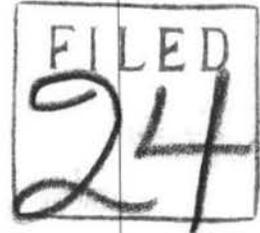


GOVERNOR:
DEFICIENCY APPROPRIATION:

Agreement of the Governor to sign a deficiency appropriation violates certain provisions of the Constitution and Statutes.

February 19, 1942



Honorable Forrest C. Donnell
Governor
Jefferson City, Missouri

Dear Governor Donnell:

We acknowledge receipt of your letter requesting an opinion from this office, which reads as follows:

"Enclosed is copy of letter of February 10 from Mr. Turner B. Morton, Grain Warehouse Commissioner, to myself. You will observe that, due to an earlier misunderstanding as to the length of time the appropriations were to cover, Mr. Morton finds the department in a condition of financial stringency. Mr. Morton feels that a deficiency is inescapable in operations. As I understand, from a conference with him, the printing company is willing to sell merchandise in reliance on a deficiency appropriation for such merchandise being made provided the Governor makes an agreement that he will approve such deficiency appropriation if the same shall be made by the Legislature. I ask of you your official opinion whether there would be, in the Governor making such an agreement, any violation of law. I call especially to your attention, in this connection, Section 48 of Article IV of the Constitution of Missouri though I do not mean to imply that said Section is the only

portion of the law which requires examination in order to provide me with the desired official opinion."

59 C. J., Section 286, page 172, reads as follows:

"Public officers have and can exercise only such powers as are conferred on them by law, and a state is not bound by contracts made in its behalf by its officers or agents without previous authority conferred by statute or the constitution, unless such authorized contracts have been afterward ratified by the legislature. * * *"

Section 285 of the same authority reads in part as follows:

" * * * The governor and other executive officers of a state have no general authority to contract in its behalf and can bind the state only within the power specially conferred on them by law."

In the case of Aetna Ins. Co. v. O'Malley, 124 S. W. (2d) 1164, the court, at l. c. 1166, said:

" * * * Before a state officer can enter into a valid contract he must be given that power either by the Constitution or by the statutes. All persons dealing with such officers are charged with knowledge of the extent of their authority and are bound, at their peril, to ascertain whether the contemplated contract is within the power conferred. Such power must be exercised in manner and form as directed by the Legislature."

Section 48 of Article IV of the Constitution of Missouri provides:

"The General Assembly shall have no power to grant, or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered or a contract has been entered into and performed in whole or in part, nor pay nor authorize the payment of any claim hereafter created against the State, or any county or municipality of the State, under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void."

Under the above constitutional provision, contracts or agreements made without express authority of law, attempting to bind the State, are null and void, and the General Assembly is prohibited from paying or authorizing the payment of any such claim.

A diligent search fails to reveal any constitutional or statutory provision authorizing you to make an agreement to approve a deficiency appropriation for printing furnished the Grain Inspection and Weighing Department in excess of its appropriation, and we have no hesitancy in holding that such an agreement made by you would be null and void and not binding upon the State. We think a number of other statutory and constitutional provisions, however, should be considered in answering your request.

If the agreement about which you inquire should be construed as a contract between the Printing Company and yourself or the Grain Inspection and Weighing Department to purchase printing and material in excess of the appropriation for that purpose, it would be a contract made without express authority of law, and, in fact, in violation of law, and the Legislature would be prohibited, under the provisions of Section 48 of Article IV of the Constitution, supra, from paying or authorizing the payment of any claim arising thereunder.

Under the provisions of Article 1, Chapter 120, R. S. Mo. 1939, the contract for State printing, including the printing for executive departments, must be let by the Commissioners of Public Printing.

The case of State v. Hackmann, 282 S. W. 1007, was an original proceeding in mandamus to compel the State Auditor to issue a warrant to pay for certain printing alleged to have been furnished the State Highway Commission. The printing and stationery was furnished the State Highway Commission without compliance with any of the provisions regulating public printing, and the Auditor refused to issue his warrant because the Commission was without power to bind the State for such an account. The Supreme Court upheld the contention of the State Auditor and in its opinion, at l. c. 1013, said:

"It further appears that no money has been appropriated out of which relator's bill, as herein submitted, can be paid. And since under the provisions of section 19, article 10, of the Constitution, no money may be paid out of the state treasury, except in pursuance of an appropriation by law, the respondent was and is without authority to issue a warrant in payment of relator's claim. For it cannot be said that a claim is paid pursuant to an appropriation act, where it is paid out of money specifically appropriated for a different purpose. And it might be said in passing that the Legislature could not now pass a valid act appropriating money out of which relator's claim could be paid, because his claim is based upon a contract entered into without authority of law, and section 48 of article 4 of the Constitution expressly prohibits the General Assembly from authorizing the payment of any claim hereafter created against the state under any agreement or con-

tract made without express authority of law, and that all such authorized contracts shall be null and void."

If the furnishing of printing or other materials to the Grain Inspection and Weighing Department upon your agreement to sign a deficiency appropriation was construed as a contract to furnish such printing and materials under the contract already let by the State Printing Commissioners, we still think that Section 48 of Article IV of the Constitution, supra, would prohibit the Legislature from paying or authorizing the payment of such claim.

Under the provisions of Section 14992, R. S. Mo. 1939, all work to be executed for the executive departments must be ordered through the Commissioners of Public Printing, after a requisition is first obtained in advance signed by the head of the department ordering such work, and said requisition must be approved by the Commissioners of Public Printing.

Under the provisions of Section 14995, R. S. Mo. 1939, the accounts for such printing must be carefully examined by the Commissioners of Public Printing and compared with the voucher and the order therefor, and when the account is corrected and endorsed by the Commissioners, the State Auditor is required to draw a warrant upon the treasury for the amount thereof, "payable out of any moneys appropriated for that purpose."

According to your letter, the work to be furnished the Grain Inspection and Weighing Department is or will be for an amount in excess of the appropriation for such purpose. In other words, the printing to be furnished, whether under the contract with the State Printing Commission or under a separate contract with you or the Grain Inspection and Weighing Department, will amount to more than the money appropriated by the Legislature for the present biennium for that purpose.

In the case of *Clas v. State*, 220 N. W. 185, the Supreme Court of Wisconsin said:

"The department of agriculture is an agency of the state, and the duties of

the commissioner are clearly defined by statute. In the expenditure of the public moneys he is strictly limited to the sums appropriated by the Legislature for a given purpose. No discretionary power is vested in him to exceed such appropriations. This is the law not only in this state, but elsewhere, and it is incumbent not only upon the department to take cognizance thereof and to act in accordance therewith, but every individual or corporation transacting business with the department is legally governed thereby, whether a contract provides for it or not."

In the case of Dickinson v. Edmondson, 178 S. W. 930, the Supreme Court of Arkansas, at l. c. 931, said:

" * * * The power of the General Assembly with respect to the public funds raised by general taxation is supreme, and no state official, from the highest to the lowest, has any power to create an obligation of the state, either legal or moral, unless there has first been a specific appropriation of funds to meet the obligation. The constitution provides, too, that no appropriation shall be for a longer period than two years, and thus a period is fixed over which the lawmakers hold complete control over the purse strings of the state."

The case of Fergus v. Brady, 115 N. E. 393, was an injunction suit against the Auditor of Public Accounts and Treasurer of the State of Illinois to prevent the payment of various sums appropriated by the General Assembly to boards and individuals for claims created without express authority of law and either without a previous appropriation or in excess of the appropriation. The Supreme Court

of Illinois, in passing upon constitutional and statutory provisions similar to our own, at l. c. 396, said:

"These provisions of the Constitution and statute are clear and unambiguous in terms, and their purpose and object cannot be misunderstood. Section 18 prohibits appropriations in excess of the revenue authorized by law to be raised in the period for which appropriations are made, but necessarily revenue, whether derived from one source or another in the future, must always be estimated and never can be a fixed and certain sum. Circumstances may occur that will cause the reasonable expectations of the General Assembly as to the amount of revenue to miscarry or not to be fulfilled so that there may be a temporary deficiency. To meet that condition which may arise from failure in making collections of taxes or result from decreased revenue from other sources, the section provides that in case of failure of revenue the General Assembly may contract debts, never to exceed \$250,000. This debt is only to be created by borrowing money--not by incurring debts or making contracts--since the section requires that the moneys thus borrowed shall be applied to the purpose for which they were obtained or to pay the debt thus created, and to no other purpose. No other debt can be contracted, except for the purpose of repelling invasion, suppressing insurrection, or defending the state in war, except upon a vote of the people at a general election. By section 19 the General Assembly is prohibited from authorizing the payment of any claim, or part

thereof, created against the state under any agreement or contract made without express authority of law, and all such unauthorized agreements or contracts are null and void, with the exception that the General Assembly may make appropriations for expenditures incurred in repelling invasion or suppressing insurrection. By the Criminal Code the making of a contract in excess of the amount of an appropriation subjects the offender to a fine not exceeding \$10,000 and removal from his office, trust, or employment. No right whatever can grow out of the commission of a crime, and by the plain language of the Constitution every claim or contract is utterly void if not within the amount of appropriations already made, unless there is express authority of law for the creation of the debt or claim or the making of the contract. * * *

In the case of *Thatcher v. City of St. Louis*, 122 S. W. (2d) 915, our Supreme Court recognized that an officer cannot bind the State in excess of appropriations made for the particular purpose. At l. c. 917 it was said:

" * * * Although he cannot obligate the state beyond appropriations made for such purposes, our Attorney General does have authority to employ special assistants. * * *

The case of *State v. Weatherby*, 129 S. W. (2d) 887, was an action by the State to recover legal fees paid the defendant as counsel for the Insurance Department out of appropriations for the Legal Department, and also to recover fees paid for writing opinions other than for the Insurance Department. The court upheld the contention of the State that the fees paid the defendant for writing the opinions at the request of the Attorney General could be recovered for the reason that there was no available funds appropriated to pay such a claim. In regard to the defendant's contention

that he could offset the value of his services performed for the Insurance Department against the claim of the State for money paid out of the Attorney General's fund, the court held that such a right would depend on whether or not there remained a sum sufficient to discharge defendant's claim out of the appropriation for the Insurance Department properly available for the payment of defendant's services and expenses. The court, at l. c. 893-4, said:

" * * * By its appropriation, the Legislative Department clearly limited the lawful extent of the State's obligation to pay for services rendered and expenses incurred on behalf of the Insurance Department. Our Statute respecting set-offs against the State and the common law principle of recoupment contemplate the assertion of legal, not unauthorized and unlawful, claims. To permit defendant to recoup payments made, absent available funds for lawful payment, would accomplish by indirection what could not be lawfully done directly, would make unlawful payments legal, infuse validity into the State Auditor's unauthorized warrants, encroach upon the legislative function of our State government and smack of judicial tyranny. * * *"

In view of the above, it is our opinion that a contract for printing in excess of the amount appropriated therefor, whether made by the State Printing Commission or otherwise, would be made without express authority of law, and therefore void.

There is another provision of the Constitution that should be considered. Section 44 of Article IV reads in part as follows:

"The General Assembly shall have no power to contract or to authorize the contracting of any debt or liability on behalf of the State, or to issue

bonds or other evidences of indebtedness thereof, except in the following cases:

* * * * *

"Second, On the occurring of an unforeseen emergency, or casual deficiency of the revenue, when the temporary liability incurred, upon the recommendation of the Governor first had, shall not exceed the sum of two hundred and fifty thousand dollars for any one year, to be paid in not more than two years from and after its creation. * * * *"

Under the above constitutional provision, the General Assembly has the power to contract or to authorize the contracting of a debt or liability, on the occurrence of an unforeseen emergency, or casual deficiency of the revenue, when the temporary liability incurred, upon the recommendation of the Governor first had, shall not exceed the sum of two hundred fifty thousand dollars for any one year. We fail to find, however, that the General Assembly has authorized you or the Grain Inspection and Weighing Department to contract any liability for printing or for any other purpose.

The General Assembly has a right to anticipate the revenue for the biennium, and an appropriation in anticipation of the current revenue is not a debt within the meaning of the Constitution. 59 C. J., Section 369, p. 223. However, by the great weight of authority an obligation in excess of the anticipated revenue is a debt within the meaning of the Constitution. 59 C. J., Section 368, p. 222. See, also, annotations contained in 92 A. L. R., pp. 1299 to 1315.

59 C. J., Section 367, p. 222, reads as follows:

"Agreements creating a liability against the state without express authority of law are void where in violation of a constitutional inhibition, and the same is true in the case of an agreement made without express

authorization by an officer of the state exceeding a proper appropriation or of an indebtedness incurred without an appropriation for the specific purpose. Where funds involved are public funds raised by the state, directly through taxation, they cannot be impaired by hypothecation by the officers in charge, unless there is express authority therefor."

In view of the above, we think that the purchase of printing in excess of the appropriation, not having been authorized by the Legislature under the provisions of Section 44 of Article IV, supra, would be incurring a debt in violation of said constitutional provision.

We call your attention also to the State Budget Law. Section 10907 of said Act, R. S. Mo. 1939, reads as follows:

"The auditor shall keep accounts showing the appropriations and allotments. Such accounts shall show all charges and obligations incurred against such appropriations and allotments. No expenditure shall be made and no obligation incurred by any department without the certification of the auditor that there is a sufficient unencumbered balance in the allotment and a sufficient unencumbered cash balance in the treasury to the credit of the fund from which such expenditure or obligation is to be paid, each sufficient to pay the same. The auditor shall be liable personally and on his bond for any certification in excess of any allotment or in excess of the cash balance available. Any officer or employee of the state who shall make any expenditure or incur any obligation without first securing such certification from the auditor shall be personally liable and liable

on his bond for the amount of such expenditure or obligation. For any department maintaining its principal office outside of Jefferson City, the auditor shall be authorized to establish a system for certification of obligations and expenditures so as to prevent inconvenience and delay."

The above section specifically provides that no expenditure shall be made and no obligation incurred by any department without the certification of the Auditor that there is a sufficient unencumbered balance in the allotment and a sufficient unencumbered cash balance in the treasury to the credit of the fund from which such expenditure or obligation is to be paid. Said section makes any officer or employee of the state who shall make any expenditure or incur any obligation without first securing such certification from the Auditor personally liable and liable on his bond for the amount of such expenditure or obligation.

Section 10895, R. S. Mo. 1939, makes it the duty of the Governor to enforce observance of the appropriations made by the Legislature and the provisions of the State Budget Act. Said section reads in part as follows:

"The Governor shall have full authority to carry out the provisions of this article and to do all things necessary thereto. He shall be responsible for the preparation of the budget and its presentation to the legislature and shall enforce observance of the appropriations made by the legislature and the provisions of this article with reference thereto. * * *"

CONCLUSION

In view of all of the above, it is our opinion that an agreement by you to approve a deficiency appropriation, if the same was made by the Legislature, for printing fur-

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nished the Grain Inspection and Weighing Department in excess of its appropriation would be without authority of law, and therefore void and not binding upon the State.

It is our further opinion that a contract for printing to be furnished the Grain Inspection and Weighing Department in excess of the appropriation for that purpose, whether made by the State Printing Commission or by you or the Grain Inspection and Weighing Department, would be made without express authority of law, and therefore void, and the Legislature, under the provisions of Section 48 of Article IV of the Constitution of Missouri, would be prohibited from paying or authorizing the payment of any such claim.

It is our further opinion that a contract for printing in excess of the appropriation would be a debt within the meaning of Section 44 of Article IV of the Constitution, and such debt, not having been authorized by the Legislature in conformity with the provisions of said section, would be in violation thereof and therefore void.

We further hold that the incurring of an obligation in excess of the appropriation, either by the State Printing Commission, the Grain Inspection and Weighing Department or yourself, is prohibited by Section 10907, R. S. Mo. 1939, and that the agreement in question, if made by you, would violate your duties under the provisions of Section 10895, R. S. Mo. 1939, to enforce the observance of the appropriations made by the Legislature and the provisions of the State Budget Act.

Respectfully submitted

J. E. TAYLOR
Assistant Attorney General

APPROVED:

ROY MCKITTRICK
Attorney General

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