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ANDREW KETTERER
ATTORNEY GENERAL

Telephone: (207) 626-8800
FAX: (207) 287-3145

REGIONAL OFFICES:

96 HARLOW ST., SUITE A
BANGOR, MAINE 04401
TEL: (207) 941-3070

59 PREBLE STREET
PORTLAND, MAINE 04101-3014
TEL: (207) 822-0260

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
6 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0006

October 19, 1995

Honorable Dan A. Gwadosky
Speaker, Maine House of Representatives
2 State House Station
Augusta, ME 04333-0002

Dear Speaker Gwadosky:

I am writing in response to your letters of September 19, 1995 and September 21, 1995, asking two questions with regard to the powers of the Governor to implement recommendations of the Productivity Realization Task Force, established at the First Regular Session of the 117th Legislature.

Your letter of September 19 asks whether, in the circumstance in which a recommendation of the Task Force will require legislative action, the Governor has the authority to lay off State employees in advance of such action. Your letter of September 21 concerns the authority of the Governor with respect to programs for which appropriations have been made in "All Other" accounts, and it is our understanding from discussions with your staff that your essential question is whether the Governor has the legal authority to eliminate programs by declining to spend funds appropriated to particular State agencies in their "All Other" accounts.

For the reasons which follow, it is the opinion of this Department that the Governor may not lay off employees in advance of legislative action if the result of those layoffs would be to eliminate a legislatively mandated program. In addition, it is our view that, while the Governor may direct that "All Other" funds appropriated to particular State agencies not be spent in order to achieve efficiencies, he may not use such authority to eliminate legislatively mandated programs entirely. In both cases, however, the legality of any particular layoff or any particular reduction in "All Other" funds would depend on the specific statutory provisions relating to the governmental program in question and the specific facts and circumstances of the proposed layoff or program cut.

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The Productivity Realization Task Force was created by Part D of P.L. 1995, ch. 99. The legislative objective is expressed in the introductory statement of purpose for the overall productivity initiative, contained in Section D–1 of Chapter 99:

> The intent of the productivity initiative is to expedite and facilitate the implementation of improvements in State Government operations through the realization of cost savings from increased productivity of state employees, more efficient delivery of services and the elimination of waste, duplication and unnecessary programs . . .. The intent of this Part is to develop a mechanism so as to achieve $45,346,780 in savings to the General Fund in the 1996–97 biennium.

The thrust of this statement, as well as the further delineation of Task Force responsibilities in Sections D–2(1) and D–3(1), is plain: the Task Force is to recommend to the Governor and the Legislature changes in the structure and operation of State government for the purpose of achieving $45,000,000 in savings through greater efficiency. The Task Force itself has no authority to lay off employees or make management or program changes. Its role is advisory only. *See* Section D–2(1). Sections D–3(2), D–4 and D–5 contemplate that the Governor will have authority to implement certain Task Force recommendations on his own and that other recommendations will require legislative action. Against this statutory background, this Department answers your questions as follows:

In your September 19 letter, you ask whether, in the event that a Task Force recommendation would require legislative action, the Governor could begin to implement the recommendation by laying off State employees in anticipation of such legislation action. When P.L. 1995, ch. 99 was enacted, it was contemplated that the Governor would have the ability to achieve budgetary savings through various measures, including layoffs, in instances where the Productivity Realization Task Force recommended that State functions could be performed by fewer employees and statutory changes are not required.

A more troublesome issue is created if layoffs are not related to increased productivity but are instead designed to implement proposed legislative changes that have not yet been enacted. To the extent that such layoffs would have the effect of eliminating a statutorily mandated State program,[1] we do not believe that the Governor would have such authority. Until the Legislature acts, the existing statute

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[1]In this connection, it bears emphasis that a distinction should be drawn between a statute that mandates a specific state program and a statute that authorizes but does not require a state agency to conduct a given program. If the relevant statutory provisions give a state agency discretion as to whether or not to conduct or implement a program, that program could be scaled back or eliminated by the Executive Branch without legislative action.

remains in effect, and the Legislature is free to reject the proposed legislative change. Under these circumstances, the Governor would not be free to override existing statutory provisions on the theory that they might be amended in the future.

It bears emphasis that this would not preclude the Governor from making layoffs based on productivity improvements in program areas in which it is also anticipated that future legislative changes will be made. Nor would it preclude the Governor from making layoffs in areas where the result of such layoffs would not contravene any existing statute. The legality of any particular layoffs would depend both on the specific statutory provisions relating to the affected program and the specific impact of the proposed layoffs on the operations of the program.

Your inquiry of September 21, as we understand it, is whether, in carrying out the recommendations of the Task Force, the Governor may decline to spend funds appropriated to particular State agencies in their "All Other" accounts in such a way as to achieve the elimination of legislatively mandated programs.

It is the view of this Department that the Governor generally has authority to decline to spend appropriated funds in "All Other" accounts. Indeed, in P.L. 1995, ch. 368, Part H, the Legislature deappropriated a total of $35,258,833 from the "Personal Services" accounts of the departments and agencies of the Executive Branch for fiscal years 1996–97 and deappropriated $3,541,781 from those agencies' "All Other" accounts. Those deappropriations were made in anticipation of savings to be realized as a result of the productivity initiative in P.L. 1995, ch. 99, Part D. Thus, the Legislature specifically contemplated that the Executive Branch would realize at least $3.5 million in "All Other" savings.

To be sure, the Governor could also reduce "All Other" spending by more than $3.5 million to the extent that he or his commissioners find that governmental services can be provided in a more efficient manner. Nothing requires the Executive Branch to spend every penny that has been appropriated. However, this principle does not permit the Executive Branch to decline to spend "All Other" money where that would result in the elimination of a statutorily mandated program. Once again, the operative principle is that the Governor may not override existing statutes in exercising his executive authority to control spending.

Section D–5 of P.L. 1995, ch. 99, does provide the Governor with authority, notwithstanding any other provision of law, to transfer the available balances of General Fund appropriations between line categories, accounts and departments. By its express terms, this authority is limited to the amount required "to achieve the savings necessary to meet the lump sum deappropriations to be authorized in [fiscal years 1996 and 1997]." Moreover, we interpret the Governor's authority under Section D–5 in keeping with the overall intent of the productivity initiative, thus allowing the Governor to transfer appropriation balances (notwithstanding

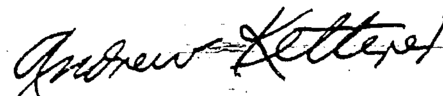
statutory provisions that would otherwise prohibit such transfers) where such transfers are intended to achieve efficiencies in governmental operations. The Governor's delegated authority in Section D–5 is accompanied by express statutory standards which demonstrate that such authority was designed to allow the Governor to realize cost savings through increased efficiency and productivity and did not constitute a grant of authority to override legislative decisions as to whether or not to provide a specific governmental service. *See* our earlier opinions on the subject of the Task Force, Op.Me.Atty.Gen. 95–6 and 95–7.

While there is language in Part D of P.L. 1995, ch. 99 that suggests that one of the goals of the productivity initiative is to eliminate "unnecessary programs," *see* Section D–1,[2] we believe that this language does not allow existing statutes to be overridden (except for any specific statutes that would bar transfers between appropriations as contemplated by Section D–5) because the productivity initiative legislation specifically contemplates in Section D–4 that certain Task Force recommendations will require legislative changes and sets up detailed procedures relating to such changes.

Thus, while the Governor has significant authority with respect to the expenditure of appropriated funds, he is not authorized to make spending decisions that would effectively eliminate a statutorily mandated program or otherwise contravene existing statutes. The legality of any specific decision not to spend "All Other" funds would depend on the particular statutory provisions involved and the specific impact of the particular reduction in spending.

I hope the foregoing is helpful to you. Please feel free to reinquire if further clarification is necessary.

Sincerely,



ANDREW KETTERER
Attorney General

AK:sw
cc: Governor Angus S. King, Jr.
President Jeffrey H. Butland

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[2] *See also* Section D–3(1)(G) (Task Force shall consider "changes in agency . . . missions"); Section D–3(2) (Task Force shall recommend that the Governor "reduce, eliminate, or otherwise alter current state programs and operations in order to achieve the deappropriations to be authorized in fiscal year 1995–96 and fiscal year 1996–97").