

OFFICIAL OPINION NO. 72-14, Governor has no authority to encumber an appropriation

STATE OF SOUTH DAKOTA
OFFICE OF
THE ATTORNEY GENERAL

April 10, 1972

Honorable Albert Gunderson
Chairman, Executive Board
Legislative Research Council
Lesterville, South Dakota 57040

OFFICIAL OPINION NO. 72-14

Governor has no authority to encumber an appropriation

Dear Honorable Gunderson:

You have asked for an official opinion on the following factual situation:

On February 11, 1972, the 1972 General Appropriations Bill (SB 278) was delivered to Governor Richard F. Kneip for his consideration. On February 19, 1972, the Governor signed the General Appropriations Bill, but vetoed certain portions not pertinent here.

On page two (subdivision (2) of Section 2) of the Act as signed by the Governor is found an appropriation of \$50,000 from the general funds to the Legislative Research Council which is listed as being for a "Tax Study." Although this item was not vetoed by the Governor, the Governor did in a letter dated February 19, 1972, to the State Budget Officer, direct that official to "encumber" the \$50,000 mentioned above "until formal justification and explanation on how the money is to be used is received in my office (Governor's office)." The Governor cites as authority for his action SDCL 4-7-3.

In connection with that opinion you have asked the following questions:

1. Does the Governor of this state have the authority under SDCL 4-7-3 to direct the State Budget Officer to "encumber" the \$50,000 appropriation made to the Legislative Research Council?
2. Does the Governor of this state have authority, based upon any source, to "encumber" a specific appropriation of funds provided for in the General Appropriations Act?

The powers of the government of the State of South Dakota are divided into three distinct departments, the legislative, executive and judicial; and the powers and duties of each are prescribed by the State Constitution. South Dakota Constitution, Article II. The Governor may not perform a legislative function. The appropriations of moneys is a legislative function. South Dakota Constitution, Article XII, Sections 1 and 2.

The only power regarding appropriations given to the Governor by the Constitution is the veto power. South Dakota Constitution, Article IV, Sections 9 and 10. In addition to the constitutional power, the Legislature has made the Governor the ex officio director of the budget, SDCL 4-7-2, and has delegated to him the authority to prepare a budget report for submission to the Legislature, SDCL 4-7-9. The Legislature has also permitted the Governor to reduce expenditures of any of the State's budget units, but only when it is reported to him by the State Budget Officer that revenues of the State are substantially less than .the legislative estimates in making appropriations for expenditures, SDCL 4-8-23. I can find no other constitutional or statutory provisions which would be applicable to your question.

For the purposes of this opinion, I will assume that there is no impropriety of including the appropriation in question in the General Appropriations Act.

Based upon the foregoing constitutional and statutory provisions, I am of the opinion that the Governor does not have any power to prohibit an agency from expending money for lawful purposes, once that money has been legally appropriated, except and unless the revenues of the State are substantially less than legislative estimates, as provided by SDCL 4-8-23, supra, and the answer to both of your questions would therefore be NO.

I do not believe that SDCL 4-7-3 grants the Governor the power to prevent an appropriation from being spent. This statute provides:

GENERAL BUDGETARY POWERS OF GOVERNOR - The Governor, through the office of the budget, shall have such supervision of every public department, agency, commission, institution and other governmental unit as shall be necessary to secure a uniform and standard classification of accounts and financial reports that will promote the efficient and accurate financial information necessary to conduct the fiscal affairs of state government. He may inquire into the methods of conducting the affairs of any public body; HE MAY PRESCRIBE AND DIRECT THE USE OF STANDARD forms and uniform records of accounts and standard forms and uniform financial reports, including, if deemed advisable, AN ENCUMBRANCE SYSTEM and an allotment system. (emphasis added)

An "encumbrance system" as used in the above state is a governmental accounting procedure whereby "an anticipated expenditure, evidenced by a contract or purchase order, or determined by administration action," is deducted from an agency's appropriation prior to

the time the actual warrant is issued, Dictionary for Accountants, Kohler, Third Edition, Prentice Hall. That this is the definition of "encumbrance system" the Legislature had in mind when passing the statute, is substantiated by the wording of SDCL 4-8-19:

REVERSION OF UNENCUMBERED APPROPRIATIONS AT END OF YEAR - PERIOD OF AVAILABILITY OF ENCUMBERED AMOUNTS. - All unexpended annual appropriations at the end of the fiscal year covered by the general appropriations act which have not been contractually obligated in writing and approved by the secretary of finance and the state budget officer prior to the end of the fiscal year, shall lapse and cease to be available, and shall revert to the fund from which appropriated. Such encumbered amounts shall be only available for such expenditure for a period of not to exceed two fiscal years as determined by the state budget officer.

This statute makes it clear that the Legislature was thinking of encumbering in the sense of accounting for anticipated expenditures, rather than in the sense of allowing someone outside of the budget unit to prevent money from being spent.

The Legislature has the right of control over appropriations of money from the state treasury. It may place general restrictions upon all appropriations or specific restrictions upon specific appropriations, or it may delegate powers over appropriations to an executive officer. In this particular instance, the Legislature has appropriated \$50,000 to the Legislative Research Council with the restriction only that it be used for a tax study. The effect of such an appropriation is that the agency to which such moneys are appropriated, may, within its discretion, determine the uses for which such money will be expended, so long as it follows the broad legislative purpose for which the money was appropriated. See **State ex rel Board of Health v. Frohmiller**, (1933) 42 Ariz. 231, 23 P 2d 941; **Carr v. Frohmiller** (1936) 47 Ariz. 430, 56 P 2d 644; **Hutchison v. Swinton** (1940) 56 Ariz. 451, 108 P 2d 580; **Green v. Rawls** (Fla. 1960) 112 S.E. 2d 10; and **State ex rel Preston v. Ferguson** (Ohio 1960) 166 N.E. 2d 365.

Respectfully submitted,

Gordon Mydland
Attorney General