

DEFICIENCY APPROPRIATIONS: Invalid when passed to satisfy claims arising out of a contract or agreement made in violation of the State Budget Act.

May 19, 1944



Honorable Forrest C. Donnell
Governor of Missouri
Jefferson City, Missouri

Your Excellency:

Recently you requested the opinion of this department, which request is as follows:

"A letter, dated July 30, 1943, addressed To the House of Representatives of the Sixty-Second General Assembly of the State of Missouri, from myself, which letter accompanied House Bill No. 657 of said General Assembly, reads in part as below quoted:

"Although there are approved the following items, namely:

- (a) the appropriation of the sums set forth in Section 6, aggregating Three Thousand Seven Hundred Eighteen Dollars and Ninety-One Cents (\$3,718.91);
- (b) the appropriation of the sum, set forth in Section 15, of Eleven Thousand Four Hundred Twenty-Two Dollars and Forty-Three Cents (\$11,422.43);
- (c) the appropriation of the sum, set forth in Section 18, of One Hundred Seventy-Two Dollars and Eighty-Eight Cents (\$172.88); * * *
- (e) the appropriation of the sum, set

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forth in Section 24, of Nineteen Thousand Five Hundred Forty-Nine Dollars and Ninety-Eight Cents (\$19,549.98);

(f) the appropriation of the sum, set forth in Section 43, of Thirty-Two Thousand Three Hundred Twenty-Three Dollars and Eighty-Nine Cents (\$32,323.89);

(g) the appropriation of the sum, set forth in Section 50, of Five Thousand Dollars (\$5,000.00),

"I have the assurance of the State Auditor that a warrant will not be issued by him for any part or all of the sum appropriated by any one of said Sections 6, 15, 18, 22, 24, 43 or 50 respectively until and unless either (a) it shall have been adjudged by the Supreme Court of Missouri that such warrant should be issued or (b) there shall have been delivered to the State Auditor the written opinion of the Attorney-General of the State of Missouri that, under the law, such part or all respectively of such sum so appropriated can be recovered by suit from the State of Missouri."

"Your opinion is respectfully requested on the following question:

"Can part or all respectively of the sums so appropriated by Sections 6, 15, 18, 24, 43 or 50 of said House Bill No. 657 be recovered by suit from the State of Missouri?"

The items mentioned are deficiency appropriations passed by the Sixty-Second General Assembly. Item (a) represents \$3,718.91 appropriated for the relief of certain officers and individuals for the apprehension of criminals; item (b) concerns an appropriation in the amount of \$11,422.43 for the purpose of paying accounts for the year 1940 of the State Cancer Commission Hospital; item (c) refers to an appropriation of \$172.88 to pay the accounts of the Embalming Board for 1942; item (e) relates to \$19,549.98 appropriated to satisfy defi-

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ciencies in connection with license plates; item (f) deals with an appropriation of \$32,323.89 for the relief of persons, firms and corporations because of cattle slaughtered as reactors to Bang's disease tests in the period commencing January 1, 1941, and ending December 31, 1942; and item (g) reflects an appropriation in the sum of \$5,000.00 for the relief of the city of Chillicothe, Missouri, for services rendered the State Industrial Home for Girls in that city in connecting its public sewer system with the private sewer service of such home. The total amount of the above items is \$72,188.09.

This department has heretofore ruled that the General Assembly may not effectively appropriate funds to satisfy contractual obligations incurred by a department or officer of the state at a time when there were not sufficient unencumbered cash balances in the treasury to the credit of the appropriated funds from which the obligations are to be paid, and by reason of the provisions of the State Budget Law (Article 1, Chapter 73, R. S. Mo. 1939) and Section 48 of Article 4 of the Constitution. The above ruling is represented by copies of opinions here enclosed.

This office on January 31, 1944, held that the deficiency appropriation to pay the tuition of certain negro students was valid because such tuition charges were not claims founded upon an agreement or contract. A copy of that opinion is likewise enclosed.

It is, therefore, apparent to us that the proposition submitted hinges upon the following two elements, namely, (1) do the appropriations in question seek to satisfy a claim based upon an authorized agreement or contract, and (2) if based upon such agreement or contract, were sufficient unexpended and unencumbered funds available by reason of an appropriation act sufficient to satisfy such contracts or agreements at the time of their creation?

If the appropriations in question are for the purpose of paying claims not authorized by the substantive law, then such appropriations fail by force of the constitutional provision regardless of the Budget Act. The authority for this statement may be found in the last mentioned opinion of this office. On the other hand, if the obligations are sanctioned by our law and not bottomed upon a contract or agreement, then such appropriation or appropriations would be valid irrespective of the Budget Act provisions. However, if the appropria-

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tions seek to satisfy obligations prescribed by law but arising out of contracts or agreements, and if at the time such agreements or contracts were made there were not sufficient unexpended cash balances in the treasury to the credit of appropriated funds to satisfy such obligation or obligations, then the deficiency appropriations are of no effect.

An examination of the various statutory provisions respecting the various items mentioned in the request results in the conclusion that the respective obligations for which the questioned appropriations were enacted were authorized by the substantive law but grew out of contracts or agreements. The statutes are not here cited due to their number and length.

We are not unmindful that Section 8378, R. S. Mo. 1939, requires the Secretary of State to procure license plates from the Department of Penal Institutions. The Department of Penal Institutions is required to furnish such at a price that will not exceed the open market price and at not less than the manufacturing cost. Section 8988, R. S. Mo. 1939, requires the disposition of prison produced articles at a profit to the state. Thus the price for manufacturing license plates is set by a contract or agreement and the obligation sounds in contract.

Since two of the enclosed opinions were written, the Supreme Court of Missouri has had under consideration Section 48 of Article 4 of the Constitution. In the case of *White v. Jones*, 177 S. W. (2d) 603, that court in passing upon the rental of certain lands by the Board of Managers of the State Eleemosynary Institutions for a longer period than the life of the appropriation act, held such lease void, and ruled, l. c. 606:

"Section 48 of Art. 4 of the Constitution of Missouri, relied upon by appellants, expressly prohibits the General Assembly from authorizing the payment of any claim hereafter created against the state under any agreement or contract made without express authority of law and provides that all such unauthorized agreements or contracts shall be null and void. While Section 14590, supra, expressly authorizes the state purchasing agent to negotiate leases, there is no express authorization for him to incur obligations for rentals or otherwise that will fall

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due and become payable after the lapse of two years from the date of the passage of the appropriation out of which said indebtedness is to be paid. The second clause of Section 48, Art. 4, forbids the payment of a claim under an illegal contract, meaning in this case any contract or lease entered into contrary to the terms and provisions of Sec. 9265, supra, and of Chapter 105, supra. See *Sager v. State Highway Commission*, 349 Mo. 341, 346, 160 S. W. 2d 757, 759."

The decision of State ex rel. *Averill v. Smith*, 175 S. W. (2d) 831, deals with an appropriation made to a board to pay claims incurred soon after its creation and at a time when it had no appropriation. The court held that the budget and purchasing agent's acts did not apply, but used the following language, l. c. 833:

" * * * No doubt, after sufficient time has elapsed to enable the board to comply with the time table set up by the budget act and the conflict disappears the board will come within its terms, but the budget act does not apply to the obligations here involved nor in any way affect their legality."

It may be contended that notwithstanding the provisions of the Constitution and the Budget Act, and inasmuch as the State received the benefit of supplies and services, a moral obligation exists to compensate therefor, and that the Legislature properly passed these deficiency appropriations to comply with that moral obligation.

The justification of moral obligation was urged in the case of *Donovan v. Kansas City*, 175 S. W. (2d) 874 (see 179 S. W. (2d) 108), wherein recovery was sought for supplies sold Kansas City in a manner that did not comply with its charter and statutory provisions. In passing upon this argument, the Supreme Court said, l. c. 883:

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* * * * The principle is not applied
when counter to paramount principles of
law. * * *"

The above cited cases apparently lend support to the views expressed by this department.

In the final analysis the problem is a question of fact, viz.: At the time of the creation of the claims now sought to be satisfied from the appropriation items in question, was there a sufficient unencumbered cash balance in an appropriation account out of which such obligations then could have been satisfied? If the answer is in the negative, then recovery cannot be had from the State.

Information secured from the Auditor's Office indicates that sufficient data does not exist in that office upon which the fact may be determined with certainty. The Attorney General does not know when the claims were incurred, and, of course, does not know what unencumbered cash balance, if any, existed in the various appropriation funds of the several offices and departments here involved at any particular time.

The difficulty confronting this office may be illustrated in the following manner: The Cancer Hospital deficiency appropriation involves items of equipment and supplies purchased in the 1939-1941 biennium. We cannot tell from the evidence at our command when the obligation to purchase any particular equipment was created, and we do not know if there was an unencumbered cash balance in the hospital's appropriation fund for that period out of which the obligation could have been paid at the time it came into existence. It may be that some of these obligations were incurred at a time when a sufficient appropriation fund existed, but that later created claims were preferred in payment and these exhausted the appropriation fund, leaving a valid claim unpaid.

The result is that this department is forced to content itself with merely furnishing the yardstick by which the facts are to be measured, that is, the formula by which the problem may be solved, dependent upon its factual elements.

Honorable Forrest C. Donnell

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CONCLUSION

It is the opinion of this department that if any of the claims or commitments covered by Sections 6, 15, 18, 24, 43 and 50 of House Bill 657 of the Sixty-Second General Assembly came into existence at a time when there were not sufficient unencumbered cash balances in appropriation funds then in the state treasury out of which such obligations, or any of them, could have been paid, then the amount of such obligation or obligations cannot be recovered by suit against the State of Missouri.

Respectfully submitted

VANE C. THURLO
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

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