absorb the reduction to the General Fund appropriation made for fiscal year 1985-86 by the Beutler-Vickers amendment with the least possible adverse effect on direct services to the public; . . .

In a previous opinion dated October 29, 1975, we addressed a similar legislative proposal which also arose out of a special session seeking budget reductions. A copy of this opinion is attached. In that situation the proposed legislation would also have allowed agency directors' discretion in where to cut their own appropriations. We concluded that such legislation was an unconstitutional delegation of legislative authority and did not

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meet the constitutional requirements for a specific appropriation. We find that reasoning applicable here.

Article III, Section 25, of the Nebraska Constitution provides that

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.

Article III, Section 22, also provides that "Each Legislature shall make appropriations for the expenses of the Government."

The term "specific appropriation" has been defined on numerous occasions by our courts. In State v. Wallichs, 12 Neb. 407, 11 N.W. 806 (1882), the court indicated that: "'specific appropriation' means a particular, a definite, a limited, a precise appropriation. . . ." In State ex rel. Cline v. Wallichs, 15 Neb. 609, 20 N.W. 110 (1884), the court further indicated that: "A specific appropriation is one expressly providing funds for a particular purpose. There can be no implied appropriation of money under our constitution, . . ." Likewise, in State v. Moore, 50 Neb. 88, 69 N.W.373 (1896), the court stated that:

An appropriation may be specific, according to any of the definitions heretofore given, when its amount is to be ascertained in the future from the collection of the revenue. It cannot be specific when it is to be ascertained only by the requisitions which may be made by the recipients.

. . .

In State v. Moore, the court also noted that:

[T]o "appropriate" is to set apart from the public revenue a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object and for no other. This definition cannot be too strict as applied to our

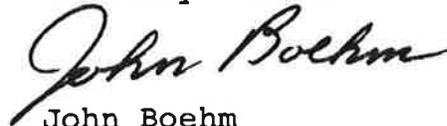
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own constitution containing the requirement that the appropriations must be specific. . . .

Your proposal would appear to be in contravention of these principles, since there would, in effect, be no specific appropriations for the various programs within the state agencies. This would in turn constitute an improper delegation of legislative authority to the agency directors to determine their own level of appropriations for the various programs within their agencies. We must therefore conclude that such an amendment would be unconstitutional.

Very truly yours,

ROBERT M. SPIRE
Attorney General



John Boehm
Assistant Attorney General

JB:ejg
enc.

cc Mr. Patrick J. O'Donnell
Clerk of the Legislature

The Legislature, pursuant to Neb. Rev. Stat. § 85 180 (Reissue 1971), has expressly provided that the Board of Regents may enter into agreements with suitable schools or colleges of veterinary medicine and surgery in other states for certain purposes. So long as those agreements are made with schools or colleges which are owned or exclusively controlled by other states or political subdivisions of other states, section 11 of Article VII of the Constitution of Nebraska is not violated. See, section 18 of Article XV of the Constitution of Nebraska, which is quoted above. We are therefore of the opinion that the University of Nebraska's veterinary program, as it has been described to us, does not violate section 11 of Article VII of the Constitution of Nebraska.

Perhaps an additional comment is in order. In an opinion filed 23 May 1975 this office applied the rule of ejusdem generis to the precise language used in Neb. Rev. Stat. § 43-642 (Supp. 1974) and concluded that the general phrase "any program operated or approved by the State of Nebraska" in that statute refers to and means any such programs offered by governmental institutions of this state. That opinion is strictly in accord with the constitutional principles discussed herein and is hereby affirmed.

II.

"Is Nebraska constitutionally barred from participating in the State Incentive Program of the Federal Government because the State Constitution prohibits the state from adding funds to the federal funds provided for this program?"

The State Student Incentive Grant Program, Title IV, Part A, Subpart 3 of the Higher Education Act of 1965, as amended, makes federal funds available to the states to assist them in providing grants to eligible students to attend or continue to attend institutions of higher education. It does not require the states to appropriate funds to match federal funds and to award the combined funds in the form of a grant to students to attend or continue to attend institutions of higher education which are not owned or exclusively controlled by the respective states. Consequently Nebraska is not constitutionally barred from participating in the State Incentive Grant Program of the federal government.

No. 133

October 29, 1975

Dear Senator Clark:

You request our advice concerning section 66 of L.B. 6, for the First Special Session of the Eighty-Fourth Legislature. Section 66 of L.B. 6 reads as follows:

"To allow flexibility in meeting the reduction in the total agency General Fund appropriations made by this act, each agency is authorized to expend from any program General Fund appropriation an amount not to exceed the original General Fund appropriation to that program provided by the Eighty-fourth Legislature, First Session, 1975; Provided, the total agency

General Fund expenditure shall not exceed the General Fund appropriation established by this act."

In particular, you ask if section 66 is a constitutional delegation of authority. We find that it is not. We also find that section 66 is probably invalid in that it does not satisfy the constitutional requirement that appropriations be "specific."

Under Section 22, Article III, Constitution of Nebraska, it is the duty of each Legislature to make appropriations for the expenses of government. Section 25 of that same Article is as follows:

"No allowance shall be made for the incidental expenses of any state officer except the same be made by general appropriation and upon an account specifying each item. 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 whatsoever by resolution."

The term "specific appropriation" has been defined repeatedly by the courts. In *State v. Wallich*, 12 Neb. 407, 11 N.W. 806 (1882), the court said:

". . . 'specific appropriation' means a particular, a definite, a limited, a precise appropriation. . . ."

In *State ex rel. Cline v. Wallich*, 15 Neb. 609, 20 N.W. 110 (1884), the court said:

". . . A specific appropriation is one expressly providing funds for a particular purpose. There can be no implied appropriation of money under our constitution, nor any claim audited unless the items of the account are set out. . . . There is also a provision that, 'no money shall be diverted from any appropriation made for any purpose.' The legislature possesses no power to make an implied appropriation. . . ."

In *State v. Moore*, 50 Neb. 88, 69 N.W. 373 (1896), the court said:

". . . An appropriation may be specific, according to any of the definitions heretofore given, when its amount is to be ascertained in the future from the collection of the revenue. It cannot be specific when it is to be ascertained only by the requisitions which may be made by the recipients. . . ."

In view of the authorities cited above, it appears that section 66 of L.B. 6 does not satisfy the constitutional requirement that appropriations be specific. Section 66 authorizes each agency ". . . to expend from any program General Fund appropriation an amount not to exceed the original General Fund appropriation to that program provided by the Eighty-fourth Legislature. . . . The overall effect of section 66 is that the Legislature has made a straight lump sum appropriation to the particular agency and the executive officers of that agency are delegated the authority to determine which program appropriations should be reduced and which program appropriations should be

maintained at their previous level or possibly increased above the previously appropriated level. The obvious purpose of this section is to give the executive branch freedom to administer and expend the funds as they might determine. This does not constitute a "specific appropriation" but is a straight lump sum appropriation and therefore is not valid under our Constitution.

In *State v. Moore*, 50 Neb. 88, 69 N.W. 373 (1896), the court, in discussing appropriations, said the following:

"...to 'appropriate' is to set apart from the public revenue a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object and for no other. This definition cannot be too strict as applied to our own constitution containing the requirement that the appropriations must be specific. . . ."

In addition, our constitutional provision provides that no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, and no money shall be diverted from any appropriation made for any purpose or taken from any fund whatever, either by joint or separate resolution. This is a restriction upon the legislative authority to take funds from an appropriation to an agency without enacting specific legislation therefor. It does not, therefore, appear logical that the Legislature could authorize the executive officers of any agency to accomplish the same end by a general statement of intent in an appropriation bill such as is seen in section 66 of L.B. 6. We conclude, therefore, that section 66 of L.B. 6 is probably an invalid delegation of legislative authority. See *Rein v. Johnson*, 149 Neb. 67, 30 N.W. 2d 548 (1947), at page 80.

In view of the above discussions and cited authorities, it is our opinion that section 66 of L.B. 6, for the First Special Session of the Eighty-Fourth Legislature is probably invalid because it fails to satisfy the constitutional requirement that appropriations be specific and also because it constitutes an unconstitutional delegation of legislative authority. While our answers are somewhat general, we do hope that they can serve as a guideline to your committee and the Legislature in its consideration of the appropriations bill.

No. 134

October 24, 1975

Dear Senator:

In your letter of October 21, 1975, you make reference to Article VIII, Section 8 of the Nebraska Constitution which provides:

"The Legislature at its first session shall provide by law for the funding of all outstanding warrants, and other indebtedness of the state, at a rate of interest not exceeding eight per cent per annum."