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May 5, 1992

Representative Mary Cathcart
House District 129
120 Main Street
Orono, Maine 04473

Dear Representative Cathcart:

You have inquired whether Sections AAA-1 and AAA-2 of P.L. 1991, c. 780, would, if implemented, unconstitutionally impair certain collective bargaining contracts entered into by the University of Maine System. You also inquire as to whether those sections would, if implemented, unconstitutionally impair the terms of what have been described as employment contracts entered into between the University of Maine system and certain employees who are not represented by any labor organization. Chancellor Woodbury has requested responses to these same questions.

For the reasons which follow, it is the opinion of this Department that it is likely that sections AAA-1 and AAA-2 would be found to affect an unconstitutional impairment to the extent that they alter the salaries called for in collective bargaining agreements that are currently in force. It is also the opinion of this Department that sections AAA-1 and AAA-2 would likely not be found to be an unconstitutional impairment as applied to the employment arrangements that you and Chancellor Woodbury have described with faculty and staff who are not covered by any collective bargaining agreement.

Sections AAA-1 and AAA-2 of P.L. 1991, c. 780, provide as follows:

> **Sec. AAA-1. Salary Adjustment.** Notwithstanding any other provision of law, the annual salary of any person who received at least a 3% cost-of-living salary adjustment on or subsequent to April 1, 1991 and who is employed by the State, including probationary employees and including employees of the University of Maine System, the Maine Technical College System and the Maine Maritime Academy, and whose annual salary exceeds $50,000 is reduced by 3% effective at the beginning of the pay period closest to July 1, 1992. Any savings realized by the University of Maine System, the Maine Technical College System and the Maine Maritime Academy must be used to offset any proposed or implemented tuition increases.
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> **Sec. AAA-2. Additional salary adjustment.** Notwithstanding any other provision of law, the annual salary of any person employed by the State, including probationary employees and including employees of the University of Maine System, the Maine Technical College System and the Maine Maritime Academy, that exceeds $50,000 is reduced by 2% effective at the beginning of the pay period closest to July 1, 1992. Any savings realized by the University of Maine System, the Maine Technical College System and the Maine Maritime Academy must be used to offset any proposed or implemented tuition increases.

A. Collective Bargaining Agreements

Chancellor Woodbury has advised us that the University of Maine System has an existing collective bargaining agreement with the Associated Faculties of the University of Maine System (the "Faculty Unit Contract") which, as amended on October 28, 1991, runs from October 28, 1991 until June 30, 1993. Article 19 of the amended contract provided for a 3.5% salary increase effective retroactively on July 1, 1991 and provides for another 3.5% salary increase effective July 1, 1992. Chancellor Woodbury has also advised us that certain employees

subject to the Faculty Unit Contract currently earn an annual salary in excess of $50,000.

Chancellor Woodbury has also advised us that the University of Maine System has an existing collective bargaining agreement with the University of Maine Professional Staff Association (the "Professional Unit Contract") which, as amended on September 3, 1991, runs from September 3, 1991 until June 30, 1993. Article 17 of that contract provided for a 2.5% salary increase effective retroactively on July 1, 1991 and provides for a 3.5% salary increase effective July 1, 1992. Chancellor Woodbury has also advised us that certain employees subject to the Professional Unit Contract currently earn an annual salary in excess of $50,000.

Section AAA-1 is applicable to employees whose annual salary exceeds $50,000 and who received at least a 3% cost of living raise on or after April 1, 1991. By its terms, therefore, it would be applicable to those University of Maine employees covered by the Faculty Unit Contract whose annual salary exceeds $50,000 and who received a 3.5% salary increase under the Faculty Unit Contract effective July 1, 1991. Under Section AAA-1, those employees would have their annual salary reduced by 3% as of the pay period closest to July 1, 1992 - - even though the Faculty Unit Contract calls for another 3.5% increase.[1/]

Section AAA-2 is applicable to all employees whose annual salary exceeds $50,000. By its terms, therefore, it is applicable to those employees covered by either the Faculty Unit contract or the Professional Unit contract whose annual salaries exceed $50,000. Under Section AAA-2 those employees would have their salaries reduced by 2% as of the pay period closest to July 1, 1992 - - even though both the Faculty Unit and Professional Unit contracts call for a 3.5% increase on that date.

The question is whether the inconsistencies between sections AAA-1 and AAA-2 and the Faculty Unit and Professional Unit contracts, as applicable to employees earning in excess of $50,000, would cause sections AAA-1 and AAA-2 run afoul of those provisions in the United States and Maine constitutions

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[1/]Section AAA-1 would not be applicable to those University of Maine employees covered by the Professional Unit contract whose annual salary exceeds $50,000 because those employees received only a 2.5% increase effective July 1, 1991.

which prohibit the State from passing any law "impairing the obligation of contracts." U.S. Const., Art. 1, § 10; Me. Const. Art. I, § 11. Since the language in these two constitutional provisions is identical and has been similarly interpreted, see N.A. Burkitt, Inc. v. J.I. Case. Co., 597 F. Supp. 1986, 1089-90 (D. Me. 1984), no distinction need be drawn between them for purposes of analysis.

By virtue of the inconsistencies pointed out above, we conclude that section AAA-1 would, if implemented with respect to employees earning more than $50,000 under the Faculty Unit Contract, effect an impairment of the University's contractual obligations under that contract. Similarly, section AAA-2 would, if implemented with respect to employees earning more than $50,000 under either the Faculty Unit or Professional Staff Contracts, effect an impairment of the University's contractual obligations under those contracts.[2/] In each case, however, this does not end the inquiry. To determine whether there has been an unconstitutional impairment of contractual obligations requires analysis of the factors set forth by the U.S. Supreme Court in Energy Reserves Group v. Kansas Power and Light Co., 459 U.S. 400 (1983). In that case, the Court noted that "although the language of the contract clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people'". 459 U.S. at 411, quoting Home Building and Loan Assn. v. Blaisdell, 290 U.S. 398, 434 (1934). Under Energy Reserves, the three factors that must be considered are (1) whether the State law has operated as a "substantial" impairment; (2) whether the State is acting to further a significant and legitimate public purpose; and (3) whether the specific impairment in question is reasonable and necessary to serve the State's interest. 459 U.S. at 412-413.

A particular problem exists in this case because sections AAA-1 and AAA-2 can be seen as an impairment of the State's own

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[2/] A different conclusion might be reached if the subject of salary to the affected employees had previously been "prescribed or controlled" by state law. 26 M.R.S.A. § 979-D(1)(E)(1). Under this provision, matters prescribed of controlled by state law are not appropriate subjects for collective bargaining and even if there is contractual language on those subjects, the relevant statutes rather than the collective bargaining agreement might be controlling.

financial obligations.[3/] In U.S. Trust Co. v. New Jersey, 431 U.S. 1, 25-26 (1977), the U.S. Supreme Court noted that such an impairment requires heightened scrutiny:

> The Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations. As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.

(footnote omitted). In Energy Reserves, the Supreme Court also commented that "[w]hen a State itself enters into a contract, it cannot simply walk away from its financial obligations. In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets." 459 U.S. at 413 n. 14.

We are aware of several court decisions from other states whose Legislatures have attempted to rescind pay increases that were expressly called for in collective bargaining agreements. See Carlstrom v. State of Washington, 694 P.2d 1 (Wash. 1985); Public Employees v. County of Sonoma, 591 P.2d 1 (Cal. 1979); Matter of Subway Surface Supervisors Assn., 404 N.Y. Supp. 2d 323 (N.Y. 1978). In both the Washington and California cases, state legislation rescinding pay increases was invalidated. In both those cases the courts found that legislative prohibition of contractual pay increases was a substantial impairment under the first part of the Energy Reserves test. Moreover, they also found that such an impairment was not justified by the specific fiscal situation faced by the state at that time. Those cases found that a shortfall in revenues was not a

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[3/]For purposes of this analysis, we perceive no difference between the University of Maine System and the State.

sufficiently significant and legitimate purpose under the second part of the Energy Reserves test to justify the proposed impairment of contractual obligations.

This does not mean that a fiscal emergency can never justify legislation rescinding contractual wage increases. This is demonstrated by the New York case, where such legislation was upheld in circumstances where the City of New York was virtually bankrupt and was faced with a potential inability to meet its obligations to its bondholders and a potential inability to provide essential services to its inhabitants. See Matter of Subway - Surface Supervisors Assn., 404 N.Y. Supp. 2d at 328 n.3.

In this case, the University of Maine System would only save a minimal amount if sections AAA-1 and AAA-2 were implemented with respect to employees earning in excess of $50,000 who were covered by either the Faculty Unit or Professional Service Contracts. Moreover, by the express terms of those sections the amount saved will not go to the beleaguered General Fund but will instead offset tuition increases. Even aside from this point, it would be difficult to argue that the State has no other alternatives to achieve savings other than by reducing salaries as called for in sections AAA-1 and AAA-2. Under these circumstances, sections AAA-1 and AAA-2 (as applied to employees earning more than $50,000 who are covered by the Faculty Unit or Professional Unit Contracts) present a situation far more similar to that faced by the Washington and California courts in Carlstrom and Sonoma County than the situation faced by the New York court in Subway-Surface Supervisors. For this reason, we believe that it is doubtful that a court would uphold the application of those sections to a University of Maine System employee earning more than $50,000 who is covered by either the Faculty Unit or Professional Unit Contracts.[4/] This conclusion is consistent with the one reached in Attorney General Opinion 91-15, which considered the subject of merit pay increases under certain of the State's collective bargaining agreements.

B. Unrepresented Employees

The University of Maine System has provided us with information with respect to the employment arrangements that exist between the University System and certain categories of

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4/This does no mean that Sections AAA-1 and AAA-2 are in any way invalid as applied to other employees.

employees or faculty who earn in excess of $50,000 annually and who are not represented by any labor organization and therefore are not covered by any collective bargaining contract. Based on this information, it is our understanding that certain non-represented employees subject to Sections AAA-1 and/or AAA-2 received original appointment letters that typically set a salary for the first year but are silent as to subsequent years.[5/] Other non-represented employees have received reappointment letters (presumably after receiving an original appointment letter as set forth above) that set forth the term of the reappointment but omit any reference as to salary. Other employees subject to Sections AAA-1 and AAA-2 received appointment letters which set a salary for the first year and specifically state that the salary will include any increases voted by the Board of Trustees for non-reprsented professionals.

Finally, we have been advised that the University System has made unspecified representations (presumably orally) to its non-represented faculty members that they will receive the same pay increases as the represented faculty who are covered by the Family Unit Contract referred to above.

Leaving aside the issue of these oral representations for the moment, we do not see that the appointment letters described above created any contractual rights to salary increases that would be impaired by Sections AAA-1 or AAA-2 of P.L. 1991, c. 780. Where the relevant document is an appointment letter or a reappointment letter that makes no mention of salary increases, there is no contractual right to such increases that would be impaired by Section AAA-1's 3% cut for any employee earning more than $50,000 who received a cost

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[5/]Some of these letters appear to be for a one year term since they recite that the recipient has "a fiscal year appointment" at a specified salary. It is our understanding that the issue of cost of living salary increases in such cases arises if the appointment is renewed for another year, when the University System generally provides a cost of living increase even though neither the original appointment letter nor the reappointment contain any reference to such an increase. In other cases the initial appointment is for a multi-year term but the annual salary specified in the letter is for "this fiscal year appointment." From the information supplied by the University System, we understand that when such a letter is sent, the annual salary specified is interpreted to be for the first year and that the University generally exercises its discretion to grant cost of living increases for subsequent years.

of living increase of at least 3% on or after April 1, 1991. Similarly, there would also be no contractual right to be exempt from the 2% salary cut specified in Section AAA-2 unless that 2% cut would reduce the salary expressly set forth in the appointment letter. In other words, so long as the 2% cut does not reduce an employee's salary below the amount originally expressly set forth in his or her appointment letter, we see no contractual impairment.

We reach the same conclusion even with respect to those employees whose appointment letters state that they would receive future increases voted by the Board of Trustees. Such letters leave the approval of any such increase and the amount of any such increase solely to the Board's discretion. The Board is thus free to withhold increases and is also free to rescind increases that it has already voted on. If the Board has voted any increases that are inconsistent with Sections AAA-1 and AAA-2, therefore, it can avoid any constitutional impairment by rescinding or modifying those increases. Indeed, we understand that the Board took such action in 1991 when, as a result of the State's financial problems, it suspended previously approved increases for non-represented employees.

That leaves the issue of whether the University System may have bound itself by alleged oral representations that its non-represented faculty would receive the same increases as the represented faculty, and whether, to the extent that Sections AAA-1 and AAA-2 contradict those alleged representations, those sections would constitute an unconstitutional impairment. A full examination of such a claim would, in our view, require a detailed investigation of the facts and the evidence, an inquiry that is beyond the scope of any opinion this Department would ordinarily give under 5 M.R.S.A. § 195. However, in our view, it would be highly unlikely that a court would find an unconstitutional impairment of contractual obligations based on such oral representations.

In our view, such representations do not become part of any contract between the University System and its non-represented faculty and do not constitute the kind of contractual obligations that cannot be altered by subsequent legislation. In addition, such representations are necessarily conditional upon the ability of the person making them to perform. Any statements by University officials on budgetary matters are necessarily subject to legislative action. As a result, while we recognize all the reasons why the University may wish to continue to treat non-represented faculty similarly to represented faculty, we cannot agree that it is constitutionally required to give non-represented faculty the benefit of a collective bargaining contract does not cover them.

I hope the foregoing answers your questions. If not, please feel free to reinquire.

Sincerely,

MICHAEL E. CARPENTER
Attorney General

MEC:mfd
cc: Chancellor Robert L. Woodbury
Senate President Charles P. Pray
Speaker John L. Martin
Senator Joseph Brannigan
Representative Lorraine Chonko