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MEMORANDUM

January 26, 2024

SUBJECT: Executive Order 128; Separate the Alaska Energy Authority from the Alaska Industrial Development and Export Authority (Work Order No. 33-GH2466\A)

TO: Representative Cathy Tilton
Speaker of the House
Attn: Heath Hilyard

FROM: Emily Nauman 
Director

You asked whether Executive Order (EO) 128 raises any legal issues or whether there are any other considerations related to legislative powers to be aware of. In sum, it is likely that a court would find EO 128 exceeds the governor's executive order authority under the Alaska Constitution.¹

Section 1 of EO 128 removes the members of the Alaska Industrial Development and Export Authority (AIDEA) as the members of the Alaska Energy Authority (AEA) board and replaces those members with a new list of directors, created wholesale in the executive order. The new criteria for appointment of public members to the board in AS 44.83.030 differ from those in AS 44.88.030(a)(2) for appointment as a member of AIDEA. Section 2 of the EO sets out a new law describing the power of the commissioner to designate a deputy, setting out the terms of public members, and establishing the governor's appointment authority in the event of a vacancy. This section applies the law that currently applies to the AIDEA board to the AEA board. Section 3 of the EO also is a change in law, establishing that the AEA board shall select a chair and vice chair amongst themselves. Currently the chair and vice chair of AIDEA serve as the chair and vice chair of the AEA board.

The authority of the governor to issue an executive order 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

¹ The governor has issued 12 executive orders this session (available at <https://www.akleg.gov/basis/Law/EO/33>); the analysis in this memorandum applies only to EO 128.

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.

Prior governors have used executive orders to transfer functions from one department to another.² 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.³ 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."⁴ 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."⁵

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

² Executive Order 107 (2003) transferred functions from the Department of Fish and Game to a deputy commissioner of natural resources.

³ 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.'").

⁴ *Id.* at 2229.

⁵ *Id.* at 2228.

is 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.⁶ The blending of governmental powers is permitted only to the extent granted by the constitution; it will not be inferred.⁷ 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,⁸ and just as the governor's power to veto appropriations made by the legislature is limited to that provided by the constitution,⁹ 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.¹⁰

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 change the functions of the reorganized board or department, nor may the governor otherwise change the law by executive order. Thus, the question in evaluating EO 128 is whether the executive order expands, contracts, or changes the functions of the AEA board or changes the law apart from the reorganization of executive branch functions.

⁶ *Pub. Def. Agency v. Superior Ct., Third Jud. Dist.*, 534 P.2d 947, 950 (Alaska 1975).

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

⁸ *Id. Dunleavy v. Alaska Legislative Council*, 498 P.3d 608, 612 (Alaska 2021).

⁹ *Alaska Legislative Council v. Knowles*, 21 P.3d 367 (Alaska 2001).

¹⁰ 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.

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The changes made in EO 128 constitute changes to the law in excess of those necessary to reorganize the executive branch. The EO changes the composition of the board of the AEA entirely. Although other sections of the EO are problematic, the changes in sec. 1 of the EO are the most concerning. Nowhere else in law does the board established in sec. 1 exist; the EO composes the board of new members and creates new qualifications for those members, and therefore creates new law. This is an unconstitutional encroachment on the legislature's lawmaking authority and exceeds the governor's limited power to amend statutes as necessary to reorganize the executive branch. Even considering the fact that state courts have generally affirmed the powers of a strong executive branch, it is unlikely a court would find EO 128 complies with the Alaska Constitution.

If you agree with this assessment, or if you find EO 128 objectionable for policy reasons, the legislature's course of action is to disapprove the EO, as described in art. III, sec. 23, Constitution of the State of Alaska.¹¹ If the legislature wishes to pursue the statutory changes set out in EO 128, the correct form is a bill.

If I may be of further assistance, please advise.

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¹¹ *See also* Uniform Rule 49(a)(4).