

May 19, 2003

MEMORANDUM

TO: Senator George Munoz, Chair, Legislative Finance Committee
Representative Nathan Small, Vice-Chair, Legislative Finance Committee

FROM: Charles Sallee, Deputy Director, Legislative Finance Committee

RE: Governor's Partial Vetoes of House Bill 2 - 2023

Summary

The governor exercised executive partial veto authority on a number of items in House Bill 2 (HB2) after the 2023 legislative session. Many of the vetoes were clearly within constitutional boundaries but some raise concerns over “artful” vetoes that, in fact, seek to change, alter, or frustrate legislative intent. (See Attachment A for a list of partial vetoes.) Two partial vetoes destroyed the associated appropriation, even though the number figures were not struck. To date the agencies have not budgeted the funding but may try to this summer.

Partial Vetoes in HB2 - 2023

Some of the artful vetoes have become commonplace and left unchallenged. For example, striking “average” from compensation appropriations clearly alters how the Legislature desired the appropriation to be implemented. And striking the geographic location or political subdivision where the appropriation should be spent has also become commonplace, such as this year’s striking of “San Juan County” so the funding can spent elsewhere, another change of the Legislature’s intent.

Two partial vetoes should result in the appropriation not being budgeted. First, the Legislature appropriated \$23 million from the general fund for the General Services Department (GSD) deficiency in the state’s healthcare program. HB2 then specifically earmarked \$20 million of that amount to come from the appropriation contingency fund, which is part of the general fund reserves but a wholly separate fund from others. The intent was to appropriate remaining unappropriated amounts from the federal American Rescue Plan Act (ARPA) state relief funds that backfilled lost general fund revenue during the pandemic. The governor struck the language earmarking the \$20 million, and as such, GSD should not seek budget money from other general

fund accounts because there is no legal authority to do so. If the executive view is the appropriation is not a proper use of ARPA, that could be argued, but the appropriation is then destroyed, and an alternative source cannot replace it.

The second is a special appropriation to the Indian Affairs Department (IAD) appropriating \$2.5 million of a larger appropriation for faculty endowments in a way that totally changed the purpose of the appropriation, leaving it unrecognizable. It should not, therefore, be budgeted. The veto changes the purpose from "Native American studies faculty and teaching endowments statewide" to "Native American teaching statewide." The veto message further indicates intention to use funding for technical assistance centers as opposed to endowments for Native American studies faculty positions. The condition that the funding be used to establish endowments for faculty positions is not unreasonable, and in fact, other parts of the bill appropriate funding for the same purposes for different teaching faculty.

Partial Veto Power

Article IV, Section 22, of the New Mexico Constitution provides that the governor may “approve or disapprove any part or parts, item or items, of any bill appropriating money, and such parts or items approved shall become a law, and such as are disapproved shall be void....” As explained by the New Mexico Supreme Court, the partial veto power 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. Thus, a partial veto must ... eliminate[] or destroy[] the whole of an item or part and ... 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.

State ex rel. Sego v. Kirkpatrick, 1974-NMSC-059, ¶ 18, 86 N.M. 359 (citations omitted). *See also State ex rel. Smith v. Martinez*, 2011-NMSC-043, ¶ 8, 150 N.M. 703, 265 P.3d 1276 (“Our case law emphasizes the limitation of the governor’s partial veto power by requiring that the veto eliminate the whole of an item or part and prohibiting the striking of individual words that result in legislation inconsistent with the Legislature’s intent.”). The governor may veto an improper condition or limitation and retain the amount of the appropriation. *See State ex rel. Coll v. Carruthers*, 1988-NMSC-057, ¶ 22, 107 N.M. 439. The courts have upheld vetoes of improper conditions on the expenditure of appropriated funds that the courts view as an improper intrusion into the executive managerial function, *id.* ¶¶ 11, 36 for example.

As the New Mexico Supreme Court recognized in *Sego*, “The Legislature has power to affix reasonable provisions, conditions or limitations upon appropriations and upon the expenditure of the funds appropriated. The governor may not distort, frustrate or defeat the legislative purpose by a veto of proper legislative conditions, restrictions, limitations or contingencies placed upon an appropriation and permit the appropriation to stand.” 1974-NMSC-059, ¶ 23. The governor’s partial veto authority does not empower her to substitute her judgment for the Legislature’s regarding the need for an otherwise proper contingency placed on an appropriation. *Id.* ¶ 26 (regardless of whether the governor’s judgment was better than the Legislature’s, “The fact remains it was for the Legislature to determine the condition or contingency under which the

Racing Commission could spend [its] appropriation for contractual services“).

Conclusion

I have discussed the GSD and IAD vetoes with the secretary of the Department of Finance and Administration, and LFC staff contend the amounts should not be allowed to be budgeted. Special appropriations normally do not show up in an agency’s operating budget submitted on May 1 but, rather, are brought into the state’s budget and accounting system, SHARE, at the initiation of the agency. This year DFA set a September 1 deadline for agencies. To date, neither agency has budgeted the appropriations in SHARE, but LFC staff will continue to monitor if they do.