

DISTRICT COURT	
CITY AND COUNTY OF DENVER, COLORADO	
Plaintiff:	
THE COLORADO GENERAL ASSEMBLY	▲ COURT USE ONLY ▲
Defendants:	Case Number:
WILLIAM OWENS , in his official capacity as Governor of the State of Colorado; MIKE COFFMAN , in his official capacity as State Treasurer of the State of Colorado; and LESLIE SHENEFELT in his official capacity as State Controller for the State of Colorado	03 CV 3700
	Courtroom 6
<u>ORDER</u>	

THIS MATTER comes on for ruling after a trial to the court. The principal issue revolves around the Governor's veto of certain portions of the Colorado State General Appropriations Bill (commonly referred to as the "long bill") for two fiscal years. One smaller issue relates to a separate substantive bill in which the Governor struck down the appropriation section by the line item veto.

Governor Owens exercised the "line item veto" on numerous "headnotes" in each appropriation bill. The majority of these headnotes were definitional in nature. In addition certain headnotes made restrictions on the use of appropriated funds for personal services and explained the general purpose of footnotes included elsewhere in the bill.

PRIOR DISPUTES

A dispute between the legislature and the Governor concerning line item vetoes in appropriations bills is nothing new. The Colorado Supreme Court first addressed the type of dispute present here in the case of Stong v. People ex rel. Curran, 74 Colo. 283, 220 P. 999 (1923). That court, concluding that the case must be decided as "sui generis" because authority had failed them, ruled that the governor had no power to veto a portion of a separate, distinct and indivisible item. (The Governor had attempted to disapprove \$1,750 of a \$7,000 appropriation.)



The issue of the line item veto has reached the courts frequently since 1972. A variation on the same theme has been presented in cases involving Governor Love (MacManus v. Love, 499 P.2d 609 (Colo. 1972)); Governor Lamm (Anderson v. Lamm, 579 P.2d 620 (Colo. 1978); Colorado General Assembly v. Lamm, 700 P.2d 508 (Colo. 1985) (Lamm I); Colorado General Assembly v. Lamm, 704 P.2d 1371 (Colo. 1985) (Lamm II)); and Governor Romer (Romer v. Colorado General Assembly, 810 P.2d 215 (Colo. 1991)).

All of the cases cited above have related in one form or another to the issue presently before the court. The Colorado Supreme Court has regularly described the source of the repeated disputes. The 1972 description used the following words:

The Colorado Constitution merely states in effect that the legislature cannot exercise executive or judicial powers; and that the executive cannot exercise legislative or judicial power; and that the judiciary cannot exercise executive or legislative power. It does not prescribe the exact limits of the respective power. The dividing lines between the respective powers are often in crepuscular zones, and, therefore, delineation thereof usually should be on a case-by-case basis.

(MacManus v. Love, 179 Colo. at 221)

In the 1978 case of Anderson v. Lamm the court acknowledged that "although the concept of an absolute separation of functions is clear, it very often proves difficult to determine whether a power being exercised is executive, legislative, or judicial in character." (Anderson v. Lamm, 195 Colo. at 441).

In Lamm I Justice Kirshbaum noted prior cases including Anderson v. Lamm, *supra*, and described what he called the "tension" created by the contrasting principles that the governor had the inherent authority to administer how the money is to be spent within the executive branch and that the general assembly has the authority to determine "the amount of state funds" allocated to executive departments. Justice Kirshbaum, not quite abandoning the charming term "crepuscular," described the circumstances as:

When confronted by the necessity of exploring this twilight zone of competing constitutional authority, courts must measure the extent of the Governor's authority to administer by the extent of the General Assembly's power to appropriate.

(700 P.2d at 519)

In his dissent in Romer v. Colorado General Assembly, *supra*, Justice Vollack noted that this type of dispute between the legislature and the Governor was "capable of recurring." (810-P.2d at 226) The present case proves Justice Vollack's forecast.

THE PRESENT DISPUTE

The legislature has plenary power to determine the objects and the level of support to which the public revenues may be put. Once the legislature makes its determination allocating the funds it becomes the executive's responsibility to administer those funds. The legislative and executive branches once again ask the court to define the meeting point of the legislature's power to allocate and the executive's power to administer state monies. Whether one views this meeting point as in a "crepuscular" or a "twilight" zone may be a matter of semantics, but it is, as all the cases have suggested, not a clearly marked line.

While no one disputes the Governor's authority to exercise the line item veto in an appropriations bill, the dispute in this case concerns the veto of definitions. The Governor in his veto of May 31, 2002 was acting with an eye towards what he described as "the reality of lower revenues." (Plaintiff's Exhibit 2, May 31, 2002 veto message.) He identified revenues as declining in October 2001 and he characterized the budget as being a "20 percentage-point swing away from fiscal reality." (Plaintiff's Exhibit 2) The Governor stated that he believed the headnotes were an unconstitutional attempt to provide substantive legislation in the long bill and an attempt to invade the province of the executive in administering the funds appropriated by the legislature. (Plaintiff's Exhibit 2)

Plaintiff's Exhibit 1 is House Bill 02-1420, the long bill from the 2002 legislature. Plaintiff's Exhibit 5 is Senate Bill 03-158, the long bill for 2003. Plaintiff's Exhibit 2 is the veto message that accompanied the line item vetoes May 31, 2002 from Governor Owens. Plaintiff's Exhibit 6 is the veto message exercising the line item veto on the 2003 long bill.

The long bills and the veto messages are remarkably similar. For example, many of the definitions are identical in each year's long bill. The line item vetoes are likewise largely identical. Certain items have different numbers in the two bills, but are vetoed with remarkably similar language. The Governor repeatedly notes in his veto message that he "vetoed this item last year."

Because of the similarity of the two long bills a review of one of the bills will suffice for a discussion of the issue raised in this case. Examples of the items vetoed which appear in both bills are as follows:

(1)(a) "Capital Outlay" means:

(I) Equipment, furniture, motor vehicles, software, and other items that have a useful life of one year or more and that cost less than fifty thousand dollars;

(II) Alterations and replacements, meaning major and extensive repair, remodeling, or alteration of buildings, the replacement thereof, or the replacement and renewal of the

plumbing, wiring, electrical, fiber optic, heating, and air conditioning systems therein, costing less than \$15,000;

(III) New structures, meaning the construction of entirely new buildings, where the cost will be less than \$15,000, including the value of materials and labor, either state-supplied or supplied by contract;

(IV) Nonstructural improvements to land, meaning the grading, leveling, drainage, irrigation, and landscaping thereof and the construction of roadways, fences, ditches, and sanitary and storm sewers, where the cost will be less than \$5,000.

(b) "Capital Outlay" does not include those things defined as capital construction by section 24-75-301, Colorado Revised Statutes.

All of these sections were stricken by use of the line item veto.

In his 2002 message vetoing the capital outlay headnote Governor Owens notes the reduction in personal services and operating budgets. In his veto of the '03 bill he notes that he vetoed the same headnote in 2002. In both veto messages he makes references to the need for flexibility within the executive branch in order to administer the funds which have been allocated in a period of decreasing revenues. In both veto messages, he indicates that he will direct the departments to comply to the extent feasible given the falling revenues, but to the extent that the headnote might hinder the ability of the departments to meet the needs of the citizens the departments will be allowed to spend outside the definitional parameters, noting in 03 that "such spending will remain within the line item appropriation provided by the General Assembly." (Plaintiff's Exhibit 2 and 6) Similar notes are made by the Governor for the other line item vetoes in this section, including that the headnote had been vetoed the previous year, noting certain case law including Anderson v. Lamm, 579 P.2d 620 (1978), and noting that a given headnote inhibits the executive's authority to administer the appropriation.

This pattern of messages with the line items vetoes continues throughout his message. It appears to the court that these line items vetoes were exercised by a Governor conscious of falling revenues and conscious of his obligations in such a period, but also exercised by a Governor mindful of his obligations to administer funds without what he felt to be inappropriate interference from the legislature.

EVIDENCE

The witnesses were appropriate in a case of this type and were clear in their testimony. The testimony provided an understanding of the budgeting process utilized by the state of Colorado, the length of time a budget takes to prepare and an understanding of the roles of the

legislative and the executive branches. The executive and legislative branches must work together to arrive at a balanced budget on a yearly basis. Also clear is the fact that the budget is an estimate and that flexibility is required on the part of both the legislature and the executive in arriving at and living within a balanced budget.

The exhibits presented, particularly defense Exhibit A, were instructive as to the gradual increase in the complexity of government and the complexity of the budgeting process as reflected in various long bills. A comparison of the long bill from 1965 with the long bill from 2004 illustrates this increase in complexity. Similarly the item vetoes from the various budgets are striking. As recently as 1970 and 1971 the item veto message would occupy a page or two, but the veto in 2001 had grown to 30 pages.

The defense witnesses were particularly informative. Beginning with Dr. Nancy McCallin, the Director of the Governor's Office of State Planning and Budgeting, the defense attempted to present how the state budgeting process works. She testified that when revenues are down the executive must have flexibility in order to accomplish what is required of a state government. Dr. McCallin indicated that it is through the vetoes of these definitional terms that the Governor has provided administrative flexibility to the executive branch. She distinguished appropriations which she described as being told that she has to do her job with a given sum of money, from being told how to do that job. The former she favored, the latter she did not.

Included in her examples of concrete day-to-day issues was that of utility costs. Utility costs are unpredictable. In an era of falling revenues she indicated that the state could not have paid its monthly utility bills without the vetoes. There was enough money to pay for utility costs only if the restrictions imposed by the headnotes were stricken. Similarly she testified that there is a legislative mandate for state policing, but there were shortfalls in providing tools such as vehicles for the State Patrol. She indicated it was only through the veto of narrow definitions found in the headnotes that the state was able to provide adequate vehicles for the State Patrol.

She stressed that she was not talking about transferring monies allocated to one executive department to another department. Her testimony was that the funds were used within the department to which they were allocated.

Her words were echoed by Les Shenefelt, the Colorado State Controller since 1975. He testified that the State Controller is involved in financial management within the state. He further testified that the Controller's office is the part of the government that implements the budget. He testified concerning "GASB" standards. GASB stands for the Governmental Accounting Standards Board. He testified that GASB is a national board which sets up accounting standards for governmental agencies across the country. He testified that GASB has working definitions of standard governmental terms that can be used by all governmental agencies. He further testified that the headnote definitions applied by the Colorado legislature are much more restrictive than the GASB standards.

His examples of the restrictive definitions in the headnotes included that the GASB standard for "capital outlay" is simply fixed or capital assets for the useful life greater than one

year, but that the legislative headnote is much more restrictive. In a great variety of the areas that were addressed in the headnotes he testified that the GASB definitions give much more flexibility to the executive agency in utilizing the funds appropriated to it in order to accomplish responsibilities of the given agency. GASB standards include "health, life and dental" under the general heading of "personal services." The GASB standards have tests to determine what is a "lease purchase" as opposed to a narrow definition used in the long bill. "Leased space" is included under the broad heading of "operating expense" which gives more flexibility to the executive, and "legal services" is found under the "personal service" definition. He testified that in a great variety of areas the national standards provide much more flexibility to the executive in administering the funds appropriated.

Marilyn Golden, the Director of Health Care Policy and Finance for the state testified that the specific "operating expense" headnote relating to her department prohibits leasing space with "operating" dollars. She then testified that there was not enough money to lease the required space with the "leased space" allocation from the legislature in the budget. She testified that there was sufficient money in the "operating" section of her budget which could be used to lease space absent the narrow headnote definition. Only through vetoing the headnote could sufficient space be obtained in a timely fashion to provide what was needed for her department.

Ms. Golden acknowledged that there is a process to approach the legislature when shortfalls arise in one budget area which could be satisfied from another budget area. She indicated, however, that returning to the legislature with a "negative supplemental," to give up money from one area in order to get the legislature to allocate the money to yet another area, is a slow and cumbersome process not always guaranteed to be successful. She testified the process delays the work of the state government. She also acknowledged that when she has sought the negative and positive supplementals simultaneously the legislature has accommodated her requests.

The testimony of Gary Krueger, the Chief Financial Officer of the Colorado Department of Revenue was presented to illustrate the impact on Colorado citizens of the headnotes included by the legislature. His illustration related to an insufficient amount of money to run the Pueblo Center which is involved with tax returns and tax refunds for the state. There was a sufficient amount of money budgeted to the Department of Revenue to fulfill its obligations, but, not an adequate amount for the Pueblo Center. If there had been no line item veto it would have impacted both income tax refunds to the persons to whom they were entitled, and would have impacted the taxpayers a second time because if the refunds were not paid timely a 5% penalty would be added. He indicated that in certain circumstances such as he described the executive branch of the government simply cannot wait for the other processes such as the negative and positive supplementals to be carried out because of the needs of the citizens and potential for penalty assessments.

Through the use of a chart that she produced during her testimony Ms. Okes-Dotson, the Chief Financial Officer of the Department of Personnel and Administration, illustrated the need for flexibility. She indicated that the difficulty arises from in the last sentence of the headnote which restricts spending to one narrow area so that it cannot be spent in any other area. Her

illustration showed that unexpected events can cause the need to expend funds authorized to a given executive department outside of the narrow area defined by the headnotes. She indicated that in order to stay within the headnote definitions she would have to hold open, a term she referred to as "vacancy savings", positions within the state government until they could be adequately addressed. She said in particular with personnel and administration it is nearly impossible to estimate in the future what the exact sums will be. What she said is they know "going in" that there will be variances. By having the ability to shift funds from one narrow headnote definition to another they can accommodate these variances within the executive branch.

Rich Schweigert, Chief Financial Officer of the Colorado Department of Higher Education, testified concerning experiences he had when he was with the Colorado Department of Corrections. He indicated that there can be times when an immediate need arises. The need can relate to prisoner security. He testified that by going back to the legislature through the supplemental process what is needed today may take six to seven months to get. His testimony was that such delays are unacceptable in dealing with convicted felons in custody of the Department of Corrections.

Finally, the defense presented Exhibit M, the appropriation for the legislative branch of government from the 2003 legislature. Exhibit M was introduced to demonstrate that the legislature is capable of enacting an appropriation that provided the funds to a given part of state government while allowing that section to determine how to utilize those funds. Exhibit M was admitted to contrast with the narrow headnote definitions that had been imposed on executive departments. The legislative appropriation simply allocates sums of money to the house of representatives and the senate, to the state auditor, the joint budget committee and the legislative council. No limitations are placed on the use of the funds by the separate legislative sections by headnote or otherwise.

ANALYSIS

What is an item? Colorado courts have wrestled with this question in earlier cases and have turned to other states for guidance. In Lamm II the court looked to Virginia which had a similar constitutional provision and which had defined "item" as follows:

In the constitutional sense, an item of an appropriation bill is an indivisible sum of money dedicated to a stated purpose; the term refers to something which may be eliminated from the bill without affecting the enactment's other purposes or provisions.

(Colorado General Assembly v. Lamm, 704 P.2d 1371, 1384 (Colo. 1985) citing Brault v. Holleman, 217 Va. 441, 230 S.E.2d 238, 242 (1976).) The term therefore seems to have two components, (1) a sum of money and, (2) a dedication to a stated purpose.

In Lamm II, having cited this Virginia definition, the Colorado court went on to say "If it is clear from the appropriation bill that, with the disapproved provision eliminated, the approved appropriations cannot effectively serve their intended purposes, the attempted elimination is invalid." (Lamm II, id.) The Lamm II court went on to illustrate its meaning by reference to Stong v. People ex rel. Curran, supra. In Stong, the governor had attempted to disapprove of only a part of a sum of money appropriated by the legislature for a particular use. The Stong court held that the governor had no authority under the line item veto to disapprove that part as it had affected the enactment's other provisions.

Does the veto of the headnote definitions affect the appropriation's other purposes or provisions? This court concludes that the line item veto of the headnotes as exercised by Governor Owens does not affect the enactment's other purposes. Therefore, under the Virginia test adopted in Lamm II, the veto is an appropriate exercise of the item veto. The court concludes that the legislative appropriations were appropriations of sums of money for the continued operation of an existing executive departments. The appropriated sum could only be spent within the executive department to which it was appropriated. By eliminating only the narrow definitions the Governor was not affecting the enactment's purposes -- to fund given executive departments. The veto only allows flexibility in the administration of the appropriated funds.

The court contrasts this decision to the holding in Lamm I. In that case the question involved "the authority of the chief executive of the state of Colorado to transfer funds from the departments of the executive branch of government for which funds were appropriated to other executive departments." (700 P.2d 508, 510.) The Lamm I court concluded that such transfers were inappropriate:

We conclude that the transfers between executive departments here undertaken impermissibly infringed upon the General Assembly's plenary power of appropriation, and, therefore, cannot be deemed to fall within the inherent administrative authority of the Governor over the state budget. (Emphasis supplied.)

(702 P.2d 508, 522.)

In the present case emphasis was made through the testimony of various witnesses that by the use of the line item vetoes in this case the Governor was not attempting to transfer money between executive departments. The extent of the Governor's efforts in exercising the line item vetoes was to allow more flexibility for the use of funds appropriated within the individual departments. The court's ruling therefore is consistent with the ruling of Lamm I.

The court finds further support for its conclusion in Anderson v. Lamm, supra. In that case the Supreme Court discussed the separation of powers issue inherent in the several cases involving the legislature and the governor as follows:

In addition, the legislature may not attach conditions to a general appropriation bill which purport to reserve to the legislature powers of close supervision that are essentially executive in character.

(Anderson v. Lamm, 579 P.2d at 624.)

In this case the court concludes that the narrow definitions imposed by the legislative headnotes are efforts by the legislature to closely supervise executive authority to administer the funds appropriated.

The testimony supports the court's conclusion that the headnotes are an effort to invade the administrative authority of the executive. The witnesses all acknowledged that there was a method by which an executive department could move money already appropriated to it within a given department. The department would have to approach the legislature and offer up a trade. A "negative supplemental," giving back some money, would be offered to the legislature in exchange for a "positive supplemental," gaining more money, for the same executive department but to be applied to a different use. This example demonstrates the type of legislative supervision of the executive power which is forbidden by our constitution. (Anderson v. Lamm, supra.)

CONCLUSION

The court finds the headnotes are an attempt on the part of the legislature to invade the executive's function in administering funds. The court finds that the definitions stricken by the vetoes do not interfere with the intended purpose of the appropriation. Therefore, the court declares the vetoes of the headnotes to have been proper.

The Governor has asked this court to find that the headnotes are also an attempt at substantive legislation by the legislature. The court declines to do so. Having found that the headnotes are improper attempts to invade the province of the executive in administering the funds the court is entering a declaratory judgment in favor of the Governor's vetoes in this case. There is no need to address whether the headnotes are substantive legislation.

HOUSE BILL 02-1246

The last item to be addressed by the court relates to House Bill 02-1246 titled "Concerning the Creation of the Eligible Facilities Education Task Force, and Making an Appropriation Therefor." The Governor exercised the line item veto as to a part of this bill, the \$10,000 appropriation to compensate the members of the legislature serving on the task force. The Governor vetoed only the appropriation.

As previously mentioned the Governor has the authority under Article IV, Section 12 of the Colorado Constitution to veto items in appropriation bills. The Governor urges that his veto of the appropriation section of House Bill 02-1246 is an appropriate exercise of the line item veto.

The court is satisfied that existing precedent has resolved this issue.

All bills other than general appropriation bills must encompass only a single subject. Colo. Const., art. V, §21. With the exception of appropriation bills, therefore, the governor must approve or disapprove a bill in its entirety. Colo. Const. art. IV, §11. (Emphasis supplied.)

(Lamm II, 740 P.2d 1371, 1383.)

This court concludes that the line item veto is appropriate as to the "long bill" which is the state general appropriation bill funding previously-established executive departments. The court concludes that the constitutional provision relied on by the Governor does not apply to substantive legislation separate from the long bill. The Governor has the ability to veto the separate legislation in whole, but not in part. The court therefore concludes that the attempted exercise of the line item veto as to a single section of House Bill 02-1246 was ineffective, as stated in Lamm II, supra, "the governor must approve or disapprove a bill in its entirety. The court orders therefore that the attempted veto of section 3 of House Bill 02-1246 shall be held for naught.

Done this 29 day of September, 2004.

BY THE COURT:


H. Jeffrey Bayless
District Judge

cc: