

# MAINE STATE LEGISLATURE

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**LEGISLATIVE COUNCIL**

**LD 1614 PART 2 BUDGET BILL**

**FY 04 - 05**

**THIS FILE CONTAINS THE FOLLOWING:**

**Departmental Impact Forms**  
**Testimony**  
**Committee Recommendations**

2004-2005 "Part 2" Budget Bill  
Departmental Impact Form  
Joint Standing Committee on Appropriations and Financial Affairs

Department/Agency Name: LAW AND LEGISLATIVE REFERENCE LIBRARY

Program Name: Law and Legislative Reference Library

Account Number(s): 010-31A-0636-01

Page # in Bill: Part C

FY 2003-04

FY 2004-05

Position or FTE Increase [i.e. (0.000)] / Decrease [i.e.(-0.000)]:

<u>General Fund</u>		
<u>Federal Funds</u>		
<u>Other Special Revenue funds</u>		
<u>Other (please specify)</u>		

Appropriation or Allocation Increase / (Decrease):

<u>General Fund</u>		15,157
<u>Federal Funds</u>		
<u>Other Special Revenue funds</u>		
<u>Other (please specify)</u>		

Revenue or Balance Transfer Increase / (Decrease):

<u>General Fund</u>		
<u>Federal Funds</u>		
<u>Other Special Revenue funds</u>		
<u>Other (please specify)</u>		

Description of Initiative: Provides funds for the restoration of merit increases in FY 05.

Description of Impact on Program(s) – BE SPECIFIC: Will permit the award of merit increases for eligible Law and Legislative Reference Library employees in FY 05.

Does this Initiative have an impact on the 2006-2007 Biennium? (Yes) X (No) \_\_\_\_\_  
(please explain below)

Will be reflected in the calculation of personal services costs for the 2006-2007 biennium.

2004-2005 "Part 2" Budget Bill  
Departmental Impact Form  
Joint Standing Committee on Appropriations and Financial Affairs

Department/Agency Name: LEGISLATURE

Program Name: Legislature

Account Number(s): 010-30A-0081-01

Page # in Bill: Part C

FY 2003-04

FY 2004-05

Position or FTE Increase [i.e. (0.000)] / Decrease [i.e.(-0.000)]:

<u>General Fund</u>		
<u>Federal Funds</u>		
<u>Other Special Revenue funds</u>		
<u>Other (please specify)</u>		

Appropriation or Allocation Increase / (Decrease):

<u>General Fund</u>		136,173
<u>Federal Funds</u>		
<u>Other Special Revenue funds</u>		
<u>Other (please specify)</u>		

Revenue or Balance Transfer Increase / (Decrease):

<u>General Fund</u>		
<u>Federal Funds</u>		
<u>Other Special Revenue funds</u>		
<u>Other (please specify)</u>		

Description of Initiative: Provides funds for the restoration of merit increases in FY 05.

Description of Impact on Program(s) – BE SPECIFIC: Will permit the award of merit increases for eligible legislative employees in FY 05.

Does this Initiative have an impact on the 2006-2007 Biennium? (Yes) X (No) \_\_\_\_\_  
(please explain below)

Will be reflected in the calculation of personal services costs for the 2006-2007 biennium.

2004-2005 "Part 2" Budget Bill  
Departmental Impact Form  
Joint Standing Committee on Appropriations and Financial Affairs

Department/Agency Name: LEGISLATURE

Program Name: Commission on Interstate Cooperation

Account Number(s): 010-30A-0053-01

Page # in Bill: Part R

FY 2003-04

FY 2004-05

Position or FTE Increase [i.e. (0.000)] / Decrease [i.e.(-0.000)]:

<u>General Fund</u>		
<u>Federal Funds</u>		
<u>Other Special Revenue funds</u>		
<u>Other (please specify)</u>		

Appropriation or Allocation Increase / (Decrease):

<u>General Fund</u>		
<u>Federal Funds</u>		
<u>Other Special Revenue funds</u>		
<u>Other (please specify)</u>		

Revenue or Balance Transfer Increase / (Decrease):

<u>General Fund</u>	13,032	
<u>Federal Funds</u>		
<u>Other Special Revenue funds</u>		
<u>Other (please specify)</u>		

**Description of Initiative:** Funds in the amount of \$13,032 are available from the projected FY 03 unencumbered balance in the All Other line category due to lower than budgeted costs for dues to the Council of State Governments and the National Conference of State Legislatures.

**Description of Impact on Program(s) – BE SPECIFIC:** No negative program impact.

Does this Initiative have an impact on the 2006-2007 Biennium?

(Yes) \_\_\_\_\_ (No) X  
(please explain below)

One time savings

2004-2005 "Part 2" Budget Bill  
Departmental Impact Form  
Joint Standing Committee on Appropriations and Financial Affairs

Department/Agency Name: LEGISLATURE

Program Name: Commission on Uniform State Laws

Account Number(s): 010-30A-0242-01

Page # in Bill: Part R

FY 2003-04

FY 2004-05

Position or FTE Increase [i.e. (0.000)] / Decrease [i.e. (-0.000)]:

<u>General Fund</u>		
<u>Federal Funds</u>		
<u>Other Special Revenue funds</u>		
<u>Other (please specify)</u>		

Appropriation or Allocation Increase / (Decrease):

<u>General Fund</u>		
<u>Federal Funds</u>		
<u>Other Special Revenue funds</u>		
<u>Other (please specify)</u>		

Revenue or Balance Transfer Increase / (Decrease):

<u>General Fund</u>	8,833	
<u>Federal Funds</u>		
<u>Other Special Revenue funds</u>		
<u>Other (please specify)</u>		

**Description of Initiative:** Funds in the amount of \$8,833 are available from the projected FY 03 unencumbered balance in the All Other line category due to lower than budgeted costs for attendance at the annual conference.

**Description of Impact on Program(s) – BE SPECIFIC:** No negative program impact.

Does this Initiative have an impact on the 2006-2007 Biennium?

(Yes) \_\_\_\_\_ (No) X  
(please explain below)

One-time savings

2004-2005 "Part 2" Budget Bill  
Departmental Impact Form  
Joint Standing Committee on Appropriations and Financial Affairs

Department/Agency Name: LEGISLATURE

Program Name: Legislature

Account Number(s): 010-30A-0081-01

Page # in Bill: Part R

FY 2003-04

FY 2004-05

Position or FTE Increase [i.e. (0.000)] / Decrease [i.e.(-0.000)]:

<u>General Fund</u>		
<u>Federal Funds</u>		
<u>Other Special Revenue funds</u>		
<u>Other (please specify)</u>		

Appropriation or Allocation Increase / (Decrease):

<u>General Fund</u>		
<u>Federal Funds</u>		
<u>Other Special Revenue funds</u>		
<u>Other (please specify)</u>		

Revenue or Balance Transfer Increase / (Decrease):

<u>General Fund</u>	215,000	
<u>Federal Funds</u>		
<u>Other Special Revenue funds</u>		
<u>Other (please specify)</u>		

Description of Initiative: Funds in the amount of \$215,000 are available from the projected FY 03 unencumbered balance in the Personal Services line category .

Description of Impact on Program(s) – BE SPECIFIC: No negative impact on legislative operations.

Does this Initiative have an impact on the 2006-2007 Biennium?

(Yes) \_\_\_\_\_ (No) X  
(please explain below)

One-time savings

**2004-2005 "Part 2" Budget Bill**  
**Departmental Impact Form**  
**Joint Standing Committee on Appropriations and Financial Affairs**

Department/Agency Name: LEGISLATURE

Program Name: Office of Program Evaluation and Government Accountability

Account Number(s): 010-30A-0968-01

Page # in Bill: Part R

FY 2003-04

FY 2004-05

**Position or FTE Increase [i.e. (0.000)] / Decrease [i.e.(-0.000)]:**

<u>General Fund</u>		
<u>Federal Funds</u>		
<u>Other Special Revenue funds</u>		
<u>Other (please specify)</u>		

**Appropriation or Allocation Increase / (Decrease):**

<u>General Fund</u>		
<u>Federal Funds</u>		
<u>Other Special Revenue funds</u>		
<u>Other (please specify)</u>		

**Revenue or Balance Transfer Increase / (Decrease):**

<u>General Fund</u>	17,223	
<u>Federal Funds</u>		
<u>Other Special Revenue funds</u>		
<u>Other (please specify)</u>		

**Description of Initiative:** Funds in the amount of \$17,223 are available from the projected FY 03 unencumbered balance due to the delay in the implementation of the Office of Program Evaluation and Government Accountability. All funds for this program in FY 04 and FY 05 were deappropriated in PL 2003, c. 20.

**Description of Impact on Program(s) – BE SPECIFIC:** No negative program impact.

Does this Initiative have an impact on the 2006-2007 Biennium?

(Yes) \_\_\_\_\_ (No) X  
 (please explain below)

One time savings



2004-2005 Supplemental Budget Bill  
K

010-30A-0444-03 - Miscellaneous Studies

Commission to Improve the Sentencing, Supervision, Management and Incarceration of Prisoners

Legislative Study - Cost Estimate

	2003-04	2004-05
Number of Meetings (6 specified)	6	
Meetings During Session: No		
Report Date(s): January 2, 2004		
Extension Provision: No		
<b># of Persons Eligible for Per Diem</b>		
Legislators	4	
Others		
# of Persons Eligible for Per Diem	4	
# of Persons Eligible for Expenses but not Per Diem	5	
Number of Department/Agency Personnel or Others whom per diem and expenses are not calculated	7	
Total Number of Members	16	
<b>Personal Services Costs</b>	<b>1320</b>	
All Other Costs		
Member Expenses	2700	
Staff Travel		
Postage, Printing and Miscellaneous	750	
Public Hearings: One	1000	
<b>Total - All Other</b>	<b>4450</b>	
<b>Total Cost</b>	<b>5770</b>	

# TESTIMONY SIGN IN SHEET

COMMITTEE ON Appropriations and Financial Affairs

L.D. # OR CONFIRMATION: \_\_\_\_\_ LD 1614 Part 2 Budget Bill

DATE: \_\_\_\_\_ 8-May-03

**PLEASE PRINT!!**

Legislative Council

	NAME	TOWN/AFFILIATION	PROPONENT	OPPONENT	NEITHER FOR NOR AGAINST
1.	David Boulter	Executive Director			
2.					
3.					
4.					
5.					
6.					
7.					
8.					
9.					
10.					
11.					
12.					
13.					
14.					
15.					
16.					



SEN. BEVERLY C. DAGGETT  
CHAIR

J.P. PATRICK COLWELL  
VICE-CHAIR



121<sup>st</sup> MAINE STATE LEGISLATURE  
LEGISLATIVE COUNCIL

SEN. SHARON ANGLIN TREAT  
SEN. PAUL T. DAVIS, SR.  
SEN. KENNETH T. GAGNON  
SEN. CHANDLER E. WOODCOCK  
REP. JOHN RICHARDSON  
REP. JOSEPH BRUNO  
REP. ROBERT W. DUPLESSIE  
REP. DAVID E. BOWLES

DAVID E. BOULTER  
EXECUTIVE DIRECTOR

MEMO

DATE: May 8, 2003  
TO: Members, Joint Standing Committee on Appropriations & Financial Affairs  
FROM: Senate President Beverly C. Daggett, Chair, Legislative Council  
Speaker Patrick Colwell, Vice-Chair, Legislative Council  
RE: Governor's Draft; "Part 2" Budget Bill

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This memo is to inform you that the Legislative Council supports the budgetary proposals in the Governor's draft "Part 2" budget bill as they affect the legislative accounts. The Legislature has achieved savings in several of its accounts, resulting in a total of \$254,088 being available from the projected unencumbered balance at the close of fiscal year 2002-03 in various legislative accounts. The savings identified in Part R are presented to help offset the existing revenue shortfall and should have no negative impact on legislative operations in the 2004-2005 biennium.

In addition, consistent with provisions affecting the Executive Branch and the Judicial Branch, the budget bill includes funding in Part C in the amount of \$15,157 for the Law and Legislative Reference Library and \$136,173 for the Legislature to restore step increases for eligible legislative employees in fiscal year 2004-05 only. The Council also finds acceptable language changes relating to step increases that are to be included in Part R in the LD.

Please let us know if you have any questions or need additional information.

Thank you.

cc: Members, 121<sup>st</sup> Legislative Council  
David E. Boulter, Executive Director, Legislative Council

SEN. BEVERLY C. DAGGETT  
CHAIR

REP. PATRICK COLWELL  
VICE-CHAIR



121<sup>st</sup> MAINE STATE LEGISLATURE  
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REP. DAVID E. BOWLES

DAVID E. BOULTER  
EXECUTIVE DIRECTOR

**Memo**

To: Members, Joint Standing Committee on Appropriations and Financial Affairs

From: Beverly C. Daggett, Chair  
121<sup>st</sup> Legislative Council

Patrick Colwell, Speaker  
House of Representatives

Date: May 15, 2003

Re: Request for Information anticipated unencumbered balances

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Please find attached a summary of the information about the legislative accounts that a committee member had requested at the public hearing on the Governor's draft Part 2 budget bill last week. The figures reported are a general estimate of the anticipated FY03 balances in legislative accounts that we project will be unspent as of June 30<sup>th</sup>. The anticipated amounts to be carried forward are consistent with amounts carried in past years. More exact figures will not be available until a time closer to the end of the state's fiscal year and until the Legislative Council has had an opportunity to review necessary legislative projects and other financial commitments for the year that will require use of the balances. As you know, expenditure of carry forward balances must be authorized by the Legislative Council, based on its commitments for the upcoming fiscal year.

As was mentioned at the public hearing, the Legislative Council agrees to the reductions proposed in Part R of the Part 2 budget bill for the noted legislative accounts.

If you have any questions, please let me know.

Thank you.

Attachment

Cc: Legislative Council Members  
David E. Boulter, Executive Director, Legislative Council

05/13/03			
MAINE STATE LEGISLATURE			
FY 03 Projected Unencumbered Balance Forward Analysis - Preliminary			
GENERAL FUND			
Account Number	Account Name	Proj. FY 03	
		Unenc. Bal.	Comments
01030A004001	Legislative Branch-Wide	461,161	Computer Migration Project contractual obligation expected to be paid in FY 04
01030A005301	Comm on Interstate Coop	13,032	Part R-\$13,032 will lapse to the General Fund
01030A008101	Legislative	1,200,000	Needed for legislative operations and commitments, except \$215,000 will lapse to the General Fund in accordance with Part R
01030A024201	Comm Uniform State Laws	8,833	Part R-\$8,833 will lapse to the General Fund
01030A041801	State House Renovations	0	
01030A044403	Misc Studies Legislative	20,000	Earmarked for funding FY 04 interim studies to be reviewed and authorized by the Legislative Council
01030A061501	Leg St Capitol Comm	100,000	State House and Capitol Park Commission will fund portion of the costs relating to recommended improvements to Capitol Park
01030A072201	Apportionment Commission	0	
01030A074701	Res Fund State Hse Pres & Maint	1,000,000	State House Master Plan Projects for needed maintenance and improvements to the building
01030A082401	Educ Research Institute	0	
01030A096801	OPEGA	17,223	Part R-\$17,223 will lapse to the General Fund
01031A063601	Law and Legislative Ref. Library	0	

#### Prior Merit Freeze July 1, 1992 – June 30, 1993

- In March 1992 the Legislature enacted PL 1991, c. 780 Sec. V-1 freezing merits between July 1, 1992 – June 30, 1993 for executive branch employees as well as other state employees.
- PL 1991 c. 780 became effective July 1, 1992.
- At the time the law was enacted all executive branch collective bargaining agreements were in effect and set to expire June 30, 1992.
- The Attorney General rendered an opinion for the Senate President on December 18, 1991 that there was no problem of constitutional impairment of contract because the contracts expired on June 30, 1992 and the law was effective on July 1. He stated that “[a] contract cannot be impaired by a statute enacted before the contract was entered into.” Op. Me. Att’y Gen. 91-15, p. 5.
- MSEA filed for arbitration over the merit freeze; the State argued that the matter was prescribed or controlled by public law and thus not arbitrable.
- The Arbitrator found issue not arbitrable because the matter was prescribed or controlled by public law.
- MSEA filed a motion to compel arbitration in Superior Court; State filed a motion to stay arbitration.
- The State’s motion to stay was granted, and MSEA appealed to the Law Court.
- The Law Court found that since the contract had expired, there was no written arbitration agreement, and therefore, the State had no obligation to arbitrate the issue. The Court did not reach the issue of impairment. (*MSEA v. Bureau of Employee Relations*, 652 A. 2d 655 (Me 1995).

#### Current Merit Freeze July 1, 2003 – June 30, 2005

- This session the legislature enacted PL 2003, c. 20, Pt. D Sec. D-22 freezing merits between July 1, 2003 – June 30, 2005 for executive branch employees as well as other state employees with the proviso that the State and the bargaining agents could find other Personal Services savings to replace the cost of the deappropriated merits.
- PL 2003, c. 20 will become effective July 1, 2003.
- At the time PL 2003, c. 20 was enacted, all executive branch collective bargaining agreements were in effect and set to expire June 30, 2003.

- There has been no change in relevant law or in the Attorney General's opinion that "[a] contract cannot be impaired by a statute enacted before the contract was entered into".
- Because the matter is prescribed or controlled by public law, it is not arbitrable.
- The State has already negotiated three MSEA contracts that will take effect July 2, 2003, after the effective date of PL 2003, c. 20, Pt. D Sec. D-22.
- All other executive branch collective bargaining agreements will expire on June 30, prior to the effective date of PL 2003, c. 20, Pt. D Sec. D-22.
- Therefore, there is no constitutional impairment of contract. Nor is there any obligation to arbitrate the matter because it is prescribed or controlled by public law pursuant to 26 M.R.S.A. 979-D (1) (E) (1).

#### Attachments

- 1) PL 1991, c. 780 Sec. V-1
- 2) Op. Me. Att'y Gen. 91-15
- 3) *MSEA v. Bureau of Employee Relations*, 652 A. 2d 655 (Me 1995)
- 4) PL 2003, c. 20, Pt. D Sec. D-22
- 5) 26 M.R.S.A. 979-D (1) (E) (1)

ter for failure to file the report within the time provided in this section do not apply if the report is corrected to conform to the requirements of this chapter and returned to the Secretary of State within 30 days from the date on which it was so mailed or otherwise returned to the limited partnership by the Secretary of State.

**Sec. U-33. 31 MRSA §530** is enacted to read:

**§530. Failure to file annual report; incorrect report; penalties**

**1. Failure to file annual report.** A limited partnership required to deliver an annual report for filing as provided by section 529 that fails to deliver its properly completed annual report to the Secretary of State shall pay, in addition to the regular annual report fee, the sum of \$25, providing the report is received by the Secretary of State prior to revocation or suspension of the limited partnership. Upon failure to file the annual report and to pay the annual report fee or the penalty, the Secretary of State, notwithstanding Title 4, chapter 25 and Title 5, chapter 375, shall revoke a foreign limited partnership's authority to do business in this State and suspend a domestic limited partnership from doing business. The Secretary of State shall use the procedures set forth in section 498, subsection 2, relative to revoking the right of foreign limited partnerships to do business in this State, for suspending domestic limited partnerships. A foreign limited partnership whose authority to do business in this State has been revoked under this subsection that wishes to do business again in this State must be authorized as provided in section 492. A domestic limited partnership that has been suspended under this subsection may be reinstated by filing the current annual report together with the current annual filing fee and by paying the sum of \$125 for each year the limited partnership failed to file an annual report.

**2. Nonconformity.** If the Secretary of State finds that any annual report delivered for filing does not conform with the requirements of section 529, the report must be returned for correction.

**3. Suspension.** A limited partnership while suspended may not engage in business.

**4. Time limit specified.** If the annual report of a limited partnership is not delivered for filing within the time specified in section 529, the limited partnership is excused from the liability provided in this section and from any other penalty for failure to file timely the report, if it establishes, to the satisfaction of the Secretary of State, that failure to file was the result of excusable neglect and it furnishes the Secretary of State with a copy of the report within 30 days after learning that the Secretary of State failed to receive the original report.

**Sec. U-34. Transfer of funds.** Notwithstanding the Maine Revised Statutes, Title 5, section 95, subsection

5, \$6,000 of the Other Special Revenue Fund Account within the Administration - Archives program in the Department of the Secretary of State must be transferred as undedicated revenue to the General Fund no later than June 30, 1993.

**Sec. U-35. Motor vehicle computer system.** Notwithstanding any other provision of law, for fiscal year 1992-93 only, the General Fund account within the Office of the Secretary of State program in the Department of the Secretary of State may bill the Highway Fund account within the Administration - Motor Vehicles program in the Department of the Secretary of State for Highway Fund activities associated with the adjustment of the motor vehicle computer system to accommodate the discontinuation of IBM maintenance support of the existing 20-year-old hardware platform used on the effective date of this Act by the Division of Motor Vehicles branch offices. These funds must be credited as General Fund undedicated revenue not to exceed \$46,763.

## PART V

**Sec. V-1. Merit increases.** Notwithstanding the Maine Revised Statutes, Title 26, section 979-D and any other provisions of law, any merit increase, regardless of funding source, scheduled to be awarded between July 1, 1992 and June 30, 1993 to any person employed by the State, including probationary employees, employees of the Legislature, Judicial Department and independent agencies and employees of the University of Maine System, the Maine Technical College System and Maine Maritime Academy, may not be awarded, authorized or implemented. Any savings realized by the University of Maine System, the Maine Technical College System and Maine Maritime Academy must be used to offset any proposed or implemented tuition increases.

**Sec. V-2. Calculation and transfer.** Notwithstanding the Maine Revised Statutes, Title 5, section 1585, the State Budget Officer is authorized to calculate the amount of savings realized by the application of section 3 of this Part that applies against each General Fund account. The State Budget Officer shall cause the calculated amount to be transferred from each General Fund account and forward a report on the distribution to the Joint Standing Committee on Appropriations and Financial Affairs.

**Sec. V-3. Appropriation.** The following funds are appropriated from the General Fund to carry out the purposes of this Part.

1992-93

## FINANCE, DEPARTMENT OF

Departments and Independent  
Agencies - Statewide



MICHAEL E. CARPENTER  
ATTORNEY GENERAL

VENDEAN V. VAFIADES  
CHIEF DEPUTY

Telephone: (207) 626-8800  
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STATE OF MAINE  
DEPARTMENT OF THE ATTORNEY GENERAL  
STATE HOUSE STATION 6  
AUGUSTA, MAINE 04333

PLEASE REPLY TO:

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

59 PREBLE STREET  
PORTLAND, MAINE 04101-3014  
TEL: (207) 879-4260

December 18, 1991

Honorable Charles P. Pray  
President of the Senate  
State House Station #3  
Augusta, Maine 04333

Dear Senator Pray:

You have inquired whether Sections NN-1 of Legislative Document 1985, prohibiting the award of merit pay increases to certain employees, would, if enacted, violate the contract Clauses of the United States and Maine Constitutions. For the reasons which follow, it is the opinion of this Department that the sections would likely be found unconstitutional with regard to those employees entitled to merit increases during the period from January to June 30, 1992 under the currently valid collective bargaining agreements.

Section NN-1 of L. D. 1985 provides as follows:

Sec. NN-1. Merit Increase. Notwithstanding the Maine Revised Statutes, Title 26, section 979-D, and any other provisions of law, any merit increase scheduled to be awarded between January 1, 1992 and December 31, 1992 to any person employed by the State, including probationary employees,

employees of the Legislature, Judicial Department and independent agencies and employees of the University of Maine System, the Maine Technical College System and Maine Maritime Academy may not be awarded, authorized or implemented. Any savings realized by the University of Maine System, the Maine Technical College System and Maine Maritime Academy must be used to offset any proposed or implemented tuition increases.

At the outset, we see no potential problem with this provision except to the extent that it is inconsistent with express contractual provisions contained in current collective bargaining contracts. As to those employees who are not covered by such contracts or whose contracts do not contain any inconsistent provisions with respect to merit increases, therefore, the enactment of Section NN-1 of L.D 1985 would be entirely permissible.

Given the shortness of time, we have not attempted to review all the applicable collective bargaining contracts. However, we did review certain of the current MSEA contracts and the current AFSCME contract. These contracts, which cover the period from July 1, 1989 to June 30, 1992, provide that employees will be eligible to receive step increases based upon annual performance evaluations and that, if job performance is found to be satisfactory, the step increases will be effective on or about the employee's anniversary date -- the date that the employee originally entered state employment. As a result, certain employees will be entitled under the collective bargaining agreements to step increases during the period from January 1, 1992 to June 30, 1992 if their job performance is found to be satisfactory and if their anniversary date falls during that period.

As to those employees, the issue is whether Section NN-1 of L.D 1985, if enacted, would violate those provisions in the United States and Maine constitutions 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.

Before it can be determined whether there has been any contractual impairment, it must first be determined whether the subject of merit pay increases is "prescribed or controlled" by

state law. Specifically, 26 M.R.S.A. § 979-D(1)(E)(1) provides that all matters concerning the relationship between a public employer and its employees "shall be the subject of collective bargaining, except those matters which are prescribed and controlled by public law." (emphasis added). Under this provision, matters prescribed or 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 are controlling. Since the Legislature is always free to alter or modify existing law and since parties to a contract have no legitimate expectation that the law will not be changed, it is far less likely that any successful claim of an unconstitutional impairment of contract could be brought if the Legislature makes changes with respect to matters that were, when the contract was entered into, prescribed or controlled by State law.

In our view, however, the subject of merit pay increases is not prescribed or controlled by State law except with respect to probationary employees. Title 5 M.R.S.A. § 7065(3) provides that step increases shall not be automatic but are dependent upon performance. It also provides that no such advancements in salary shall be made until the employee has completed the probationary period. As to non-probationary employees, however, § 7065(3) does not control or prescribe when merit increases may be given and does not remove this subject from collective bargaining.

As a result, we conclude that § NN-1 of L.D. 1985, as currently proposed, would effect an impairment of contractual obligations. To determine whether this is an unconstitutional impairment, however, 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 § NN-1 involves an impairment of the State's own financial obligations. 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.

Moreover, 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 these 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. These cases found that a

shortfall in revenues was not a 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 State is faced with a \$100 plus million shortfall but would only save \$1 million by restricting merit increases. Moreover, it would be different to argue that the State has no other alternatives to achieve savings other than by eliminating merit increases. Under these circumstances, § NN-1 of L.D. 1985 presents 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 § NN-1 if faced with a challenge brought by an employee who would otherwise be entitled to a merit increase during the period from January 1, 1992 to June 30, 1992.

This does not mean that § NN-1 would be invalid in its entirety with respect to employees under collective bargaining agreements. Section NN-1, as drafted, applies not just to merit increases scheduled during the current contract but also to merit increases scheduled during the period from July 1 and December 31, 1992. Since the current collective bargaining agreements expire at the end of June, the prospective application of § NN-1 to any future collective bargaining agreement beginning after June 30, 1992 would present no constitutional problem. A contract cannot be impaired by a statute enacted before the contract was entered into. Ogden v. Saunders, 25 U.S. (12 Wheat) 213 (1827).

The opinion should also not be read to suggest that where contractual financial obligations are expressly made subject to legislative action, as in the State's collective bargaining agreements, the Legislature would not be entitled to reject unfunded pay increases for future years of the contract.

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

Sincerely,



MICHAEL E. CARPENTER  
Attorney General

MEC/rar

cc: Honorable John R. McKernan, Jr.  
Honorable John L. Martin

MAINE STATE EMPLOYEES  
ASSOCIATION, SEIU  
Local 1989,

v.

BUREAU OF EMPLOYEE RELATIONS.

Supreme Judicial Court of Maine.

Argued Nov. 1, 1994.

Decided Jan. 19, 1995.

After arbitrator found that its grievance was not arbitrable, state employees union moved to compel arbitration. Bureau of Employee Relations moved to stay arbitration. The Superior Court, Kennebec County, Alexander, J., denied union's motion and granted Bureau's motion. The Supreme Judicial Court, Roberts, J., held that trial court could not compel arbitration as only written contract between parties had expired and, thus, there was no longer written arbitration agreement as required under Uniform Arbitration Act.

Affirmed.

Labor Relations ¶436

Trial court could not compel arbitration of state employees union's grievance regarding statutory freeze in merit increases in pay; only written contract between union and Bureau of Employee Relations had expired and, thus, there was no longer written arbitration agreement as required under Uniform Arbitration Act, notwithstanding contention that Bureau's duty to continue employment terms of expired collective bargaining agreement included duty to arbitrate disputes as provided in agreement. 14 M.R.S.A. §§ 5927, 5928.

Timothy L. Belcher (orally), Maine State Employees Ass'n, Augusta, for plaintiff.

Robert N. Moore (orally), Bureau of Employee Relations, Augusta, for defendant.

Before WATHEN, C.J., and ROBERTS, GLASSMAN, CLIFFORD, RUDMAN, DANA and LIPEZ, JJ.

ROBERTS, Justice.

The Maine State Employees Association (MSEA) appeals from a judgment entered in the Superior Court (Kennebec County, Alexander, J.) denying MSEA's motion to compel arbitration and granting the motion of the Bureau of Employee Relations to stay arbitration. MSEA asks us to declare unconstitutional P.L.1991, ch. 780, pt. V, § V-1, thereby rendering the issue of merit pay an arbitrable issue. We affirm the judgment.

The MSEA is a party to this suit in its capacity as the certified bargaining agent for employees working in various bargaining units of the executive branch of the state government. The Bureau of Employee Relations is the statutorily designated representative for the executive branch in all collective bargaining activities. 26 M.R.S.A. § 979-A(5)(B) (1988 & Supp.1994). MSEA's collective bargaining agreement for the executive branch employees expired on June 30, 1992. Agreements with other state agencies expired at various times between September 30, 1992, and June 30, 1993. All of these agreements provided for salary grade progression on the basis of satisfactory job performance based on established standards of performance.

In March 1992 the Legislature enacted a law that prohibited the implementation of merit increases to state employees between July 1, 1992, and June 30, 1993. P.L.1991, ch. 780, pt. V, § V-1. Incorporated in part V of chapter 780 was a nonseverability provision that read:

Notwithstanding the Maine Revised Statutes, Title 1, section 71, if any provision of this Part is finally determined by a court of competent jurisdiction to be invalid or to impermissibly infringe on rights secured by contract or law, this Part is invalid and without effect.

P.L.1991, ch. 780, pt. V, § V-5.

Pursuant to section V-1, and on the expiration of the collective bargaining agreement with its employees, the executive branch implemented a freeze in employees' merit increases on July 1, 1992. The MSEA filed a grievance on July 30, 1992, that was eventu-

ally heard by an arbitrator. The arbitrator determined that the issue of merit increases was not an issue subject to arbitration because the State Employees Labor Relations Act excepts from collective bargaining, including grievance arbitration, "those matters which are prescribed or controlled by public law." 26 M.R.S.A. § 979-D(1)(E)(1) (1988 & Supp.1994).

Pursuant to the Uniform Arbitration Act, the MSEA sought an order to compel arbitration between the MSEA and the Bureau. The Bureau filed a cross-motion to stay the arbitration proceedings. After the court entered judgment in favor of the Bureau, the MSEA filed this timely appeal.

The trial court denied the motion to compel arbitration and granted an order to stay arbitration on the ground that the MSEA had failed to establish that the challenged statute was unconstitutional. We need not address the issue of the constitutionality of P.L.1991, ch. 780, pt. V, § V-1. The trial court could not compel arbitration of the present dispute for the simple reason that the Uniform Arbitration Act requires the existence of a written arbitration agreement. 14 M.R.S.A. §§ 5927-5928 (1980). The only written contract between the parties had previously expired by its terms.

The MSEA argues that the Bureau's duty to continue the employment terms of the expired collective bargaining agreement includes the duty to arbitrate disputes as provided in the agreement. Indeed, we have recognized that an employer may not unilaterally alter the terms and conditions of employment after the expiration of a collective bargaining agreement. *Lane v. Board of Directors, Sch. Admin. Dist. No. 8*, 447 A.2d 806, 809-10 (Me.1982). "This rule ... is not based upon contract law ... [but] on the principle that unilateral alterations of the collective bargaining agreement are in contravention of the statutory duty to bargain in good faith." *Id.* at 810. Even if the Bureau had a duty to arbitrate imposed by statute or by decision of the Maine Labor Relations Board, that duty would not be a substitute

for a valid agreement to arbitrate.<sup>1</sup> Absent such an agreement, the trial court lacked the authority to compel arbitration pursuant to the Uniform Arbitration Act. See *Teamsters Union Local No. 340 v. Portland Water Dist.*, 651 A.2d 339, 341-342 & n. 5 (Me.1994). We decline, therefore, the invitation of the parties in this litigation to address a question of the constitutionality of legislation in order to determine the arbitrability of a dispute that is not the subject of an agreement to arbitrate.

The entry is:

Judgment affirmed.

All concurring.



MAGNETIC RESONANCE TECHNOLOGIES OF MAINE LIMITED  
PARTNERSHIP, et al.,

v.

COMMISSIONER, MAINE DEPARTMENT OF HUMAN SERVICES.

Supreme Judicial Court of Maine.

Argued Nov. 15, 1994.

Decided Jan. 19, 1995.

After Commissioner of Department of Human Services denied partnership's application for certificate of need regarding partnership's proposed acquisition of mobile magnetic resonance imaging (MRI) machine to provide services to communities in northern Maine, partnership sought review. The Superior Court, Penobscot County, Pierson, J., affirmed the Commissioner's decision, and the partnership appealed. The Supreme Judicial Court, Lipez, J., held that: (1) there was no procedural error in Commissioner's

1. The MSEA stated at oral argument that it had become the practice to arbitrate grievances after the expiration of a contract. The Bureau's will-

ingness to arbitrate some grievances cannot constitute an agreement to arbitrate all grievances.



**Sec. D-21. Calculation and transfer.** Notwithstanding any other provision of law, the State Budget Officer shall calculate the amount of savings in Part B, section 1 that applies against each Highway Fund account for all departments and agencies from savings in the cost of health insurance from hospital rate adjustments and shall transfer the calculated amounts by financial order upon the approval of the Governor. These transfers are considered adjustments to allocations in fiscal years 2003-04 and 2004-05. The State Budget Officer shall provide the joint standing committee of the Legislature having jurisdiction over appropriations and financial affairs a report of the transferred amounts no later than January 15, 2005.

**Sec. D-22. Merit increases.** Notwithstanding the Maine Revised Statutes, Title 26, section 979-D and any other provision of law, any merit increase, regardless of funding source, scheduled to be awarded between July 1, 2003 and June 30, 2005 to any person employed by the Executive Branch, departments of the constitutional officers and the Department of Audit may not be awarded, authorized or implemented. These savings may be replaced by other Personal Services savings by agreement of the State and the bargaining agents representing state employees.

**Sec. D-23. Department of Administrative and Financial Services; lease-purchase authorization.** Pursuant to the Maine Revised Statutes, Title 5, section 1587, the Department of Administrative and Financial Services in cooperation with the Treasurer of State may enter into financing arrangements related to fiscal years 2003-04 and 2004-05 for the acquisition of motor vehicles for the Central Motor Pool. The financing agreements may not exceed 4 years in duration and \$5,000,000 in principal costs. The interest rate may not exceed 6%, and total interest costs may not exceed \$762,000. The annual principal and interest costs must be paid from the appropriate line category allocations in the Central Motor Pool account.

**Sec. D-24. Transfer of funds.** Notwithstanding any other provision of law, the State Controller shall transfer \$100,000 in fiscal year 2003-04 and \$100,000 in fiscal year 2004-05 from the Real Property Lease Internal Service Fund Account to the unappropriated surplus of the General Fund no later than June 30th of each fiscal year to reflect savings as a result of the renegotiation of leases.

**Sec. D-25. Transfer of funds.** Notwithstanding any other provision of law, the State Controller shall transfer \$6,112,290 from the fiscal year 2002-03 unallocated balance in the Fund for a Healthy Maine Other Special Revenue Funds account in the Department of Administrative and Financial Services to the

unappropriated surplus of the General Fund no later than June 30, 2004.

**Sec. D-26. Transfer of funds.** Notwithstanding any other provision of law, the State Controller shall transfer \$225,000 from the Maine Clean Election Fund to the unappropriated surplus of the General Fund no later than June 30, 2004.

## PART E

**Sec. E-1. 22 MRSA §2512, sub-§2, ¶P,** as enacted by PL 1999, c. 777, §1, is amended to read:

P. Establish the method for providing voluntary inspection and withdrawal of inspection of exotic animals, wild game, domesticated deer and domestic rabbits. These rules may also provide for the inspection of meat and meat food products derived from those animals. The commissioner shall provide voluntary inspection of bison, domesticated deer and ratite produced in the State, including the inspection of meat and meat food products derived from bison, domesticated deer and ratite, for which the commissioner shall charge a fee of \$5 \$35 per hour. The commissioner shall charge \$20 \$35 per hour per inspection of meat and meat food products processed in the State but derived from bison, domesticated deer and ratite produced outside the State.

**Sec. E-2. Meat and poultry inspection reimbursement.** Notwithstanding any other provision of law, the Commissioner of Agriculture, Food and Rural Resources is authorized to receive reimbursement for activities performed under the provisions of the Maine Revised Statutes, Title 22, chapter 562-A.

## PART F

**Sec. F-1. 3 MRSA §2, first ¶,** as amended by PL 1999, c. 509, §1, is further amended to read:

Each member of the Senate and House of Representatives, beginning with the first Wednesday of December 2000 and thereafter, is entitled to \$10,815 in the first year and \$7,725 in the 2nd year of each biennium, except that if a Legislator who is a recipient of retirement benefits from the federal Social Security Administration files a written request with the Executive Director of the Legislative Council within one week after the biennium commences, the Legislator is entitled to \$9,270 in each year of the biennium. Each member of the Senate and the House of Representatives must receive a cost-of-living

**§979-D. Obligation to bargain**

**1. Negotiations.** On and after January 1, 1975, it shall be the obligation of the public employer and the bargaining agent to bargain collectively. "Collective bargaining" means, for the purpose of this chapter, their mutual obligation:

**1. Negotiations.**

A. To meet at reasonable times; [1973, c. 774 (new) .]

B. To meet within 10 days after receipt of written notice from the other party requesting a meeting for collective bargaining purposes, provided the parties have not otherwise agreed in a prior written contract; [1973, c. 774 (new) .]

C. To execute in writing any agreements arrived at, the term of any such agreement to be subject to negotiation but shall not exceed 3 years; [1987, c. 33 (amd) .]

D. To participate in good faith in the mediation, fact finding and arbitration procedures required by this section; and [1985, c. 289 (amd) .]

E. To confer and negotiate in good faith:

(1) To confer and negotiate in good faith with respect to wages, hours, working conditions and contract grievance arbitration, except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession. All matters relating to the relationship between the employer and employees shall be the subject of collective bargaining, except those matters which are prescribed or controlled by public law. Such matters appropriate for collective bargaining to the extent they are not prescribed or controlled by public law include but are not limited to:

(a) Wage and salary schedules to the extent they are inconsistent with rates prevailing in commerce and industry for comparable work within the State;

(b) Work schedules relating to assigned hours and days of the week;

(c) Use of vacation or sick leave, or both;

(d) General working conditions;

(e) Overtime practices;

(f) Rules for personnel administration, except the following: Rules relating to applicants for employment in state or legislative service and state classified employees in an initial probationary status, including any extensions thereof, provided such rules are not discriminatory by reason of an applicant's race, color, creed, sex or national origin;

(g) Compensation system for state and legislative employees, which is defined as:

- (i) Guide charts, if any, and job evaluation factors, including factor language and factor weights, used to evaluate jobs for pay purposes;
  - (ii) Job point to pay grade conversion tables;
  - (iii) The number of and spread between pay steps within pay grades;
  - (iv) The number of and spread between pay grades within the system; and
  - (v) Temporary payment of recruitment and retention stipends, provided the stipends are allowed under Civil Service Law;
- (h) The nature of and procedures governing appeals of the allocation or reallocation of job classifications to pay grades resulting from any revisions to the compensation system; and
- (i) Implementation of any revisions to the compensation system.

**GOVERNOR'S PART 2 BUDGET BILL  
PROPOSED MERIT INCREASE RESTORATIONS**

**DRAFT**

	<b>FY05 APPROPRIATION / ALLOCATION</b>	<b>FY05 Transfers</b>	<b>TOTAL</b>
<b>General Fund</b>	\$3,222,668	(\$895,770)	\$2,326,898
<b>Federal Block Grant</b>	\$54,411		\$54,411
<b>Federal Expenditure Funds</b>	\$186,546		\$186,546
<b>Highway Fund</b>	\$313,838 *		\$313,838
<b>Other Special Revenue Funds</b>	<u>\$1,073,812</u>		<u>\$1,073,812</u>
	<b>\$4,851,275</b>	<b>(\$895,770)</b>	<b>\$3,955,505</b>

\* Highway Fund savings from suspension of merit increases in the Part 1 Budget was \$254,037 in FY04

## **Title 3, Chapter 37, LEGISLATIVE OVERSIGHT OF GOVERNMENT AGENCIES AND PROGRAMS (HEADING: PL 2001, c. 702, @2 (new))**

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## **Chapter 37: LEGISLATIVE OVERSIGHT OF GOVERNMENT AGENCIES AND PROGRAMS (HEADING: PL 2001, c. 702, @2 (new))**

### **§991. Evaluation and Government Accountability**

The Office of Program Evaluation and Government Accountability is created for the purpose of providing program evaluation of agencies and programs of State Government. The office also is established to ensure that public funds provided to local and county governments, quasi-municipal governments, special districts, utility districts, regional development agencies or any municipal or nonprofit corporation are expended for the purposes for which they were allocated, appropriated or contracted. When authorized by the committee, the office also may examine or direct an examination of any state contractor financed in whole or part by public funds and any expenditure by any public official or public employee during the course of public duty, including, but not limited to, any expenditure of private money for agency purposes. [2001, c. 702, §2 (new).]

PL 2001, Ch. 702, §2 (NEW).

### **§992. Definitions**

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings. [2001, c. 702, §2 (new).]

**1. Committee.** "Committee" means a joint legislative committee established to oversee program evaluation and government accountability matters. [2001, c. 702, §2 (new).]

**2. Director.** "Director" means the Director of the Office of Program Evaluation and Government Accountability. [2001, c. 702, §2 (new).]

**3. Office.** "Office" means the Office of Program Evaluation and Government Accountability established in section 991. [2001, c. 702, §2 (new).]

**4. Other entity.** "Other entity" means any public or private entity in this State that may be subject to program evaluation under this chapter as the result of its receipt or expenditure of public funds. [2001, c. 702, §2 (new).]

**5. Program evaluation.** "Program evaluation" means an examination of any government program that includes performance audits, management analysis, inspections, operations or research or examinations of efficiency, effectiveness, or economy and, when determined necessary by the committee, financial audits and post-audits. [2001, c. 702, §2 (new).]

**6. State agency.** "State agency" means each state board, commission, department, program, office or institution, educational or otherwise, of this State. [2001, c. 702, §2 (new).]

**7. Working paper.** "Working paper" means all documentary and other information acquired, prepared or maintained by the office during the conduct of a program evaluation, including all intra-agency and interagency communications relating to a program evaluation and includes electronic messages and draft reports or any portion of a draft report. [2001, c. 702, §2 (new).]

PL 2001, Ch. 702, §2 (NEW).

### **§993. Committee membership; chairs**

The membership of the committee and the selection of chairs are established by joint rule of the Legislature. [2001, c. 702, §2 (new).]

PL 2001, Ch. 702, §2 (NEW).

### **§994. Duties of committee**

### **Title 3, Chapter 37, LEGISLATIVE OVERSIGHT OF GOVERNMENT AGENCIES AND PROGRAMS (HEADING: PL 2001, c. 702, @2 (new))**

The committee has the following duties: [2001, c. 702, §2 (new).]

1. **Director.** To evaluate the director of the office and make a recommendation to the Legislative Council in writing regarding the reappointment of the director of the office before the Legislative Council considers the reappointment of the director of the office; [2001, c. 702, §2 (new).]
  2. **Annual work plan.** To review and approve the annual work plan of the office; [2001, c. 702, §2 (new).]
  3. **Direct evaluations.** To direct the office to conduct program evaluations; [2001, c. 702, §2 (new).]
  4. **Conduct hearings.** To hold public hearings for the purpose of receiving reports from the office and questioning public officials about office findings and recommendations; [2001, c. 702, §2 (new).]
  5. **Examine witnesses.** To examine witnesses and to order the appearance of any person or the appearance of any person for the purpose of production to the committee of papers or records, including books, accounts, documents, computer disks or memory or other electronic media and other materials regardless of their physical or electronic form; [2001, c. 702, §2 (new).]
  6. **Administer oaths.** To administer oaths to witnesses appearing before the committee when, by a majority vote, the committee determines the administration of an oath necessary and advisable, to determine if there is probable cause that a witness has committed perjury by testifying falsely before the committee and to direct the Attorney General to institute legal proceedings as provided by law; [2001, c. 702, §2 (new).]
  7. **Vote on reports.** To vote at the committee's discretion to endorse, to endorse in part or to release a report of the office without endorsement; [2001, c. 702, §2 (new).]
  8. **Subpoenas.** To issue subpoenas under the signature of either of the cochairs in the event of refusal to appear or to produce papers or records, including books, accounts, documents, computer disks or memory or other electronic media and other materials regardless of their physical or electronic form. A subpoena issued under this subsection must be issued pursuant to the provisions of section 165 and chapter 21; [2001, c. 702, §2 (new).]
  9. **Meetings.** To conduct meetings at such times as the cochairs determine necessary; and [2001, c. 702, §2 (new).]
  10. **Adopt rules.** To adopt rules, as long as the rules are not in conflict with the Joint Rules of the Legislature. [2001, c. 702, §2 (new).]
- PL 2001, Ch. 702, §2 (NEW).

#### **§995. Director**

1. **Appointment.** Not earlier than April 1, 2003, the Legislative Council shall appoint by an affirmative vote of 8 members of the Legislative Council a director of the office for the purposes of conducting program evaluations pursuant to this chapter. The director must be appointed to an initial 5-year term, which is subject to renewal by the Legislative Council every 5 years thereafter. During the term of the contract, the director may be terminated only for cause by an affirmative vote of 8 members of the Legislative Council. The Legislative Council shall establish the compensation of the director. The director's duties must be performed independently but under the general policy direction of the committee. [2001, c. 702, §2 (new).]
  2. **Duties.** The director shall supervise the staff of the office in accordance with policies adopted by the committee and consistent with the policies of the Legislative Council. The director shall prepare and present a biennial budget to the committee for its approval. Money appropriated or allocated to the office must be expended in the discretion of the director and the committee only. The director also shall prepare and present an annual work plan to the committee for its consideration and approval. The director also may contract with private individuals or entities for the conduct of program evaluations under this chapter. The director may request the committee to issue subpoenas. [2001, c. 702, §2 (new).]
  3. **Employees.** Employees of the office are employed by and are responsible to the director, who shall hire and fix the compensation of each employee, subject to the approval of the committee and within resources available in the biennial budget. Other than the director appointed pursuant to subsection 1, an employee of the office may not be employed prior to July 1, 2003. [2001, c. 702, §2 (new).]
  4. **Annual report.** The director shall prepare an annual report of the office's activities for each calendar year and shall submit that annual report to the committee and the Legislature no later than March 1st of each calendar year. [2001, c. 702, §2 (new).]
- PL 2001, Ch. 702, §2 (NEW).

#### **§996. Assistance to committee**

The Department of the Attorney General, the State Auditor, the State Controller, the Commissioner of Administrative and Financial Services, the Director of the Office of Fiscal and Program Review and the Director of the Office of Policy and Legal Analysis shall assist the committee and office with program evaluations under this chapter if the committee and the director determine that such assistance is

**Title 3, Chapter 37, LEGISLATIVE OVERSIGHT OF GOVERNMENT AGENCIES AND PROGRAMS**  
**(HEADING: PL 2001, c. 702, @2 (new))**

necessary. [2001, c. 702, §2 (new).]

PL 2001, Ch. 702, §2 (NEW).

**§997. Conduct and issuance of program evaluation reports**

The director and the office shall adhere to the following provisions relative to conducting and issuing program evaluation reports under this chapter. [2001, c. 702, §2 (new).]

**1. Review and response.** Prior to the presentation of a program evaluation under this chapter to the committee by the office, the director of the evaluated state agency or other entity must have an opportunity to review a draft of the program evaluation report. Within 15 calendar days of receipt of the draft report, the director of the evaluated state agency or other entity may provide to the office comments on the draft report. If provided to the office by the comment deadline, the comments must be included in the final report when it is presented to the committee. Failure by the director of an evaluated agency or other entity to submit its comments on the draft report by the comment deadline may not delay the submission of a report to the committee or its release to the public. [2001, c. 702, §2 (new).]

All documents, writings, drafts, electronic communications and information transmitted pursuant to this subsection are confidential and may not be released to the public prior to the time the office issues its program evaluation report pursuant to subsection 3. A person violating the provisions of this subsection regarding confidentiality is guilty of a Class E crime. [2001, c. 702, §2 (new).]

**2. Submission of final report to committee.** The director shall notify the committee when each final program evaluation report under this chapter is completed. The report must then be placed on the agenda for a future committee meeting. At the meeting where a report appears on the agenda for the first time, the director will release that report to the committee and to the public simultaneously. The committee, at its discretion, may vote to endorse, to endorse in part or to decline to endorse the report submitted by the director. If the committee determines it is necessary, the committee may report out to the Legislature legislation to implement the findings and recommendations of any program evaluation report presented to it by the office. [2001, c. 702, §2 (new).]

**3. Confidentiality.** The director shall issue program evaluation reports, favorable or unfavorable, of any state agency or other entity, and these reports are public records, except that, prior to the release of a program evaluation report pursuant to subsection 2 or the point at which a program evaluation is no longer being actively pursued, all papers, physical and electronic records and correspondence and other supporting materials comprising the working papers in the possession of the director or other entity charged with the preparation of a program evaluation report are confidential and exempt from disclosure pursuant to Title 1, chapter 13. All other records or materials in the possession of the director or other entity charged with the preparation of a program evaluation report under this chapter that would otherwise be confidential or exempt from disclosure are exempt from disclosure pursuant to the provisions of Title 1, chapter 13. Prior to the release of a program evaluation report pursuant to subsection 2 or the point at which a program evaluation is no longer being actively pursued, all papers, physical and electronic records and correspondence and other supporting materials comprising the working papers in the possession of the director or other entity charged with the preparation of a program evaluation report are confidential and may not be released or disclosed by the director to the Legislative Council or an agent or representative of the Legislative Council. This subsection may not be construed to prohibit or prevent public access to the records of a state agency or other entity in the possession of the director that would otherwise be subject to disclosure pursuant to the provisions of Title 1, chapter 13. The director shall refer requests for access to those records directly to the state agency or other entity that is the official custodian of the requested records, which shall respond to the request for public records. [2001, c. 702, §2 (new).]

**4. Information available to the office.** Notwithstanding any other law relating to the confidentiality of information, all information in the files of a state agency or other entity subject to program evaluation by the office under this chapter must be made available when necessary to the office for performance of its duties. [2001, c. 702, §2 (new).]

**4. Information available to the office.**

A. Before beginning a program evaluation under this chapter that may require access to records containing confidential or privileged information, the office shall consult with representatives of the state agency or other entity to discuss methods of identifying and protecting privileged or confidential information in those records. During that consultation, the state agency or other entity shall inform the office of all standards and procedures set forth in its policies or agreements to protect information considered to be confidential or privileged. The office shall limit access to information that is privileged or confidential by appropriate methods, which may include examining records without copying or removing them from the source. [2001, c. 702, §2 (new).]

[2001, c. 702, §2 (new).] [2001, c. 702, §2 (new).]

B. Documentary or other information obtained by the office during the course of a program evaluation under this chapter is privileged or confidential to the same extent under law that that information would be privileged or confidential in the possession of the state agency or other entity providing the information. Any privilege or statutory provision, including penalties, concerning the confidentiality or obligation not to disclose information in the possession of a state agency or other entity or its officers or employees applies equally to the office. Privileged or confidential information obtained by the office during the course of a program evaluation may

**Title 3, Chapter 37, LEGISLATIVE OVERSIGHT OF GOVERNMENT AGENCIES AND PROGRAMS**  
**(HEADING: PL 2001, c. 702, @2 (new))**

be disclosed only as provided by law and with the agreement of the state agency or other entity subject to the program evaluation that provided the information. [2001, c. 702, §2 (new).]

[2001, c. 702, §2 (new).] [2001, c. 702, §2 (new).]

C. If the office accesses information classified as privileged or confidential pursuant to state agency or other entity policy or procedures or by agreement, the office shall comply with the state agency's or other entity's standards or procedures for handling that information. The office may include in its working papers the excerpts from information classified as confidential or privileged as may be necessary to complete the program evaluation under this chapter, as long as the use does not infringe on department policies or procedures applicable to the original provision of information. [2001, c. 702, §2 (new).]

[2001, c. 702, §2 (new).] [2001, c. 702, §2 (new).]

**5. Confidentiality of working papers.** Except as provided in this subsection, working papers are confidential and may not be disclosed to any person. Prior to the release of the final program evaluation report, the director has sole discretion to disclose working papers to the state agency or other entity subject to the program evaluation when disclosure will not prejudice the program evaluation. After release of the final program evaluation report, working papers may be released as necessary to the state agency or other entity that was subject to the program evaluation under this chapter. [2001, c. 702, §2 (new).]

**6. Confidential sources.** If data supplied by an individual are needed to initiate, continue or complete a program evaluation under this chapter, the director may, by written memorandum to the file, provide that the individual's identity will remain confidential and exempt from disclosure under Title 1, chapter 13, and this written memorandum protects the identity of the person from disclosure under Title 1, chapter 13, notwithstanding any other provision of law to the contrary. [2001, c. 702, §2 (new).]

**7. Disposition of final report.** A final copy of a program evaluation report under subsection 2, including recommendations and the evaluated state agency's or other entity's comments, must be submitted to the commissioner or director of the state agency or other entity examined at least one day prior to the report's public release, and must be made available to each member of the Legislature no later than one day following the report's receipt by the committee. The office may satisfy the requirement to provide each Legislator a copy of the report by furnishing the report directly by electronic means or by providing notice to each Legislator of the availability of the report on the office's publicly accessible site on the Internet. [2001, c. 702, §2 (new).]

PL 2001, Ch. 702, §2 (NEW).





# HOUSE OF REPRESENTATIVES

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**Darlene J. Curley**

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June 2, 2003

Senator Mary R. Cathcart, Chair  
Representative Joseph C. Brannigan, Chair  
Joint Standing Committee on Appropriations and Financial Affairs  
5 State House Station  
Augusta, ME 04333-0005

Dear Senator Cathcart & Representative Brannigan:

As you may be aware, the Joint Standing Committee on Health and Human Services has made a recommendation to you regarding the \$800,000 recently returned from a provider, Wings, of Bangor. I agree that reinstatement of funds to community support services, case management services and out-patient services is important; and it is my desire that these important services could be fully funded. However, I propose an alternate allocation for the \$800,000 and want to share my idea with you.

I put forward that \$300,000 be used to fully fund transportation with the remaining \$500,000 to be used to fund the Office of Program Evaluation and Government Accountability (OPEGA). Furthermore, I propose this newly-formed Office start with the review of the merged DHS/BDS organization.

You may ask, *why fund transportation?*

This program affects vulnerable people all over the State. It is important to give a sick senior citizen a ride to the doctor's office or the pharmacy and it is our responsibility to provide necessary transportation for a disabled child.

*Why fund OPEGA?*

I admit that I initially thought OPEGA was part of a political agenda and I was skeptical. Nevertheless, my skepticism has subsided due to my research on similar oversight programs in Idaho and Florida. The program evaluation and oversight in those states have improved the effectiveness of state-run programs, while at the same time ensuring that more money goes to services, not unnecessary levels of administration. DHS and BDS need improvements, as is evident by the two recent accounting problems at DHS and the negative BDS consent decree ruling last week.

My commitment for the funding of direct services remains steadfast and I will continue to be an advocate for our most needy citizens. I appreciate your consideration.

Respectfully,

Darlene J. Curley  
State Representative

DJC/dak

cc: Appropriations & Financial Affairs Committee Members  
Health & Human Services Committee Members