

LEGAL SERVICES

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MEMORANDUM

January 23, 2024

SUBJECT: Executive Order 130; Board of Certified Direct-Entry Midwives
(EO 130; Work Order No. 33-GH2450\A)

TO:
Senator Gary Stevens
Senate President
Attn: Doug Gardner

FROM:
Megan A. Wallace
Chief Counsel

Megan Wallace

You asked whether Executive Order 130 (EO 130) conforms to art. III, sec. 23, of the Constitution of the State of Alaska. The short answer is probably yes.¹

EO 130 transfers the functions of the Board of Certified Direct-Entry Midwives (Board) to the Department of Commerce, Community, and Economic Development (DCCED) and eliminates the Board. The executive order makes no statutory changes other than those necessary to effectuate the reorganization. The executive order amends statutory references to the Board and replaces them with references to the department and repeals sections of law creating, setting out the composition of, directing meetings of, and termination of the Board.

The authority of the governor to issue EO 130 arises from art. III, sec. 23, Constitution of the State of Alaska. That section states:

The governor may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration. Where these changes require the force of law, they shall be set forth in executive orders. The legislature shall have sixty days of a regular session, or a full session if of shorter duration, to disapprove these executive orders. Unless disapproved by resolution concurred in by a majority of the members in joint session, these orders become effective at a date thereafter to be designated by the governor.

¹ The governor issued 13 executive orders this session, the analysis in this memorandum applies only to EO 130.

Senator Gary Stevens

Senate President

January 23, 2024

Page 2

Prior governors have used executive orders to merge two departments together,² to transfer functions from one department to another,³ and to move the functions of a council to a department and eliminate the council.⁴ However, little authority sheds light on the permissible scope of an executive order. Simply because an executive order has been employed without disapproval in the past does not guarantee that it was legally permissible.

The minutes of the Alaska Constitutional Convention Proceedings do offer some guidance; the executive order power of the governor is discussed over the course of several pages. It is clear that the delegates viewed the power as enabling the governor to amend law as necessary to reorganize the functions of the executive branch.⁵ Summing up the power, Delegate Nordale stated "when the governor sees there are too many departments set up functioning by themselves or functioning under boards and there isn't any coordination, he has the right to suggest a reorganization and a different assignment of functions. Where his executive order might be contrary to the law which originally set up this department or board, that part of his executive order would have to be disapproved by a legislature. That is the way it works, just like the President."⁶ Delegate Hellenthal noted, "generally the executive branch of the government is supreme when acting in the executive sphere. In that sphere it cannot properly be interfered with by either the judiciary or the legislative branch."⁷

Despite the sweeping statements of the delegates, the power of executive orders is not without bounds. Importantly, an executive order may not be used to enlarge, diminish, or otherwise alter reorganized functions of the executive branch; these powers are reserved to the legislature. The power to pass laws is conferred upon the legislature by art. II, sec. 1 of the Alaska Constitution, which states: "The legislative power of the State is

² EO 39 (1977) merged the Department of Highways and the Department of Public Works into one department.

³ EO 107 (2003) transferred functions from the Department of Fish and Game to a deputy commissioner of natural resources.

⁴ EO 113 (2005) transferred the functions of the Telecommunications Information Council to the Department of Administration and eliminated the Council.

⁵ Alaska Constitutional Convention Minutes, 2226 - 2229 (January 16, 1956). (As Delegate Rivers explained, "It does give him the power to alter existing organizational structures that have been set up by law, but only after the legislature has failed to say 'No, we won't let you do that.'")

⁶ *Id.* at 2229.

⁷ *Id.* at 2228.

vested in a legislature consisting of a senate with a membership of twenty and a house of representatives with a membership of forty." As a consequence of the doctrine of separation of powers inherent in the Alaska Constitution, one branch of government is prohibited from encroaching upon or exercising the powers of another branch.⁸ The blending of governmental powers is permitted only to the extent granted by the constitution; it will not be inferred.⁹ Therefore, the most appropriate way to view the executive order power is as a limited power of the governor to amend statutes as necessary to reorganize the executive branch, a sliver of legislative power delegated to the governor by the constitution. Just as the legislature's power over executive branch appointments is limited to the confirmation of certain appointments as expressly provided by the constitution,¹⁰ and just as the governor's power to veto appropriations made by the legislature is limited to that provided by the constitution,¹¹ the governor's executive order power is limited to that expressly set out in art. III, sec. 23. The governor's executive order power will be narrowly construed and will be confined within the bounds expressed in the constitution.¹²

In sum, while the governor, through an executive order, has the power to "make changes in the organization of the executive branch," he may not go so far as to expand, contract, or otherwise change the functions of the reorganized board or department. Thus, the question becomes whether EO 130 expands, contracts, or changes the functions of the department or whether the executive order permissively reorganizes the certification and regulation of the practice of midwifery within the executive branch.

⁸ *Pub. Def. Agency v. Superior Ct., Third Jud. Dist.*, 534 P.2d 947, 950 (Alaska 1975).

⁹ *Bradner v. Hammond*, 553 P.2d 1, 7 (Alaska 1976).

¹⁰ *Id. Dunleavy v. Alaska Legislative Council*, 498 P.3d 608, 612 (Alaska 2021).

¹¹ *Alaska Legislative Council v. Knowles*, 21 P.3d 367 (Alaska 2001).

¹² Few Alaska cases mention art. III, sec. 23, of the Constitution of the State of Alaska. In 1983, the Department of Corrections was created by EO 55. About three decades later, a prisoner filed a *pro se* lawsuit alleging, among other claims, that "DOC's creation by executive order violated the separation of powers doctrine." *Rae v. State, Dep't of Corr.*, 407 P.3d 474, 477 (Alaska 2017). The Alaska Supreme Court's analysis of this claim was cursory: it found "no merit" to the argument and simply noted that "the Constitution itself, in article III, section 23, clearly empowers the executive to adjust the organization of its agencies." *Id.* at 478. In *Suber v. Alaska State Bond Committee*, 414 P.2d 546, 556 (Alaska 1966), the Alaska Supreme Court held that sec. 23 was not implicated where the commissioner of commerce created an executive agency to carry out the provisions of legislation when the legislation gave him specific authority to hire staff.

Senator Gary Stevens
Senate President
January 23, 2024
Page 4

It is likely that the statutory changes made by EO 130, transferring the functions of the Board of Certified Direct-Entry Midwives to DCCED and eliminating the Board is within the limits of the governor's constitutional authority under art. III, sec. 23. While eliminating a board entirely may seem to surpass reorganization, moving the functions of a board to an executive branch department and "deleting" the board was specifically listed as an example of a permissible act of an executive order during the Constitutional Convention Proceedings.¹³ As noted earlier in this memo, EO 130 does not make any statutory changes over those necessary to transfer the responsibilities of the Board to DCCED.¹⁴ This, combined with the fact that state courts have generally affirmed the powers of a strong executive branch, make it likely a court would find EO 130 to comply with the Alaska Constitution.

If you disagree with this assessment, or if you find EO 130 objectionable for policy reasons, the legislature's course of action is to disapprove the executive order, as described in art. III, sec. 23, Constitution of the State of Alaska.¹⁵

If I may be of further assistance, please advise.

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¹³ "For instance, *deleting a certain board or ceasing its functions and putting it under the single department head or something of that nature*, whatever *major change* he would want he would have to depend upon the legislature to pass that bill and get it into operation. Doing it this way, he sets forth an executive order but it does not become effective until it slips through the next session of the legislature without being voted out by the legislature . . . I think it runs in line with the strong executive we have where he can set forth his changes and the legislature by being silent on it, in that way they approve of the order." Emphasis added. Delegate Londborg, Alaska Constitutional Convention Minutes, 2229 (January 16, 1956).

¹⁴ An attorney general opinion notes that "an executive order is typically used to transfer functions, not to effect a termination of activities. To the extent that it is desired to terminate [a board]'s functions, legislative reform is the preferred course." 1983 Op. Att'y Gen. No. 86 (May 11).

¹⁵ See also Uniform Rule 49(a)(4).