STATE OF ALASKA

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June 27, 2001

The Honorable Tony Knowles
Governor
State of Alaska
P.O. Box 110001
Juneau, AK 99811-0001

Re: CCS HB 103 -- Fiscal year 2002 operating budget
Our file: 883-01-0034

Dear Governor Knowles:

At your legislative office's request on your behalf, we have reviewed CCS HB 103, the operating budget bill for fiscal year 2002 (beginning on July 1, 2001, and ending on June 30, 2002). We have relatively few comments on the bill, with those that we have largely focusing on the provisions included by the legislature relating to abortion funding and pay classification studies.

We traditionally begin our annual review of the operating budget bill with a discussion of the expressions of legislative intent that are set out in the bill. We have noted in years past that you, like your predecessors, can choose to follow these non-binding expressions, to ignore them, or to veto them, although we noted that it was not clear whether you could constitutionally veto them. In *Alaska Legislative Council v. Knowles*, 21 P.3d 367 (Alaska 2001),[1] the Alaska Supreme Court has strictly construed the executive veto power by holding that it applies only to amounts set out in the bill. You may not veto text set out in the bill

[1] Hereinafter *Legislative Council II*. The first *Legislative Council* case involved the validity of a legislative override of a gubernatorial veto. *Legislative Council v. Knowles*, 988 P.2d 604 (Alaska 1999) (hereinafter *Legislative Council I*).

because these provisions do not constitute "items" subject to your veto power with regard to appropriation bills found in article II, section 15 of the Alaska Constitution: ([the governor] "may, by veto, strike or reduce items in appropriations bills"). However, the *Legislative Council II* opinion clearly did not indicate that the expressions of intent are binding. Indeed, in another section of the opinion, it indicated that they are not. *Id.* at 382 (certain language vetoed by the governor "can permissibly be characterized as *merely* expressing the legislature's intent"; emphasis added).

Legislative Council II may, however, produce interpretation and implementation problems with regard to another regular feature of appropriation bills (including this one): constitutionally doubtful conditions that the legislature attaches to appropriations. We stated in the past that the legislature clearly has the power to condition appropriations within constitutional bounds. In fact, the Alaska Supreme Court in *Legislative Council II* informed us that some of the conditions in an earlier appropriation bill that we considered unconstitutional (because they seemed to "micro-manage" the way appropriations were to be spent, in violation of the separation of powers principle and confinement clause) were actually permissible conditions. However, the court also ruled that we were correct as to other purported conditions which were declared invalid under the confinement clause of article II, section 13 of the Alaska Constitution.

This leaves the question of what you are to do when the legislature attaches a possibly unconstitutional condition to an appropriation. The problem arises from two prior decisions of the Alaska Supreme Court. In *O'Callaghan v. Coghill*, 888 P.2d 1302 (Alaska 1995) the court ruled that the Attorney General could not take legal action based on his or her determination that a law was unconstitutional without a court ruling confirming that determination unless the provision was clearly unconstitutional. But in *Legislative Council I*, the court ruled that, under article III, section 17 of the Alaska Constitution, the governor may not sue the legislature even for a declaration of law: the otherwise logical avenue to pursue a dispute about the validity of a contested condition to an appropriation.

Some purported conditions will be so clearly unconstitutional under *Legislative Council II* that you and your successors may announce an intent to ignore them without falling afoul of the *O'Callaghan* principle. Others, though, may not be so plainly illegal, especially since the court in *Legislative Council II* indicated that the legality of conditions must generally be decided on a case-by-case basis. When faced with such a condition, you appear to have two choices: either announce an intent to ignore it, or sue some party (other than the legislature) to obtain a determination of constitutionality. This latter course seems highly undesirable. Even if you can find a legally appropriate party, that party may be

inappropriate for other reasons; it may, for instance, be a non-profit grantee whose resources would not be well spent in this sort of litigation. Another route to litigation would be an *ex rel* suit in which the attorney general or some other state official sues another department head for a declaration as to the validity of the condition. The cost of legal fees could be high and possibly not covered in the budget. Further, measures would need to be taken to ensure that the suit is adversarial in nature. The preferable course would seem to be announcing an intent to ignore the condition after the attorney general reviews and rules upon the question of validity. In any case, the response to each doubtful condition should be decided separately.

There are two parts of this bill that attempt to limit the expenditure of money appropriated to the Department of Health and Social Services for abortions. These appear at p. 19, lines 3-9, applicable to Medical Assistance appropriations and at p. 23, lines 24 and 25, applicable to the Commissioner's Office (or Administrative Services) appropriations.

These provisions specifically state that no money appropriated may be expended for an abortion that is not a mandatory service required under AS 47.07.030(a). The text set out in the bill further addresses the Medical Assistance appropriations by declaring that the money appropriated may only be expended for the mandatory and optional Medicaid services approved in the state plan. It further declares that this is not a statement of intent nor mere description, but a statement of purpose.

This provision is intended to prevent expenditures for therapeutic or medically necessary abortions from these appropriations, though the department is currently under a court order to operate its Medicaid program in a constitutional manner by providing payment for these abortions. This matter is presently on appeal to the Alaska Supreme Court. *State of Alaska, Dept .of Health & Social Services v. Planned Parenthood of Alaska*, Supreme Court No. S-9109 (filed 4/30/99). Consequently, the provision is also intended to prevent the department from providing funds for these abortion services if the Alaska Supreme Court determines that the state must provide these services in order to operate its Medicaid program in a constitutional manner. The department could then be faced with a ruling that the limit on abortion services results in the operation of the Medicaid program in an unconstitutional manner but without the funds available to pay for services to operate the program legally.

A veto of this provision is no longer available under the analysis of *Legislative Council II* that is discussed above. However, even with the declaration that this provision addresses a "purpose," the validity of this limitation on expenditures from these appropriations will have to be analyzed as to its actual effect on the administration of the

Medicaid program. Whether text in an appropriation bill is unconstitutional as a violation of the confinement clause is to be determined under the *Hammond* factors articulated in *Legislative Council II;* using qualifying language that is more than minimally necessary, trying to administer the program of expenditure, enacting law or amending existing law, extending the intent provision beyond the life of the appropriation, or stating intent that is not germane to an appropriation bill.[2] There are two factors that may pose a problem with this provision.

First, it may be construed as an attempt to administer the program. The operation of the Medicaid program is an executive function. The department has an obligation to administer its program in a manner that is constitutional. This limitation on the expenditures may be a barrier that will prevent the operation of the program in a constitutionally sound manner and therefore be found to be an intrusion into the administrative prerogative of the executive.

The other *Hammond* factor that poses a problem is that this can be construed as an attempt to enact substantive law by prohibiting an expenditure for specific medically necessary services under the Medicaid program. *Legislative Council II* firmly establishes that an appropriation bill may not contain substantive law.

Because this language may violate two of the *Hammond* principles, it is vulnerable to challenge as a violation of the confinement clause. We cannot at this time advise you that the abortion funding condition is clearly invalid. As a result, we believe that a determination of validity must be obtained from a court. We also believe that the legislature should be encouraged to intervene in the proceeding to ensure that all issues are properly joined by the real parties in interest.

Section 1 of the bill is the main part of the operating budget. It has four introductory paragraphs that warrant comment.

The first paragraph, at lines 4-6, reads, "A department-wide, agency-wide, or branch-wide unallocated reduction set out in this section may be allocated among the appropriations

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[2] These five criteria are referred to as "the *Hammond* factors" in *Alaska Legislative Council v. Knowles*. 21 P.3d at 377-79. These five factors used to analyze whether intent language violates the confinement clause were first presented in the superior court decision in *Alaska State Legislature v. Hammond*, Case No. 1JU-80-1163 (Alaska Super., May 25, 1983).

made in this section to that department, agency, or branch." A quick perusal of the budget indicates that the legislature has not set out unallocated reductions across agency appropriations, so it is unclear why this language is included. There is an unallocated reduction confined to the appropriation in which it appears. See the appropriation for Administration and Support, Department of Transportation and Public Facilities, sec. 1, page page 32, lines 26-28. However, there are no actual unallocated reductions across appropriations, a practice we have previously questioned. *See* 1999 Inf. Op. Att'y Gen. (June 28; 883-99-0062).[3]

After this first paragraph the bill adds a condition applicable to all personal services appropriations, set out in the following paragraph:

> No money appropriated in this section may be used to pay the costs of personal services due to reclassification of job classes during the fiscal year ending June 30, 2002 except those specifically budgeted.

In the second paragraph of the introductory portion of section one, the legislature seeks to limit appropriations for job reclassifications conducted in FY 2002. We understand that AS 39.25.150(2), which refers to legislative approval of the pay plan as a whole, has been cited as authority. We do not believe the legislature can affect job classification, which is a part of the pay plan, in this manner. The legislature has by general law adopted a pay scale for persons not covered by collective bargaining. *See* AS 39.27.011. It can decide by appropriation whether or not to approve the monetary terms of a collective bargaining unit. AS 23.40.215. But there is no similar device for approving components of the pay plan the division of personnel is authorized by law to formulate. AS 39.25.150(1) and (2).

Classification, described in AS 39.25.150(1), groups together positions into job classes based on duties and responsibilities. The Alaska Supreme Court has held that this exercise is essential to the merit principle, protected in Alaska's Constitution under *APEA v. State*, 831 P.2d 1245, 1250-1252 (Alaska 1992). In that case, the court held the pay plan was comprised of the elements set out at AS 39.25.150(2)(A) and (B), meaning that the pay plan is based on a grouping of positions into classes with appropriate specifications under AS 39.25.150(1), and the assignment of fair and reasonable compensation, reflecting the principle of like pay for like work. 831 P.2d at 1250. The court noted that paragraph (2) was ambiguous as to whether the assignment of job classes to pay ranges was bargainable, but noted that AS 39.25.010(b)(2) is a legislative statement that regular integrated salary systems

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[3] The same language is set out in section 2 of the bill.

are essential to the merit system. 831 P.2d at 1251.

Presently, the legislature approves the pay plan for those not covered by collective bargaining agreements by the adoption of a general law under AS 39.27.011 and by deciding under AS 24.40.215 whether to appropriate those provisions of collective bargaining agreements which require appropriations for their implementation. Thus it does determine the range and step at which discrete units of state employees are to be paid. The legislature has by general law required the personnel director and the personnel board to adopt rules to assure that the merit principle is observed. The legislature cannot in an appropriation bill alter the statutory scheme set out at AS 39.25 and the rules adopted under it in an appropriation bill by targeting only a part of the process for adopting a pay plan. *Legislative Council II*, 21 P.3d at 380-381 (confinement clause prevents use of appropriation bill to make or amend substantive law). *See also State v. A.L.I.V.E Voluntary*, 606 P.2d 769 (Alaska 1980)(when the legislature exercises its constitutional power, it must do so by the enactment of laws, not acting as an administrative agency).

These principles, and the protection of the merit principle under art. XII, sec. 6, make legislative approval of particular job class studies unconstitutional even if they result in pay raises. The exercise involved is not the same as approving the monetary terms of collective bargaining agreements - which is simply a matter of deciding whether to pay for terms after permitting bargaining about them. What the legislature proposes to do here is to substitute its own judgment for the professionals whom it has authorized to make these executive decisions about where the jobs in question fit in the classification plan and what other considerations make the compensation fair and reasonable.

The legislature can decide how much to pay for functions of government, but it cannot selectively veto an executive decision after it has been made under authority of general law. The legislature has, by funding the collective bargaining agreements, approved the parties' agreement that the pay for the ranges and steps for covered employees will be increased by a certain percentage. But the classifications in question are not themselves the product of bargaining - they are, under *APEA*, the result of a statutory process designed to implement the constitutionally mandated merit system. AS 39.25.010; Alaska Const. art. XII, sec. 6; 831 P.2d at 1249.

As noted, a change in the salary of a classified position, which is not in the salary plan for non-covereds, is not the same as a change to AS 39.27.011, which creates a right to receive a certain salary for a certain range, nor is it the same as a rejected monetary term, which defeats entitlement - terms not funded do not go into effect. The entitlement here is

more abstract - to a fair and reasonable salary consistent with the merit principle. The factors that play a role in the determination of appropriate placement of a job class with respect to salary shift in focus depending on changing demands, the relationship of a job class with respect to other job classes, market forces, and more. In some cases, job duties can be changed if the range assignment cannot be changed. But that will not always be possible, especially where the minimum qualifications of a position are parallel with, for example, a licensed profession, or where recruitment difficulties are a primary factor.

Legislative action directed at specific job classes is not consistent with its purported power to approve the pay plan under AS 39.25.150(2). It is not what the statute actually calls for, which is approval of the pay plan as a whole. This is another way in which the action violates the confinement clause and other principles enunciated in *A.L.I.V.E. Voluntary* and *Legislative Council II*. As a practical matter, the legislature approves the plan when it approves salaries for the ranges to which the job classes are assigned either through AS 39.27.011 or by approving the monetary terms of a collective bargaining agreement under AS 23.40.215. This approval is manifested when the legislature exercises its power to appropriate. However, targeting particular job classes or examining them on an irregular basis is not consistent with merit principles and is, in fact, inimical to them.

For example, had the legislature intended to prohibit certain reclassifications conducted in FY 2001, it would have prevented a reclassification of at least one job class dominated by women, i.e., nurses, which could be inconsistent with SB 65, which calls for a study of gender equity in the state's pay plan. Substantial liability might arise for the state treasury if the legislature engaged in a pattern of disapproval which affected a protected class, or decided not to approve a particular reclassification for reasons not related to merit. The legislature retains the power to determine the funding of an agency's operations whether or not the agency reclassifies a position. And an agency must operate consistent with its budget and obtain funding for its operations from regular or supplemental appropriations. But by adopting AS 39.25.010 and 39.25.150, the legislature recognized that classification under the merit system involves an orderly merit-based process. The Alaska Supreme Court recognized in *APEA* that this constitutionally mandated and legislatively enabled function is so important that it cannot be left solely to collective bargaining.

We are not aware of any abuses of reclassification, and indeed the executive branch cannot reclassify without painstaking examination of the relationships between job classes and without considering the cost of operations which a change might cause. The legislature can properly maintain oversight in order to assure itself that the classification process is in accordance with general laws previously enacted. But it cannot, consistent with the merit

principle and within the limitations of an appropriations bill, act to veto only some classifications, only part of the pay plan, otherwise conducted in accordance with general law as presently constituted. On balance, then, we believe the provisions in this bill on reclassification are unconstitutional and thus not binding on executive branch agencies.

We note with respect to the impact of this language, that it appears to be intended to affect class studies that might be conducted in FY 2002 rather than to act as a prohibition on funding of salary changes for studies conducted in FY 2001.

The following paragraphs of section one on page two of the bill, read as follows:

> The money appropriated by this Act may be expended only in accordance with the purpose of the appropriation under which the expenditure is authorized. Money appropriated by this Act may not be expended for or transferred to a purpose other than the purpose for which the appropriation is made unless the transfer is authorized by the legislature by law. See, Alaska Legislative Council v. Knowles, Alaska Supreme Court, Opinion No. 5395, April 20, 2001. All appropriations made by this Act are subject to AS 37.07.080(e).
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> A payment or authorization of a payment not authorized by this Act may be a violation of AS 37.10.030 and may result in action under AS 37.10.030 to make good to the state the amount of an illegal, improper, or incorrect payment that does not represent a legal obligation under the act.

These two paragraphs consist of restatements of general law. It is true that money may only be expended consistent with the purpose of the appropriation. It is unclear why these truisms are included here. Perhaps the legislature simply wanted to point out to the executive what it saw as a major part of the *Legislative Council II* Supreme Court opinion, the statement that the item veto "permits the governor only to tighten or close the state's purse strings, not to loosen them or to divert funds for a use the legislature did not approve."

The last of these paragraphs is simply a declaration with no legal force. It simply reiterates what AS 37.10.030 already states. It would seem to be included only as a caution to state officials to obey that statute.

There is one additional insertion in sec. 1 of the bill that, even though not drafted as an expression of intent, should be construed as such (i.e., as not binding), lest it violate the confinement clause of the Alaska Constitution (art. II, sec. 13: "Bills for appropriations shall be confined to appropriations"), as construed by *Legislative Council II*. It is found at page 15, lines 14-17, and purports to direct the Department of Environmental Conservation "to seek a waiver to exclude Alaska public drinking water systems from the operator certification requirements prescribed in the final guidelines for the Certification and Recertification of the Operators of Community and Nontransient Noncommunity Public Water Systems as published in the Federal Register, Vol. 64, No. 24, February 5, 1999." While, as noted, you may not veto this language, you may choose to ignore it. The power to waive the certification requirements rests with a federal agency. If the legislature wants to establish a policy of seeking a waiver, it must do so in general law.

We find no other constitutional or legal problems with the bill.

Sincerely,

Bruce M. Botelho
Attorney General

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