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December 17, 1991

Rep. Dan A. Gwadosky
Maine House of Representatives
State House Station 2
Augusta, Maine 04333

Dear Majority Leader Gwadosky:

You have inquired whether the Governor's power to temporarily curtail budgetary allotments, pursuant to 5 M.R.S.A. § 1668, extends to funds transferred to the municipalities of the State by the Treasurer pursuant to the state-municipal revenue sharing program, established by 30-A M.R.S.A. § 5681. For the reasons which follow, it is the opinion of this Department that the Governor's authority does extend to this program. Whether a particular curtailment of revenue-sharing would be defensible, however, would depend on the specific amount curtailed and the other relevant circumstances.

The Governor's authority to curtail State spending in times of financial crisis is established by 5 M.R.S.A. § 1668. Under that section, whenever the Commissioner of Finance certifies to the Governor that anticipated income will not be sufficient to meet expenditures authorized by the Legislature, the Governor is authorized to temporarily curtail "allotments" so that expenditures will not exceed the anticipated income. The only limitations on the Governor's authority contained in section 1668 are that he must exercise his curtailment authority "equitably" and "insofar as practicable, . . . consistent with the intent of the Legislature."

The "allotments" referred to in section 1668 are established by 5 M.R.S.A. § 1667. Pursuant to that section,

each department and agency of State government is directed to provide the Governor in advance of the beginning of each fiscal year with a "work program," dividing "all appropriations, revenues, transfers and other funds, made available to [the] department or agency for its operation and maintenance . . ." for the fiscal year into four portions, or "allotments", one for each quarter of the year. These "allotments", once approved by the Governor, form the basis by which agencies are permitted by the State Controller to spend money in each quarter of the fiscal year. Thus, when the Governor curtails allotments pursuant to section 1668, each agency is required to reduce its actual spending by the amount curtailed.

Your question is whether this curtailment process applies to the state-municipal revenue sharing program, established by 30-A M.R.S.A. § 5681. That section provides that 5.1% of sales and use taxes and personal and corporate income taxes collected by the State (plus an additional $237,000 of sales and use taxes) shall be transferred on a monthly basis by the State Treasurer to the "Local Government Fund" and from there, on a proportionate basis, to the municipalities of the State. As this Department understands it, to implement this program, the State Treasurer has established a special revenue account on his books (the Local Government Fund), to which he credits 5.1% of the sales, use and income taxes collected each month (plus $237,000), as soon as he knows that specific amount (usually by the 10th of each month). The amount so credited is then apportioned among the municipalities of the State according to formula, and the Controller is directed to print checks in the appropriate amounts (usually by the 15th of each month). The Controller then provides the checks to the Treasurer, who mails them to the municipalities (usually by the 20th of each month, as required by section 5681(5)).

The general problem presented by your question is whether there is any expression of legislative intent that the state-municipal revenue sharing program is outside the Governor's curtailment powers. In determining whether there is such a legislative intention, this Department has examined the general budget statutes, the General Appropriations Act for Fiscal Year 1992, and the state-municipal revenue sharing statute. As set forth below, in our view, none of these indicate that the Legislature intended that the program be so exempt.

With regard to the general budget statutes, 5 M.R.S.A. § 1661, et seq., the only issue which presents itself is whether the state-municipal revenue sharing funds constitute "appropriations, revenues, transfers and other funds, made available to [a] department or agency for its operation and maintenance . . .," within the meaning of section 1667. In this regard, these funds appear in each year's general appropriation act as appropriations to the Office of the

Treasurer of the State. See, e.g., the General Appropriation Act for Fiscal Year 1992, P.L. 1991, c. 591, § A-25, appropriating $67,000,000 for that Office (an amount evidently equalling 5.1% of estimated sales, use and income tax revenues for the fiscal year, plus twelve times $237,000). It appears, therefore, that the Legislature regards these funds as "appropriated". Consequently, they are subject to the provisions of section 1667, as well as the rest of the budget statutes, including section 1668.

Another possible expression of legislative intent relating to the state-municipal revenue sharing program is found in section A-22 of the General Appropriation Act of 1991. That section provides that "Any funds appearing in this Act that are specifically appropriated or allocated in another Act are included in this Act for informational purposes only, ..." Thus, even though the state-municipal revenue sharing funds appear as an appropriated item for the Office of the Treasurer of State in the General Appropriation Act, they are not to be considered as actually being appropriated by that Act if they are appropriated by some other Act. The question thus becomes whether the state-municipal revenue sharing statute, 30-A M.R.S.A. § 5681, is such an appropriation statute.

In the opinion of this Department, it is not. Section 5681 merely directs that a certain percentage of certain tax revenues, whatever that might be, is to be diverted to the municipalities of the State. It does not appropriate a specific amount for that purpose, in the manner that appropriation acts generally do. An example of such an appropriation act, aside from the General Appropriation Act itself, is the so-called Highway Fund Appropriation Act, P.L. 1991, c. 592, in which specific amounts of money are appropriated from the Highway Fund for very specific purposes. Thus, section A-22 of the General Appropriation Act can not be regarded as an expression of legislative intent that the state-municipal revenue sharing funds are outside of the appropriation process.

That being the case, the only other source of a possible expression of legislative intent that the funds of the program be excluded from the Governor's curtailment powers is the state-municipal revenue sharing statute itself. An examination of that statute, however, shows no indication whatever that the Legislature intended that it be exempt from the operation of

section 1668. Accordingly, this Department concludes that the Legislature did not so intend.[1/]

The only question remaining, therefore, concerns the degree of discretion available to the Governor under section 1668 to curtail the state-municipal revenue sharing program. As indicated above, such curtailment must be "equitable" and "consistent with the intent of the Legislature."

With regard to the equitability standard, this Department would only observe that, as it has in the past, the word "equitable" does not mean "equal", and that, therefore, the Governor has some discretion with regard to the percentages of curtailments which he imposes on various agencies and programs. Op. Me. Att'y Gen. to Gov. James B. Longley (Jan. 7, 1976) at 4; See also the Decision of the Superior Court in the only "curtailment" case to be litigated thus far in Maine, Butterfield v. Department of Human Services, No. CV-91-29 (Me. Super. Ct., Ken. Cty., Jan. 17, 1991) at 6. This does not mean, of course, that there is no limit to the Governor's authority to curtail revenue-sharing. In this connection, we note that since the revenue sharing statute specifies that the amount transferred to the Local Government Fund is a percentage of taxes collected, the amount of revenue sharing has necessarily already been reduced because tax revenues have declined. Whether an actual curtailment order would be defensible would involve further consideration of the actual figure proposed to be curtailed balanced against the equitability standard discussed above.

With regard to the requirement that the curtailment be "consistent with the intention of the Legislature," it does not appear, for the reasons set forth above, that the Legislature has expressed any particular intention with regard to the

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1/ As you point out, this Department did issue an Opinion in 1980 to the effect that it was the intention of the Legislature that funds in the so-called State Aid to Construction Fund are outside of the Governor's curtailment authority under section 1668. The reason for this conclusion was that the State Aid to Construction Fund is one into which the municipalities of the State and the State itself contribute on a matching basis, and exists, on a non-lapsing basis, prior to the passage of any particular appropriation act. The question posed was whether the Governor, pursuant to his curtailment powers, could reach this pre-existing fund. This Department concluded that he could not since the funds in question had already been set aside in prior biennia. Op. Me. Att'y Gen. 80-65.

susceptibility of the state-municipal revenue sharing program to the Governor's curtailment powers.

I hope the foregoing answers your question. Please feel free to reinquire if further clarification is necessary.

Sincerely,

MICHAEL E. CARPENTER
Attorney General

MEC:lm

cc: Governor John R. McKernan, Jr.
President Charles P. Pray
Speaker John L. Martin
Samuel Shapiro
State Treasurer
H. Sawin Millett
Commissioner of Finance