

OPINION NO. 75-059**Syllabus:**

1. The power of the Governor under Article II, Section 16, Ohio Constitution, to disapprove "any item or items in any bill making an appropriation of money" includes the power to disapprove non-appropriation items, provided such items are separate and distinct from other provisions in the same bill.
2. Items 25, 26, 31, and 32 of the Governor's veto message to the House of Representatives by which he disapproved the enactment or amendment of R.C. Sections 127.011, 127.02, 127.03, 127.04, 3333.041, and 3901.39, in Am. Sub. H.B. No. 155, the general biennial appropriation bill, are separate and distinct items under Article II, Section 16, and their disapproval was proper and valid.
3. Provisions in the biennial appropriation bill which were disapproved in Items 34, 40, 47, 49, 54, and 56 of the Governor's veto message are not separate and distinct items from the appropriations to which they relate, and their disapproval was not proper and valid under Article II, Section 16.
4. Language in Section 40 of the biennial appropriation bill which repealed existing R.C. Sections 127.02, 127.03, and 127.04 was implicitly disapproved by the disapproval in Item 26 of the Governor's veto message of the provision amending those sections.
5. The disapproval in Item 70 of the Governor's veto message of "125.81" in Section 50 of the biennial appropriation bill was not the disapproval of a separate and distinct item and was not proper and valid under Article II, Section 16.
6. The language in the biennial appropriation bill disapproved by the Governor in Items 22, 23, 24, and 46 of his veto message did not constitute separate and distinct items subject to veto pursuant to Article II, Section 16.

To: Vernal G. Riffe, Ohio House of Representatives, Columbus, Ohio
By: William J. Brown, Attorney General, September 12, 1975

As Speaker of the House of Representatives, you have forwarded to me for my consideration House Resolutions Nos. 319, 320 and 321, which request my opinion on the propriety and validity of the Governor's vetoes of various portions of Am. Sub. H.B. No. 155, the general biennial appropriation bill for fiscal years 1976-77.

I will consider first H.R. No. 319 which reads in pertinent part as follows:

RESOLVED, That the members of the House of

Representatives of the 111th General Assembly of Ohio, in adopting this Resolution, hereby request the Attorney General, pursuant to section 109.13 of the Revised Code, for a written opinion as to whether the vetoes of the language of sections 127.011, 127.02, 127.03, 127.04, 127.11, 127.13, 127.14, 127.16, 3333.041, and 3901.39 of the Revised Code in Am. Sub. H.B. 155, the veto of section 125.81 in Section 50 of Am. Sub. H.B. 155, and vetos numbered 34, 40, 47, 49, 54, and 56 which are of language conditional to appropriations are a proper exercise of the Governor's power under Article II, Section 16 of the Ohio Constitution and whether the language is void or remains a part of the bill, and to advise the House of the particular reasons for his opinion; and be it further

RESOLVED, That the Attorney General advise the House of Representatives as to whether the Governor's failure to veto the parts of section 49 (the repealer clause) of Am. Sub. H.B. 155, which refer to sections 127.02, 127.03, and 127.04 of the Revised Code means that those sections are, upon the effective date of Am. Sub. H.B. 155, no longer in existence.

For the reasons set out below it is my opinion that Items 25, 26, 31, and 32 of the Governor's veto message filed with the House on June 29, 1975, in which the enactment or amendment of R.C. Sections 127.011, 127.02, 127.03, 127.04, 3333.041, and 3901.39 was disapproved, were separate and distinct "items" as that term is used in Article II, Section 16, Constitution of Ohio. Therefore, the disapproval of that language was a proper exercise of the Governor's power under that section. In addition, language in Section 49 of Am. Sub. H.B. No. 155 (hereinafter referred to as "The Bill"), which repeals the existing R.C. Sections 127.02, 127.03 and 127.04 was implicitly disapproved by the veto of language in the bill which would have amended those sections.

However, Items 34, 40, 47, 49, 54 and 56 in the Governor's veto message, which disapproved noncodified portions of The Bill, did not address separate and distinct items. Therefore, the vetoes of these items were not a proper exercise of the Governor's power under Article II, Section 16, *supra*. Similarly Item 70, which disapproved the inclusion of "125.81" in Section 50 of The Bill, was not a separate and distinct item and was not proper.

The Governor's power to disapprove items in a bill arises under Art. II, Section 16, Ohio Constitution; which reads:

If the governor approves an act, he shall sign it, it becomes law and he shall file it with the secretary of state.

If he does not approve it, he shall return it with his objections in writing, to the house in which it originated, which shall enter the objections at large upon its journal, and may then reconsider the vote on its passage. If three-fifths of the members elected to the house of origin vote to repass the bill, it shall be sent, with the objections of the governor, to the other house, which may also reconsider the vote on its passage. If three-fifths of the members elected to the second house vote to repass it, it becomes law notwithstanding the objec-

tions of the governor, and the presiding officer of the second house shall file it with the secretary of state. In no case shall a bill be repassed by a smaller vote than is required by the constitution on its original passage. In all cases of reconsideration the vote of each house shall be determined by yeas and nays, and the names of the members voting for and against the bill shall be entered upon the journal.

If a bill is not returned by the governor within ten days, Sundays excepted, after being presented to him, it becomes law in like manner as if he had signed it, unless the general assembly by adjournment prevents its return; in which case, it becomes law unless, within ten days after such adjournment, it is filed by him, with his objections in writing, in the office of the secretary of state. The governor shall file with the secretary of state every bill not returned by him to the house of origin that becomes law without his signature.

The governor may disapprove any item or items in any bill making an appropriation of money and the item or items, so disapproved, shall be void, unless repassed in the manner prescribed by this section for the repassage of a bill. (Emphasis added.)

The first legal issue posed by H.R. No. 319 is essentially: what constitutes an "item" in an appropriation bill which may be disapproved by the Governor pursuant to his power under Article II, Section 16, supra. In State ex rel. Brown v. Ferguson, 32 Ohio St.2d 245 (1972), the court applied the following test to determine what is an item, and, therefore, what is subject to an item veto:

"Upon the basis of the reasoning in these decisions, we conclude that those provisions in an appropriation bill which are separate and distinct from other provisions in the same bill, insofar as the subject, purpose, or amount of the appropriation is concerned, are items within the meaning of Section 16, Article II of the Ohio Constitution."

Id. 252 (Emphasis added)

In that case the court held that a provision in the general appropriation bill for fiscal years 1972-1973 authorizing the Secretary of State to name special counsel to represent him, payable from appropriations to the Attorney General, was an item separate from the appropriation to the Attorney General. It noted that under the provision in question, the Attorney General was eligible for reimbursement from the Controlling Board for any expenditure to the Secretary of State. Thus the court reasoned that:

"The funds appropriated for the Secretary of State depend only indirectly on the appropriation for the Attorney General; they are ultimately disbursed from the fund available to the Controlling Board.

If the vetoed language in question were severed from the appropriation for the Attorney General, both provisions could stand alone. Since the Attorney General is entitled to reimbursement from the Controlling Board for any expenditure to the Secretary of State, the total amount of the appropriation for the Attorney General remains the same." Id. 253

Your questions raise the additional issue of whether in a general biennial appropriation bill, the Governor may disapprove "items" which are neither appropriations nor related to appropriations. The Court's opinion in State ex rel. Brown v. Ferguson, supra, did not discuss this issue. However, my predecessor had occasion to consider it in 1961 Op. Atty. Gen. No. 2411, p. 412 and I concur with his reasoning. Having defined "items" for purposes of Article II, Section 16, supra, as any "distinct and severable detail" of a bill making an appropriation, he considered the disapproval of language in a general biennial appropriation bill which did not make an appropriation. He observed that the Governor's authority under Article II, Section 16, supra, to disapprove items extended to "any item or items in any bill making an appropriation of money" and that in practice many subjects not germane to the title are included in appropriation bills. Thus he concluded at p. 414, and I concur, that non-appropriation items were subject to disapproval by the Governor pursuant to Article II, Section 16, supra, stating:

"Section 16 of Article II, supra, clearly contemplates that the Governor shall have the right to disapprove complete bills and to disapprove items in bills which make appropriations of money. If language such as here concerned were not subject to the disapproval of the Governor as an item veto, this right could be defeated. Any language which the General Assembly wished to pass without being subject to veto could be inserted in a bill making an appropriation. In order to veto such language the Governor would be forced to veto the entire bill even though he might desire to veto only certain items of the bill. I do not believe that this is the intent of said Section 16, and I am of the opinion that any detail of a bill making an appropriation of money, which detail is distinct and severable from the remainder of the bill, is an item in a bill making an appropriation within the purview of Section 16 of Article II, supra."

See also State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 524 P. 2d 975 (1974), State ex rel. Turner v. Iowa State Highway Comm'n., 186 N.W. 2d 141 (Iowa 1971), in which this interpretation was applied to similar constitutional provisions in other jurisdictions, as well as 1971 Op. Atty. Gen. No. 71-088, in which I followed Opinion No. 2411.

H.R. 319 questions the propriety of fifteen different item vetoes. Eight of those vetoes, which were set out in Items 25 through 32 of the Governor's veto message, disapproved language in The Bill, which amended R.C. Sections 127.011, 127.02, 127.03, 127.04, 127.11, 127.13, 127.14, 127.16, 3333.041, and 3901.39.

With respect to Items 27, 28, 29, and 30, which amended R.C. Sections 127.11, 127.13, 127.14, and 127.16, your questions have been rendered moot by the subsequent passage and approval by the Governor of Am. S.B. No. 358 (Effective 7-30-75), which re-enacted those sections. Therefore, I need not consider these items.

With respect to Items 25, 26, 31 and 32, which disapproved the language of R.C. Sections 127.011, 127.02, 127.03, 127.04, 3333.041, and 3901.39, the resolution asks whether under Article II, Section 16, supra, the Governor may disapprove permanent provisions of law which merely happen to be in an appropriation bill. As discussed above, the Governor's authority under Article II, Section 16, supra, to disapprove items in appropriation bills extends not only to

items of appropriation, but also to items of permanent law. Therefore, provided the items of permanent law are separate and distinct from other provisions in the bill, the Governor may disapprove them. It is necessary, therefore, to consider whether each of these items is in fact separate and distinct from other provisions in the same bill.

Item 25 of the veto message disapproves the enactment of R.C. 127.011. That section would increase the size of the Emergency Board by two members and make provisions for filling the two new positions. The Governor's veto disapproved the entire section and the bill contains no other language the nature or operation of which is directly affected by the disapproval of R.C. 127.011. Therefore, it appears that R.C. 127.011 as enacted by The Bill is a separate and distinct item and its disapproval in Item 25 of the veto message was proper and valid.

Item 31 of the veto message disapproved the enactment of R.C. 3333.041. That section directs the Board of Regents to promulgate rules requiring state assisted institutions of higher education to adopt programs for the recruitment of females and minorities for faculty and staff positions and as students. R.C. 3333.041 as enacted would also establish a time schedule for implementation of the programs. While this section would affect institutions that receive appropriations from the state, it does not purport to make such appropriations contingent on compliance with the policy. Nor does it make appropriations to the Board of Regents contingent on the promulgation of rules in accordance with this section. It appears, therefore, that the provisions of R.C. 3333.041 as enacted by The Bill constitute a separate and distinct item which may be disapproved by the Governor pursuant to Article II, Section 16, supra.

Item 32 disapproved the enactment of R.C. 3901.39. This section would prohibit the issuance of certain policies of sickness and accident insurance that exclude hospitalization benefits for the first one hundred days of hospitalization where the insured is hospitalized in a tax-supported institution of the state or any county or municipality. As with R.C. 3333.041, this section does not impose any conditions on any appropriation made by The Bill. Nor is its operation affected directly by any other language in The Bill, whether permanent or not. Therefore, it must be viewed as a separate and distinct item, and the Governor's disapproval of it is proper and valid.

Item 26 disapproved the amendment of R.C. Sections 127.02, 127.03, and 127.04. The amendment of these sections would substitute the Controlling Board for the Emergency Board as the appropriate agency to authorize the creation of obligations to meet deficiencies in appropriations for the expenses of institutions, departments, and commissions and to meet emergency expenditures not specifically provided for by law. These sections also provide procedures for handling such obligations and for contingent appropriations to the Controlling Board for use in meeting these deficiencies. As with R.C. 127.011, discussed above, the provisions in R.C. Sections 127.02, 127.03, and 127.04, while interrelated and dependent in their operation on each other, are separate and distinct from other provisions of the bill and, therefore, constitute a distinct item subject to disapproval under Article II, Section 16, supra.

With respect to Item 26 (the disapproval of R.C. Sections 127.02, 127.03, and 127.04) H.R. 319 further questions the

Governor's power to disapprove language which is a re-enactment or amendment of an existing statute where the language disapproved is the same as the prior statute. However, Article II, Section 16, supra, states that "any item" in a bill making an appropriation may be disapproved. Therefore, under the test enunciated in State ex rel. Brown v. Ferguson, supra, it appears that so long as the language is part of a separate and distinct item it may, and in fact must, be disapproved along with the rest of the language of that item, even though the disapproved provision is the same as the language in the prior statute.

Am. Sub. H.B. No. 155 amended R.C. Sections 127.02, 127.03, and 127.04, by substituting the Controlling Board for the Emergency Board as the proper authority to exercise certain powers granted by those sections. Consequently, while most of the existing language remained the same, it was in fact directly related to the new language vesting the duties and powers in the Controlling Board. It follows that the existing language in those sections was properly included as part of the item disapproved.

H.R. 319 also asks the effect of the Governor's failure to disapprove along with Item 26 that portion of Section 49 of The Bill, which repealed the existing R.C. Sections 127.02, 127.03 and 127.04. It should first be noted that a repealer clause is necessitated by the provision in Article II, Section 15(D) of the Ohio Constitution providing that "[n]o law shall be revived or amended unless the new act contains the entire act revived or the section or sections amended, and the section or sections amended shall be repealed." Thus when used in conjunction with an amendment, a repealer clause would not evidence a legislative intention to repeal a provision of law, but would merely be a technical device used in amending the provision.

In this regard the courts have repeatedly held that when the General Assembly repeals a section of the Code by express terms of a bill and in the same bill re-enacts the original portion of that section with certain additions, the original portions are not to be regarded as having been repealed and re-enacted, but as having been continuous and undisturbed by the amending act. Weil v. Taxicabs of Cincinnati, Inc., 139 Ohio St. 198 (1942); State ex rel. Taylor v. Cowen, 96 Ohio St. 277 (1917); State v. Knecht, 21 Ohio Misc. 91 (1969). It appears clear then that the language in Section 49 of The Bill, repealing the existing R.C. Sections 127.02, 127.03, and 127.04, was included for the purpose of complying with Article II, Section 15(D), supra. Therefore, the Governor could not, by disapproving only an enacting clause, cause the repeal of a statute which the General Assembly merely intended to amend.

It remains to be determined, however, whether the Governor's failure to expressly disapprove the repealer clause defeats his disapproval in Item 26 of the enacting clause, or whether the repealer clause should be viewed as implicitly disapproved and inoperative as a result of the disapproval of the enacting clause. While I find no Ohio cases specifically dealing with this issue, the Ohio Supreme Court has on several occasions considered a similar problem in the case of an act which is unconstitutional.

In State ex rel. Walton v. Edmondson, Auditor of Hamilton County, 89 Ohio St. 351 (1914), the court considered an act, one section of which repealed certain provisions in the General Code and another section of which enacted substitute language. The substitute provisions were found by the court to be unconstitutional.

The court rejected the contention that the legislature would have passed the repealing language without including the substitute language. Therefore, it held at pp. 364, 365 that:

"Where an amendatory and repealing act is a substitute for the law repealed and the body of the act is unconstitutional, the repealing law is inoperative and the old law remains in force."

See also State ex. rel. Kelly v. Thrall, 59 Ohio St. 368, 401 (1899); State ex rel. v. Smith, 48 Ohio St. 211, 219 (1890).

The same rationale is applicable here. It is clear that the inclusion of language in Section 49 of Am. Sub. H.B. No. 155 repealing the existing R.C. Sections 127.02, 127.03, and 127.04 was an incident to the amendment of those sections by that bill, and that the General Assembly did not intend to repeal those sections, but only to amend them. Therefore, since the Governor cannot legislate the repeal of a statute by disapproving an attempt to amend it, the repealing clause must be viewed as having been implicitly disapproved by the express disapproval in Item 26 of the amending language.

In addition to the above discussed items in the Governor's veto message, H.R. No. 319 questioned a series of disapprovals of language in the noncodified portions of Am. Sub. H.B. No. 155. Specifically the resolution challenges the validity of Items 34, 40, 47, 49, 54 and 56 in the veto message. The essential issue involved here is whether the language disapproved is separate and distinct from other approved language in the bill. In making this determination, it is important to recognize that when language in an act qualifies an appropriation or imposes a condition on the expenditure of appropriated money, such language is a part of the appropriation and is necessarily inseparable from it for purposes of an item veto. State ex rel. Brown v. Ferguson, supra; 1961 Op. Atty. Gen. No. 2411. To conclude otherwise would have the effect of allowing the Governor to legislate by use of the item veto power. In State ex rel. Sego v. Kirkpatrick, supra, p. 981 the court considered the item veto provision of the New Mexico constitution, which is similar to Ohio's, and observed that:

"The power of partial veto is the power to disapprove. This is a negative power, or a power to delete or destroy a part or item, and is not a positive power, or a power to alter, enlarge or increase the effect of the remaining parts or items. It is not the power to enact or create new legislation by selective deletions. Bengzon v. Secretary of Justice, 299 U.S. 410, 57 S.Ct. 252, 81 L.Ed 312 (1927); Fitzsimmons v. Leon, 141 F.2d 886 (1st Cir. 1944); State v. Holder 76 Miss. 158, 23 So. 643 (1898); State ex rel. Cason v. Bond, supra; Veto Case, 69 Mont. 325, 222 P. 428 (1924); Fulmore v. Lane, supra. Thus, a partial veto must be so exercised that it eliminates or destroys the whole of an item or part and does not distort the legislative intent, and in effect create legislation inconsistent with that enacted by the Legislature, by the careful striking of words, phrases, clauses or sentences."

With reference to Items 34, 40, 47, 49, 54, and 56, a consideration

of them individually reveals that they are not separate and distinct items.

Item 34 in the Governor's veto message disapproved language in The Bill, which qualifies an appropriation to the Governor for special counsel. The disapproved language states that the appropriation may be used only to pay those special counsel chosen in accordance with that provision. To permit the disapproval of this condition alone without disapproval of the appropriation would enable the Governor by item veto to change the character of the appropriation. It follows that the qualifying language is an integral part of the appropriation and the separate and distinct item subject to disapproval by the Governor pursuant to Article II, Section 16, supra.

Item 40 of the Governor's veto message disapproved the following language in Section 2 of the bill:

"The foregoing appropriation, 514-410 Centers for Readjustment, shall be used for no purpose other than Centers for Readjustment."

As with Item 34, this was an attempt to disapprove language which qualifies and is necessarily a part of the appropriation. Therefore, it is not separate and distinct from the appropriation, which was not disapproved.

Item 47 of the veto message disapproved the following language:

"In the event that funds appropriated to the department of education for the implementation of Chapter 3317. of the Revised Code are determined by the superintendent of public instruction to be in excess of those necessary to fund all the payments required by such chapter, the department shall, in fiscal year 1976-1977, pay the excess funds by a uniform percentage increase in payments to each district eligible to receive payments under such chapter provided that the total amount expended in each fiscal year shall not exceed the amount appropriated for such payments for fiscal year 1975-1976 or 1976-1977."

This provision relates directly to the use of funds appropriated by The Bill. It imposes a restriction on the use of such money in that it establishes a formula for the distribution of funds in excess of what are needed to meet payments under R.C. Chapter 3317. It follows that the language is not an item, separate and distinct from the appropriation to which it relates.

Item 49 disapproved the following language:

"The foregoing appropriations for clinical teaching facility operations shall be subject to reduction in such amounts as the director of budget and management may determine to offset in equal amounts income lost to the institution of higher education by reason of a failure to take advantage of patient-cost supplements available under existing federal laws and regulations."

This language qualifies the appropriations to various medical colleges for clinical teaching facilities. In effect it requires the Director of the Office of Budget and Management to condition the appropriations on an institution's affirmative action in obtaining federal patient-cost supplements. Therefore, because the disapproval of this qualifying language would change the character of the appropriation to which it relates, it is not a separate and distinct item subject to disapproval under Article II, Section 16, supra.

Item 54 disapproved language which reads as follows:

"The subsidy appropriations made in this act to state-supported and state-assisted institutions of higher education are contingent upon the development of written contract formats for all unclassified administrators and faculty members at such institutions."

This language evidences a clear intention on the part of the General Assembly to impose a condition on the subsidy appropriations. Therefore, it may not be disapproved as a separate and distinct item.

Item 56 of the veto message disapproved the following language:

"The foregoing appropriation item, 360-504 Outdoor Dramas, shall be used to support wholly or in part any dramatic productions presented in outdoor theaters recognized by the Ohio historical society which portrays the history and heritage of Ohio."

The provision that theaters receiving financial support be recognized by the Ohio Historical Society places a condition on the use of the funds and, therefore, may not be disapproved as a separate and distinct item.

Finally H.R. No. 319 questions Item 70, which disapproved "125.81" in Section 50 of Am. Sub. H.B. No. 155. Section 50 delays the effective date of the amendment of various sections until the first day of the next pay period after the effective date of the act, but not prior to January 1, 1976. The Governor in disapproving this language stated that its inclusion was a clerical error.

The effective date of legislation is an integral part of the General Assembly's determination to enact the legislation where, as here, the General Assembly has specified a different effective date for one part of an act than for the rest of the act. By his purported veto, the Governor would assign the amendment of R.C. 125.81 a different effective date than that determined by the General Assembly. Therefore, the language disapproved in Item 70 is not a separate and distinct provision subject to disapproval pursuant to Article II, Section 16, supra. Rather it is an attempt by the Governor to legislate by making the amendment of R.C. 125.81 effective earlier than the date set out in Section 50 of The Bill.

House Resolution No. 320 questioned the propriety of a series of purported item vetoes and raised essentially two issues. As with the items questioned in H.R. No. 319, it is necessary to determine whether the provisions are in fact separate

and distinct "items" for purposes of Article II, Section 16, supra. In addition, H.R. No. 320 asks what action by the Governor is necessary for an effective disapproval.

H.R. No. 320 reads in pertinent part:

RESOLVED, That the members of the House of Representatives of the 111th General Assembly of Ohio, in adopting this Resolution, hereby request the Attorney General, pursuant to section 109.13 of the Revised Code, for a written opinion as to whether the purported veto of the above quoted language of section 2 in Am. Sub. H.B. 155 relating to the authority of the State Department of Education to reallocate money between subsidy line items is a proper exercise of the Governor's power under Article II, Section 16 of the Ohio Constitution and whether the language is void or remains a part of the bill, and to advise the House of the particular reasons for his opinion; and be it further

RESOLVED, That the members of the House of Representatives of the 111th General Assembly of Ohio, in adopting this Resolution, hereby request the Attorney General, pursuant to section 109.13 of the Revised Code, for a written opinion as to whether the veto of portions of the language of sections 124.14, 124.16, 125.81 and 126.09 of the Revised Code in Am. Sub. H.B. 155 is a proper exercise of the governor's power under Article II, Section 16 and whether the language is void or remains a part of the bill, and to advise the House of the particular reasons for his opinion.

For the reasons set out below it is my opinion that the language disapproved by the Governor in Item 46 of his veto message did not constitute an "item" as that term is used in Article II, Section 16, supra. Similarly, the provisions disapproved in Items 22, 23, and 24 of the veto message were not separate and distinct from other provisions of The Bill and were, therefore, not "items" subject to veto pursuant to Article II, Section 16, supra.

Your first question pertains to Item 46 of the Governor's veto message of June 29, 1975, which disapproved the following language in Am. Sub. H.B. No. 155:

"In the event that funds appropriated to the department of education for the implementation of Chapter 3317. of the Revised Code are determined by the superintendent of public instruction to be insufficient to make all the payments required by such chapter, the department must either reallocate funds appropriated, but not expended, for programs under such chapter to other programs under such chapter or make a uniform percentage reduction in the payment to each district under such section so that the total amount expended in each fiscal year shall not exceed the amount appropriated for such payments for fiscal year 1975-1976 or 1976-1977."

This language was not set out as a marginal note on the enrolled bill which the Governor signed on June 29th and filed with the Secretary of State on June 30, 1975. On July 1, 1975, two days

after the bill was signed by the Governor and became law, in a letter to the Secretary of State, the Governor sought to amend the enrolled act to reflect his disapproval of this language in his veto message. You have questioned the validity of this veto.

It is not necessary to answer the legal question of how the Governor must communicate his disapproval in order to conclude that the Governor's attempted veto of this language was invalid under Article II, Section 16, supra.

Assuming arguendo that the method by which the Governor communicated his disapproval of Item 46 was proper, the language disapproved must be separate and distinct from other provisions of the same bill. State, ex rel. Brown v. Ferguson, supra.

The provision in question directs that when the funds appropriated to the Department for implementation of R.C. Chapter 3317 are insufficient, then the Department must either reallocate unexpended funds appropriated for other programs under that chapter or make a uniform reduction in the payments to each district. This provision imposes no condition on the appropriations or restrictions on their use. However, it is an affirmative grant of authority to the Department of Education to reallocate unneeded funds from one program to another. The effect of including this language in the appropriations bill was to provide the Department of Education with flexibility in funding programs operated under R.C. Chapter 3317. In this respect the language is directly related to the appropriations for the implementation of such programs, and any attempt to disapprove this language alone would directly affect the appropriation and uses for which it may be expended. For this reason I must conclude that the language was not distinct and severable from the appropriation and may not be disapproved as a separate item.

You have also questioned the Governor's disapproval of portions of R.C. Sections 124.14, 124.16, 125.81 and 126.09, which were amended by Am. Sub. H.B. No. 155. These vetoes were set out in Items 22, 23 and 24 of the Governor's veto message.

Item 22 disapproved the following underlined language in R.C. 124.14(A):

"Sec. 124.14. (A) THE DIRECTOR OF ADMINISTRATIVE SERVICES WITH THE APPROVAL OF THE STATE EMPLOYEE COMPENSATION BOARD SHALL ESTABLISH, AND MAY MODIFY OR REPEAL, BY RULE A JOB CLASSIFICATION PLAN FOR ALL POSITIONS, OFFICES, AND EMPLOYMENTS THE SALARIES OF WHICH ARE PAID IN WHOLE OR IN PART BY THE STATE. THE DIRECTOR WITH THE APPROVAL OF THE BOARD SHALL GROUP JOBS WITHIN A CLASSIFICATION SO THAT THE POSITIONS ARE SIMILAR ENOUGH IN DUTIES AND RESPONSIBILITIES TO BE DESCRIBED BY THE SAME TITLE, TO HAVE THE SAME PAY ASSIGNED WITH EQUITY, AND TO HAVE THE SAME QUALIFICATIONS FOR SELECTION APPLIED. HOWEVER, THE DIRECTOR WITH THE APPROVAL OF THE BOARD SHALL CONSIDER IN ESTABLISHING CLASSIFICATIONS AND ASSIGNING PAY RANGES SUCH FACTORS AS DUTIES PERFORMED ONLY ON ONE SHIFT, SPECIAL SKILLS IN SHORT SUPPLY IN THE LABOR MARKET, RECRUITMENT PROBLEMS, SEPARATION RATES, COMPARATIVE SALARY RATES, THE AMOUNT OF TRAINING REQUIRED, AND OTHER CONDITIONS AFFECTING EMPLOYMENT. THE DIRECTOR WITH THE APPROVAL OF THE BOARD SHALL DESCRIBE THE DUTIES AND RESPONSIBILITIES OF THE CLASS AND ESTABLISH THE QUALIFICATIONS FOR BEING EMPLOYED IN THAT POSITION; THE BOARD SHALL FILE WITH THE

SECRETARY OF STATE A COPY OF SPECIFICATIONS FOR ALL OF THE CLASSIFICATIONS. NEW, ADDITIONAL, OR REVISED SPECIFICATIONS SHALL BE FILED WITH THE SECRETARY OF STATE BEFORE BEING USED. THE DIRECTOR WITH THE APPROVAL OF THE BOARD SHALL BY RULE ASSIGN EACH CLASSIFICATION, EITHER ON A STATEWIDE BASIS OR IN PARTICULAR COUNTIES OR STATE INSTITUTIONS, TO A PAY RANGE ESTABLISHED UNDER SECTION 124.15 OF THE REVISED CODE. THE DIRECTOR WITH THE APPROVAL OF THE BOARD MAY ASSIGN A CLASSIFICATION TO A PAY RANGE ON A TEMPORARY BASIS FOR A PERIOD OF TIME DESIGNATED IN THE RULE."

(Disapproved language underlined)

As enacted by the General Assembly, R.C. 124.14 would, among other things, qualify the authority of the Director of Administrative Services to group jobs in a particular classification by requiring that such action have the approval of the State Employee Compensation Board. Similarly, the Board's approval is required when the Director describes the duties and responsibilities of a class and establishes qualifications for employment therein, and the Board is required to file with the Secretary of State a copy of specifications for all the classifications. The Governor's veto of the language underlined in Item 22 would remove the requirement that the Board approve any of these actions by the Director. In addition, it would substitute the Director for the Board as the proper party to file specifications with the Secretary of State.

The words disapproved do not constitute a separate and distinct item. If removed they could not stand alone as a separate provision. Instead they form an integral part of the sentences in which they are found. Therefore, such language was not subject to disapproval by the Governor pursuant to Article II, Section 16, supra.

As discussed earlier in this opinion, the Governor's power to veto items in a bill making an appropriation is a negative one. 1945 Op. Atty. Gen. No. 396, p. 379. He may not, by deleting certain words, create new legislation. This would be the effect of the Governor's purported veto in Item 22.

Item 23 disapproved the underlined provisions in R.C. 124.16:

"Sec. 124.16. There is hereby established a state employee compensation board, to consist of the director of administrative services, director of budget and management, auditor of state, a member of the house designated by the speaker, and a member of the senate designated by the president pro tempore. A per diem equal to step 1 of pay range 32 for each day actually spent by each legislative member while in the performance of the duties enumerated in this section, and upon the summons of the chairman of the board, together with their necessary expenses, shall be paid from the funds appropriated for the expense of legislative committees upon vouchers approved by the chairman of the board. This section shall not be construed to conflict with section 101.26 of the Revised Code. Any member of the board may designate an authorized representative to take his place at board meetings. The board shall meet once a month, and may hold additional meetings upon call of A

MAJORITY OF THE MEMBERS, OR the director of administrative services, who shall act as chairman. THE BOARD WILL APPOINT A SECRETARY AND SUCH OTHER EMPLOYEES NECESSARY TO EXERCISE ITS POWERS AND PERFORM ITS DUTIES AND PRESCRIBE THE DUTIES OF SUCH SECRETARY AND OTHER EMPLOYEES. The board shall have authority to assign any of the classes established by division (A) of section 124.14 of the Revised Code or established by the director of administrative services under division (C) of section 124.14 of the Revised Code to higher pay ranges, either on a statewide basis, in particular counties of the state, or at particular state institutions. The board shall have the authority to assign all of the classes established by division (A) of section 124.14 of the Revised Code or established by the director of administrative services under division (C) of section 124.14 of the Revised Code to lower pay ranges on a statewide basis if the board determines that such a lower assignment of all classes is advisable. The board may take action either upon request of an appointing authority or on its own initiative and employees, appointing authorities, and representatives of employee organizations shall have the opportunity to appear and offer evidence at any meetings of the board. The board shall keep a record stating the reasons for any pay range assignments made by it and shall notify all affected state departments, boards, commissions, and institutions of its action. In making its decisions, the board shall be guided by comparative salary data, recruitment problems, separation rates, and other conditions affecting employment in the positions under consideration. The board may assign particular positions to a higher range than that established for the class where it finds that the working conditions of the position are of particularly hazardous or dangerous nature. Any action taken by the board in assigning classifications to higher or lower pay ranges may be of a temporary nature, but in any case shall continue only until adjournment of the next regular session of the general assembly, unless other provision is made in that session. The director of administrative services, on behalf of the board, shall submit a report of the board's actions to each member of the general assembly at the beginning of each calendar year."

(Disapproved language underlined)

It should be noted that the Governor did not approve any language added by the enactment of Am. Sub. H.B. No. 155, but only provisions that were already in effect. Such provisions are, as I have already discussed, not to be viewed as new enactments, but rather as continuous laws. Weil v. Taxicabs of Cincinnati, Inc., supra; State, ex rel. Taylor v. Cowen, supra; State v. Knecht, supra. Thus the Governor's veto of the underlined language is not a disapproval of the General Assembly's amendment of R.C. 124.16. Rather it is an attempt to legislate by vetoing provisions of law already in effect. These provisions are not separate items but are directly related to the other language in R.C. 124.16. The elimination of these powers and duties would emasculate the section leaving only procedural provisions for the performance of non-existent duties.

Item 24 disapproved portions of R.C. 125.81 and R.C. 126.09, which were amended by Am. Sub. H.B. No. 155. The language disapproved consists of a sentence at the end of each section. The sentences, the same for each section, state that the sections do not apply to the Ohio Building Authority. The sections themselves assign powers and duties to the Department of Administrative Services and the Office of Budget and Management with respect to the preparation of plans and standards for the acquisition, development and utilization of real estate, buildings and other public improvements. Thus the General Assembly, by providing that the sections do not apply to the Ohio Building Authority, has qualified the authority granted to the Department of Administrative Services and the Office of Budget and Management pursuant to those sections.

It appears clear then that the disapproved language does not constitute a separate and distinct item. On the contrary, the sentences are integral to the rest of R.C. 125.81 and R.C. 126.09, and their repeal would change the effect of those provisions. In addition, as noted above, the Governor's power to veto items pursuant to Article II, Section 16, *supra*, is a power to disapprove legislation, and he may not exercise it to create new legislation. Such would be the effect here if he could expand the authority granted under R.C. 125.81 and R.C. 126.09 by vetoing exceptions to those sections.

In House Resolution No. 321, you have posed a series of questions concerning the existence of the Controlling Board. These questions have been rendered moot by the enactment and approval by the Governor of Sub. S.B. No. 358 (eff. 7/30/75). That bill re-enacted sections providing for the Controlling Board, was declared to be an emergency measure, and became effective upon approval by the Governor. Therefore, I need not consider the questions posed by H.R. No. 321.

In specific answer to the questions posed by H.R. Nos. 319 and 320, it is my opinion and you are so advised that:

1. The power of the Governor under Article II, Section 16, Ohio Constitution, to disapprove "any item or items in any bill making an appropriation of money" includes the power to disapprove non-appropriation items, provided such items are separate and distinct from other provisions in the same bill.
2. Items 25, 26, 31, and 32 of the Governor's veto message to the House of Representatives by which he disapproved the enactment or amendment of R.C. Sections 127.011, 127.02, 127.03, 127.04, 3333.041, and 3901.39, in Am. Sub. H.B. No. 155, the general biennial appropriation bill, are separate and distinct items under Article II, Section 16, and their disapproval was proper and valid.
3. Provisions in the biennial appropriation bill which were disapproved in Items 34, 40, 47, 49, 54, and 56 of the Governor's veto message are not separate and distinct items from the appropriations to which they relate, and their disapproval was not proper and valid under Article II, Section 16.
4. Language in Section 49 of the biennial appropriation bill which repealed existing R.C. Sections 127.02, 127.03, and

127.04 was implicitly disapproved by the disapproval in Item 26 of the Governor's veto message of the provision amending those sections.

5. The disapproval in Item 70 of the Governor's veto message of "125.81" in Section 50 of the biennial appropriation bill was not the disapproval of a separate and distinct item and was not proper and valid under Article II, Section 16.
6. The language in the biennial appropriation bill disapproved by the Governor in Items 22, 23, 24, and 46 of his veto message did not constitute separate and distinct items subject to veto pursuant to Article II, Section 16.