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FILE NO. S-1097

APPROPRIATIONS:
Substantive Matter in
an Appropriation Bill.

Honorable George W. Lindberg
Comptroller
State of Illinois
Springfield, Illinois 62706

Dear Mr. Lindberg:

I have your letter wherein you state in part as follows:

"By Section 1 of Public Act 79-257, a copy of which is attached hereto, the General Assembly has made certain line item appropriations from the Road Fund to meet the ordinary and contingent expenses of the Department of Transportation. In addition to the line item appropriations, Section 1 of that Act provides:

'The Department of Transportation may reallocate up to 8% of the total amount appropriated in this Section. Such reallocation may be between line items including personal services, offices or districts.'

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The Department of Transportation has requested the Office of the Comptroller to make the necessary changes in the Comptroller's Records in accordance with the Department of Transportation's Appropriation Reallocation Authorization, as approved by the Governor, for transfer of funds within the Road Fund appropriations. * * *

I request your opinion on whether I should make the transfers."

You then ask the following specific questions:

1. Is section 13.2 of "An Act in relation to State finance" an unconstitutional delegation of legislative power?
2. Is section 1 of Public Act 79-257 an unconstitutional delegation of legislative power?
3. Does section 1 of Public Act 79-257 violate section 8(d) of article IV of the Illinois Constitution of 1970?
4. If section 1 of Public Act 79-257 is constitutional, does it prevail over section 13.2 of "An Act in relation to State finance?"

Section 1 of article II of the 1970 Illinois Constitution provides for the separation of powers among the three branches of government. Section 1 of article IV of the Constitution provides that "the legislative power is vested in a General Assembly"; and section 2(b) of article VIII provides that the "General Assembly by law shall make

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appropriations for all expenditures of public funds by the State". It is my opinion that section 13.2 of "An Act in relation to State finance" (Ill. Rev. Stat. 1975, ch. 127, par. 149.2) does not violate these constitutional provisions.

Section 13.2 provides in pertinent part as follows:

"§ 13.2 Transfers among line item appropriations from the same treasury fund for the object specified in this Section may be made in the manner provided in this Section when the balance remaining in one or more such line item appropriations is insufficient for the purpose for which the appropriation was made. No transfers may be made from one agency to another agency, nor may transfers be made from one institution of higher education to another institution of higher education. Transfers may be made only among the objects of expenditure enumerated in this section, except that no funds may be transferred from any appropriation for personal services. The sum of such transfers for an agency in a fiscal year shall not exceed 2% of the aggregate amount appropriated to it within the same treasury fund for the following objects: Personal Services; Extra Help; Student and Inmate Compensation; State Contributions to Retirement Systems; State Contributions to Social Security; Contractual Services; Travel; Commodities; Printing; Equipment; Electronic Data Processing; Operation of Automotive Equipment; Telecommunications Services; Library Books; Federal Matching Grants for Student Loans; Refunds; Workmen's Compensation, Occupational Disease, and Tort Claims; and, in appropriations to institutions of higher education, Awards and Grants.

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Transfers among appropriations made to agencies of the Legislative and Judicial departments and to the constitutionally elected officers in the Executive branch require the approval of the officer authorized in Section 10 of this Act to approve and certify vouchers. * * * Transfers among appropriations to all other agencies require the approval of the Governor. The officer responsible for approval shall certify that the transfer is necessary to carry out the programs and purposes for which the appropriations were made by the General Assembly and shall transmit to the State Comptroller a certified copy of the approval which shall set forth the specific amounts transferred so that the Comptroller may change his records accordingly. * * *

I discussed the purpose of section 13.2 in Opinion No. S-643 (1973 Ill. Att'y. Gen. Op. 177) wherein I stated as follows:

* * * It appears that prior to the enactment of section 13.2 by Public Act 76-2412, agencies and departments of the State government had no flexibility in control of their budgets. With any minor change of circumstances or unexpected expense, budgets could be thrown out of line even though the total appropriation contained enough funds to carry out the purposes and objectives of the General Assembly. Agencies and departments were forced to go through the complete legislative process in order to make minor readjustments in their budgets. This necessity was not conducive to efficient management in state government and it added unnecessary legislation to the crowded calendar of the General Assembly.

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In order to remedy this situation, the General Assembly enacted Public Act 76-2412. It appears that within the prescribed limits and procedures, the General Assembly intended to give the State agencies and departments the budget flexibility needed to meet changes of circumstances during the fiscal year. The General Assembly also wished to eliminate the need for legislative action for minor budget readjustments."

County of Cook v. Ogilvie, 50 Ill. 2d 379, concerned the power of the Governor to transfer a portion of the public aid appropriation from the general assistance category to the aid to families with dependent children category, a program also included in the public aid appropriation. The appropriations bill provided that the director of the Illinois Department of Public Aid could transfer funds, with the approval of the Governor, between the programs as the need arose. The court held that this provision was an invalid delegation of legislative power to the executive branch of government.

The provision in the Cook County case delegated to the executive branch unfettered discretionary power to reappropriation items of appropriations without limit; the executive branch was also given the authority to reappropriation funds

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appropriated for specific programs. This broad delegation of power to the executive branch made it possible for the Department of Public Aid with the consent of the Governor to thwart the achievement of the goals the legislature hoped to accomplish when it passed the appropriation. The executive branch was, in essence, given the authority to make appropriations.

The court explained at page 385 as follows:

" * * *
Furthermore, in this case, the Illinois Department with consent of the Governor would have the apparent unrestricted authority to determine when the need for reapportionment of funds exists. Once it is determined by them that need exists, they could transfer money between funds which would frustrate the clear legislative intent to appropriate according to the fiscal requirements of each specific program and treat those in similar circumstances -- receiving welfare 'to maintain a livelihood compatible with health and well-being' -- in a different way. * * *

* * * "

The transfer provision the court examined in the Cook County case differs from the provision for transferring funds in section 13.2 of "An Act in relation to State finance". The grant of authority to the executive branch in section 13.2 is neither a broad delegation to reapportion items without

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limit, nor an authorization to reappropriation funds appropriated for specific programs. Transfers of funds may be made only among specific objects of expenditure, and the sum of such transfers for an agency in a fiscal year may not exceed 2% of the aggregate amount appropriated to the agency. Section 13.2 gives the agencies and departments of State government a degree of flexibility in the administration of their budgets. This flexibility fosters efficient management in State government without turning over the authority to make appropriations to the executive branch. The limitation on the power to transfer funds provided for in section 13.2 ensures that transfers made pursuant to the section will not result in the exercise of legislative powers by the executive branch. Therefore, it is my opinion that section 13.2 of "An Act in relation to State finance" is not an unconstitutional delegation of legislative power.

It is unnecessary to discuss whether section 1 of Public Act 79-257 is an unconstitutional delegation of legislative authority since it is my opinion that this section violates section 8(d) of article IV of the Illinois Constitution

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of 1970. Section 8(d) provides in relevant part: "Appropriation bills shall be limited to the subject of appropriations."

Although there was a provision in the Illinois Constitution of 1870 which restricted bills appropriating officers' salaries to no other subject, the provision in the Illinois Constitution of 1970 is broader; and there are few Illinois cases which define the meaning of the limitation under either the Illinois Constitutions of 1870 or 1970. However, in The People ex rel. Kirk v. Lindberg, 59 Ill. 2d 38, the Supreme Court stated at pages 42 and 43 in regard to this provision as follows:

* * *

The constitutional provision which limits appropriation bills to the subject of appropriations is not simply a formal requirement in the enactment of legislation. It is much more than that. It has its roots in the doctrine of separation of powers. As a practical matter, if subjects other than the immediate subject of appropriations in the sense of authorizations of expenditures are permitted to be included in an appropriations bill, then the veto power of the Governor is effectively nullified. Appropriation bills are characteristically passed late in the legislative session and they must become effective in order to prevent government operations from being brought to a complete stop. The Governor's amendatory veto power is also affected, for an amendatory veto would also delay the availability of the appropriated funds to insure the continued operation of governmental functions.

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Similar provisions are found in constitutions of other states. State courts have never held that these provisions mean that only bare appropriations with no related matter are permitted in appropriation bills. For instance, section 16 of article IV of the Constitution of New Mexico provided: "General appropriation bills shall embrace nothing but appropriations * * * ". The Supreme Court of New Mexico in State v. Safford, 214 P. 759 (1923) stated in regard to this constitutional provision that:

"* * * The details of expending the money so appropriated, which are necessarily connected with and related to the matter of providing the expenses of the government, are so related, connected with, and incidental to the subject of appropriations that they do not violate the Constitution if incorporated in such general appropriation bill. It is only such matters as are foreign, not related to, nor connected with such subject, that are forbidden. Matters which are germane to and naturally and logically connected with the expenditure of the moneys provided in the bill, being in the nature of detail, may be incorporated therein. Otherwise everything connected with the expenditure of money provided in the general appropriation bill would have to be provided in separate and special acts of the Legislature — a condition which was never intended."

However, such related matter may not change other substantive law. The Constitution of Florida also has a pro-

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vision similar to section 8(d) of article IV. Section 12 of article III provides: "Laws making appropriations for salaries of public officers and other current expenses of the state shall contain provisions on no other subject". In regard to that section in In Re Opinion to the Governor, 239 So. 2d 1 (1970), the Supreme Court of Florida stated that:

"* * * The Constitution expressly recognizes the power of the Legislature to make appropriations subject to qualifications and restrictions. See Sec. 8 of Article III. [This section provides in part: 'The governor may veto any specific appropriation in a general appropriation bill, but may not veto any qualification or restriction without also vetoing the appropriation to which it relates.'] Such qualifications and restrictions may not go to the extent of changing other substantive law, but they may limit or qualify the use to which the moneys appropriated may be put and may specify reasonable conditions precedent to their use, even though this may leave some governmental activities underfinanced in the opinion of officers of other departments of government."

Standing alone, section 1 of Public Act 79-257 appears to be related to the subject of appropriations; and if it were the only statutory provision related to the reallocation of appropriations, it might not violate section 8(d) of article IV of the Illinois Constitution of 1970. However, that is not the situation. The provision must be considered

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in the context of existing law. Section 13.2 of "AN ACT in relation to State finance" specifically provides for the transfer of funds among line item appropriations. It specifically provides not only "that no funds may be transferred from any appropriation for personal services" but also that "such transfers for an agency in a fiscal year shall not exceed 2% of the aggregate amount appropriated to it * * * ", and that "transfers among appropriations to all other agencies [which would include the Department of Transportation] require the approval of the Governor". Section 1 of Public Act 79-257 changes each of these requirements in regard to appropriations to the Department of Transportation. Under section 1 there is no restriction on transferring funds from appropriations for personal services; the limit of such transfers is increased from 2% to 8%; and there is no requirement that the Governor approve such transfers. Clearly, section 1 creates an exception to the requirements for transfers set forth in section 13.2 of "AN ACT in relation to State finance" which is substantive law. It changes other substantive law and is thus itself substantive in nature.

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Furthermore, this provision, by authorizing the transfer to be approved by the Department of Transportation instead of requiring the approval of the Governor as provided in section 13.2 of "AN ACT in relation to State finance" clearly increases the power of the Department of Transportation and decreases the power of the Governor. Whether the Governor approved of such provision in the bill, he was under great pressure to approve the entire bill because it was an appropriation bill. This is an example of the veto power of the Governor being effectively nullified, a possibility against which the Supreme Court warned in The People ex rel. Kirk v. Lindberg, supra. The court stated that it was to prevent such an occurrence that the provision limiting appropriation bills to the subject of appropriations was incorporated into the Illinois Constitution of 1970.

In answer to your third question, I, therefore, am of the opinion that the provision in section 1 of Public Act 79-257, regarding the transfer of funds, being substantive in nature, is unconstitutional and that you may not honor any requests for reallocation of an appropriation based

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on such provision. The provision, however, is severable and its unconstitutionality does not affect the other provisions in the Act.

Since section 1 of Public Act 79-257 is unconstitutional, it is not necessary to answer your fourth question.

Although you may not honor any requests for reallocation of an appropriation based on section 1 of Public Act 79-257, you may honor requests which conform to the provisions of section 13.2 of "AN ACT in relation to State finance". Therefore, you may comply with the Department of Transportation's request for the transfer of funds if that transfer is in accordance with section 13.2.

Very truly yours,

A T T O R N E Y G E N E R A L