October 19, 1977

To: Lanning S. Mosher, Director, State Employee Relations

From: Kay R. H. Evans, Assistant Attorney General

Re: Treatment of Unclassified Employees in Collective Bargaining Units

Your memo of September 9, 1977, asks our opinion on certain specific aspects of the treatment of unclassified State employees in collective bargaining and invites our commentary on the general approach which your office has developed. We will explain our view in responding to your specific questions.

1. Duty to Bargain. We agree that the State Employees Labor Relations Act, 26 M.R.S.A. Chapter 9-B, obligates the State to bargain with respect to non-exempt classified and unclassified employees, on "(a)ll matters relating to the relationship between the employer and employees . . . except those matters which are prescribed or controlled by public law." 26 M.R.S.A. § 979-D(1)(E)(1). As you are undoubtedly aware, interpretation of the phrase, ". . . except those matters prescribed or controlled by public law" is no simple task. For example, under one interpretation, certain subjects which are covered by present statutory provisions are nonetheless impliedly open to arbitration and, if arbitrable, must be negotiable, e.g., retirement. See 5 M.R.S.A. § 1001 et seq., and cf. 26 M.R.S.A. § 979-D(4)(B). Further, the required legislative approval of cost items, 26 M.R.S.A. § 979-D(1)(E)(3), may in effect permit the Legislature to ratify changes in public law made by the provisions of the collective bargaining agreements, thus opening for collective bargaining negotiations many subjects otherwise apparently foreclosed. Under another interpretation, matters "prescribed or controlled by public law" are simply foreclosed from negotiation at the outset.

Since we interpret your opinion request to involve questions

of bargaining posture rather than questions of the specific parameters of bargainability, we are not now offering our opinion as to the proper interpretation of the phrase under discussion. We simply note the existence of conflicting interpretations and of the tensions between various provisions of the collective bargaining statute.

For the present purpose of responding to questions of bargaining posture, we regard present provisions of public law as "prescribing or controlling" provisions which indicate the appropriate posture for the State. On the matter of the treatment of unclassified employees, §§ 671 and 711 are such provisions. Their explicit effect is to establish two forms of State employment, the classified and the unclassified services.[1] Implicitly, the two are to be treated as separate and distinct.[2] It is our opinion that the State may not bargain to an end which effectively obliterates, or even badly blurs, the differences between the two services.

Each unclassified position must be treated in light of the provisions of its authorizing statute, and these provisions generally provide significant differences from the classified service which must be maintained.[3]

1/ This effect of §§671 and 711 is reinforced by numerous other statutory provisions establishing positions and assigning them, explicitly or implicitly, to one service or the other.

2/ This implication is borne out by numerous provisions of the Personnel Law and of general law which in terms relate to only one service, or if to both, do so by specific inclusion of both.

3/ We do not think that the language that "the State shall be considered as a single employer and employment relations, policies and practices throughout the state service shall be as consistent as practicable," 26 M.R.S.A. § 979-A(5), cuts against our interpretation. It is our opinion that the language of § 979-A(5) was intended to express the idea that a single management entity should sit across the table from employee representatives, to the end that contract provisions would not vary widely from agency to agency or department to department. The language was not intended to signal or suggest legislative willingness to acquiesce in an amalgamation of the classified and unclassified services.

2. The Right to Grieve. It is permissible to negotiate contract grievance procedures for unclassified employees which, in the light of Sperry,[4/] may be jurisdictionally broader than those for classified employees. The outcome of the Sperry appeal[5/] may of course establish common jurisdictional boundaries for contract grievance procedures for classified and unclassified employees, but procedures within those boundaries need not and perhaps should not be identical.

3. Discipline and Dismissal. We would agree that discipline and dismissal procedures may be negotiated for unclassified employees other than those who by statute serve at the pleasure of an appointing authority. Such procedures need not track the present statutory and rule procedures for classified employees.

Your approach of couching general questions regarding bargaining in terms of specific examples is a useful one. We hope our response is similarly useful.

KAY R. H. EVANS
Assistant Attorney General

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4/ Honorable James B. Longley v. S.E.A.B. and Sperry, Docket No. 75-1031 (Superior Court Kennebec County, April 19, 1977); Appeal docketed KEN-76-10. Again, for the purposes of responding to questions of bargaining posture, we regard present statutory provisions, and of course court opinions interpreting them, as prescriptive. Under other interpretations discussed above, neither statutory grievance procedures or related case law have much relevance.

5/ See fn. 4, supra.