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OPINION
OF
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Opinion No. 89-26

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TO: Senator Timothy Z. Jennings
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QUESTION:

Does the General Appropriations Act of 1989 effectively amend Section 22-2-8.2 NMSA 1978 given that New Mexico's Constitution places restrictions on the kinds of provisions that may be included in an appropriations act?

CONCLUSION:

No.

ANALYSIS:

Section 22-2-8.2 NMSA 1978 (Supp. 1988) governs staffing patterns, class loads and teaching loads in elementary schools. The General Appropriations Act of 1989 contains provisions purporting to modify certain requirements specified in Section 22-2-8.2. For the reasons explained in the following discussion, we determine that the modifying language in the General Appropriations Act should not have been included in the appropriations bill.

Article IV, Section 16 of the New Mexico Constitution limits the legislature's ability to amend general legislation through appropriations measures:

> General appropriations bills shall embrace nothing but appropriations for the expenses of

> the executive, legislative and judiciary departments, interest, sinking fund payments on the public debt, public schools, and other expenses required by existing laws.

The Constitution prohibits the legislature from enacting general legislation that is unrelated to providing for government expenses in an appropriations bill. See State ex rel. Coll v. Carruthers, 107 N.M. 439, 445 759 P.2d 1380, 1386 (1988) ("The General Appropriations Act may not be used as a vehicle by which to nullify general legislation"); State ex rel. Prater v. State Bd. of Fin., 59 N.M. 121, 127-28, 279 P.2d 1042, 1046 (1955) (Art. IV, §16 of the Constitution prohibits the legislature from effectively repealing a board established by statute by reducing appropriations to the point it goes out of business). Only those "[m]atters which are germane to and naturally and logically connected with the expenditure of the moneys provided in the bill ... may be incorporated therein." State ex rel. Whittier v. Safford, 28 N.M. 531, 534-35, 214 P. 759, 760 (1923). Provisions for spending, accounting for and raising the money appropriated generally are regarded as acceptable. State ex rel. Lucero v. Marron, 17 N.M. 304, 316, 128 P. 485, 489 (1912). See, e.g., National Bldg. v. State Bd. of Educ., 85 N.M. 186, 510 P.2d 510 (1973) (finding that requiring a state agency to relocate its offices was germane to expenditure of appropriated funds); State ex rel. Holmes v. State Bd. of Fin., 69 N.M. 925, 367 P.2d 925 (1961) (finding provisions authorizing state board of finance to reduce state agency operating budgets acceptable because they governed expenditure of appropriated amounts).

Even if related to spending, however, provisions in an appropriations bill that purport to remain in effect beyond the fiscal period covered by the bill or which affect funds not appropriated by the bill are unconstitutional. Compare State ex rel. Prater v. State Bd. of Fin., 59 N.M. 121, 279 P.2d 1042 (1955) (allowing temporary specific appropriation in appropriations bill to supersede continuing appropriation provided by statute) with State ex rel. Delgado v. Sargent, 18 N.M. 131, 134 P. 218 (1913) (finding unconstitutional a provision which permanently diverted insurance fund money to state salary fund and which was not limited to meeting appropriations out of the salary fund during the year covered by the appropriations statute).

As construed by New Mexico's Supreme Court, the state constitution forbids the legislature from enacting an appropriations bill that affects general legislation and is not logically related to expenditures provided for under the bill or is not limited to the fiscal period covered by the bill. See also Op. Att'y Gen. No. 67-49 (stating that a provision in a general appropriations act is constitutional if it is related, connected with, and

incidental to the subject of the appropriation and does not attempt to go beyond the current appropriation). The General Appropriations Act of 1989 states:

> Notwithstanding Subsection C(3) of Section 22-2-8.2 NMSA 1978, the provisions of Subsection A of Section 22-2-8.2 NMSA 1978 shall be effective with the 1990-91 school year. Notwithstanding Subsection D (1) and (2) of Section 22-2-8.2 NMSA 1978, the local school districts may either comply with Section C of Section 22-2-8.2 NMSA 1978 or they may opt, upon the approval of the state superintendent, to phase in the class load requirements as follows: 1) through the 1989-90 school year, the individual class load for kindergarten teacher shall not exceed twenty-six students, provided that any kindergarten teacher with a class load greater than twenty shall be entitled to the assistance of an instructional assistant; 2) through the 1989-90 school year, the individual class load for grade one teachers shall not exceed twenty-six students, provided that any grade one teacher with a class load greater than twenty-two shall be entitled to the assistance of an instructional assistant. Notwithstanding the provisions of Subsection G of Section 22-2-8.2 NMSA 1978, the superintendent of public instruction may waive individual class load requirements for the 1989-90 school year if a school district clearly demonstrates an inability to provide the necessary staff or classroom facilities. For the 1989-90 school year "noninstructional duties" shall mean only noon hall duty, noon grounds duty and noon cafeteria duty.

1989 N.M. Laws, ch. 13, §4 at 726.

The statutory provisions affected by the appropriations measure are those contained in Section 22-2-8.2 NMSA 1978 which set forth maximum class loads for grades kindergarten through six. The specific provisions of Section 22-2-8.2 affected are:

-- Subsection (C) (3), which provides that the class load requirements for grade three shall be effective with the 1989-90 school year;

-- Subsection (D) (1) and (2), which states that local school districts can phase in the specified class load requirements through the 1988-89 school year;

-- Subsection (G), which provides that:

> The state superintendent may waive the individual class load requirements established in subsection A of this section for a period not to exceed two years if a school district demonstrates that:
>
> (1) a critical need exists for additional classrooms;
>
> (2) the critical need cannot be met by the public school capital outlay fund;
>
> (3) no portable classrooms are available;
>
> (4) it is bonded to capacity and cannot issue additional general obligation bonds;
>
> (5) it has imposed the capital improvements tax pursuant to the Public School Capital Improvements Act; and
>
> (6) no other available sources of funding exist to meet its need for additional classrooms; and

-- Subsection (I), defining "noninstructional duties" which certified school instructors are not required to perform. The appropriations measure amends Subsection (I), by extending to 1989-90 the definition of "noninstructional duties" which, under the statute, applies only for the 1987-88 and 1988-89 school years.

Although we, like the courts, hesitate to find a statute void unless clearly unconstitutional, State ex rel. Whittier v. Safford, 28 N.M. 531, 534, 214 P. 759, 760 (1923); Op. Att'y Gen. No. 88-58, we conclude that the amendments to Section 22-2-8.2 made in the General Appropriations Act of 1989 are not proper. Essentially, the 1989 appropriations measure changes the effective dates for various actions under Section 22-2-8.2 and enlarges the authority of the state superintendent to waive class load requirements. The amendments to the statute may be temporary, but they are unconnected to the appropriations made in the Act: they do not specify how those appropriations are to be raised, spent or accounted for. They constitute general legislation which, though

necessary or desirable, may not constitutionally be included in an appropriations bill. Further, as we observed in a recent opinion of this office which addressed a similar attempt to incorporate general legislation in the 1988 appropriations bill, use of the phrase "notwithstanding" in reference to a statute affected indicates that the Legislature was aware that the provision in the appropriations act conflicted with general law. Op. Att'y Gen. No. 88-58. See also Op. Att'y Gen. No. 67-49 (finding void a provision in an appropriations bill which began "Notwithstanding the provisions of Section 77-6-45..."). In this connection, it is significant that changes in Section 22-2-8.2 similar to those attempted in the General Appropriations Act of 1989 were made properly by general legislation in 1988. See 1988 N.M. Laws, ch. 105, §1.

The provisions of the 1989 Appropriations Act which purport to amend Section 22-2-8.2 are the kind of general legislation which cannot properly be included in an appropriations bill and we conclude that they are without effect.

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