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June 28, 2002

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

Re: CCS HB 403 -- Fiscal year 2003 operating budget
Our file: 883-02-0028

Dear Governor Knowles:

At your legislative office's request on your behalf, we have reviewed CCS HB 403, the operating budget bill for fiscal year 2003 (beginning on July 1, 2002, and ending on June 30, 2003). As with last year's operating budget bill, we have relatively few comments on this 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 review each year 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 strictly construed the

[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*).

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 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).

This bill, like some of the past operating budget bills, contains what might be called a "hybrid" intent section. This is a paragraph that leads off with an intent statement, but then contain a sentence, not qualified by "intent" language, that appears to be a mandatory directive. *See* section 5(c) (after announcing legislative intent that each state agency report to the legislature on the percentage of the FY 2003 authorized operating expenditures that were expended during the first six months of the fiscal year, as compared to the same percentage for FY 2002, declaring that "these reports shall be submitted to the legislature by January 31, 2003, and should contain line item information for each allocation of an appropriation made in this Act"). It is our view that nothing in section 5(c) is binding on the executive branch, because the entire paragraph is a non-binding intent statement. As a matter of simple logic, if there is no binding directive to submit reports to the legislature, there can hardly be a binding directive as to when the reports must be submitted or what they should contain.

Turning to individual sections of the bill, we find that the first paragraph of the bill, 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 made in this section to that department, agency, or branch."[2] Every executive branch department except four (Corrections, Environmental Conservation, Health and Social Services, and Labor), and the legislature and the court system, has a negative appropriation or allocation representing an agency-wide unallocated reduction. In 1999 Inf. Op. Att'y Gen. 167 (June 28; 883-99-0062), our review of the FY 2000 operating budget, we discussed unallocated reductions that purported to affect more than one appropriation. We noted that this approach raised constitutional questions, but did not recommend any vetoes because of these possible questions. We adhere to our discussion and advice.

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[2] The same language is set out in sec. 2 of the bill, the budget for new legislation.

Next, we turn to the two parts of section 1 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 8 - 15, applicable to medical assistance appropriations, and at p. 18, lines 20 - 23, applicable to the commissioner's office appropriation.

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.

Like virtually identical language that appeared in last year's operating budget bill, this language is intended to prevent expenditures from these appropriations for therapeutic or medically necessary abortions, even though the department is under a court order to operate its Medicaid program in a constitutional manner by providing payment for them. That order has been upheld by the Alaska Supreme Court, which specifically rejected an argument that the separation-of-powers doctrine precluded the superior court from ordering the state to pay. *State of Alaska, Dept .of Health & Social Services v. Planned Parenthood of Alaska*, 28 P.2d 904 (Alaska 2001). Thus, the Department of Health and Social Services is now faced with a ruling from the state's highest court that the limit on payment for abortion services results in the operation of the Medicaid program in an unconstitutional manner, while the Department of Health and Social Services is ostensibly without the funds available to pay for services to operate the program legally. In addition, a veto of these two provisions is no longer available under the analysis of *Legislative Council II* that is discussed above.

In our review of last year's budget bill we suggested that we might file a declaratory judgment action to determine the validity of the abortion expenditure restrictions that were included in that bill. Before we could do that, however, the plaintiffs in the *Planned Parenthood* case asked the superior court, after the enactment of last year's operating budget bill, to clarify how those restrictions impacted its judgment. The superior court, three days after the supreme court affirmed the judgment, issued an opinion ordering the Department of Health and Social Services not to comply with the restrictions. We obeyed the superior court's order, and we advise you to continue to obey it: *i.e.*, to continue to pay for these medically necessary abortions until such time, if any, as a court advises you that you do not have the authority to do this.

As in the last two years' operating budget bills, this bill contains the following language, in section 5(b):

> 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, 21 P.3d 367 (Alaska 2001). All appropriations made by this Act are subject to AS 37.07.080(e). 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.

We reiterate our comments on this language. The paragraph consists 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."

Section 6 of the bill provides:

> No money appropriated in this Act may be used to pay the costs of personal services due to reclassification of job classes during the fiscal year ending June 30, 2003, except those specifically budgeted.

A virtually identical provision appeared in last year's operating budget bill. We wrote then that the meaning of the phrase "specifically budgeted" is not immediately apparent from the bill itself, but that, in any case, we do not believe the legislature can affect job classification, which is a part of the pay plan, in this manner. We adhere to this position.

The legislative 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 such device for approving components of the pay plan the legislature has authorized the division of personnel 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 article

XII, section 6. *Alaska Public Employees Association v. State*, 831 P.2d 1245, 1250-1252 (Alaska 1992). In that case, the court held that the pay plan was comprised of the elements set out at AS 39.25.150(2)(A) and (B); that is, it is based on a grouping of positions into classes with appropriate specifications under AS 39.25.150(1), and on the assignment of fair and reasonable compensation, reflecting the principle of like pay for like work. *Id.*, at 1250. The court noted that paragraph (2) was ambiguous as to whether the assignment of job classes to pay ranges was subject to mandatory collective bargaining under the Public Employment Relations Act (AS 23.40.070 - 23.40.260), but noted that AS 39.25.010(b)(2) is a legislative statement that regular integrated salary systems are essential to the merit system. *Id.*

Presently, the legislature does approve the pay plan for those not covered by collective bargaining agreements through the adoption of a general law under AS 39.27.011, and by deciding under AS 23.40.215 whether to make appropriations for those provisions of collective bargaining agreements that require appropriations for their implementation. Thus it does have a say in the appropriate salary for each range and step of the statutory and collectively bargained pay scales. However, the legislature also by general law has 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 by targeting only a part of the process for adopting a pay plan. *Legislative Council II*, 21 P.2d at 380-381 (confinement clause prevents use of appropriation bill to make or amend substantive law).

The merit principles, and article XII, section 6 of the Alaska Constitution protecting them, 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 that of the professionals whom it has authorized to make these 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 overrule in an appropriations bill a decision it has made through 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. Rather they are, under *APEA*, the result of a statutory process designed to implement the constitutionally mandated merit system. 831 P.2d at 1249.

As noted, a change in the salary of a classified position, which is not governed by the salary plan for employees not in bargaining units, 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 and step. 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: it is the entitlement 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 level shift in focus depending on changing demands, the relationship of a job class with respect to other job classes, market forces, etc. In some cases, job duties can be changed if the range assignment cannot be changed. But that will not always be possible, especially if the minimum qualifications of a position are parallel with, for example, a licensed profession, or if recruitment difficulties are a primary factor.

Nor is legislative action directed at specific job classes consistent with the legislature's power to approve the pay plan under AS 39.25.150(2)(C). Such action 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 could violate the confinement clause and other principles enunciated in *Legislative Council II*. Targeting particular job classes is not consistent with merit principles and is indeed, inimical to them.

For example, had the legislature successfully identified any reclassifications in section 6 that covered more than one department, but only prevented funding in one department's budget, that would be a violation of the classification rules authorized by the legislature. It would fail to assure like pay for like work, in this case work by employees in different departments but with identical job titles and substantially similar duties. One can easily imagine the problems that would arise if the legislature engaged in a pattern of disapproval that predominantly affected a protected class (*e.g.*, women), or if it decided not to approve a particular reclassification for reasons not related to merit. The legislature is not required to increase the funding of an agency that reclassifies positions, and a department would have to have staffing levels consistent with its budget. But the legislature has, by adopting AS 39.25.010 and 39.25.150, recognized that classification under the merit system must involve an orderly merit-based process. And 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 the Department of Administration, Division of Personnel's reclassification powers; indeed, the division cannot reclassify without painstaking examination of the relationships between job classes when it changes a job class, and without considering the cost of operations which it might represent. The legislature might wish to have reports to assure itself that the classification process is in accordance with the general laws it has previously enacted. But it cannot, consistent with the merit principle and within the limitations of an appropriations bill, act to void or

partially void a reclassification otherwise conducted in accordance with general law as presently constituted.

Finally, with respect to section 6, we note that in last year's operating budget bill review we stated that virtually identical language "appears to be intended to affect class studies which might be conducted in FY 2002, rather than to act as a prohibition on funding of salary changes for studies conducted in FY 2001." Even though the legislature was presumably aware of our opinion, it did not change the language found in section 6 to reflect any disagreement with that opinion. We believe that this failure to change the language is strong evidence of implicit legislative agreement with our opinion. Thus, even if a court were to determine that we are in error on the invalidity of section 6, the section should be interpreted only to prohibit use of funds in the budget to pay for reclassifications made during FY 2003, and not for reclassifications made before July 1, 2002.

We find no other constitutional or legal problems with the bill. We would note, though, that two of the sections of this bill would be amended by sections 86 and 92 of the capital budget bill (HCS CSSB 2006(FIN) am H), and that the authority to draw money from the constitutional budget reserve fund, usually found in the operating budget bill, is this year found in sec. 94(b) of HCS CSSB 2006(FIN) am H.

Sincerely,

Bruce M. Botelho
Attorney General

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