June 16, 1988
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July 1, 1992

Honorable Steve Cowper
Governor
State of Alaska
P.O. Box A
Juneau, AK 99811

Re: SCS HB 543(Fin) --
reappropriations, etc.
Our file: 883-88-0176

Dear Governor Cowper:

At Judy Fleming's request on your behalf today, we have reviewed SCS HB 543(Fin), which makes various appropriations and reappropriations for government operations and capital projects. This type of bill has become an annual event and ultimately is the catchall appropriation bill that passes late in the session.

The original HB 543 was your bill, simply appropriating money to implement the state's settlement with the federal Department of Education in the dispute over state compliance with P.L. 81-874. Our file no. 773-88-0063. Cf. sec. 57 of this final version. This final version also incorporates your HB 444, making various supplemental and special appropriations (our file no. 773-88-0058), along with numerous changes by the legislature.

News articles have reported the substantial delay in the delivery of this bill for your review and signature. The relationship of possible item vetoes to the possible special session has been offered as the explanation for this delay. Generally, the clerks of each house of the legislature need only a week or so after adjournment to enroll bills passed during the final hours of the session and to prepare the final journals. After that, authentication by the presiding officers should follow immediately. Authentication is at most a ministerial act that involves no discretion. We believe that the governor cannot be deprived of the veto power by the legislature's failure to deliver a bill. However, someone who suffers from the veto of an item in this bill might contend that, by gubernatorial acquiescence in the

withholding of the bill, it has become law through the passage of time.

In a couple of instances during earlier legislative sessions, a presiding officer of a house of the legislature unilaterally (and, as it has so far turned out, temporarily) refused to authenticate and deliver a bill passed by the legislature. This kind of action, if allowed to stand, would amount to an unauthorized pocket veto, and the delivery of the bill should be demanded immediately or enforcement by injunction should be sought in the courts. Constitutional rights and powers are not lost because a governor fails to assert them. However, legislative officers could grow bolder and might use this tactic to delay bills that you consider to be immediately necessary to carry out your programs. It is possible that a perceived condonation of this practice will lead to more mischief.

The bill contains several items that raise legal issues for your consideration. Because of the length and complexity of this bill, we cannot exhaustively discuss each item noted. If, during implementation of an appropriation made by this bill, an agency discovers facts that cause it to question the validity of an item in this bill, the agency should not hesitate to consult with this office.

The bill contains several appropriations to school districts that raise a common issue for your consideration. The appropriation to finance state aid for operating expenses is allocated to local school districts according to a foundation formula set out in general law. AS 14.17.010 -- 14.17.250. Based on a uniform application of the formula, each school district receives a pro rata share of the appropriations available for education. However, in this bill, additional appropriations are made to certain school districts for school district operations. Some of these appropriations are made to correct alleged inequities in the foundation formula. The problem is that some, but not all, of the districts receive additional appropriations. There might not be a rational justification for the allocation to some, but not all, districts.

Currently, the state is litigating with two boroughs about the equities of the legislature's allocation of funding. Matanuska-Susitna Borough v. State, No.3PA-86-2022 Civ.; Kenai Peninsula Borough v. State, No. 3KN-83-0422 Civ. This bill actually provides some evidence that would support the theory of the parties opposing the state. If the foundation formula is

inadequate, it should be amended. The legislature cannot amend the foundation formula through passage of an appropriation bill. However, it is axiomatic that this or a future legislature cannot bind itself to appropriate in a particular way. These appropriations are entitled to the presumption of validity. They might give rise to a cause of action by others who believe that education funding is not equal throughout the state. If you are willing to accept the risk that the legislature has not adequately weighed the equities, nothing requires the veto of those appropriations. From the standpoint of defending, in the current litigation, the allocations mandated by the existing formula, it would be desirable for you to veto (by striking or reducing) any appropriation that appears to arbitrarily depart from the levels of funding set out in the foundation formula, except that the amounts needed to satisfy the federal "conditional determination" referred to in sec. 57 should not be vetoed. (Some of the amounts in sec. 57 are in addition to the amounts needed to satisfy the conditional determination.) The appropriations set out in the following sections raise the issue mentioned here: secs. 51, 52, 54, 57, and 59.

The bill contains another provision concerning the foundation formula that raises a legal issue for your consideration. Section 264(b) appropriates $3,500,000 for fiscal year 1989 to implement changes in the area cost-of-living differential applied to the amount allocated for each base instructional unit. Apparently, the McDowell Group is studying the cost of living in the state as applied to the cost of providing education. This section appears to authorize the governor to implement any recommended changes before the foundation formula is amended to conform to the new study. This delegation of power might be overbroad. See State v. Fairbanks North Star Borough, 736 P.2d 1140 (Alaska 1987).

Additionally, sec. 264(b) appears to authorize the governor to ignore the existing area cost differential formula established by law. This kind of authorization, in effect of statutory change, cannot be accomplished in an appropriation bill. The manner in which the discretionary adjustment money is obtained will heighten the anger of other districts. The money was taken from the appropriation that would have been paid out under the formula. This means that there will immediately be districts that are not benefited. They might sue, thereby involving more state resources to solve the problem. It is better to delay any adjustment until after the legislature changes the law.

Section 56 makes an appropriation of $345,140 to "reimburse" legislative agencies for amounts spent to prepare a proposal for the superconducting collider project. This reimbursement is intended to repay the legislature for the advancement of money to executive-branch agencies. The executive branch lacked available appropriations to finance the cost of preparing a proposal. At the time, we advised that the operating appropriations of the legislature should not be used in this manner. Appropriations made for legislative purposes cannot be used to perform executive functions. The notion that legislative agencies are entitled to reimbursement when they improperly spend money is not sound.

Several items of appropriation in this bill are conditioned on the amount lapsed from prior-year appropriations. The use of this type of condition first appears in sec. 83(b) -- (d) of the bill. (Curiously, sec. 83(a) "repeals" the unexpended and unobligated balance of an earlier appropriation, rather than lapse the balance or amend the appropriation itself.) Another condition reduces reappropriations proportionately if the amount available from a prior-year appropriation is less than expected. Section 83(e). The use of these conditions recognizes that appropriations might have valid outstanding obligations that have not been presented for payment. The condition seems to tacitly imply that these obligations must be paid from the prior-year appropriation before the reappropriation repeals it.

Generally, a condition that attempts to tie the making of one appropriation to the repeal of another unrelated appropriation is of great concern. In this case, the common factor linking the appropriations together is the legislature's intent to provide spending authority by reprogramming money restricted in a prior fiscal year. In theory, that money is then available to ensure that there will be adequate unrestricted money for the new appropriations. An appropriation is merely an authorization to spend if there is adequate money available. We are not confident that appropriations made for each fiscal year are matched by earned revenue. Under our system of budgeting, that would be an impossible task because appropriations are based on anticipated revenue during the upcoming fiscal year. Often, revenue attributed to a fiscal year is received by the state in a subsequent fiscal year.

A condition is considered valid if it limits or directs the use of an appropriation. Colton v. Branstad, 372 N.W.2d 184 (Iowa 1985). We understand that there has been some thought given to whether the condition tying a new appropriation to the

amendment or repeal of an existing appropriation may be vetoed as an item. It has been held that an item is something that can be taken out of a bill without affecting its other purposes and provisions. Rush v. Ray, 362 N.W.2d 479, 481 (Iowa 1985). A veto of this kind of condition would directly affect the purpose of having each reappropriation being offset by the repeal of a prior-year appropriation. There is strong evidence that the legislature did not intend the condition to be severable from the other provisions. If there is not a sufficient unencumbered balance available, the legislature probably would not have made the new appropriation. We conclude that the conditions in sec. 83 are valid and are not separate items that may be vetoed without also reducing or deleting the items to which the conditions pertain.

There is no legal problem with vetoing a specific reappropriation contained in sec. 83, or in any one of the other sections similar to it. We consider each provision reducing, amending, or deleting an existing appropriation to be a separate item. Similarly, each new appropriation is a separate item. The condition attaches to all of these items equally because the purpose of the legislature is to avoid adding new restrictions on available revenue. If a provision deleting a prior authorization is vetoed or if you decide to retain a part of the prior authorization, the condition may operate to reduce the remaining "new" appropriations by a pro rata amount. You can influence the operation of the condition by the manner in which you exercise the veto.

Our opinion regarding the validity of the conditions would be different if the legislature did not intend to limit the new appropriation to the amounts that became unrestricted by the amendment or repeal of an existing appropriation. For example, the legislature appropriates money for a highly desirable purpose, but only if another, prior-year appropriation for an unrelated and unfavored purpose is repealed. I.e., the money from the earlier appropriation is not necessarily intended as the source of the new appropriation. Under this set of circumstances, the legislature is holding an appropriation hostage on the condition that the governor also accept the repeal of an existing appropriation. Generally, we believe that the legislature cannot by specific draftsmanship merge separate items into a single item. And generally, each action taken that increases or reduces an authorization to spend must be considered a separate item for purposes of the item veto.

We have also been requested to comment on your power to reduce the effect of an amendment to an existing appropriation.

That is, your might believe that a smaller reduction is in order. We believe that you may use your reduction veto on this sort of item. You may exercise the veto by lining through the amount to which the existing appropriation is amended and inserting a greater amount. This has the effect of retaining a part of the existing appropriation. However, you cannot insert an amount that authorizes the expenditure of more than the unobligated balance of the existing appropriation. Each action regarding spending authority in this bill is an item and, as to these items, your full executive powers of veto apply to them. When the legislature takes action to amend an existing appropriation, you may again take action on the spending authorization.

We also note that secs. 270, 271, 273, and 274 use words that express legislative intent rather than words making an appropriation. Under these circumstances, we believe that neither you, nor the executive-branch agencies mentioned in those sections, are bound to follow the instructions set out there because the legislature is merely expressing a will, wish, or desire. There is plenty of evidence in the bill that the legislature knows how to make a definite appropriation. We can only surmise that the legislature intended to give the executive branch sufficient latitude, not tie its hands.

Sections 285 and 301 of this bill go together to authorize and implement a transfer of $150,000,000 from the Alaska Housing Finance Corporation (AHFC) to the general fund. The transfer takes the form of a purchase of a substantial part of the loan portfolio of the housing assistance loan program in the Department of Community and Regional Affairs. It is important to remember that sec. 301 does not require a purchase at par value. This would give you the latitude to reduce the amount set out in sec. 285. AHFC at one time proposed to purchase the same loan portfolio for $80,000,000. We understand that AHFC is less than enthusiastic about any requirement to purchase the loans after amendments were added in the final version of HB 555 (SCS CSHB 555(Fin) am S; ch. 147, SLA 1988; our bill-review file no. 883-88-0169), which require the corporation to segregate payments of principal and interest on the acquired loans from other assets. Bond counsel has expressed the opinion that the segregation requirement will cause AHFC to suffer a downgrade in bond rating by the predominant rating agencies.

As mentioned in our review of the capital appropriation bill (CCS SB 144; our bill-review file no. 883-88-0177), now before you for your action, something can and should be done about this process. The many appropriations for grants in this bill

continue to be a cause for concern. The legislature is simply not capable of administering grant programs of this magnitude. The unfairness of attempting to dispense money for social programs based on election districts and political clout becomes more and more evident each year.

This review can only touch upon the points in which your budget office has expressed an interest. The bill is lengthy and very complicated. We are concerned that there might be many other defects that will be uncovered during implementation. Principally, this fear is based on the haphazard manner in which this bill was assembled by the Senate during the closing hours of the session. We are also concerned by the delay in delivery of the bill. This delay might cause uncertainty in the effect of some appropriations if the effective date is after the end of this fiscal year. In those cases, agencies should request legal advice from this office.

Your action on this bill before June 30, thus providing an effective date in FY 88 for most sections in this bill, would avoid several legal questions about the effect of some of those sections.

Sincerely yours,

Grace Berg Schaible
Attorney General

GBS:JLB:pjg

cc: Alison Elgee, Director
Division of Budget Review
Office of Management & Budget
Office of the Governor