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April 4, 1991

Honorable Michael H. Michaud
House of Representatives
Seat No. 142

Honorable Sharon A. Treat
House of Representatives
Seat No. 115
State House Station 2
Augusta, Maine 04333

Dear Representative Michaud and Representative Treat:

You have inquired whether Governor John R. McKernan, Jr. had the constitutional or legal authority to prevent the Chairman of the Board of Environmental Protection from filling the recently created position of Executive Director of the Board. For the reasons which follow, it is the opinion of this Department that the Governor was without the necessary constitutional or statutory authority to take this action.

During the Second Regular Session, the 114th Legislature enacted 38 M.R.S.A. § 341-F, authorizing the Board of Environmental Protection, for the first time, to have its own professional staff independent of that of the Department of Environmental Protection. Subsection 1 of the new law provided that the staff of the Board, including the Executive Director, was to be "hired by the chair with the consent of the board." 38 M.R.S.A. § 341-F(1), enacted by P. L. 1989, ch. 890,§ A-13. Also, P.L. 1989, ch. 890, §§ B-296 and 297, Appropriations provided the Board with the authorization and funds to hire two

staff members; an Executive Director and a Clerk-Typist III. The law became effective, along with all other non-emergency legislation passed by the Second Regular Session of the 114th Legislature, on July 14, 1990.

It is this Department's understanding that the Board began entertaining applications for the position of Executive Director; during the summer of 1990. The Board conducted interviews and eventually narrowed its choice to a particular applicant, Ms. Karen Tilberg. Accordingly, on November 5, 1990, the Chairman of the Board, Mr. E. Christopher Livesay, sent a letter to Ms. Tilberg, with the concurrence of a majority of the Board, offering her the position. Later that week, however, Governor McKernan called Chairman Livesay and advised him that he had directed that the position not be funded because of the budget crisis facing State government generally. Your question is whether this action of the Governor was lawful. In the view of this Department, it was not.

In order to direct that a particular position in State government authorized by the Legislature not be filled, the Governor must act pursuant to some statutory or constitutional authority. With regard to the former, the only statute currently in force authorizing the Governor to take such action is 5 M.R.S.A. § 1668. This section provides that when the Commissioner of Finance reports to the Governor that anticipated income to the State government will not be sufficient to meet authorized expenditures, the Governor may "temporarily curtail allotments [to the agencies of state government] equitably . . .[and], insofar as practicable . . . consistent with the intent of the Legislature in authorizing these expenditures." Since the action of the Governor at issue here was not made pursuant to an order under section 1668, that action may not be justified by it. Indeed, on or about January 1, 1991, the Governor did issue a curtailment order effecting State government generally. That order, however, cannot serve as a basis retroactively to authorize the action at issue here, which was taken some weeks earlier. Accordingly, it is clear that the Governor had no statutory authority to take the action.

The remaining question is whether the Governor was empowered to direct that the position not be filled under some inherent power deriving from his constitutional position as head of the Executive Branch. The issue of the Governor's inherent executive powers under the Maine Constitution has not been addressed by the Supreme Judicial Court of Maine. However, this issue has been the subject of a prior Opinion of this Department in which the Department advised, relying upon

federal cases interpreting similar provisions of the United States Constitution,[1] that while the Governor may have the constitutional authority to run programs authorized by the Legislature as economically as possible, that authority does not extend to "impounding" legislatively mandated funds, and thereby frustrating the legislative intent that certain programs be funded. Op. Me. Att'y Gen. (Jan. 7, 1976) at 2-3 (copy attached). In the words of one United States District Court, "there is no basis for [an] assertion of inherent constitutional power in the Executive to decline to spend in the face of a clear statutory intent and directive to do so." National Council of Community Mental Health Centers, Inc. v. Weinberger, 361 F.Supp. 897, 901 (D.D.C. 1973)(citations omitted). Accord International Union, United Automobile Aerospace & Agricultural Implement Workers of America v. Donovan, 746 F.2d 855, 862 (D.C.Cir. 1984)(Scalia, J.). See also other "impoundment" cases not cited in this Department's 1976 Opinion: Train v. City of New York, 420 U.S. 35 (1975); City of Los Angeles v. Adams, 556 F.2d 40 (D.C.Cir. 1977);State Highway Commission v. Volpe, 479 F.2d 1099 (8th Cir. 1973).

The narrow issued raised by your question, therefore, is whether the Governor's directive to not fund the position of Executive Director of the Board of Environmental Protection was undertaken "in the face of a clear statutory intent or directive" to do otherwise. In the view of this Department, it was. By enacting 38 M.R.S.A. § 341-F, the Legislature clearly intended that there be independent staff for the Board and one staff member be an Executive Director. Consequently, any action of the Governor to prevent that position from being filled is clearly inconsistent with the intention of the Legislature.[2]

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[1] Art. II, § 1 of the United States Constitution provides that: "the executive Power shall be vested in a President of the United States of America," and Art. III, § 3 provides, in part, that the President "shall take Care that the Laws be faithfully executed, . . ." Art. V, pt. 1, § 1 of the Maine Constitution provides that "the supreme executive power of this State shall be vested in a Governor," and Art. V, pt. 1, § 12 provides that the Governor "shall take care that the laws be faithfully executed."

[2] Needless to say, in this case the Governor is without any authority whatever to refuse to permit the position of Executive Director of the Board to be filled because of any objection which he might have to the actual person chosen. The statute vests the power to fill the job exclusively with the Chair, acting with the consent of the Board.

For the foregoing reasons, it is the opinion of this Department that the Governor acted without statutory or constitutional authority in preventing the Board of Environmental Protection from hiring an Executive Director. I hope the foregoing satisfactorily answers your question.

Sincerely,

MICHAEL E. CARPENTER
Attorney General

MEC/bls
cc: Governor John R. McKernan, Jr.
Senator Judy Kany
E. Christopher Livesay
Chair, Board of Environmental Protection

MEd
J.E.B.

January 7, 1976

Honorable James B. Longley
Governor of Maine
State House
Augusta, Maine 04333

Dear Governor Longley:

Your letter of December 30, 1975, described a fiscal dilemma which the State appears to face today. Briefly stated, anticipated State revenues evidently will not be sufficient to meet appropriated expenditures. You have set forth your intent to meet this problem by asking the Executive Departments to refrain from instituting certain new programs, though funding for these programs has been appropriated by the Legislature, and have asked for our counsel on this matter. In our opinion, the Governor's authority to withhold or reduce allocations of appropriated funds is limited to that authority which has been conferred by statute, and, as such, would not include authority to withhold funds in the manner you have suggested.

The primary source of the Governor's authority is the Constitution, which vests in him the supreme executive power of the State. Article V, Part 1, § 1, Constitution of Maine. One might argue that the executive power includes promotion of sound fiscal policies and, therefore, implies the power to withhold or reduce allocations from appropriated funds. This argument has not been tested by the Maine judiciary, but the same argument, as applied to the President and his subordinates, has been rejected by the Federal courts in several "impoundment" cases. In Sioux Valley Empire Electric Association, Inc. v. Butz, 367 F. Supp. 686 (D.S.C., 1973), a Federal District Court noted that the President has broad powers, but these do not include the power to nullify Congressional action. In other words, there is no inherent executive power to impound legislatively mandated funds. The basis for this decision, which would have equal application in Maine, is the constitutional

doctrine of "separation of powers." [See Art. III, §§ 1 and 2 Constitution of Maine]. If the executive determined to withhold appropriated funding from certain programs, it would frustrate the legislative intent that the programs be funded. Art. IV, Part 1, § 1, Constitution of Maine [See also: Guadamuz v. Ash, 368 F. Supp. 1233 (D.D.C., 1973)]. Further, as pointed out in Sioux Valley, an executive impoundment of appropriated funds could be interpreted as displeasure with the programs to be financed, especially when the appropriations were enacted over the executive's veto. In the latter case, such action could be construed as subverting the Legislature's constitutional right to override the Governor's veto, in derogation of the doctrine of "checks and balances." Art. IV, Part 3, § 2 Constitution of Maine. In light of the foregoing, it is clear that there is no constitutional authority for withholding or reducing allocations of appropriated funds.

It should be noted at this point that the Governor obviously does have the authority to institute authentic cost-saving programs. The Governor has the constitutional duty to take care that the laws, which include appropriation acts, are faithfully executed. Art. V, Part 1, § 12, Constitution of Maine. This means that he must promote the legislative intent in all cases. If the Legislature has instituted a particular program, it is clear that it intends the purpose of the program to be carried forward. However, it is also assumed that the Legislature would intend that the program be run as economically as possible. Therefore, the Governor may seek cost-savings in any program, with resultant decreases in allotments, so long as these economies do not detract from performance of the program's original purpose as intended by the Legislature. Carrying this logic a step further, there is some authority for the proposition that an Executive Officer may terminate allotments of appropriated funds for an existing program which is no longer performing its function in accordance with the original legislative intent. Commonwealth of Pennsylvania v. Lynn, 501 F.2d 848 (D.D.C., 1974). However, any executive action performed on this basis would undoubtedly be closely examined.

In the absence of constitutional authority or direction, the Governor's powers in a particular area are limited to those conferred by statute. The statutory direction in the present case is quite clear. Both the Current Service Appropriations Act (P. & S.L. 1975, c. 78) and the Additional Appropriations Act (P. & S.L. 1975, c. 90) included an identical Section 3, which reads:

> "Sec. 3. Temporary curtailment of allotments. Whenever it appears to the Commissioner of Finance and Administration that the anticipated income and other available funds of the State will not be sufficient to meet the expenditures authorized by the Legislature, he shall so report to the Governor and Council and they may temporarily curtail allotments equitably so that expenditures will not exceed the anticipated income and other available funds." (underlining provided)

This section, which is incorporated in most general appropriations bills, acquired its present wording in 1967 with the addition of the two words underlined in the quotation. [P. & S.L. 1967, c. 154]. These words were added during a redrafting of the bill by the Committee on Appropriations and Financial Affairs [Compare L.D. 70 with L.D. 1575]. The intent of the resulting legislation was explained in the Senate as follows:

> "If our actual experience during the next biennium indicates that the State revenues are not meeting these anticipated [revenue] estimates it is the intent of this language that upon the determination that such a situation exists the Legislature shall be called in session as soon as possible to deal with the problem. It is also the intent of this section that there shall be no arbitrary cuts in specified departments in order to balance the budget if such revenues are not anticipated." Legislative Record, Senate, April 11, 1967, p. 1118.

It is reasonable to assume that the legislative intent has not changed since 1967, considering the fact that succeeding Legislatures have used this section verbatim. Therefore, the statutory gubernatorial authority and the procedures to be used in the present case are clear.

First, the Governor has no power, acting alone, to curtail allotments. The Commissioner of Finance and Administration must determine that anticipated State income and other available funds will not be sufficient to meet authorized expenditures, and he must report this fact to the Governor and Council. Then, the Governor and Council have the discretionary authority to

temporarily curtail allotments of appropriated funds on an equitable basis among the departments, but only until such time as the Legislature can meet and correct the problem through the exercise of their legislative power. It is anticipated that the Legislature would meet for this purpose as soon as possible.

The Governor and Council, after receiving the report of the Commissioner of Finance and Administration, would have flexibility in determining how to "equitably" curtail allotments. In construing a statute a word should be given effect according to its common meaning [Canal National Bank of Portland v. Bailey, 51 A.2d 482 (Me., 1947)], unless the word has acquired a special meaning through judicial definition [Acheson v. Johnson, 86 A.2d 628 (Me., 1952)]. In the case of the word "equitably," it appears that both the common and legal definitions are very close. Webster's New International Dictionary (2nd Ed.) gives the common meaning as "justly; fairly; impartially." The same definition was judicially adopted in Pearce v. Wisdom, 165 S.E. 574 (Ga., 1932), which also noted that the word gave flexibility to the defendant school superintendent who was to distribute tax funds "equitably." [See also Gericke v. City of Philadelphia, 44 A.2d 233, 236 (Pa., 1945) for proposition that the word confers an element of discretion]. Further, Black's Law Dictionary (Revised Fourth Edition) defines the adjective form, "equitable," as: "Just, fair, and right, in consideration of the facts and circumstances of the individual case." Any curtailment plan utilized by the Governor and Council would have to fall within these definitions, but latitude is still possible. For example, the Governor and Council could make across-the-board cuts which would affect each agency and program equally. Alternatively, each department head might be asked to determine what programs or governmental functions could most fairly stand curtailments, consistent with the legislative intent, and the amounts concerned. These examples are not exhaustive, but it is clear that a complete withholding of funds for a program mandated by the Legislature would not be an alternative available to the Governor and Council under current law. Indeed, complete withholding of funds would, in effect, amount to an item veto, a power which the Governor of the State of Maine does not possess under present law.

There are two additional points which should be discussed in light of the fact that your letter primarily concerned new programs funded by the Additional Appropriations Act (P. & S.L. 1975, c. 90). First, although this Act does involve some new programs, the "new or expanded programs" prohibition of Section 9 of that Act would not apply because all of the programs contained

therein have been reviewed by the Budget Office and the Legislature has made funds available for their use by appropriations in the Act. Second, the foregoing discussion concerning the Governor's statutory authority would apply equally to both the Current Service and Additional Appropriations Acts since the identical provision for temporary curtailment of allotments is found in both Acts. In addition, this statutory authority is also applicable to all other appropriations measures, as provided in the last introductory section of both Acts.

In summary, the Governor has certain powers conferred on him by statute which he may exercise, together with the Executive Council, in the situation where estimated State revenues will not be sufficient to meet authorized expenditures. These powers to temporarily curtail allotments on an equitable basis pending legislative action, allow the Governor certain flexibility, but do not include withholding all funds from new, legislatively-approved programs. The Governor has no constitutional powers in this area to augment those conferred by statute, though cost-saving programs which further legislative intent are not prohibited. Therefore, the Governor does not have the power to withhold funds in the manner you have suggested, for such action is not authorized by statute and would violate the constitutional doctrine of "separation of powers" and "checks and balances."

Very truly yours,

JOSEPH E. BRENNAN
Attorney General

JEB/ec