

GOVERNOR: COMPTROLLER: Interpretation of Sections 33.030 and 33.-
BUDGET: ALLOTMENTS: 290, RSMo, respecting power of the Comptroller
WORK PROGRAM: and Governor concerning expenditures and
APPROPRIATIONS: budgetary allotments.

OPINION NO.-407

December 8, 1966



Honorable Warren E. Hearnes
Governor of Missouri
Capitol Building
Jefferson City, Missouri

Dear Governor Hearnes:

This is in response to your recent opinion request in which you posed several questions to this office. The questions presented in your request are as follows:

"A. What authority does the Executive Branch of Government have over all State Government Agencies, Boards, Bureaus, Commissions, and Departments, hereinafter called Agencies, for fiscal control? Are the duties imposed upon the State Comptroller by provisions of Section 33.030, RSMo 1959, subsections (2) and (3), * * * applicable to the claims submitted by these agencies?

B. Does the duties imposed by the above section (33.030) apply to all agencies of state government no matter what the source of revenue appropriations are made from? (For example, General Revenue, Conservation Fund, Highway Fund, etc.)

C. Are these agencies required to follow the line item as shown within the work program submitted by each agency, and when adjusted by the Governor's recommendations, passed by the General Assembly, and signed into law by the Governor?

D. When the appropriation bills read (x) amount of dollars by object, (example, personal service, operations, repairs and replacements, and operations) does the agency have a right to expend this money any way he shall see fit as long as he stays within the total amount appropriated for this object? The agency will have justified this appropriation by line item supporting papers.

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E. What duty does the State Comptroller have in seeing that all agencies follow the Legislative intent of the General Assembly? (When notified by the State Fiscal Affairs Office of the intent of the General Assembly in writing)

F. Is the State Comptroller's power ministerial or discretionary with each of these agencies? If the State Comptroller's power is discretionary, to what extent?"

This is manifestly a very complex problem. It involves the powers of the Budget Director, the Comptroller and the Governor respecting the whole business of fiscal control of state spending from the building up of the intricate details of the budget to the administration of the finally passed and approved appropriation acts. It is our belief that some confusion arises in some areas of state government out of the failure to clearly distinguish and separate the functions relating to building up the budget, the budget hearings, the hearings before the Legislature on the appropriation acts which, of course, relate directly to the budget and finally the administration of the appropriation acts as finally passed by the Legislature and approved by the Governor.

Reference is made in the inquiry to whether agencies are required to follow the line item as shown within the work program. This appears to be an example of the confusion that exists. As we understand the matter, "line items" have reference to detailed items in the budget. As a result of totaling all of these items in each category of expenditure purpose a total figure is arrived at by the Legislature which constitutes the appropriation act. On the other hand, the work program and the allocations to the departments and agencies is that plan of operations submitted after the appropriation acts are passed and approved. We find nothing in the statutes to indicate that "line items" in the budget are to be equated with work program and allotments. They are separate and distinct, prepared at different times and may or may not be the same.

Relating to question "A", you cited and quoted Section 33.030, (2) and (3), RSMo 1959, which section reads, in its entirety, as follows:

"The division of the budget and comptroller shall:

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(1) Assist the director of revenue in preparing estimates and information concerning receipts and expenditures of all state agencies as required by the governor and general assembly.

(2) Certify approval of the incurring of every obligation for the payment of money and that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. As a prerequisite to certification, the comptroller shall ascertain that the obligation to be incurred is within the work program and budget allotment.

(3) Preapprove all claims and accounts and certify them to the state treasurer for payment. As a prerequisite to his preapproval of claims and accounts, the comptroller shall ascertain that the claims and accounts are regular and correct.

(4) Prepare and report to the governor or to the general assembly or either house thereof when requested any financial data or statistics which he or it requires, such as monthly or quarterly estimates of the state's income and cost figures on the current operations of departments, institutions or agencies."

The Constitution reveals that Section 33.030, supra, embodies language from two separate constitutional provisions. The relevant part of Article IV, Section 22, Missouri Constitution of 1945, reads as follows:

" * * * The division of budget and comptroller shall assist the director of revenue in preparing estimates and information concerning receipts and expenditures of all state agencies as required by the governor and general assembly. * * * " (Emphasis added.)

The above part of Article IV, Section 22, is exactly the language of paragraph (1), Section 33.030, supra.

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A relevant part of Article IV, Section 28, states:

" * * * nor shall any obligation for the payment of money be incurred unless the comptroller certifies it for payment and certifies that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it * * * "

The above quote is found clearly set out in almost identical language in paragraph (2) of Section 33.030, supra.

Part of Article IV, Section 22 of the Constitution of Missouri, states:

" * * * The comptroller shall be director of the budget and shall preapprove all claims and accounts and certify them to the state treasurer for payment." (Emphasis added.)

The above emphasized part of the quote is identical to the language found in paragraph (3) of Section 33.030, supra. The certification to the state treasurer is, incidentally, the subject of the 1959 amendment to Section 33.030, supra. The certification previously has been to the auditor. Therefore, the amendment has no material relation to the questions you have asked.

While Section 33.030 has application to the questions submitted, a broader question is encompassed in that part of "A" above, which states:

"What authority does the Executive Branch Government have over all State Government Agencies, Boards, Bureaus, Commissions, and Departments, hereinafter called Agencies, for fiscal control?
* * * "

It is assumed that this question is mainly directed to that part of fiscal control that occurs after the budget is submitted and the appropriation acts are signed into law.

Section 33.290, RSMo 1959*, is related to Section 33.030, supra. A time-honored rule of construction is that related provisions may be examined in determining the intent and purpose of a particular provision. Chaffin vs. Christian County, Mo., 359 S.W. 2d 730 (1962).

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Section 33.290, in its entirety, states:

"Within two weeks after the approval of the appropriation acts by the governor, each department shall submit to the budget director a work program and requested allotments of appropriations by quarterly periods for the first fiscal year of the biennium. Such requested allotments shall show how the department proposes to classify its expenditures for various purposes and objects of expenditure within each such quarterly period for the fiscal year. Such allotment requests and the allotments as approved shall be in such form and in such detail as the budget director shall direct. Such allotments shall be subject to approval by the governor in such detail as he may determine except that the allotments of the departments not directly under the control of the governor shall be subject to approval only as to the total allotment for each quarter. At the end of any quarterly period any department may make changes in the allotments for the remaining periods upon approval of the governor. At the end of any quarterly period the governor may revise the allotments of any department, and if it shall appear that revenues in any fund for the fiscal year will fall below the estimated revenues for such fund to such extent that the total revenues of such fund will be less than the appropriations from such fund, then and in such case, the governor shall reduce the allotments of appropriations from such fund to any department or departments so that the total of the allotments for the fiscal year will not exceed the total estimated revenue of the fund at any such time. Each such department shall in its requested allotments set aside three per cent of the appropriations as a reserve fund which shall be subject to expenditure only with approval of the governor; provided, that this shall not apply to amounts for personal service to pay salaries fixed by law. On or before June first of the first fiscal year of the biennium, similar work programs and requested allotments of the appropriation for the second fiscal year of the biennium shall be submitted to the budget director. Such requests and allotments shall be subject to the same approval, limitations and changes as those for the first year."

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Although somewhat broader, it appears that Section 33.290 is enacted pursuant to the authority of Article IV, Section 27 of the Constitution of Missouri which reads as follows:

"The governor may control the rate at which any appropriation is expended during the period of the appropriation by allotment or other means, and may reduce the expenditures of the state or any of its agencies below their appropriations whenever the actual revenues are less than the revenue estimates upon which the appropriations were based."

In construing the intent and meaning of the Constitution, our Missouri Supreme Court, en banc, has stated in State vs. Neill, (1966) 397 S.W. 2d 666 (l.c. 669):

"The Constitution in general is subject to the same rules of construction as other laws with due regard being given to the broader scope and objects of the Constitution as a charter of popular government, and intent of the organic law is the primary object to be attained in construing it."

The Court, in the Neill case, supra, reiterated the rule for statutory construction, (l.c. 669):

"In determining the meaning and application of statutory provisions, this court must ascertain the legislative intent from the words used, if that is possible, and in doing so give to such words their plain and ordinary meaning so as to promote the object and manifest purpose of the statutes."

Keeping in mind the rules of statutory construction enumerated in the Neill case, supra, especially that the language used is to be given its plain and ordinary meaning, Section 33.290 will now be examined. Because of the language of 33.290 we must keep in mind two categories of departments: (1) those under the direct control of the Governor, and (2) those not directly under the control of the Governor.

The first full sentence of Section 33.290 states:

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"Within two weeks after the approval of the appropriation acts by the governor, each department shall submit to the budget director a work program and requested allotments of appropriations by quarterly periods for the first fiscal year of the biennium. * * * "
(Emphasis added.)

Each department must submit (1) a work program and (2) a request for an allotment of the appropriations within two weeks after the acts are signed into law. It should be noted that each department shall submit, etc. "Shall" is used in the usual mandatory sense. "Department" refers to all units of state government, except the judicial and legislative branch. Attorney General Opinion No. 3, Atterbury, 2/3/54.

There is nothing to indicate what is meant by "work program" because the term is not defined or explained in the statute.

What is a work program? There is no direction of what a work program should contain or of the detail to be recited therein. Since it is not defined or explained and the only place it is used in Section 33.290, it is used in conjunction with "allotment", hence, we believe that the key to the interpretation of this language is the meaning of "allotment". This section does explain what is meant by allotment and the character and nature of the information and detail that is to be furnished in allotment requests by departments under the direct control of the Governor. The answer would seem to lie in the following analysis. The Governor is the administrative head of his own departments, as well as the chief executive officer of the state. The discretion vested in him by Section 33.290, to require detailed itemization from his own departments, is limited to those departments.

The second full sentence of Section 33.290 states:

"Such requested allotments shall show how the department proposes to classify its expenditures for various purposes and objects of expenditure within each such quarterly period for the fiscal year. * * * "

Appropriation bills generally provide for four categories or objects: (1) Personal Services (2) Additions (3) Repairs and Replacements (4) Operations. This sentence apparently has reference to these categories or objects of expenditures.

The third full sentence of Section 33.290 states:

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"Such allotment requests and the allotments as approved shall be in such form and in such detail as the budget director shall direct. * * * "

This sentence directs that these allotments shall be in such detail as the budget director shall require.

The fourth full sentence of Section 33.290 states:

"Such allotments shall be subject to approval by the governor in such detail as he may determine except that the allotments of the departments not directly under the control of the governor shall be subject to approval only as to the total allotment for each quarter. * * * "

This sentence requires each department, under the direct control of the Governor, to submit its allotment requests in whatever detail the Governor may require. Since the Governor has, by this provision, the power of approval of such allotments it must be concluded that the Governor has the power of disapproval of the allotments requested by departments directly under the Governor's control. However, it is equally clear that the Governor does not have a like authority over departments not directly under his control. In departments not under his direct control, the Governor is authorized to approve or disapprove the allotment request only as to total and not as to detail.

At this point it would be pertinent to show the relationship of Section 33.030, supra, to that part of Section 33.290 which has been discussed to this point. The last full sentence of Section 33.030 (2) mandatorily requires the Comptroller, as a prerequisite to certification of approval, to ascertain that the obligation to be incurred is within the work program and budget allotment. The work program so referred to is the same work program mentioned in the first sentence of Section 33.290. The budget allotment referred to in Section 33.030 (2) is a reference to the allotment of appropriation approved by the Governor, referred to in the fourth sentence of Section 33.290, supra. The General Assembly has provided a standard by which the Comptroller, pursuant to Section 33.030 (2), can determine whether or not the obligation to be incurred is within the purpose of the appropriation. This is to be accomplished by the Comptroller looking to the work program and the approved allotment required by Section 33.290. If the department has failed to include the purpose or object of the obligation, then the Comptroller could disapprove the requisition and withhold his certification.

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The language of Section 33.030 (2) indicates the purpose of that paragraph is to require certification by the Comptroller before the obligation is incurred that the obligation is within the work program and the allotment. A failure to approve at this stage prohibits the department from placing the order by which a debt would accrue.

Departments Not Under the Control of the Governor

What is the authority of the Comptroller over departments not under the direct control of the Governor and who are not required to detail their allotment requests? These departments receive approval only as to total allotment. With respect to departments not under the Governor's control, Section 33.030 (2) requires the Comptroller to ascertain that the proposed expenditure is within the total allotment for the categories or objects--Personal Services, Additions, Repairs and Replacements, and Operations. Since the request for allotments does not need to be detailed, it would follow that the work program would, as a correlation, not be any more detailed than the allotment request.

The discretion vested in the Budget Director and the Comptroller by the third full sentence of Section 33.290, supra, is that given to the Governor by that part of Article IV, Section 27, which states:

"The Governor may control the rate at which any appropriation is expended during the period of the appropriation by allotment or other means, * * * " (Emphasis added.)

The Comptroller, on behalf of the Governor, can exercise only that power which is enumerated in terms of controlling the rate of appropriation expenditure. Perhaps "or other means" needs to be construed. Since the framers of the Constitution indicated that special power of allotment was one form of authorized control, and state no other example, they obviously were thinking of some other method similar to allotment. This construction is consistent with the holding in Kroger Grocery & Baking Co. vs. City of St. Louis, Mo., 106 S.W. 2d 435 (1937). In the Kroger case, supra, the court stated, (l.c. 439):

" * * * when special powers are conferred, or special methods are prescribed for the exercise of a power, the exercise of such power is within the maximum expressio unius est exclusio alterius, and 'forbids and renders nugatory the doing of the thing specified, except in the particular way pointed out.' "

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Departments Deemed Not Under the Direct Control of the Governor

It appears desirable to comment on departments which are deemed under the direct control of the Governor and departments which are not. Section 33.290 uses the language "Departments not directly under the control of the Governor." We believe the use of the word "directly" is significant. It is clear that elected state offices are not directly under the control of the Governor. These are:

Lieutenant Governor - Section 26.020
Secretary of State - Section 28.030 (4)
Auditor - Section 29.040
Treasurer - Section 30.120
Attorney General - Section 27.020

In addition there are three departments that are made separate and distinct by the Constitution. They are:

Highway Commission - Article IV, Section 29,
Constitution of Missouri
Conservation Commission - Article IV, Section
42, Constitution of Missouri
Board of Curators of the University of Missouri -
Article IX, Section 9(a), Constitution of
Missouri.

These departments are not under the direct control of the Governor because they are responsible to the Legislature and to the people. This intent is manifest by the following discussion at the Constitutional Convention between McReynolds and Brown. "Debates of the Constitutional Convention", One Hundred Sixty-Sixth Day.

"MR. BROWN (OF CHRISTIAN): Senator, is it your idea that where the Legislature makes an appropriation, say for the Attorney General for instance, that this Comptroller should have the right to tell the Attorney General how to spend that money within his appropriation?"

"MR. McREYNOLDS: No, I don't think so. I don't think he would undertake to do that."

In addition, there are a large number of Departments, Boards and Agencies which function in various manners pursuant to statute, usually under the supervision of a Board and most often the Board appointed by the Governor. These include the following:

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State Board of Accountancy - Section 326.180
State Board of Registration for Architects and Professional Engineers - Chapter 327
State Board of Barber Examiners - Section 328.040
State Board of Cosmetology - Section 329.180, 329.210, 329.230
State Board of Chiropractic Examiners - Section 391.090, 391.100
State Board of Chiropodists - Section 330.140, 330.190
Missouri Dental Board - Section 332.310
State Board of Embalmers and Funeral Directors - Section 333.095
State Board of Registration for the Healing Arts - Section 334.123
State Board of Nursing - Section 335.150
State Board of Optometry - Section 336.140, 336.150
State Board of Pharmacy - Section 338.130
Missouri Real Estate Commission - Section 339.120
Missouri Veterinary Medical Board - Section 340.140
Industrial Commission
Water Resources Board
Oil and Gas Council
Water Pollution Board
State Library Board
Department of Education
Human Rights Commission
Lincoln University
State School for the Blind
State School for the Deaf
Commission of Higher Education
Arts Council
State Tax Commission
Commerce and Industrial Development Commission
State Banking Board
Division of Mental Diseases
Board of Probation and Parole
Board of Training Schools
Soil and Water Districts Commission
Air Pollution Board
Board of Mediation
Atomic Energy Commission
Boat Commission
Reciprocity Commission
Outdoor Recreation Council
Public School Retirement Board
State Retirement Board
State Colleges

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The foregoing probably lists most all of the Boards, Commissions and Agencies which fall in this category, however, it is not intended to be all inclusive nor exclusive of others which might properly fall in this category.

While in practical effect many of these Boards and Agencies are subject to the control of the Governor, we believe that a fair construction of the intent and meaning of Section 33.290 can only mean that these Boards, Commissions and Agencies are not "directly" under control of the Governor and therefore fall within the exception in the fourth sentence of Section 33.290.

Departments, Divisions and Agencies Deemed
Under the Direct Control of the Governor

Likewise it appears desirable to comment on the Departments, Divisions and Agencies which are deemed under the direct control of the Governor because the administrative head of each is directly appointed by and serves at the will of the Governor. These appear to include the following:

- Division of Public Buildings
- Department of Revenue
- Office of Economic Opportunity
- Department of Agriculture
- Division of Finance
- Division of Insurance
- Division of Savings and Loan Supervision
- Division of Employment Security
- Department of Public Health and Welfare
- Division of Welfare
- Division of Health
- Department of Civil Defense
- Department of Corrections
- Department of Liquor Control
- Division of Budget and Comptroller
- Department of Adjutant General
- Division of Industrial Inspection
- Division of Mine Inspection
- Division of Workmens Compensation
- Division of Procurement
- Department of State and Regional Planning and Community Development

Here again the foregoing list probably includes most of the Departments, Divisions and Agencies which fall in this category, however, it is not intended to be all inclusive nor exclusive of others which might properly fall in this category.

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It would therefore appear that when the Comptroller is exercising his authority set out in Section 33.030 (2) he could not withhold approval of a request, to incur a debt, from a department not under the control of the Governor because the object or purpose of the debt was not specifically detailed or enumerated in a work program or an allotment request. In this instance the Comptroller would only pass on whether the appropriation act authorized money for the particular category, i.e., personal services, repairs and replacements, etc. However, if such an obligation would cause a deficiency in the allotment, then the request must be disapproved because of the other requirements of Section 33.030 (2).

The words "approved" or "approval", when used in a statute requiring that a certain act meet with some designated approval, may merely contemplate the doing of a purely ministerial act. Boyes vs. Bank of Caruthersville, Mo. App., 118 S.W. 2d 1051 (1938). In the context of Section 33.030, supra, the acts contemplated of the Comptroller are ministerial. The only judicial decision in Missouri has so held, and in State ex rel Kresge Co. vs. Howard, Mo., 208 S.W. 2d 247 (1947) the court stated (l.c. 249):

"Accordingly, under the facts presented there is no occasion for the exercise of any discretion on his (comptroller) part, and if the appropriation is valid it becomes his positive ministerial duty under the law to perform the necessary acts for the payment of the claim."

CONCLUSION

It is the opinion of this office that:

1. The Governor can require departments directly under his control to submit allotment requests for funds for quarterly period in such detail as he shall deem proper and such allotments are valid only when approved by the Governor.
2. The Comptroller can approve requests for expenditures by departments directly under the Governor's control only if such expenditures are listed in the quarterly allotments approved by the Governor.
3. The Governor cannot require departments not directly under his control to submit allotment requests setting out proposed expenditures in detail but his only power insofar as such departments are concerned is to determine the amount of each quarterly allotment.

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4. The Comptroller has no authority to disapprove requests for expenditures by departments not directly under the Governor's control except when the expenditure is not within the purpose of the appropriation or when there are not sufficient unencumbered funds in the appropriation to pay for such expenditure.

5. The Comptroller has no power insofar as departments not under the control of the Governor are concerned to deny requests for expenditures because such requests allegedly are not in compliance with the Comptroller's understanding of the intent of the General Assembly in passing appropriation laws except as set out in such appropriation laws or because such requests allegedly are not in compliance with the intent of the Governor in making quarterly allotments to such departments.

The foregoing opinion, which I hereby approve, was prepared by my Assistants, William A. Peterson and J. Gordon Siddens.

Very truly yours,


NORMAN H. ANDERSON
Attorney General