5188.

APPROPRIATION — EFFECT OF GOVERNOR'S VETO ON ITEMS OF APPROPRIATION CONTAINED IN AMENDED S. B. No. 401, 91ST G. A.

SYLLABUS:

1. Items of appropriation contained in Amended Senate Bill No. 401 of the 91st General Assembly, special session, under the heading "1935" may be expended to pay liabilities incurred during the year 1936, even though such act contains no appropriation for such item for the year 1936, whether by reason of veto of the Governor or failure of the legislature to provide any amount for such year.

2. If an item of 1936 appropriation contained in House Bill 531 of the 91st General Assembly has been partially expended prior to the enactment of Amended Senate Bill 401, which act contains no such item of account of having been vetoed by the Governor, the veto of such item serves as a veto of only the unexpended and unobligated balance thereof remaining on the date of repeal of such 1936 item contained in such House Bill 531.

3. The veto of an item of appropriation does not render void obligations of the state duly contracted prior to such veto which are payable from such item.

4. Neither the Emergency Board nor the Controlling Board may make allowance or transfer to 1935 items of appropriation where an appropriation has been made for such item by the legislature for the year 1936, which 1936 item of appropriation has been vetoed by the Governor, the power to thwart or circumvent the veto power of the Governor being vested solely in the General Assembly by a vote of three-fifths of each house as provided in Article II, Section 16, of the Constitution. Third and fourth branches of the syllabus of an opinion appearing in Opinions of the Attorney General for 1927, Vol. IV, page 2667, overruled. Public Utilities Commission v. Controlling Board, 130 O. S. 127.

COLUMBUS, OHIO, February 26, 1936.

HON. JOSEPH T. TRACY, *Auditor of State, Columbus, Ohio.*

DEAR SIR: Your letter of recent date is as follows:

"In order that this office may be consistent in its application of the law relating to expenditures under Senate Bill 401, we would like to have your opinion upon the following questions:

Q. 1. Are the balances remaining in items under column '1935' in said Bill still effective if the amount in said item under column '1936' was vetoed by the Governor under date of February 7th, 1936?

Q. 2. If an item of 1936 had been partially expended between January 1, 1936 and February 7, 1936, does the veto of the Governor of said item appearing in the Bill cancel only the balance remaining after the repeal of such item for 1936 by Amended Senate Bill 401?

Q. 3. If an amount that has been vetoed has been partially or wholly encumbered between January 1st, 1936 and February 7th, 1936, does said message render void the encumbrances unpaid on February 7th, 1936?

Q. 4. If your answer to Question 1 is in the affirmative, may the Emergency Board or the Controlling Board make allowance or transfer to such items when there is an appropriation for 1935 and an unexpended balance therein and the 1936 appropriation has been vetoed?

An early opinion will be appreciated as bills are being filed for payment."

Amended Senate Bill No. 401, as passed by the General Assembly on January 23, 1936, approved by the Governor excepting certain items vetoed on February 7, 1936, and filed in the office of the Secretary of State February 7, 1936, is entitled an act "To amend section 1 of House Bill No. 531, an act entitled, 'To make general appropriations for the biennium beginning January 1, 1935, and ending December 31, 1936', passed May 23, 1935, approved June 18, 1935, except as to certain items vetoed, and filed in the office of the secretary of state June 18, 1935, relative to appropriations for the year 1936." The third paragraph of Section 1 of this act was reenacted in exactly the same language as contained in Section 1 of House Bill 531. This paragraph reads as follows:

"The sums herein named in the column designated '1935' shall not be expended to pay liabilities or deficiencies existing prior to January 1, 1935, nor to pay liabilities incurred subsequent to December 31, 1936; those named in the column designated '1936' shall not be expended to pay liabilities or deficiencies existing prior to January 1, 1936, or incurred subsequent to December 31, 1936."

It is observed that it is expressly provided that amounts appropriated for 1935 shall not be expended "to pay liabilities incurred subsequent to December 31, 1936". Had the legislature sought to limit expen-

ditures from amounts appropriated for 1935 to pay liabilities incurred in 1935, it could easily have used apt words so to do. The fact that the time limit placed upon expending 1935 appropriations is December 31, 1936, certainly indicates that the legislature intended that liabilities may be incurred up to the end of the year 1936 which are payable out of 1935 appropriations.

The conclusion which I have indicated upon your first question is strengthened by a consideration of the language of Section 3 of House Bill 531, which section was not repealed by Amended Senate Bill 401. It is obvious that if unexpended balances appearing in a 1935 item of appropriation at the end of that year may not be expended during 1936, then balances would lapse on December 31, 1935 into the funds from which they were appropriated. Such Section 3, however, provides otherwise in the following language:

> "The appropriations made in this act shall be and remain in full force and effect for a period of two years commencing with the dates on which such appropriations shall take effect, for the purpose of drawing money from the state treasury in payment of liabilities lawfully incurred hereunder, and at the expiration of such period of two years, and not before, the moneys hereby appropriated shall lapse into the funds from which they are hereby severally appropriated."

In so far as your first question is concerned, no distinction is seen between a case where no item of appropriation appears for 1936 by virtue of such item having been vetoed by the Governor, and one where no such item appears by virtue of having been omitted by the General Assembly. It is accordingly my opinion that unexpended balances appearing in items of appropriation contained in Amended Senate Bill 401 of the 91st General Assembly, as enacted in special session, under the heading "1935" may be expended to pay liabilities incurred during the year 1936, even though such act contains no appropriation for such item for the year 1936, whether by reason of veto of the Governor or failure of the legislature to provide any amount for such year.

Your second question is apparently predicated upon a case where the General Assembly re-enacted in Amended Senate Bill 401 an item of appropriation for 1936 which had appeared in House Bill 531 and the Governor vetoed such 1936 item. Since you refer to an item of 1936 partially expended, such item must have been contained in House Bill 531 for the reason that Amended Senate Bill 401 was not signed by the Governor until February 7, and was not until that date effective as a law even in part. There is, of course, no doubt whatsoever but that when an item of appropriation is repealed no liabilities may be incurred after

the effective date of such repeal which are payable from such repealed item. Section 22 of Article II of the Constitution. It follows that the veto of such 1936 item serves as a veto of only the unexpended and unobligated balance thereof remaining on the date of the repeal of such 1936 item contained in House Bill 531.

In your third question, you ask whether or not the veto message of the Governor renders void encumbrances made prior to February 7, 1936, the date of such vetoes, but unpaid on that date. I assume by the term "encumbrances" you refer to valid contractual obligations which were theretofore entered into.

Section 2288-2, General Code, provides as follows:

> "It shall be unlawful for any officer, board or commission of the state to enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the expenditure of money, unless the director of finance shall first certify that there is a balance in the appropriation pursuant to which such obligation is required to be paid, not otherwise obligated to pay precedent obligations."

This section was under consideration in an opinion of this office appearing in Opinions of the Attorney General for 1931, Vol. II, page 933, which ruled upon the circumstances under which the Director of Finance may cancel a certificate issued thereunder. It is recognized in this opinion that the mere certification under this section does not constitute an encumbrance in the sense that an obligation is thereby entered into whereby the state may be said to have contracted to any public funds. The discussion appearing on pages 934 and 935 is clear as to this point. After quoting Section 2288-2, supra, and commenting upon the necessity for the Director of Finance keeping a record of appropriations and certificates issued against them under this section, my predecessor said:

> "There is no particular method provided by statute for the keeping of this record. The method of keeping the record is left entirely to the Director himself. Neither does the statute prescribe to whom a certification made by the Director of Finance is to be addressed. In practice, I understand, the certification is directed to the officer, board or commission which seeks to enter into a contract, agreement or obligation involving the proposed expenditure or is about to pass a resolution or give an order for the expenditure of money. For convenience, a copy of the certificate is filed with the Auditor of State and frequently duplicates are made for contractors and others.
>
> When such a certificate is made, the appropriation involved

is said to be 'encumbered' to that extent. This 'encumbrance', if it may properly be called an encumbrance, is not so fixed or permanent that it may not be removed in the same manner it was created. The mere certification itself does not act directly on the appropriation or the fund which it represents. For instance, if a certification were to be made by mistake it would not affect the real balance in the fund and the Director of Finance is required to certify that balances exist in an appropriation if in fact they do so exist. The Director of Finance is a mere ministerial officer in so far as his duty with reference to making this certification is concerned. In the case of State ex rel. v. Baker, 112 O. S., 356, the Supreme Court of Ohio held as stated in the third branch of the syllabus thereof:

'By virtue of Section 2288-2, General Code, no public improvement constructed by the expenditure of state funds can lawfully proceed unless the director of finance shall first certify that there is a balance in the appropriation not otherwise appropriated to pay precedent obligations. In the event the money is in fact in the fund, it is the ministerial duty of the director of finance to make the required certificate, and the discharge of this duty may be compelled by mandamus.'

It will be observed from the terms of the statute that the certification which the Director of Finance is directed to make is to the effect that there is a balance in a certain appropriation pursuant to which a proposed expenditure or obligation is required to be paid 'not otherwise obligated to pay precedent obligations.' The mere certification that a balance is in an appropriation to meet a proposed expenditure or obligation is not spending the money, *nor is it obligating an expenditure.* The obligation is made by the officer, board or commission proposing to obligate or spend the money, and if the money is not obligated or spent the Director may certify that it is still there 'not otherwise obligated to pay precedent obligations.'

I know of no reason why, if the Director of Finance is assured that a proposed expenditure, for which a certificate previously has been made, and thereby the appropriation from which the proposed expenditure was to be made is encumbered for the purposes of that particular expenditure, is entirely abandoned, he may not disregard the previous certificate and treat the appropriation as though the certificate had never been made.

Of course *so long as the certificate is extant, it enables the officer, board or commission to whom it is directed to reduce the real balance in the appropriation to the extent of the amount*

certified, by obligating it or expending it. Until it is obligated by the making of a contract or expended by the drawing and issuing of warrants against it, it may, in my opinion, be made available for certification as a balance in the appropriation by the abandonment of the former proposed expenditure or obligation, and the canceling of the former certificate." (Italics the writer's.)

It is perfectly obvious that if a valid contractual obligation has been entered into pursuant to the certificate of the Director of Finance issued under Section 2288-2, supra, that the subsequent veto of the item of appropriation from which such obligation is payable cannot serve to release the state from liability to pay such obligation from such item of appropriation. Article I, Section 10 of the Constitution of the United States expressly prohibits any state from passing a law to impair the obligation of contracts. The Governor's veto accordingly does not render void such encumbrances whereby, pursuant to certification of the Director of Finance under Section 2288-2, General Code, the state has contracted to pay moneys out of an item which was vetoed by the Governor subsequent to the incurring of such obligations.

I come now to your fourth question which is one of considerable difficulty.

Shortly after the action of the Governor in vetoing numerous items for 1935 contained in House Bill No. 531, being the first general appropriation act for the current biennium as passed by the 91st General Assembly in regular session, this office as a member of the Controlling Board considered the matter of the power of that board under Section 3 of such House Bill 531 to authorize transfers of funds "to new classification items in cases where proper code items have not been provided by the legislature". Application was made for the transfer of funds to a 1935 item of appropriation which had been provided by the legislature but which did not appear in the general appropriation bill on account of having been vetoed by the Governor. This office construed the hereinabove quoted language of Section 3 of the first general appropriation act as authorizing transfers to new items only in cases where the legislature itself had failed to provide such items and took the position that this language did not authorize the transfer of funds to an item which had been provided by the legislature but vetoed by the Governor. In adopting this position precedent of eight years standing was adhered to and two opinions of this office appearing in Opinions of the Attorney General for 1927 were followed. I refer to an opinion reported in Vol. II of the opinions for that year at page 1263, the syllabus of which is as follows:

"1. The Emergency Board has no authority to allot any

part of the money appropriated to it for the purpose of continuing the work of the Ohio State Library from July 1, 1927, to January 1, 1929.

2. The act of the Governor in vetoing appropriations to carry on the work of the Ohio State Library does not create a 'deficiency in any of the appropriations for the expense of an institution, department or commission of the state for any biennial period', nor does it constitute an 'emergency requiring the expenditure of money not specifically provided by law.'"

I also refer to an opinion appearing in Opinions of the Attorney General for that year in the same volume at page 1441, particularly directing your attention to the sixth branch of the syllabus which reads as follows:

"Since such action would have the effect of nullifying the Governor's veto power where, by vetoing an entire appropriation item, a classification in an appropriation bill has been entirely wiped out, the Controlling Board is without authority to restore such classification or to authorize a transfer of funds thereto."

This construction placed upon the statutory authority vested in the Controlling Board in accordance with the foregoing opinions of this office rendered in 1927, was attacked in the case of State, ex rel. Public Utilities Commission v. Controlling Board, 130 O. S., 127, Ohio Bar July 15, 1935, wherein the Supreme Court unanimously upheld the 1927 opinions, supra, which were followed by this office.

It may be contended that the specific question here is in some respects distinguishable from that under consideration in the Controlling Board case, supra, in that we are here concerned with an item of appropriation designated as a 1935 item in which there are still moneys which may be expended and against which obligations may be incurred during the year 1936. This specific question was considered and passed upon by this office later on in the year 1927 in an opinion rendered to the Public Utilities Commission on December 30 of that year appearing in Opinions of the Attorney General for 1927, Vol. IV, page 2667. In that opinion, the then Attorney General was concerned with an appropriation having been made for a given item for the six months period beginning July 1, 1927 and ending December 31 of that year and an additional amount appropriated to such item for the year beginning January 1, 1928 and ending December 31, 1928. The Governor had vetoed the item for the year 1928, leaving the amount appropriated to such item for the six months period of 1927. The question there under consideration and the principles of law involved are directly analagous to the questions raised by

your questions numbers one and four set forth in your letter. The third and fourth branches of the syllabus read as follows:

> "3. The appropriation of $3,000.00 to the Department of Commerce—Division of Public Utilities under the classification 'A.-3 Unclassified—Reporting and transcribing testimony', contained in the column designated 'Six Months,' page 34, House Bill No. 502, passed by the 87th General Assembly, may by the terms of Section 1 of House Bill No. 502, be expended to pay liabilities incurred during, and is for, the eighteen months' period, July 1, 1927, to December 31, 1928. Notwithstanding the veto by the Governor of the appropriation of $6,000.00 under the same classification in the column designated 'Year', if there be a deficiency in said appropriation of $3,000.00 by the terms of Sections 2313, et seq. of the General Code, the Emergency Board is authorized and empowered to make allowances to the department in question, from the current contingent appropriation for the uses and purposes of the Emergency Board, if such board finds that a deficiency does in fact exist in said appropriation, and deems such allowance proper.
>
> 4. Likewise the Controlling Board may authorize transfers to such classification, from other detailed classifications under the same general heading, viz.: 'Total maintenance,' in the appropriation made to said department and division."

The reasoning in the body of the opinion in support of the conclusions set forth in the syllabus, supra, is pertinent and should be herein quoted at length. At pages 2679 and 2680, it is said:

> "This brings me to your second question. It will be observed that by the express directions of the last sentence of Section 1 of House Bill No. 502, supra, it is provided that 'The sums * * * appropriated in the column designated "Six Months" * * * shall not be expended to pay liabilities or deficiencies existing prior to July 1, 1927, or incurred subsequent to December 31, 1928.' In other words, the items contained in the column designated 'Six Months' are for the eighteen months' period ending December 31, 1928. It cannot be said, therefore, that there is no appropriation under the classification 'A-3. Unclassified—Reporting and Transcribing Testimony' for the year 1928. It is true that the governor has vetoed the item of $6,000 for the same purpose contained in the column designated 'Year,' which by the terms of the last sentence of Section 1, supra, could

not 'be expended prior to January 1, 1928, nor to pay liabilities incurred subsequent to December 1, 1928. So far as the appropriations under consideration are concerned, therefore, there is an appropriation for the eighteen months' period.

As above pointed out, the appropriation act must be read in connection with Sections 2312, 2313, 2313-1 and 2313-2, General Code, which provide in substance that in case of any deficiency in any of the appropriations for the expenses of an institution, department or commission of the state for any biennium period, allowances may be made by the Emergency Board from the 'contingent appropriation for the uses and purposes' of such board which is to 'be applied exclusively to the payment of deficiencies in other current appropriations.'

Frankly, I have doubt as to the validity of the use of any part of the appropriation to the Emergency Board for the purposes of making up any deficiency in any of the appropriations for the expenses of any department of the state government.

Under Section 22 of Article II of the Ohio Constitution, quoted above, no money may be drawn from the state treasury except in pursuance of a specific appropriation made by law. I am inclined to the view that Sections 2313, et seq. violate said last mentioned constitutional provision in so far as they attempt to authorize monies appropriated to the Emergency Board to be used to make up deficiencies in operating expenses. This seems to be an authorization of the very abuse prohibited by said constitutional provision. It may be argued that emergencies come in this same classification but I can see wherein the courts would be justified in upholding an appropriation for emergencies, that is, unforeseen contingencies in government. To my mind to create a board to look after unforeseen contingencies and to appropriate a reasonable amount of money to that board for such purposes only is not a violation of the above last mentioned constitutional provision.

Inasmuch as:

(a) I am not clear beyond reasonable doubt that such an appropriation is unauthorized.

(b) In 1912 the people of this state amended the Constitution so that it is now provided in section 2 of Article IV that—

'No laws shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the

judges, except in the affirmance of a judgment of the Court of Appeals declaring a law unconstitutional and void.'

(c) there is a presumption of validity to be accorded to acts of the General Assembly and unless clearly unconstitutional it is the duty of courts to uphold the same,

(d) notwithstanding the Budget Classifications and Rules of Procedure provide that 'f-8 Contingencies' is a classification which should be used only for 'unforeseeable expenses.' I am informed that there has grown up a practice by the Emergency Board of using monies appropriated under this budget classification for any and all purposes set forth in Sections 2313, et seq.

Until our Supreme Court holds otherwise, I shall assume that the emergency board has the power to use the monies appropriated to it under said classification for any of the purposes set forth in Sections 2313, et seq.

As a matter of law, therefore, in the cases under consideration the Emergency Board is authorized and empowered to grant authority to your commission to create obligations within the scope of the purpose for which the $3,000 appropriation was made, if it finds that a deficiency does in fact exist and, if in the exercise of its discretion, the board sees fit so to do; and such authority may be granted at any time during the eighteen months' period.

It might be contended that such action on the part of the Emergency Board would have the effect of overriding or destroying the governor's veto. The answer, however, to such a contention is that the governor with a knowledge of the provisions of Sections 2312, et seq., supra, not only did not veto the items of $150,000 and $350,000 to the Emergency Board under the classification 'F-8. Contingencies—Uses and Purposes,' but in his veto message specifically said that the 'veto of some of the items will necessitate a readjustment of funds by the State Board of Control from time to time.' While this statement mentioned the Controlling Board and made no reference to the Emergency Board, it shows, on the part of the governor, an appreciation of the fact that a transfer of funds was authorized under the law, at least in some cases where items were vetoed.

The case here presented is entirely different from the case where both the item in the column designated 'Six Months' and the item in the column designated 'Year' is vetoed, the appropriation thus being destroyed in its entirety. In such a case there is no appropriation whatever for the eighteen months' period, and

there being no appropriation, there can, from the very nature of things, be no deficiency in any appropriation."

The Attorney General then cited and quoted from the two earlier 1927 opinions hereinabove discussed.

In determining the controlling force of the foregoing opinion as responsive to the question here under consideration, it should first be observed that Sections 2313, et seq. of the General Code, relating to allowances by the Emergency Board have not since been amended or repealed. It should be further observed that Section 4 of House Bill 531, which section is still in force and effect, grants as broad, if not broader, powers to the Controlling Board with respect to the transfer of funds as that contained in the general appropriation act of the 87th General Assembly.

It remains to be determined whether or not the recent decision of the Supreme Court in the Controlling Board case, supra, overrules the third and fourth branches of the syllabus of the hereinabove discussed opinion rendered December 30, 1927. It should be noted that the then Attorney General specifically pointed out his doubts as to the constitutionality of the statutes as conferring the powers there considered, but having no benefit of judicial expression of the law applicable thereto, adhered to the policy of this office of refraining from any attempt to set aside an act of the legislature on constitutional grounds—a policy based upon the principle that the power to set aside an act of the legislature on such grounds is the highest prerogative of the judiciary and not vested in an administrative or executive officer.

In this Controlling Board case, the court of last resort of this state has laid down in no uncertain terms the lack of constitutional authority on the part of the legislature to vest in an administrative board a power which could result in thwarting or circumventing the veto power of the Governor. The clear, and I believe controlling, language of the court on this point is contained in the concluding paragraph of its opinion which reads as follows:

> "The Legislature itself can override the Governor's veto only by a vote of three-fifths of the members elected to each house of the General Assembly. The Controlling Board, of course, has no such power. The Legislature is powerless to confer on any administrative board authority that would result in thwarting or circumventing the veto power of the Governor."

The question with which we are here concerned is solely one of power. If either the Emergency or the Controlling Board has the power

to augment the 1935 items of appropriation where there has been an appropriation therefor vetoed for 1936 to the extent of even one cent, then the Emergency or Controlling Board may augment such 1935 items of appropriation in an amount sufficient to completely thwart or circumvent the veto power of the Governor by augmenting the 1935 item in an amount equal to the amount vetoed for 1936. The Supreme Court has expressly recognized that this may only be done by three-fifths vote of each house of the General Assembly as provided in Article II, Section 16 of the Constitution.

In consideration of the foregoing, it is my opinion that neither the Emergency Board nor the Controlling Board may make allowance or transfer to 1935 items of appropriation where an appropriation has been made for such item by the legislature for the year 1936, which 1936 item of appropriation has been vetoed by the Governor, the power to thwart or circumvent the veto power of the Governor being vested solely in the General Assembly by a vote of three-fifths of each house as provided in Article II, Section 16 of the Constitution. The third and fourth branches of the syllabus of the opinion of this office appearing in Opinions of the Attorney General for 1927, Vol. IV, page 2667, must accordingly be overruled under authority of Public Utilities Commission v. Controlling Board, 130 O. S. 127.

Respectfully,
JOHN W. BRICKER,
Attorney General.

5189.

APPROVAL—BONDS OF SCIO VILLAGE SCHOOL DISTRICT, HARRISON COUNTY, OHIO, $42,000.00.

COLUMBUS, OHIO, February 26, 1936.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

5190.

APPROVAL—WASHINGTON SPECIAL RURAL SCHOOL DISTRICT, MONROE COUNTY, OHIO, $17,500.00.

COLUMBUS, OHIO, February 26, 1936.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.