

# LEGAL SERVICES

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## MEMORANDUM

January 23, 2024

**SUBJECT:** Executive Order No. 131; Alaska Marine Highway Operations Board (EO 131; Work Order No. 33-GH2014A)

**TO:** Senator Gary Stevens  
Senate President  
Attn: Doug Gardner

**FROM:** Megan A. Wallace  
Chief Counsel 

You asked if there were any legal or constitutional issues with Executive Order (EO) 131 recently introduced by the governor.

EO 131 amends AS 19.65.120(a) to remove the power of the speaker of the house and the president of the senate to appoint public members to the Alaska Marine Highway Operations Board and grants the power to appoint all six public members of the board exclusively to the governor. EO 131 also makes a conforming amendment to AS 19.65.120(c) to remove references to appointments made by the president of the senate and speaker of the house. EO 131 does not make any other statutory changes.<sup>1</sup>

### General authority to issue executive orders

The authority of the governor to issue EO 131 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.

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<sup>1</sup> The transition section of EO 131 provides that the terms of the current members of the Alaska Marine Highway Operations Board expire on the effective date of the order, but that the governor may appoint a person who was serving on the board as it existed before the effective date who meets the qualifications of AS 19.65.120(a).

Prior governors have used executive orders to merge two departments together,<sup>2</sup> to transfer functions from one department to another,<sup>3</sup> and to move the functions of a council to a department and eliminate the council.<sup>4</sup> 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.<sup>5</sup> 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."<sup>6</sup> 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."<sup>7</sup>

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 in art. II, sec. 1 of the Alaska Constitution, which states: "The legislative power of the State is vested in a legislature consisting of a senate with a membership of twenty and a house of

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

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

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

<sup>5</sup> 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.'")

<sup>6</sup> *Id.* at 2229.

<sup>7</sup> *Id.* at 2228.

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.<sup>8</sup> The blending of governmental powers is permitted only to the extent granted by the constitution; it will not be inferred.<sup>9</sup> 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,<sup>10</sup> and just as the governor's power to veto appropriations made by the legislature is limited to that provided by the constitution,<sup>11</sup> 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.<sup>12</sup>

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 131 expands, contracts, or changes the functions of the Alaska Marine Highway Operations Board or whether the EO permissively reorganizes an executive branch board.

#### Alaska Marine Highway Operations Board separation of powers issues

Existing AS 19.65.120(a) raises a separation of powers issue by granting the presiding officers of the legislature the authority to appoint public members of an executive branch

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

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

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

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

<sup>12</sup> 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.

board. Allowing the presiding officers of the legislative branch to appoint public members of the board, could be found to violate the separation of powers doctrine because the legislature is involving itself in executive functions.

However, while the board is located within the executive branch, the functions of the board appear primarily advisory in nature.<sup>13</sup> Because of the advisory nature of the board, it is possible that a court would find that no separation of powers violation exists.<sup>14</sup> It is noteworthy that the presiding officers currently appoint public members to the Citizens' Advisory Commission on Federal Management Areas in Alaska<sup>15</sup> and the Alaska Minerals Commission.<sup>16</sup>

### Conclusion

Whether the statutory changes made by EO 131, transferring the power to appoint public members of the Alaska Marine Highway Operations Board from the presiding officers to the governor, is within the limits of the governor's constitutional authority under art. III, sec. 23 is a complex question. While the changes do not expand or contract the duties of the board, it might be argued that changing how this advisory board is composed would have an impact on how the advisory board functions. On the other hand, given the separation of powers issues noted above, a court might find the governor's changes permissible on grounds that the presiding officers lack the authority to appoint public members to an executive branch board.

If you find EO 131 objectionable for these or other 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.<sup>17</sup>

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<sup>13</sup> AS 19.65.180.

<sup>14</sup> The attorney general has advised that "the constitution is not offended by having legislators serve on boards and commissions that can only inquire and advise . . . and do not actually execute or administer the law." 2016 Op. Alaska Att'y Gen. (July 19). However, the attorney general opinion does not specifically address the potential separation of powers issue raised by the appointment of public members of boards and commissions by the presiding officers.

<sup>15</sup> AS 41.37.170.

<sup>16</sup> AS 44.33.431(b).

<sup>17</sup> *See also* Uniform Rule 49(a)(4).