Office of State Employee Relations Transfer
26 MRSA 979-A(5)

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Honorable David Bustin
Joint Standing Committee on Labor
184 Mount Vernon Avenue
Augusta, Maine 04330

Dear Representative Bustin:

Your letter of September 23, 1977, asks for an opinion on a question occasioned by the recent action of the Governor by which the Office of State Employee Relations became a part of the Department of Personnel. You have asked

> . . . whether the transfer of the Office of State Employee Relations to the Department of Personnel is a proper exercise of executive authority under the constitution and laws of the State of Maine.

The relevant statute is the State Employees Labor Relations Act, 26 M.R.S.A. Chapter 9-B. Section 979-A(5) of that Act reads:

> Public employer. "Public employer" means all the departments, agencies and commissions of the executive branch of the State of Maine, represented by the Governor or his designee. In the furtherance of this chapter, 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. It is the responsibility of the executive branch to negotiate collective bargaining agreements and to administer such agreements. To coordinate the employer position in the negotiation of agreements, the Legislative Council or its designee shall maintain close liaison with the Governor or his designee representing the executive branch relative to the negotiation of costs items in any proposed agreement. The Governor's office or its designee is responsible for the employer functions of the executive branch under this chapter, and shall coordinate its collective bargaining activities with operating agencies on matters of agency concern. It is the responsibility of the legislative branch to act upon those

portions of tentative agreements negotiated by the executive branch which require legislative action.

The Office of State Employee Relations was heretofore the Governor's "designee" under § 979-A(5) and an independent office within the Executive Department. By the Governor's action, the Office of State Employee Relations, though it apparently remains the Governor's designee, has become part of an administrative department of the State.

You have asked several specific questions, to which we respond in the course of this opinion:

1. Whether the transfer, by the Governor of the Office of State Employee Relations into the Department of Personnel constitutes a reorganization of State government or an establishment of a public office without legislative approval.

2. Whether the assignment of collective bargaining functions to the Commissioner of Personnel is permissible under 5 M.R.S.A. § 631.

3. Whether the transfer of the Office of State Employee Relations to the Department of Personnel would constitute an illegal transfer of funds between departments of State government.

4. Whether the placement of the Office of State Employee Relations under the authority of the Commissioner of Personnel would result in a change of the Governor's designee under 5 M.R.S.A. § 979-A.

The answer to your questions turns on whether the legislative language of § 965-A(5) gives the Governor full discretion to designate who, in his stead, shall represent the State as the public employer and how that designee shall function, or whether that section and other provisions of the State Employees Labor Relations Act place limitations on the Governor's discretion, limitations which would, in the present context, prevent the transfer of the Office of State Employee Relations to the Department of Personnel.

Though the question is not free from doubt, we are not persuaded that the Governor's action contravenes the State Employees Labor Relations Act.

The statute contains language by which the Legislature may have intended to limit the Governor's discretion by requiring him to maintain his designee as a member of his own staff, outside the "departments, agencies and commissions of the Executive branch" which constitute the public employer. The directive that "The

Governor's office or its designee. . . shall coordinate its collective bargaining activities with operating agencies on matters of agency concern" may have been intended to embody the same limitation. However, the intention behind this language is not clear enough to override the reiteration in the subsection that "The Governor or his designee" could carry the defined responsibilities. The use of the term "designee" implied discretionary authority in the Governor both to name the individual and to direct that individual's work as he saw fit. The Governor could surely structure his own mode of operation were he to choose to himself represent management. No qualifying language clearly limits his ability to structure the mode of operation of his designee.

The legislative history is similarly inconclusive. Some Legislators clearly envisioned a separate Governor's office staff; others mentioned the need to fortify the Department of Personnel to handle the new task. Debate never really focused on the specific question. We are left with the statutory language, alone, on the basis of which we cannot say that the Governor's action exceeds his statutory authority.

Nor do we think that the Governor's action constitutes an encroachment on the Legislature's constitutional authority to establish public offices. Article III, Sections 1 and 2, Maine Constitution; State v. Butler, 105 Me. 91, 73 A. 560 (1909). In this instance, the Legislature established the office of representative of the public employer and authorized the exercise of its functions by the Governor or by his designee, as the Governor should choose. So long as the legislatively-created position is filled and functions so that the office remains what the Legislature created, there is no encroachment on legislative territory. The Legislature could, and may in this instance have intended to, place limitations on the Governor's ability to utilize the designee but as discussed above, it has not effectively done so as yet.

In reply to your question "whether the assignment of collective bargaining functions to the Commissioner of Personnel is permissible under 5 M.R.S.A. § 631," we note that it does not appear that the Commissioner of Personnel himself exercises collective bargaining functions, but rather that the Office of State Employee Relations staff still serves as management representatives by the Governor's designation. If the Commissioner were functioning in this capacity, or if he were to exercise supervisory authority over the Office of State Employee Relations staff by virtue of their transfer to his department, such would be improper only if in so doing he overrode authority given the designee or operated in some manner contrary to the Governor's directions as to the way in which the designee was to function. Our interpretation of section 965-A(5), that the authority therein given permits the Governor to name the designee and to define the manner in which his functions will be carried out, permits involvement of the Commissioner so long as it is by direction of and in accordance with the Governor's plan.

As to the question whether the Commissioner could exercise collective bargaining functions, we note that while neither section 631 nor any of the other provisions of the personnel law explicitly or implicitly assigned collective bargaining functions to him, if a provision elsewhere in the statutes directs or permits him to exercise such a function, his exercise of it cannot be illegal because it is not encompassed in the provisions of the personnel law.

In reply to your inquiry whether the transfer of the Office of State Employee Relations to the Department of Personnel ". . . constitute(s) an illegal transfer of funds between departments of state government," it appears that there is no authority under which one department's or agency's appropriation may be transferred to or taken over by another department or agency.1/

In short, it is our opinion that nothing presently prevents the Governor's action of transferring the Office of State Employee Relations to the Department of Personnel. If the Legislature wishes to insure that the representative of the public employer functions from a position outside the administrative departments of state government, or to otherwise limit the Governor's discretion in naming his designee, it must supply statutory language to that effect.

We hope this opinion adequately responds to your concerns. If we can be of further assistance, please do not hesitate to ask.

Yours truly,

Joseph E. Brennan

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1/ Cf. 5 M.R.S.A. § 1585, where unutilized or underutilized appropriations of a department or agency may be transferred to another use within the same department or agency. However, the move of an office or department from one agency to another or from separate status to a location within an agency would not necessarily involve an interdepartment or interagency transfer of funds. Without more facts, it is not possible to provide a definitive reply, but it is our opinion that if the Office of State Employee Relations' appropriations were transferred to the Department of Personnel, such would be illegal. However, what appears to have occurred is that the Office of State Employee Relations, along with its appropriation, has moved under the general authority of the Department of Personnel.