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DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

November 6, 1975

The Honorable Thomas R. LaPointe
Committee on Health and Institutional Services
State House
Augusta, Maine 04333

Dear Representative LaPointe:

Your request dated October 23, 1975, to the Attorney General has been referred to me for response. You ask three questions relative to the "correctional plan", so-called, proposed by the Department of Mental Health and Corrections.

Of necessity, we have extended the scope of our response beyond the specific statute, the import of which you questioned-- 5 M.R.S.A. § 1585, which reads:

"Any balance of any appropriation or subdivision of an appropriation made by the Legislature for any state department or agency, which at any time may not be required for the purposes named in such appropriation or subdivision, may, upon the recommendation of the department or agency head concerned and the State Budget Officer, be transferred by the Governor and Council, at any time prior to the closing of the books, to any other appropriation or subdivision of an appropriation made by the Legislature for the use of the same department or agency for the same fiscal year."

Your first question is, "Whether, under Title 5, M.R.S.A. § 1585, program and services provided for in an appropriation may be cut by a department or state agency in order to generate a 'balance' to transfer into other use by that department or state agency."

In view of the fact that you have raised your question with direct reference to the "correctional plan," so-called, we respond in contemplation of that plan. Our examination of the "correctional plan" does not reveal a proposal of the Department of Mental Health

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and Corrections to cut "program and services." It appears, however, that the Department proposes to lay off personnel at the Stevens School and Boys Training Center and to use salary savings realized through such layoffs to fund other positions within other institutions and divisions of the Department.

The answer to your first question cannot be fully determined by reference to 5 M.R.S.A. § 1585. This section sets forth a procedure by which funds may be transferred within a department from one appropriation to another when funds in the first have been determined not to be required for the purposes for which the funds were appropriated. Implicit in the language in this section is a legislative recognition of some executive discretion. We must look at other statutes in order to determine the limits of such discretion. Pertinent to the issue here are 34 M.R.S.A. § 1 and 15 M.R.S.A. § 2712. Together these sections provide that the Department of Mental Health and Corrections shall "maintain training centers to rehabilitate children committed thereto as juvenile offenders by the courts of the State. Toward this end, the disciplines of education, casework, group work, psychology, psychiatry, medicine, nursing, vocational training and religion related to human relations and personality development shall be employed. . . ." 15 M.R.S.A. § 2712.

The layoffs proposed by the Department as part of its "correctional plan" may be undertaken and a "balance" achieved in affected appropriations and transfers made under 5 M.R.S.A. § 1585 to the extent discussed later in this opinion, as long as the legislative mandate, quoted above, with respect to the maintenance of the two juvenile institutions is continued to be met by the Department. It is pertinent to note that the purposes named in the appropriation in which a saving is sought to be achieved is in terms only of the line budget designation "Personal Services" applicable to the Stevens School and Boys Training Center. See P. & S.L. 1975, Chapter 78. The extent to which such appropriated funds are needed for the purpose, i.e., "Personal Services" at each institution may be determined by the Department of Mental Health and Corrections, limited by the above-cited mandate.

Your second question is "Whether under Title 5 M.R.S.A. § 1585, any balance of any appropriation for any department or state agency not required for purposes in the appropriation may be transferred by the Governor and Executive Council for use by the department or state agency for either new programs, services or even to assume funding of previously federally funded programs and services not provided for in any other legislative appropriation." Funds may not be transferred from one appropriation account to another under 5 M.R.S.A. § 1585 if the proposed transfer is to fund new programs or services or to expand programs or services, such action being proscribed by the language of Section 9 of Chapter 78 of the Private and Special Laws of 1975:

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"No department shall establish new programs or expand existing programs beyond the scope of those programs already established, recognized and approved by the Legislature, until such program and the method of financing shall be submitted to the Budget Office for evaluation and recommendation to the Legislature, and until funds are made available therefor by the Legislature."

Referring to the "correctional plan" it is seen that the Department of Mental Health and Corrections proposes to utilize salary savings achieved through layoffs at the Stevens School and Boys Training Center for the following purposes:

- 1) Employ nine persons in limited appointments at the Maine State Prison to be used to additionally staff a pre-release center on the grounds of the Bangor Mental Health Institute;
- 2) Employ eight persons in limited appointments at the Maine State Prison to be used to staff a pre-release center to be established on the grounds of the Men's Correctional Center;
- 3) Employ four persons in limited appointments at the Maine State Prison to be used to supplement staff at the Maine State Prison;
- 4) Employ twenty-six persons in limited appointments at the Men's Correctional Center to additionally staff that institution;
- 5) Employ ten persons in limited appointments as Probation and Parole officers within the Division of Probation and Parole whose primary responsibilities will be as follows: 4 as court officers; 2 as job developers, and 4 as juvenile officers.

Other legislative provisions pertinent to resolution of your question are:

"Savings accruing within appropriations made for permanent positions may be used for nonrecurring personal services or retirement costs when recommended by the department head and the State Budget Officer, and approved by the Governor and Council. . . ."
P. & S.L. 1975, Chapter 78, § 6.

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"In administering the policy and purposes of this Chapter," (34 M.R.S.A. Chapter 62) "the Bureau of Corrections is authorized to expend correctional institutional appropriations on persons within that portion of its sentenced or committed population participating in halfway house, pre-release, vocational training, educational, drug treatment or other correctional programs being administered physically apart from the institution to which such persons were originally sentenced or committed for the purpose of defraying the direct and related costs of such persons' participation in such programs." 34 M.R.S.A. § 529, as enacted by P.L. 1975, c. 193.

We find that the Department's proposal does not contravene the provisions of section 6 of Chapter 78 of the Private and Special Laws of 1975, as quoted above, inasmuch as the positions the Department of Mental Health and Corrections intends to fund with salary savings are to be limited appointments. Reference is made to the definition of limited appointment as contained within Personnel Rule 8.11: "A limited appointment is a regular appointment to a position where a pre-established abolishment date has been set by the appointing authority. Employees shall be certified as prescribed in Rule 8.2 and shall acquire permanent appointment as prescribed in Rule 9.6. Employees shall, prior to appointment, be informed by the appointing authority of the established layoff date and shall be laid off on that date in accordance with Rule 12.3 unless the position is to be continued as a result of budgetary limitations being removed." It is clear, therefore, that limited appointments are non-recurring in nature, the termination of such employees being fixed at the time of hiring. The reference to Rule 12.3 in the above-quoted language we take to include only the procedural aspects thereof. As to termination, Rule 8.11 is specifically applicable to the limited appointment employee.

Under Title 34 of the Maine Revised Statutes, Chapter 62-A, as enacted by P. & S.L. 1975, c. 90, § I, the Bureau of Corrections is authorized, inter alia, to provide pre-release services. Section 529, as quoted above, provides the authority for the Bureau to expend correctional institutional appropriations to defray the direct and related costs of persons committed to the correctional institutions who participate in pre-release programs. We interpret the provisions of § 529 to be legislative approval of a partial funding mechanism in connection with the pre-release program, i.e., the use of appropriations to the institutions. Thus, we do not consider the

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salary savings to be violative of § 9 of Chapter 78 of the Private and Special Laws of 1975. The Department may effect the salary savings through layoffs, transfer the monies saved from an appropriation account at, e.g., the Stevens School under 5 M.R.S.A. § 1585, to an appropriation account at the Maine State Prison, and under Title 34, § 529, such funds may be utilized by the Bureau of Corrections to hire into limited positions, as above defined, persons necessary to the operation of pre-release facilities.

Neither is the additional staffing of the Maine State Prison and the Men's Correctional Center contemplated by the "correctional plan" through the employment of persons in limited appointments violative of § 9 of Chapter 78, P. & S.L. 1975; since, no new programs are created nor are any expanded. We are informed such positions are rendered necessary by sharply increased institutional populations.

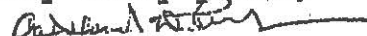
We are constrained to respond negatively to the use of salary savings as proposed in order to hire, albeit into limited positions, persons to fill the above-described positions within the Division of Probation and Parole. Up to this time, and for the past three years, as we understand it, these positions have been funded with federal monies. To date, the Legislature has neither funded such positions nor has it otherwise approved such expanded programs of the Division of Probation and Parole. We view the proposed expenditure of state monies accrued from salary savings to fund these positions as violative of § 9 of Chapter 78 of the Private and Special Laws of 1975, the same being an expansion of an existing program.

The third question is as follows: "Whether, under the Maine Constitution, the executive department's cutting of programs and services provided for in legislative appropriations and refusal to expend appropriation funds necessary to carry out the purposes of these appropriations violates the doctrine of separation of powers."

In response to your question 3, again, in contemplation of the "correctional plan," we find no attempt on the part of the Department of Mental Health and Corrections as a division of the executive branch of government, to exercise legislative powers in contravention of Sections 1 and 2 of Article III of the Maine Constitution.

It is hoped that this opinion has reached you in timely fashion and will be of assistance to you and the Sub-committee of the Health and Institutional Services Committee in its review of the "correctional plan."

Very truly yours,



COURTLAND D. PERRY
Assistant Attorney General