

Attorney General

1275 WEST WASHINGTON

Phoenix, Arizona 85007

Robert R. Corbin

April 28, 1988

Mr. Ray Rottas
Arizona State Treasurer
State Capitol
Phoenix, Arizona 85007

Re: I88-053 (R88-049)

Dear Mr. Rottas:

You have asked whether authorization exists to pay Evan Mecham's costs and attorneys' fees for his defense in the impeachment proceedings and also to pay the other costs of the impeachment proceedings.

We conclude that neither the statutory authority nor a valid appropriation of funds has been enacted that would permit payment of Evan Mecham's impeachment costs and attorneys' fees. We also conclude that the authorized expenses of the legislature for conducting the impeachment proceedings are enumerated in A.R.S. §§ 38-314, 38-315 and 38-317 and may be paid once an appropriation for these purposes has been approved by both houses of the legislature and signed by the governor.

The requirements that must be met before public monies may be expended can be broken down into two components -- first, lawful authority to expend for a public purpose and second, the setting aside of funds for that purpose. The Arizona Supreme Court summarized the constitutional provisions relating to the expenditure of public monies as follows:

It is, of course, axiomatic that money raised by public taxation is to be collected for public purposes only, and can only legally be spent for such purposes and not for the private or personal benefit of any individual. Sections 1 and 7, article 9, Constitution of Arizona. It is equally axiomatic that public money may not be spent, even for public purposes, unless somebody, authorized by the Constitution and the law to

Mr. Ray Rottas
April 28, 1988
I88-053
Page 2

do so, has made an appropriation therefor. Section 5, article 9, Constitution of Arizona. Under our system of government, these appropriations may only be made by the direct authorization of the people, through the Constitution or an initiated act, or by an act of the Legislature, which has plenary power over the expenditures of public money, except as restricted by the terms of the Constitution.

Proctor v. Hunt, 43 Ariz. 198, 201, 29 P.2d 1058, 1059 (1934). The Court has also discussed the definition of appropriation:

an appropriation is "the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other."

It will therefore be seen that the difference between an "apportionment" and an "appropriation" is that, to make the "appropriation," there must be added to the dividing and assigning of funds which constitutes the "apportionment" the specific authority to spend.

Hunt v. Callaghan, 32 Ariz. 235, 239-240, 257 P. 648, 649 (1927) (citations omitted). And in Carr v. Frohmiller, 47 Ariz. 430, 56 P.2d 644 (1936), the Arizona Supreme Court discussed the function of the general appropriation bill as follows:

The general appropriation bill is not "legislation" in the strict sense. Its object is to provide funds to meet previously authorized expenses of the government's different departments, offices, agencies, and institutions.

47 Ariz. at 441, 56 Ariz. at 649 (emphasis added).

To answer your questions, we will explore first whether the legislature, and specifically the Senate, is authorized by

Mr. Ray Rottas
April 28, 1988
I88-053
Page 3

law to incur the expenses about which you inquire. The Arizona Constitution is silent on the subject of authorized expenses for the conduct of impeachment proceedings. The statutes pertaining to impeachment proceedings are set out in A.R.S. §§ 38-311 to -322. A.R.S. § 38-314 prescribes the staff the Senate, organized as a court of impeachment, may employ:

Not later than ten days after the articles of impeachment have been presented to the senate, the senate shall organize as a court of impeachment and may, for the purpose of conducting the proceedings of that court, appoint a clerk who may be the secretary of the senate. The clerk shall issue all process and keep a record of the proceedings of the court. The court shall also appoint a marshal, who shall be the sergeant at arms of the senate, and an assistant marshal. The senate sitting as a court of impeachment may also employ such legal, stenographic, clerical and other assistance as is required, and fix their compensation.

A.R.S. § 38-315(B) provides:

Officers executing the process and orders of the court of impeachment shall receive the fees allowed sheriffs for like service in the superior court.

A.R.S. § 38-317 provides for payment of members of the court of impeachment, its employees, and members of the board of managers of the House of Representatives and its employees:

B. . . . the managers may during the preparation of the proceedings and the trial thereof also employ legal, stenographic, clerical and other assistance as is required and fix their compensation.

C. The members, officers, employees of the court, the board of managers and all employees of the board of managers shall be paid on verified claims approved by the presiding justice of the court and attested by its clerk.

Mr. Ray Rottas
April 28, 1988
I88-053
Page 4

D. Court reporters employed by the court
may be paid the compensation provided by law
for reporting proceedings before magistrates
. . . .

Payment of these expenses is provided for in A.R.S. § 38-318:

The expenses of impeachment proceedings,
after the legislature has adjourned, shall be
a charge upon the general fund of the state
and shall be paid from any money in the
general fund not otherwise appropriated upon
verified claims, approved and attested as
provided in § 38-317.

These statutes authorize the Senate, sitting as a court
of impeachment, and the board of managers to employ legal,
clerical and other assistance.

The impeachment statutes do not authorize the payment
of expenses of the officer being impeached. "[E]xpression of
one or more items of a class indicates an intent to exclude all
items of the same class which are not expressed." Pima County
v. Heinfeld, 134 Ariz. 133, 134, 654 P.2d 281, 282 (1982).
Additionally, no other authority exists outside the impeachment
statutes for the payment of the legal fees and costs for an
impeached officer. The Arizona Supreme court has summarized the
general law pertaining to payment of attorneys fees as follows:

Statutes and common law practices that
require the losing party to pay the successful
party's attorney's fees are contrary to
traditional American jurisprudence. Under the
so-called American rule, counsel fees are not
regarded as "costs" and each party to
litigation generally bears its own attorney's
fees regardless of who prevails. State v.
Boykin, 112 Ariz. 109, 113, 538 P.2d 383, 387
(1975). Over the years, especially in this
century, courts and legislatures have
fashioned exceptions to this rule. These
exceptions are commonly intended 1) to
encourage private enforcement of public laws
by victims, 2) to discourage non-meritorious
litigation, 3) to encourage a just claim or a

Mr. Ray Rottas
April 28, 1988
I88-053
Page 5

just defense, or 4) to promote settlement of disagreements out of court. . . . Unless each party is on notice before each stage of the law suit that its opponent intends to ask for attorney's fees, the last purpose cannot be served.

Wagenseller v. Scottsdale Memorial Hospital, 147 Ariz. 370, 391, 710 P.2d 1025, 1046 (1985) (emphasis in original). Attorney's fees are not recoverable unless provided for by contract or statute. State v. Mahoney, 103 Ariz. 308, 310, 441 P.2d 68, 70 (1968). No specific statute creates an exception for impeachment proceedings to the general rule that parties bear their own costs and attorney's fees.^{1/} We therefore conclude that there is no authority to pay Evan Mecham's costs and attorneys' fees.

We now turn to the question whether an appropriation has been made for payment of Evan Mecham's attorneys' fees or the legislature's costs of the impeachment proceedings.

Art. IX, § 5 of the Arizona Constitution provides, in part, "[n]o money shall be paid out of the State treasury, except in the manner provided by law." The Arizona Supreme Court has interpreted this provision to mean:

^{1/}Note also that Ariz. Const., art. IX, § 7 prohibits a gift of public funds to any individual. Therefore, public funds may only be expended for a public purpose.

A "public purpose" has for one of its objectives the promotion of the public health, safety, morals, general welfare, security, prosperity and contentment of public employees or officers who are exercising the sovereign powers of the state in the promotion of public purposes or public business.

Schwartz v. Jordan, 82 Ariz. 252, 255, 311 P.2d 845, 847 (1957). Even if a public purpose could be articulated for paying a non-prevailing party's attorney's fees in an impeachment proceeding, art. IX, § 5 may be violated "if the value to be received by the public is far exceeded by the consideration being paid by the public." See Wistuber v. Paradise Valley Unified School District, 141 Ariz. 346, 349, 687 P.2d 354, 357 (1984).

Mr. Ray Rottas
April 28, 1988
I88-053
Page 6

that the people's money may not be expended without their consent either as expressed in the organic law of the state or by constitutional acts of the legislature appropriating such money for a specified purpose.

Crane v. Frohmiller, 45 Ariz. 490, 495-496, 45 P.2d 955, 958 (1935); see also Cockrill v. Jordan, 72 Ariz. 318, 319, 235 P.2d 1009, 1010 (1951); Eide v. Frohmiller, 70 Ariz. 128, 133, 216 P.2d 7226, 729 (1950); Tillotson v. Frohmiller, 34 Ariz. 394, 404, 271 P. 867, 871 (1928). The Court also held that the legislature may not "delegate its power to make laws to any other person or body, except when authorized by the Constitution" and that an "appropriation must be specific as to a maximum amount and cannot be left indefinite" Crane v. Frohmiller, 45 Ariz. at 496-497, 45 P.2d at 958.

For an appropriation bill to be validly passed, it must be approved by majority vote of both houses of the legislature and signed by the governor. Ariz. Const. art. IV, pt. 2, §§ 12, 15. Before any claim can be paid, the department of administration must examine encumbrance documents to "determine that the proposed expenditure is authorized by appropriation and allotment" A.R.S. § 35-151(A). A.R.S. § 35-154 provides:

A. No person shall incur, order or vote for the incurrence of any obligation against the state or for any expenditure not authorized by an appropriation and an allotment. Any obligation incurred in contravention of this chapter shall not be binding upon the state and shall be null and void and incapable of ratification by any executive authority to give effect thereto against the state.

B. Every person incurring, or ordering or voting for the incurrence of such obligations, and his bondsmen, shall be jointly and severally liable therefor. Every payment made in violation of the provisions of this chapter shall be deemed illegal, and every official authorizing or approving such payment, or taking part therein, and every

Mr. Ray Rottas
April 28, 1988
I88-053
Page 7

person receiving such payment, or any part thereof, shall be jointly and severally liable to the state for the full amount so paid or received.

The impeachment proceeding costs enumerated in A.R.S. §§ 38-314, 38-315 and 38-317 may be paid if an appropriation bill setting a maximum amount that may be expended for these purposes is passed by both houses of the legislature and signed by the governor.^{2/} Ariz. Const., art. IV, pt. 2, §§ 12, 15; Crane v. Frohmiller; Eide v. Frohmiller. The passage of such a bill is necessary before payment can be made because the Arizona Supreme Court has stated:

authorization by law to a state agency to employ persons in the performance of agency duties does not, in itself, constitute a right to draw on the general fund. Payment to such employees can be made only if there is an actual and proper appropriation. Obligations incurred in the absence of such are null and void

Millett v. Frohmiller, 66 Ariz. 339, 344-345, 188 P.2d 457, 461 (1948).^{1/}

The Senate's order for payment of Evan Mecham's attorneys' fees does not, by itself, bind the state or authorize payment of monies from the state treasury. The full legislature could not and did not delegate its authority to make such an appropriation to only one house of the legislature. No

^{2/}Senate Bill 1460 providing for an appropriation for the senate's and board of managers' costs is currently pending before the legislature. These statutorily authorized expenses could also be paid out of the senate and house lump sum appropriations, to the extent funds are available.

^{1/}While A.R.S. § 38-318 authorizes impeachment proceeding expenses to be paid "from any money in the general fund not otherwise appropriated," this statute is not an effective appropriation because it sets no maximum amount that may be expended. See Eide v. Frohmiller where the Arizona Supreme Court, citing Tillotson v. Frohmiller and Crane v. Frohmiller, held that a statute containing similar language failed to appropriate funds.

Mr. Ray Rottas
April 28, 1988
I88-053
Page 8

appropriations bill setting a maximum amount for this purpose has been approved by a majority of both houses and signed by the governor. Therefore, any claim for payment of Evan Mecham's impeachment attorneys' fees and costs cannot be paid in the absence of a statute and an appropriation authorizing the state to pay an impeached officer's costs and attorney's fees.

Sincerely,



BOB CORBIN
Attorney General

BC:JGF:gm