

**WHY EXECUTIVE ORDER (EO) 121 IS THE PROPER VEHICLE
TO ACHIEVE THE SPLIT OF DHSS**

Why is the Executive Order (EO) 121 the proper vehicle to achieve the split of DHSS?

1. The reorganization of a department is specifically outlined in the Alaska Constitution and is a power vested in the governor:

Article II, section 23. Reorganization. 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.

2. The creation of a new department is not without precedent as DOTPF was created out EO 39. Prior to EO 119, there were **118 other examples** of EOs whereby Alaska governors made organizational changes or reassigned departmental functions. This EO is not unique, unprecedented, or unconstitutional.
3. There are no rules that an EO must be not long or not complicated. For Leg Legal to imply or expressly state that such rules exist is misleading and is without legal merit.
4. Leg Legal's position is in direct contravention of its own longstanding advice related to EOs and how they are used to implement the governor's authority outlined in Article III, section 23 of the Alaska Constitution.
5. Many of the concerns raised by Leg Legal show a fundamental misunderstanding about how executive branch agencies operate. The function of the department is not implicated by the EO – rather, it is the organization of the department that is affected by the EO. By focusing on function, the memo misses the governor's authority to reorganize and creates a strawman argument that is based upon pure speculation and is not supported by the law.
6. In order to make the split of the department through an EO, statutes must necessarily be changed. The argument that statutes are changed in EO 121 is a false flag. That premise fundamentally misrepresents the need to amend statute in order to implement the organizational or functional changes contemplated by the constitution. To suggest that any such change could occur without changing statutes in full or in part is simply misleading.

TIMELINE

Timeline:

- EO 119 drafting November/December 2020
- Introduced on first day of session January 19, 2021
- Legislative hearings held
 - 2/25/21 House HSS
 - 3/3/21 Senate Finance
 - 3/6/21 House HSS
- Revisions start in March and go through December
- Final working draft sent to Leg legal for review in fall 2021, response received in January 2022

Leg Legal Memos:

- March 5, 2021
- July 9, 2021
- January 134, 2022
- February 14, 2022

Law Responsive Letters/memo

- Authority memo sent to House HSS and Senate Finance in March 2021.

TC with Leg Legal**Other Communication with legislators/GLO/LEG LEGAL****Senator Wilson sent:**

- Question/changes/drafts to Leg Legal on April 5, 2021, response from Leg Legal on June 8 that they were working on it, but nothing final. Finally received formal response on July 9, 2021
- Working draft based upon July 9, 2021 provided to them by Sen Wilson in October 30 response to that was received on January 14, 2022.

**SUMMARY OF CHANGES
BETWEEN EXECUTIVE ORDER 119 AND EXECUTIVE ORDER 121**

Summary of Changes Between Executive Order 119 and Executive Order 121

<u>EO 119 Sec#</u>	<u>EO 119 Pg. No.</u>	<u>EO 121 Sec. #</u>	<u>EO 121 Pg. No.</u>	<u>Statutory reference</u>	<u>Explanation for change</u>
2	1	N/A	N/A	08.68.700(g)	Leg Legal noted that this change to current law was substantive (related to pronouncing death of patients the AK Pioneer Home and Veterans Home). We agreed and this section was removed from EO 121.
3	1	136	98	11.71.100(a)	This section in EO 119 would have effectively replaced a DHSS representative on an executive board or commission with a representative from both new departments. Legislative Legal argued that this was a substantive change. EO 121 now identifies a single department or commissioner to sit on each body.
4	2	137	100	12.62.100(a)	Moved the change in commissioner of DFCS to the revisers section.
5	2-5	2	1	12.62.400(a)	This section in EO 119 would have effectively replaced a DHSS representative on an executive board or commission with a representative from both new departments. Legislative Legal argued that this was a substantive change. EO 121 now identifies a single department or commissioner to sit on each body.
11 and 12	6-7	134 and 137	93 and 99	18.66.020(a) and 18.66.050(4)(12)	This section in EO 119 would have effectively replaced a DHSS representative on an executive board or commission with a representative from both new departments. Legislative Legal argued that this was a substantive change. EO 121 now identifies a single department or commissioner to sit on each body.
16	8	14	7	26.23.071(b)	This section in EO 119 would have effectively replaced a DHSS representative on an executive board or commission with a representative from both new departments. Legislative Legal argued that this was a substantive change. EO 121 now identifies a single department or commissioner to sit on each body.
17-18	9-10	15-16	8-9	37.05.146(c)(77) And 37.05.146(c)(80)	EO 119, sections 17 and 18, amend AS 37.05.146(c), definition of program receipts and non-general fund program receipts, by adjusting an existing paragraph to apply to the Department of Health and adding a new paragraph to incorporate the Department of Family and Community Services. Each paragraph references "fees collected under AS 47.32," which

Summary of Changes Between Executive Order 119 and Executive Order 121

					the Legislative Legal memo questioned. These sections remain unchanged because the introductory language to both paragraphs limits the fees received to those collected by the applicable department. This eliminates the possibility of duplicative fees, as each department has authority over specific licenses and certificates.
31 - 33	30	29-32	30	44.29.022(d)	Changes between EO 119 and EO 121 are to include the more precise statutory references related to the provision of "the integrated comprehensive mental health program." There were also technical changes related to typographical errors in EO 119.
35	31	35	32	44.29.600-.670	This section contains a drafting error that included definitions for words, which are not present in the current statute; essentially this was a cut and paste mistake in EO 119, that was pointed out by Legislative Legal. We agreed and those provisions have been removed for EO 121. (See pages 39 and 40 of EO 119.)
36	40	36	43	44.30.030 and 44.30.040	Changes between EO 119 and EO 121 are to include the more precise statutory references related to the provision of "the integrated comprehensive mental health program." There were also some technical changes related to typographical errors in EO 119; same changes as found in section 29-32.
40	45	N/A	N/A	47.05.290	This section proposed a change to a citation that was not necessary. This section was removed from EO 121.
61	54	64	57	47.05.390	This section proposed a change that does not meet legislative drafting rules. We agreed with the suggestion from Legislative Legal that the section should amended and repealed and readopted. This has been corrected in EO 121.
62	54	65	58	47.06	Creation of new dept. (DFCS); <i>Section outlines duties.</i> Change involves the removal of subsection (14) which was in EO 119. The language to have both departments coordinate and facilitate programs cooperatively is in Sec. 78 in EO 121.
73	64	78	69	47.30.660	EO 121 includes reference to both departments to clarify how both departments will operate in the mental health arena.

Summary of Changes Between Executive Order 119 and Executive Order 121

74-78 (88)	66	137	99	AS 47.30.600-915	The original changes in EO 119 are not needed; all that was required is an amendment to the definition of the department in AS 47.30915, which was done in the section related to instructions to the revisor.
124	92	118	89	47.40.110	The incorrect department was referenced; it has been corrected.
125-127	92	35	37		EO 119 did not move the Commission on Aging to Title 44 as intended; this is fixed in EO 121.
130	94	123	90		This section inadvertently repealed the definition of crisis stabilization, which was an error. This is corrected in EO 121. Added new repealers identified in the review of EO 121.
141	97	N/A	N/A		This section regarding sharing and confidentiality between the two new departments was removed, Legislative Legal argued inclusion was arguably substantive; this concern will be addressed through implementation of new business associate agreements, MoAs and MoUs.
142-145	97	134-137	93		These sections are instructions to the revisor of statutes to change the commissioner or department reference in statute to reflect the appropriate new department. In our review, we identified additional changes that needed to be made to these sections for accuracy. Those have been included in EO 121.

New provisions added in EO 121

Section	Page number	Statute added
3	3	12.65.120(a)
5	4	14.03.231
12	7	24.20.235(a)
21	10	37.14.007(b)
34	31	44.29.140(c)
70	65	47.24.070
117	88	47.40.100
118	89	47.40.110
119	89	47.40.120

Summary of Changes Between Executive Order 119 and Executive Order 121

No changes from 119 to 121 (just different section numbers)

EO 119	Page Number	EO 121	Page Number
1	1	1	1
5	2	2	1
6	5	4	4
7	5	6	4
8	5	7	4
9	5	8	5
10	6	9	5
13	7	10	6
14	7	11	6
15	8	13	7
19	10	17	9
20	10	18	9
21	10	19	10
22	11	20	10
23	11	22	11
25	11	24	11
26	11	25	11
27	11	26	11
28	12	27	12
29	27	28	27
34	31	33	31
44-61	47	41-64	47
64	60	68	65
66-72	61	71-77	65
89-122	75	79-123	71
123	91	115	88
128	93	120	90
131-140	94	124-133	90
146	106	138	100
147	106	139	100

A REVIEW OF THE HISTORY OF EXECUTIVE ORDERS
SHOWS THE PURPOSE OF EXECUTIVE ORDER 121 IS NOT UNUSUAL

List of every Executive Order issued by the Governor of Alaska

EXECUTIVE ORDER #	DESCRIPTION
123	Changed the name of the Division of Forestry to the Division of Forestry and Fire Protection to more accurately reflect the agency's responsibilities.
122	Reassigned facilities procurement, leasing, and management duties from the Department of Administration to the Department of Transportation and Public Facilities.
121	Split the Department of Health and Social Services into two departments: the Department of Health and the Department of Family and Community Services.
120	Moved the Violent Crimes Compensation Board from the Department of Administration to the Department of Public Safety.
119	Withdrawn by Governor on 3/11/21. Split the Department of Health and Social Services into two departments: the Department of Health and the Department of Family and Community Services.
118	Revised statutes to reflect the reorganization of the Department of Labor and Workforce Development as a result of the Governor's Administrative Order 275. The Employment Security Division and the Division of Business Partnerships were merged into the Division of Employment and Training Services.
117	Moved the Statewide Independent Living Council from the Department of Labor and Workforce Development to the Department of Health and Social Services.
116	Reassigned certain hearing and appeal functions of the Department of Health and Social Services to the Office of Administrative Hearings in the Department of Administration. Aimed at coordinating central administrative hearing process in Alaska.
115	Moved the Alaska Aerospace Corporation from the Department of Commerce, Community, and Economic Development to the Department of Military and Veterans' Affairs. Aimed at integrating military affairs in Alaska.
114	Reverted functions of protection of fish habitat from the Deputy Commissioner of Natural Resources back to the Department of Fish and Game. Also restored the statutory balance between stream preservation and forest stewardship from the State Forester in the Division of Forestry back to the Commissioner of Natural Resources under AS 41.17.
113	Eliminated the Telecommunications Information Council and reassigned its functions to the Department of Administration and the Governor. Aimed at consolidating Alaska telecommunications policy.
112	Reassigned international trade functions and duties from the Department of Community and Economic Development to the Office of the Governor.
111	Reassigned functions relating to advocacy on behalf of the public in matters that come before the Regulatory Commission of Alaska to the Attorney General.
110	Moved the Alcohol and Beverage Control Board from the Department of Revenue to the Department of Public Safety. Aimed at adding law enforcement expertise to assist the board in its duties.
109	Moved the Violent Crimes Compensation Board from the Department of Public Safety to the Department of Administration.
108	Reassigned alcohol safety action program functions from the Division of Alcoholism and Drug Abuse to the Department of Health and Social Services. Reassigned board seat from the Director of the Division of Alcoholism and Drug Abuse to the Commissioner of the Department of Health and Social Services.
107	Reassigned certain functions of protection of fish habitat from the Department of Fish and Game to a Deputy Commissioner of the Department of Natural Resources.

List of every Executive Order issued by the Governor of Alaska

- Preserved statutory balance by also reassigning the preservation role of the Commissioner of the Department of Natural Resources to the State Forester in the Division of Forestry.
- 106** Moved the Alaska Coastal Policy Council from the Office of the Governor to the Department of Natural Resources. Also reassigned the functions of the Office of Coastal Management within the Office and Management and Budget to the Department of Natural Resources.
- 105** Moved the Alaska Seismic Hazards Safety Commission from the Office of the Governor to the Department of Natural Resources.
- 104** Reassigned the functions of administering the Equal Employment Program from the Office of the Governor to the Division of Personnel in the Department of Administration. The Director of Personnel will add these reassigned functions to their existing duties.
- 103** Reassigned the responsibility for maintenance and legal custody of regulations from the Office of the Lieutenant Governor to the State Archivist.
- 102** Moved the Office of Long Term Care Ombudsman from the Department of Administration to the Alaska Mental Health Trust Authority in the Department of Revenue.
- 101** Moved the Highway Safety Planning Agency from the Department of Public Safety to the Department of Transportation and Public Facilities.
- 100** Reassigned responsibility for administration of the Authentic Native Handicraft Identification Seal program from the Department of Commerce and Economic Development to the Alaska State Council on the Arts within the Department of Education.
- 99** Reassigned certain functions related to motor vehicles from the Department of Public Safety to the Department of Administration.
- 98** Reassigned the enforcement of size, weight, and load standards for vehicles; and inspection of scales and other measuring devices; and enforcement of air carrier financial responsibility requirements from the Department of Commerce and Economic Development to the Department of Transportation and Public Facilities. Also reassigned the administration of motor vehicle safety inspection programs and the state's commercial motor vehicle financial responsibility program from the Department of Public Safety to the Department of Transportation and Public Facilities.
- 97** Disapproved. Merged the student aid and educational institution regulation functions of the Alaska Commission on Postsecondary Education into the Alaska Student Loan Corporation.
- 96** Reassigned responsibility for administration of the Alaska Children's Trust to a new version of the Alaska Children's Trust Board within the Office of the Governor.
- 95** Disapproved. Reassigned responsibilities for licensing and regulating big game guides to the Department of Commerce and Economic Development.
- 94** Eliminated the Division of International Trade and reassigned duties and functions to the Department of Commerce and Economic Development.
- 93** Reassigned responsibility for the Alaska Regional Economic Assistance Program from the Department of Commerce and Economic Development to the Department of Community and Regional Affairs.
- 92** Disapproved. Reassigned duties of the Department of Natural Resources to consolidate the Division of Oil and Gas and the Division of Geological and Geophysical Surveys into a new Division of Oil, Gas, and Geology.

List of every Executive Order issued by the Governor of Alaska

- 91 Moved the Office of Equal Employment Opportunity from the Department of Administration to the Office of the Governor.
- 90 Moved the Alaska Science and Technology Foundation from the Department of Revenue to the Department of Commerce and Economic Development. Reassigned duties of the Science and Engineering Advisory Commission to the Alaska Science and Technology Foundation.
- 89 Reassigned the enforcement of size, weight, and load standards for vehicles and authority to issue overweight and oversize permits for vehicles from the Department of Commerce and Economic Development to the Department of Transportation and Public Facilities.
- 88 Reassigned responsibility for establishing an adventure-based education program from the Department of Community and Regional Affairs to the Department of Health and Social Services.
- 87 Withdrawn on 3/8/93. Merged state facility leasing and management functions from the Department of Administration and other agencies to the Department of Transportation and Public Facilities.
- 86 Reassigned the duties involving rehabilitation, enhancement, and development from the Division of Fisheries to the Department of Fish and Game.
- 85 Reassigned the bonding program that serves as security for the collection of wages and payment for raw fish from the Department of Labor to the Department of Revenue.
- 84 Merged the Alaska Women's Commission and the Alaska Commission on Children and Youth into a new Alaska Human Relations Commission within the Governor's Office.
- 83 Merged the State Geographic Board and the Historic Sites Advisory Committee into the Alaska Historical Commission within the Department of Natural Resources.
- 82 Moved the charitable gaming program under AS 05.15 from the Department of Commerce and Economic Development to the Department of Revenue.
- 81 Withdrawn on 1/27/93. Moved the Alaska Science and Technology Foundation from the Department of Revenue to the Department of Commerce and Economic Development.
- 80 Eliminated the Professional Teaching Practices Commission and reassigned its functions to the Department of Education.
- 79 Moved the Office of International Trade, including the Alaska Foreign Offices, from the Office of the Governor to a new Division of International Trade within the Department of Commerce and Economic Development.
- 78 Moved the Office of Equal Employment Opportunity from the Office of the Governor to the Department of Administration.
- 77 Merged labor-relations functions of the Department of Administration personnel board, the Department of Labor generally, and the Railroad Labor Relations Agency into the Alaska Labor Relations Agency.
- 76 Reassigned division status to the Office of Alcoholism and Drug Abuse creating the Division of Alcoholism and Drug Abuse.
- 75 Moved the bulk fuel loan program and the power development loan program from the Department of Commerce and Economic Development to the Alaska Power Authority.
- 74 Reassigned the function of regulating games of chance and contests of skill from the Department of Revenue to the Department of Commerce and Economic Development.
- 73 Reassigned the functions of issuing certain fishing, hunting, and trapping licenses, tags, and identification cards from the Department of Revenue to the Department of Fish and Game.

List of every Executive Order issued by the Governor of Alaska

- 72 Reassigned the rate-setting and related functions of the Medicaid Rate Commission to the Department of Health and Social Services.
- 71 Merged the Review Board on Alcoholism and the Advisory Board on Drug Abuse.
- 70 Moved the Alaska State Archives from the Department of Administration to the Department of Education.
- 69 Reassigned responsibilities for rural assistance, economic development, and housing assistance from the Division of Housing Assistance to the Department of Community and Regional Affairs.
- 68 Moved the Alaska business license program, created under AS 43.70, from the Department of Revenue to the Department of Commerce and Economic Development.
- 67 Moved the alcohol breath and blood testing program from the Department of Health and Social Services to the Department of Public Safety. Based in part on new crime laboratory being opened in the Department of Public Safety.
- 66 Eliminated the statutory requirements for two separate divisions and a deputy commissioner in the Department of Administration involving telecommunications powers and duties. Reassigned these duties to the department generally.
- 65 Moved the Alaska Foreign Offices from the Department of Commerce and Economic Development to the Office of the Governor. Modified Executive Order 57.
- 64 Withdrawn on 3/6/87. Merged functions of the Division of Geological and Geophysical Surveys and the Division of Mining into the Division of Mining and Geology.
- 63 Moved the Alaska Historical Commission from the Department of Education to the Department of Natural Resources. Modified Executive Order 43.
- 62 Moved the fire-service training program from the Department of Education to the Department of Public Safety.
- 61 Moved the Alaska Royalty Oil and Gas Development Advisory Board from the Department of Commerce and Economic Development to the Department of Natural Resources.
- 60 Moved the Athletic Commission from the Office of the Governor to the Department of Commerce and Economic Development.
- 59 Moved the Alaska Wing of the Civil Air Patrol from the Department of Military and Veterans' Affairs to the Department of Public Safety. Modified Executive Order 33.
- 58 Moved the Veterans' Service and Veterans' Burial Allowance programs from the Department of Commerce and Economic Development to the Department of Military Affairs. Also changed the name of the Department of Military Affairs to the Department of Military and Veterans' Affairs.
- 57 Moved the Alaska State Office from the Office of the Governor to the Department of Commerce and Economic Development and changed the name to the Alaska Foreign Office.
- 56 Reassigned the responsibility of distributing the Session Laws of Alaska and the Alaska Statutes from the Department of Administration to the Department of Education.
- 55 Amended version of Executive Order 54 with the insertion of an amendment of AS 33.15.010 dealing with the membership of the Board of Parole.
- 54 Created the Department of Corrections as a principal department of the State of Alaska. The new department was created from the Division of Corrections which was in the Department of Health and Social Services.
- 53 Merged the Division of Budget and Management and the Division of Policy Development and Planning into the Office of Management and Budget within the Office of the Governor.

List of every Executive Order issued by the Governor of Alaska

- 52 Merged the Wage and Hour Division and the Division of Occupational Safety and Health within the Department of Labor.
- 51 Reassigned certain inspection and enforcement functions from the Department of Natural Resources to the Department of Health and Social Services.
- 50 Reassigned all telecommunications responsibilities from the Department of Transportation to the Department of Administration. Also moved the Alaska Public Broadcasting Commission from the Department of Education to the Department of Administration. Created two new divisions in the Department of Administration: the Division of Telecommunications Services and the Division of Telecommunications Systems.
- 49 Reassigned the statutory responsibility for inspecting certain recreational devices from the Department of Public Safety to the Department of Labor.
- 48 Moved the Alaska Council on Science and Technology from the Department of Environmental Conservation to the Department of Administration. Modified Executive Order 46.
- 47 Reassigned the recording function of the Uniform Commercial Code from the Department of Commerce and Economic Development to the Department of Natural Resources. Modified Executive Order 40. This Order was submitted in conjunction with HB 35 and SB 20 reassigning the fees associated with the UCC to the Department of Natural Resources as well.
- 46 Moved the Alaska Council on Science and Technology from the Governor's Office to the Department of Environmental Conservation.
- 45 Moved the Alaska Police Standards Council from the Governor's Office to the Department of Public Safety.
- 44 Moved the Alaska State Council on the Arts from the Governor's Office to the Department of Education.
- 43 Moved the Alaska Historical Commission from the Governor's Office to the Department of Education.
- 42 Moved the Public Defender's Office from the Governor's Office to the Department of Administration.
- 41 Moved the Alaska Public Offices Commission from the Lieutenant Governor's Office to the Department of Administration.
- 40 Reassigned the recording function of the Uniform Commercial Code from the Department of Administration to the Department of Commerce and Economic Development.
- 39 Created the Department of Transportation and Public Facilities to centralize transportation systems. Added new chapter to Title 44, 44.42.010, creating the position of Commissioner.
- 38 Created an archive of papers related to Alaska worthy of preservation for reference and research purposes. Added language to AS 40.21.020 that obligated the Department of Administration to provide a records management program for state agencies.
- 37 Withdrawn. Dealt with abolishing the Department of Economic Development and reassigning its functions. Essentially the same purposes were accomplished by ch 207 SLA 1975.
- 36 Withdrawn. Dealt with transferring administration of the Neighborhood Youth Corps from the Office of the Governor to the Department of Labor. Administrative Order 11 served the same purpose.

List of every Executive Order issued by the Governor of Alaska

- 35 Withdrawn. Dealt with name of Division of Mines and Geology as Administrative Order 9 served the same purpose.
- 34 Withdrawn. Dealt with name of Division of Corrections as Administrative Order 8 served the same purpose.
- 33 Reassigned authority over the Alaska Wing of the Civil Air Patrol as set forth in AS 44.33.110 from the Department of Commerce to the Department of Military Affairs.
- 32 Reassigned authority over the Governor's Employment Advisory Commission as set forth in AS 44.19.460 - 560 from the Office of the Governor to the Department of Labor.
- 31 Reassigned responsibility for the provisions of AS Chapter 20, Title 26 from the Department of Public Safety to the Department of Military Affairs.
- 30 Reassigned the administration of the Pioneers' Home from the Office of the Governor to the Department of Administration.
- 29 Amended AS 44.45.050(a) to split a department into two divisions; repealed AS 44.45.090; amended AS 44.19.450 to create a new Alaska Planning and Research Division in the Office of the Governor. Also added AS 44.19.470 allowing the new division to apply and receive aid from the federal government and other sources.
- 28 Assigned the Department of Economic and Development and Planning, Division of Economic Opportunity to administer a technical assistance program authorized by the Economic Opportunity Act of 1964. Appointed Executive Assistant to the Governor and Acting Commissioner of the Department of Economic Development and Planning to act as the Governor's authorized representative with regard to the technical assistance program.
- 27 Created the State of Alaska Reconstruction and Development Planning Commission in response to the earthquake of March 27, 1964.
- 26 Executive Order 26 appears identical to Executive Order 24 creating the Alaska Teachers' Retirement Fund Advisory Board other than the authority cited; in 24 it is AS 44.19.060 and in 26 it is Section 23, Article III of the Constitution of the State of Alaska.
- 25 Rescinded Executive Order 19 and transferred those functions relating to industrial safety of oil and gas exploration, drilling, and production within the State of Alaska back to the Department of Labor as originally provided for in § 5 ch 109 SLA 1955 or AS 18.60.030.
- 24 Created the Alaska Teachers' Retirement Fund Advisory Board per AS 44.19.060. The board is to consist of three members appointed by the Governor for overlapping three-year terms.
- 23 Allowed all State employees, other than those required to perform emergency and essential services, to be excused from duty on December 24th without loss of leave or compensation. Further directed the heads of all departments to adopt a liberal policy of granting time off during the holiday season.
- 22 Reassigned control of all equipment described in Executive Order 18 (creating Department of Highways) not related to the Highway Program and which is required for the Department of Public Works back to the Department of Public Works.
- 21 Reassigned duties of the operation of motor vehicle weighing stations from the Department of Public Works to the Department of Commerce, Public Services Commission, Division of Motor Transportation.
- 20 Repealed by §5 ch 74 SLA 1977. Required that all disbursements of funds from the treasury are subject to the Governor's prior authorization.

List of every Executive Order issued by the Governor of Alaska

- 19 Assigned the duties of the enforcement of laws, and in the promulgation of rules and regulations concerned with industrial safety of all oil and gas exploratory, drilling and production operations within Alaska to the Department of Natural Resources.
- 18 Created a Department of Highways as a principal department of the state government. Also assigned as executive the Commissioner of Highways. Also reassigned maintenance and operation responsibilities for roadways and equipment from the Department of Public Works to the Department of Highways and eliminated the Division of Highways within the Department of Public Works.
- 17 Reassigned duties of collection, accounting, and custody of state revenues, which are only incidental to the regulation and management of the fish and game resources of the State of Alaska, at present performed by the Department of Fish and Game, to the Department of Revenue.
- 16 Created a Governor's Advisory Committee on Economic Development for the purposes of studying State, regional, and local economic problems and formulating alternative recommendations for review by the Office of the Governor.
- 15 Designated the Attorney General as the person to succeed to the office of Secretary of State should that office for any reason become vacant.
- 14 Reassigned the function of constructing, maintaining and operating vessels predominantly utilized by the Department of Fish and Game from the Department of Public Works to the Department of Fish and Game.
- 13 Directed that the Pay Plan for State of Alaska employees under the State Personnel Act of 1960 be placed into effect on 9/1/1960. Also made effective the Personnel Rules adopted under the Personnel Act which were also approved by the State Personnel Board.
- 12 Delegated from the Governor to Commissioners of departments appointing authority as specified by the State Personnel Act of 1960.
- 11 Assigned functions of Section 50-1-4, and Section 50-1-5, ACLA 1949 to the Department of Public Works.
- 10 Assigned functions of Section 50-1-4, and Section 50-1-9, ACLA 1949 to the Department of Public Safety.
- 9 Assigned functions of Section 50-1-4, ACLA 1949 to the Departments of Public Works and Public Safety.
- 8 Designated the Commissioner of the Department of Health and Welfare as the custodian of all prisoners sentenced to any institution by courts of the State of Alaska. Included supervision of probation and parole.
- 7 Reassigned police and fire protection on airports to the Department of Public Works. Also directed the Department of Public Works to coordinate with the Department of Public Safety to fulfill new assignment.
- 6 Reassigned function of rescue and relief of lost persons from the Governor to the Department of Public Safety.
- 5 Moved Territorial-era entity Alaska Housing Authority to the Department of Commerce as a new section titled the Alaska State Housing Authority. New section consisted of three members appointed by Governor for overlapping three-year terms.
- 4 Rescinded by Executive Order 7. Provided police and fire protection at airports through the Departments of Public Safety and Public Works.
- 3 §29, ch 64, SLA 1959 directed Governor to assign administrative functions of the law to the most appropriate department. Governor Egan assigned the Scale House Operation to the Department of Public Works.

List of every Executive Order issued by the Governor of Alaska

- 2** Post-Statehood reorganization. Moved two entities from the Office of the Territorial Governor: Alaska Advisory Commission, International North Pacific Fisheries Commission to the Department of Fish and Game; Aid to Alaska Industrial and Agriculture Fairs to the Department of Natural Resources.
- 1** Reassigned functions related to public health from the Department of Agriculture to the Department of Natural Resources.

THE LEGISLATIVE AFFAIRS AGENCY, AS FAR BACK AS 1995, HAS RECOGNIZED THE SCOPE OF THE
GOVERNOR'S AUTHORITY WITH RESPECT TO EXECUTIVE ORDERS

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MEMORAN

April 24, 1995

(2h)

SUBJECT: Reorganization of functions performed by the Alaska Oil and Gas Conservation Commission and the Alaska Public Utilities Commission (Art. III, sec. 22, state constitution, Work Order No. 9-LS1108)

TO: Senator Dave Donley

FROM: Tamara Brandt Cook *TBC*
Director of Legal Services

You have asked about the authority of the Governor to make changes in the organization of the executive branch and, in particular, whether the Governor could use his power to reorganize by moving all the functions of the Alaska Oil and Gas Conservation Commission (AOGCC) and the Alaska Public Utilities Commission (APUC) so as to eliminate those two commissions. In my opinion, the Governor could accomplish this through the use of an executive order, but this action would be subject to disapproval by the legislature.

This legislature has the authority to establish independent regulatory or quasi-judicial agencies. (Art. III, sec. 22, Constitution of the State of Alaska; Boehl v. Sabre Jet Room, Inc., 349 P.2d 585 (Alaska 1960); Alaska State-Operated School System v. Mueller, 536 P.2d 99 (Alaska 1975)) This is what the legislature has done in establishing the AOGCC (AS 31.05.005) and the APUC (AS 42.05.010). However, these types of independent agencies are not excluded from application of Art. III, sec. 23 of the state constitution which provides:

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.

I have found only one case discussing this section of the constitution and it is not particularly on point. (Suber v. Alaska State Bond Committee, 414 P.2d 546 (Alaska 1966) holding the section not implicated where the Commissioner of Commerce created an executive agency

Senator Dave Donley

April 24, 1995

Page 2

to carry out the provisions of legislation when the legislation gave him specific authority to hire staff) However, the section is discussed in the Alaska Constitutional Convention Proceedings (pages 2226-2229) and it appears clear that the delegates viewed this section as providing the Governor the power, as an administrative matter, to reorganize the functions of the executive branch, but not to enlarge, diminish, or otherwise alter those functions. This power of reorganization applies to both department functions and functions of boards and commissions.

NORDALE: I just perhaps could amplify the Committee's thinking a bit on this. We were thinking primarily of laws setting up boards and sort of sloppy administration, as we have at the present time. Now then, 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.

LONDBORG: Mr. President, just another word along that line, and I think Mrs. Nordale brought it out quite clear, now the other way would be if the governor wanted some reorganization he would have to go to the legislature and have a bill introduced by somebody or on his own request and that bill would be acted upon to make this necessary change. 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 acts 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 suppose you could call it reverse legislation. The governor makes a new law and if the legislature does not want it done away with, well, then they can let it go through, but 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. (Constitutional Convention Proceedings, Part III, Page 2229; emphasis added)

Please note that an executive order does not become effective until after the legislature has had an opportunity to disapprove it. The legislature disapproves an executive order by majority vote of the members in joint session (at least 31 votes). AS 24.08.210 provides that executive orders are to be submitted to each house on the day it organizes, but the Governor has taken the position that his power to submit an executive order cannot be so restricted in time. (See Senate Journal, January 23, 1991, Page 60)

TBC.klb

95-293.klb

DRAFTING ERRORS IN EXECUTIVE ORDERS ARE TRADITIONALLY ADDRESSED THROUGH THE REVISOR OF
STATUTES (AND CAN ALSO BE ADDRESSED VIA A SEPARATE BILL)

LEGAL SERVICES

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MEMORANDUM

June 24, 2003

SUBJECT: Problems with Executive Order 108

TO: Deborah Behr, Regulations Attorney
Department of law

FROM: Pam Finley 
Revisor of Statutes

We have discovered several problems with Executive Order 108. I can address these in the 2004 revisor's bill, but would like your opinion about whether and how to do so.

First, several sections of ch. 4, SSSLA 2002 contain conditional amendments or temporary provisions that refer to the Department of Administration. Should the conditional amendments of codified law be carried forward to the sections enacted in E.O. 108, or can they be left as is? Should the uncoded law be amended? The sections of ch. 4, SSSLA 2002 that are affected are as follows:

Section 1, which amends AS 44.21.120 (repealed by E.O. 108)
Section 5, which amends AS 47.55.010 (repealed by E.O. 108)
Section 12(b), which refers to the Department of Administration
Section 13(b), which refers to the commissioner of administration

Also, there are various cross-references in existing statutes that I think should have been amended in E.O. 108, but were not. They are as follows:

<u>Location</u>	<u>Citation that needs correcting</u>
AS 11.61.195(a)(2)(B)	AS 14.37
AS 11.61.220(a)(4)(A)	AS 14.37
AS 14.43.148(h)(1)(B)(iii)	AS 14.37
AS 25.27.244(s)(2)(B)(ii)	AS 14.37
AS 28.35.032(f)	reference to div. of alcoholism & drug abuse
AS 44.66.010(a)(10)	AS 44.21.200
AS 47.24.070	AS 44.21.200
AS 47.30.016(b)(2)(D)	AS 44.21.200
AS 47.30.036(3)	AS 44.21.230(a)(10)

Finally, the following changes in E.O. 108 may have substantive effect (instead of just transferring authority.) If these were the result of oversights, let me know and we can discuss

correcting them in the revisor's bill. (I've used the numbers given in the E.O., although some will be renumbered in the editorial process.)

✓ Section 3. The new language that refers to AS 47.25.007 - 47.25.009 is narrower than the reference it is replacing [AS 14.38.100]. AS 14.38.100, which corresponds to AS 47.25.001 in this order, refers to agreements with providers of services under AS 14.38.100 - 14.38.199, which corresponds to AS 47.25.001 - 47.25.009 in this order. So the reference that should appear as underlined language in sec. 3 that would make the procurement code apply in the same way as in current law is either "AS 47.25.001" or "AS 47.25.001 - 47.25.009."

✓ Section 21. In AS 47.35.010(a)(2) and (3), should references to "certification" be added? That word appears in AS 14.37.020, which is repealed by this order. Also, AS 47.35.010(a)(5) is not found in AS 14.37.020, so to the extent that it authorizes DHSS to accept licenses "issued by other organizations, etc." for child care facilities, this section looks like a substantive change.

Section 24. In AS 47.35.017(b)(5), the phrase at the end that says that the records that can be reviewed by DHSS must be relevant "to the type of license for which the application has been submitted" does not appear in AS 14.37.040(b)(5) (repealed by this order), so it appears to be a substantive change (a new limitation) with respect to records that can be reviewed by DHSS regarding applications for licensure of child care facilities.

In regard to AS 47.35.017(b)(6), I cannot find the new language in subparagraph (B) in AS 14.38 (which is repealed by this order.) If the new language is not in AS 14.38, placing it in AS 47.35 is a substantive change.

Also, I cannot find the provision in AS 47.35.017(b)(12) in AS 14.38³⁷ (which is repealed by this order), so, to the extent that it would now apply to child care facilities, it looks like a substantive change.

Section 25. Should the same provision added here be enacted for AS 47.35.021? The language of AS 47.35.021 does not appear in AS 14.38³⁷ (which is repealed by this order). Application of AS 47.35.021 to child care facilities would represent a substantive change.

Similarly, the language of AS 47.35.140 does not appear in AS 14.38³⁷ (repealed by this order), so its application to child care facilities represents a substantive change.

Please let me know what, if anything, you want to do about the above.

PF:mdr
03-138.mdr

LEGISLATIVE AFFAIRS AGENCY LEGAL MEMORANDUM DATED MARCH 5, 2021

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MEMORANDUM

March 5, 2021

SUBJECT: Legality of EO 119 (Work Order No. 32-GS1695\A)

TO: Representative Tiffany Zulkosky
Attn: Logan Basner

FROM: Andrew Dunmire 
Legislative Counsel

You asked for a legal memo examining the legality of the substance and timing of Executive Order 119 (EO 119), an executive order that would split the Department of Health and Social Services (DHSS) into the Department of Family and Community Services (DFCS) and the Department of Health (Health). On February 22, 2021, our office sent your office a memo discussing the timing of EO 119. This memo discusses the substantive legal issues with EO 119.¹

Article III, sec. 23 of the Alaska Constitution grants the governor authority to reorganize executive departments. To accomplish this, the governor may issue executive orders to reassign or transfer executive branch functions, but he may not delete or add functions or make other substantive changes. The majority of EO 119 consists of permissible uses of the executive power – examples include bill sections that rename the applicable department(s), move statutory duties from DHSS to DFCS, and fix citations to repealed statutes. However, some sections of the executive order impermissibly make substantive changes to existing law. This memorandum identifies sections of EO 119 that may create a substantive change in law or raise a different legal issue. Those sections are detailed below.

Sec 2. This section changes current law by preventing registered nurses from pronouncing the death of a patient at the Alaska Pioneers' Home or the Alaska Veterans' Home. This function is not transferred under EO 119 and is a substantive change to existing law.

Secs. 3 - 4. These sections create new board positions on the Controlled Substances

¹ Note that the enrollment process for executive orders differs from the normal process described in Uniform Rule 43. If the legislature does not disapprove EO 119 within 60 days, the governor's office will deliver the executive order to Legal Services for enrollment. It will not be modified by the editors or revisor: it will instead be enrolled exactly as received from the governor and sent to the print shop for inclusion in the session laws and resolves.

Advisory Committee and the Criminal Justice Information Advisory Board. Currently, the commissioner of DHSS is a member of each committee. These two sections declare that the commissioners of Health and DFCS would both be members of those two boards. EO 119 would bring both boards from an odd number (nine) to an even number (ten) of members. Creating a new board position and assigning a commissioner to that position is a substantive change to existing law.

Sec. 11. This section adds a member to the Council on Domestic Violence and Sexual Assault. This extra board member is created by naming the commissioners of both new departments to the council. This change results in the council going from an odd number of members (nine) to an even number (ten). Creating a new board position and assigning a commissioner to that position is a substantive change to existing law.

Sec. 15. This section amends AS 25.27.125(b), which regulates an account funded from charges by state agencies under AS 37.10.050. The current statute provides that the legislature may make appropriations to DHSS for certain specified purposes, but this section removes the language indicating that the appropriation goes to DHSS. While the section does not otherwise change the purposes that the appropriations may be used for, this change may be substantive.

Sec. 16. This bill section adds the commissioner of family and community services as a new member to the Alaska State Emergency Response Commission. This results in the commission going from an odd number of members (15) to an even number (16). Creating a new board position and assigning a commissioner to that position is a substantive change to existing law.

Secs. 17 - 18. Both of these sections add new language to AS 37.05.146(c) that reference "fees received under AS 47.32." This is problematic, because both Health and DFCS would have authority over fees received under AS 47.32.

Sec. 30. The DHSS commissioner currently has statutory authority to establish a schedule of fees for the services found in AS 44.29.020(a)(1), (8), and (14). Section 30 would substantively change the commissioner's powers by giving the commissioner authority to establish fee schedules for the programs that are currently codified at (a)(1) - (7) and (14), while removing the commissioner's authority to establish fees for (a)(8).²

Sec. 31. Currently, AS 44.29.022(d) permits a regulation establishing a fee for services that are part of the integrated comprehensive mental health program under AS 47.30. AS 47.30 currently contains 12 articles, each covering a distinct area of the law. Section 31 of EO 119 amends AS 44.29.022(d) so that Health would only have authority to adopt fee-for-services regulations related to Article 4 (Alcoholism and Drug Abuse) and Article 5 (Community Mental Health Services Act).

² The numbering in AS 44.29.020(a) is modified by sec. 29 of EO 119, which repeals (a)(8) and (12). Those two programs are reenacted at AS 44.30.020 by sec. 36.

Some, but not all, of the regulating power for the other parts of AS 47.30 would be transferred to the commissioner of DFCS. More specifically, sec. 36 gives this rulemaking power to DFCS for AS 47.30.655 and 47.30.660 (Article 6) and AS 47.30.670 - 47.30.915 (Articles 8 - 11).³

Additionally, EO 119 repeals Article 1 and reenacts it within AS 44.25,⁴ and it repeals Article 7 and reenacts it within AS 44.29.⁵ It appears that neither DFCS nor Health would have authority to adopt regulations related to Articles 1 or 7 after EO 119 goes into effect.

Sec. 33. Like sec. 31, this section confines rulemaking powers to only two of the articles within AS 47.30. Once again, it is unclear why this section was included in the executive order, but it appears to make a substantive change to the law.

Sec. 35. This section enacts definitions in AS 44.29.890 that are applicable to the statutes governing the Alaska Mental Health Board. These definitions come from existing statutes found at AS 47.30.669 and 47.30.915. However, sec. 35 contains a blank definition for "inpatient,"⁶ a term that is not used within AS 44.29.800 - 44.29.890. Several of the definitions included under AS 44.29.890 are not used in any of the statutes that the terms are defined for. Page 40, lines 8 – 10 includes a definition for "state" that does not make sense since the occurrences of "state" in these sections refer exclusively to Alaska. Additionally, page 33, line 4 cites to AS 44.29.610 - 44.29.670, when it should cite to AS 44.29.600 - 44.29.670.

Sec. 40. This section enacts a substantive change in law by applying existing definitions to other existing statutes. It also uses an unusual span of statutes (AS 47.05.070 - 47.05.290), which includes part of Article 1 and the entirety of Article 2.

Sec. 61. This section repeals and reenacts AS 47.05.390. This section should be amended rather than repealed and reenacted, as sec. 61 merely removes the definition of "department" from the statute.

Sec. 62. This section enacts a new chapter within Title 47. The language used in this section differs from the existing law that it is replacing. For example, AS 47.05.010(1) - (2) currently tasks DHSS with administering and regulating adult public assistance, the Alaska temporary cash assistance program, diversion payments, and "all other assistance programs." Section 62 replaces the explicit list of programs with a vague term describing "applicable assistance programs." And sec. 62 similarly grants DFCS authority to adopt

³ EO 119, page 41, lines 26 - 30.

⁴ EO 119, page 12, line 15.

⁵ EO 119, page 37, line 8.

⁶ EO 119, page 40, line 2.

regulations "necessary for the conduct of its business," which appears to be a broader grant of authority than is currently found in the statute.

Additionally, sec. 62 omits AS 47.05.010(5) from DFCS's mandate. That paragraph currently declares that DHSS shall: "cooperate with the federal government in matters of mutual concern pertaining to adult public assistance, the Alaska temporary assistance program, and other forms of public assistance." EO 119 would keep that mandate within Health (*see* sec. 39). It is unclear why this paragraph would remain under Health.

Finally, sec. 62 makes substantial revisions to AS 47.05.012. Language from that statute would be codified at AS 47.06.030 to apply to DFCS.⁷ The current statute includes 16 paragraphs identifying categories of material that may be incorporated in future department regulations. However, the new statute that sec. 62 enacts would only include one such category.

Sec. 73. This section amends AS 47.30.660. The resulting change to that state would require Health to "administer AS 47.30.655,"⁸ which is a statute codifying the purpose and principles of a 1981 revision to Alaska's civil commitment statutes.

Section 73 would also mandate that the Mental Health Trust Authority must now prepare its comprehensive mental health program plan with both Health and DFCS. This appears to create a substantive change in law.

Additionally, sec. 73 simply omits paragraphs (10) - (16), which exist in the current statute. These paragraphs should have been included in the document regardless of whether or not the order amends them. As a result of the omission, the citation changes that EO 119 makes were not made to paragraphs (14) and (15), even though those two paragraphs contain the same citation span that is amended in (3), (8), and (9). This appears to be an oversight by the drafters, but it will result in inconsistent interpretation of the duties assigned to Health under AS 47.30.660(b).

Secs. 74 - 88. All of these sections remove a citation to AS 47.30.660, which may create a substantive change in law. (AS 47.30.660 is amended by sec. 73, as discussed above.) It appears that the order omits AS 47.30.660 because that section would be administered by Health, while the remaining sections cited in these statutes would be administered by DFCS. Additionally, sec. 88 changes the span for which the definitions in AS 47.30.915 apply, so the term "department" would no longer be defined for AS 47.30.660.

Section 85 also removes a citation to Article 8 within AS 47.30, which likely results in a substantive change. (Article 8 relates to voluntary admission to a medical facility for mental health treatment.) And sec. 85 appears to contain a typo: page 70, line 31 should probably contain the same citation as line 26. However, line 31 omits AS 47.30.670 -

⁷ EO 119, page 59, line 17.

⁸ EO 119, page 65, lines 14 – 15 and 28 and page 66, lines 2 - 3.

47.30.695.

Sec. 130. This section repeals AS 47.32.900(5), which defines "crisis stabilization center." EO 119 does not replace this definition anywhere else in the Alaska Statutes. This is a substantive change of law that will create unintended problems. For example, AS 12.25.031 cites to this definition.

Sec. 141. This section would enact an uncodified section of law that instructs both Health and DFCS to share confidential information with each other. This seems to be a substantive change in law, as it would grant the departments authority to disclose information with another department that would otherwise be confidential.

Secs. 142 - 145. The sections assign functions to both departments and there appears to be ambiguous overlap in the form of chapters to which both new departments would be assigned responsibilities. For example, sec. 142 instructs the revisor to replace a reference to DHSS with a reference to Health in AS 47.14.990(6).⁹ However, AS 47.14 codifies juvenile programs and institutions, so this change would result in both Health and DFCS overseeing this chapter.

Another problem exists with AS 47.14.400(c): sec. 143 instructs the revisor to change the reference in this statute to read "commissioner of health,"¹⁰ while sec. 145 instructs the revisor to change the reference to read "commissioner of family and community services."¹¹

Sections 142 - 145 contain several other problematic errors like these.

Conclusion. As documented above, it appears that this executive order would impermissibly create substantive changes to existing law. However, this is a lengthy, complex, and dense executive order and it is possible that additional legal questions and issues may exist. The executive order also contains multiple errors and technical issues that cannot be corrected by the revisor and editor through the enrollment process. I advise that if you have any questions about specific sections of the executive order, that you direct them to the governor's office.

If you have questions or if I may be of further assistance please advise.

ASD:boo
21-025.boo

⁹ EO 119, page 101, line 14.

¹⁰ EO 119, page 103, line 21.

¹¹ EO 119, page 106, line 14.

LEGISLATIVE AFFAIRS AGENCY LEGAL MEMORANDUM DATED JULY 9, 2021

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MEMORANDUM

July 9, 2021

SUBJECT: Proposed Edits to Executive Order 119
(EO 119; Work Order 32-GS1695\A)

TO: Senator David Wilson
Attn: Jody Simpson

FROM: Andrew Dunmire 
Legislative Counsel

You have shared a document containing hand edits and inserts for Executive Order 119 and have asked whether the proposed changes would resolve the concerns raised in a memo written by this office on March 5, 2021. While the prior memo noted some minor technical errors, the memo primarily documented instances in which EO 119 impermissibly enacted substantive additions or revisions to the law. As noted on page 1 of that memo: "Article III, sec. 23 of the Alaska Constitution grants the governor authority to reorganize executive departments. To accomplish this, the governor may issue executive orders to reassign or transfer executive branch functions, but he may not delete or add functions or make other substantive changes."

The edits contained in the document you shared address some, but not all, of the errors documented in the prior memo.

Section 2. In EO 119, this section substantively changed existing law by amending it to prevent registered nurses from being permitted to pronounce the death of a patient at the Alaska Pioneers' Home or the Alaska Veterans' Home. The hand edits delete sec. 2 from EO 119, thereby resolving the problem.

Sections 3, 4, and 11. In EO 119, these sections created new positions on the Controlled Substances Advisory Committee, the Criminal Justice Information Advisory Board, and the Council on Domestic Violence and Sexual Assault. The hand edits remove these sections from the executive order, thereby resolving the problem.

Section 15. This office's prior memo noted that sec. 15 of EO 119 may enact a substantive change by removing "to the Department of Health and Social Services" from a statute authorizing the legislature to appropriate money for juvenile justice and temporary assistance. You shared a memo from the Department of Law, dated March 23, 2021, with this work order. That memo notes that the change in sec. 15 was included because juvenile justice and temporary assistance will now be overseen by the

Department of Health ("Health") and the Department of Family and Community Services ("DFCS"). Department of Law assistant attorney general Susan Pollard concluded that "this does not make a substantive change." Having reviewed her reasoning, she is probably correct – it appears that sec. 15 does not enact a substantive change to the law, as it still permits the legislature to appropriate funds out of the existing account for the same two purposes that are currently authorized by AS 25.27.125(b).

Section 16. The prior memo from this office pointed out that sec. 16 would add the commissioner of DFCS to the Alaska State Emergency Response Commission, which is a substantive change to the law. While the memorandum from Susan Pollard indicates that sec. 16 is removed in the hand edits, the proposed edits to EO 119 do not remove sec. 16 or otherwise address this problem.

Sections 17 - 18. This office's prior memo pointed out that secs. 17 and 18 add language to AS 37.05.146(c) that reference "fees received under AS 47.32" and noted that language was problematic because both Health and DFCS would have authority over fees received under AS 47.32. The Department of Law's memo argues that "the introductory language to both paragraphs limits the fees received to those collected by the applicable department. This eliminates the possibility of duplicative fees, as each department has authority over specific licenses and certificates." While that is an accurate statement, the March 5, 2021, memo from this office did not raise a concern that secs. 17 and 18 would result in duplicate fees – instead, that memo pointed out that EO 119 would result in two departments having authority over fees received under AS 47.32. The Department of Law may be correct that this does not create a substantive change to the law, but the proposed edits do not resolve the issue identified in this office's memo.

Section 30. This office's prior memo raised a concern that sec. 30 would expand the power of the commissioner of Health. That concern was based upon a drafting error in EO 119 (the span of paragraphs in (a)(1) - (8) was missing the dash). The document you submitted has corrected that drafting error.

Sections 31 and 33. In the prior memo, this office advised that sec. 31, operating in conjunction with sec. 36, neglected to grant rulemaking authority to either Health or DFCS for Article 1 (Mental Health Trust Authority) or Article 7 (Alaska Mental Health Board) within AS 47.30. The hand edits on page 41, appear to correct this oversight for Article 7. The Department of Law's memo states that Article 1 "is not part of the span citations; the authority is moved to AS 44.25 in sec. 28 because, despite the statutes being housed in Title 47, it is established within the Department of Revenue."¹ I am unable to locate where that rulemaking grant is found in sec. 28 and thus cannot confirm that the proposed edits address the concern stated in this office's prior memo.

Section 35. The hand edits delete all definitions except that for "board." This rectifies one error documented by this office's prior memo – but the proposed edits do not correct the

¹ Department of Law memo, March 23, 2021, page 2.

span citation found on page 33, line 4. That citation still reads "AS 44.29.610 - 44.29.670" when it should cite to AS 44.29.600 - 44.29.670.

Section 40. The proposed deletion and insert for this section attempt to address the issue raised by this office's prior memo, but the insert introduces yet another drafting error into EO 119. The insert (found at the bottom of page 110 of the document you submitted) cites to "AS 47.05.010 - 47.05.190" when it should cite to AS 47.05.010 - 47.05.290.

Section 61. This office's prior memo noted that sec. 61 is repealed and reenacted in EO 119 rather than amended. While the Drafting Manual favors an amendment for edits of this nature, it does not create a legal problem.

Section 62. It appears that the proposed edits are responsive to the concerns raised in this office's prior memo. However, the document also contains an insert to sec. 62 of the draft that duplicates AS 47.05.015, AS 47.05.040, and AS 47.05.040 at proposed secs. 47.06.070 – 47.06.090. This was presumably done so that those statutes would apply to DFCS and not just Health. This does not appear to make a substantive change in the law.

Section 73. The proposed edits appear to fix the problems highlighted in this office's prior memo.

Sections 74 - 88. The proposed edits delete these sections from EO 119, thereby removing the issues raised in this office's memo.

Section 130. The edit in this section removes the repeal of AS 47.32.900(5), which was likely a drafting error in EO 119.

Section 141. The proposed edits delete this section from EO 119, thereby removing the issue raised in this office's memo.

Sections 142 - 145. This office's prior memo pointed out that there are a number of drafting errors in EO 119. One example, detailed in that prior memo, is that sec. 143 instructs the revisor to replace a reference in AS 47.14.400(c) to read "commissioner of health" while sec. 145 instructs the revisor to replace that same reference to read "commissioner of family and community services." The proposed edits do not fix this problem.²

Conclusion. The proposed edits you shared with this office appear to rectify some, but certainly not all, of the numerous unconstitutional changes of law that this office identified in EO 119. The new edits also introduce some new drafting errors into the executive order.

² Compare page 103, line 21, with page 106, line 14.

Senator David Wilson

July 9, 2021

Page 4

As stated in this office's prior memo, EO 119 "is a lengthy, complex, and dense executive order and it is possible that additional legal questions and issues may exist." That remains true, despite the fact that the Department of Law took considerable steps toward addressing this office's concerns. If the governor reintroduces EO 119 during the next session, it is likely that even more errors will come to light. If this material were introduced as a bill, those errors could be identified in committee hearings and fixed via the amendment process. However, if it is once more introduced as an executive order the legislature will lack the ability to amend the document in response to discovered errors and will therefore be constrained in its ability to scrutinize or fine tune the department split.

If I may be of further assistance, please advise.

ASD:lme

21-320.lme

LEGISLATIVE AFFAIRS AGENCY LEGAL MEMORANDUM DATED JANUARY 14, 2022

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MEMORANDUM

January 14, 2022

SUBJECT: Proposed revisions to EO 119 (Work Order No. 32-GS1695)

TO: Senator David Wilson
Attn: Jody Simpson 

FROM: Andrew Dunmire
Legislative Counsel

Last session, the governor introduced an Executive Order 119 (EO 119), which proposed to divide the Department of Health and Social Services (DHSS) into the Department of Health (Health) and the Department of Family and Community Services (DFCS).¹ You have submitted a new draft of that executive order (EO) and asked for a legal review of five specific areas. The governor is permitted under art. I, sec. 23, Constitution of the State of Alaska to reorganize the executive branch via executive order. Dividing one department into two departments is a permissible use of the executive order and there is precedent for doing so.² However, the governor's authority is limited to "the organization of the executive branch on in the assignment of functions among its units." .

Below is a limited analysis of the draft EO that you provided; this analysis was confined to the sections and questions that you specifically flagged for review. We provide this analysis for your use in your capacity as a legislator. This memo should not be construed as an endorsement of any section of the EO or approval of the EO.

Indirect expenditure reports (page 7, lines 1 - 21). The new EO proposes to amend AS 24.20.235(a) by adding a new paragraph that establishes 2027 as the first year in which a report analyzing the indirect expenditure report created under AS 43.05.095 will be due to the legislature. The current version of AS 24.20.235(a) makes that same report for DHSS due in 2015 and every sixth year beyond that, meaning the next report would be due in 2027. The new paragraph added by the EO establishes 2027 as the first year the report will be due for Health and DFCS and therefore retains the existing six-year reporting cycle. This section appears to be consistent with the governor's power to reorganize the executive branch.

¹ The governor ultimately withdrew the Executive Order.

² See Executive Order No. 55, creating the Department of Corrections by separating it from DHSS.

Licensing fees (page 8, line 16 through page 9, line 16). This section amends AS 37.05.146(c)(77) and creates AS 37.05.146(c)(80) in order to clarify which entities' licensing fees apply to Health and which to DFCS. Both paragraphs cite AS 47.32.010(b), which is repealed and reenacted in sec. 79.³ Reading secs. 15 and 16 in conjunction with sec. 79, this appears to permissibly split existing authority between the two new departments.

Appointing DFCS commissioner to board (page 16, lines 13 - 15). Currently, AS 47.30.041 states that the commissioners of DHSS, the Department of Natural Resources, and the Department of Revenue, or their designees, serve as advisors to the Alaska Mental Health Trust Authority's board of trustees. The legislature created the Alaska Mental Health Trust Authority in 1991, and via the legislative process decided to name the above three commissioners as advisors to the board of trustees.⁴ The EO draft you submitted repeals AS 47.30.041⁵ and recodifies it at AS 44.25.260. However, the EO also amends the language so that it now names the commissioners of Health and DFCS as advisors to the board.

An argument could be made that this changes the law. The legislature decided in 1991 to name three specific commissioners as advisors to the Alaska Mental Health Trust Authority's board of trustees. The EO that you submitted is inconsistent with the current statute because it would enact legislation that appoints a fourth commissioner advisor.

Integrated comprehensive mental health program (page 30, lines 14 - 18; page 30, line 29 through page 31, line 3; page 44, lines 20 - 23; page 45, lines 3 - 6). In EO 119, sec. 31 amended AS 44.29.022(d) so that Health would only have authority to adopt fee-for-services regulations related to arts. 4 and 5 of AS 47.30. Section 36 of EO 119 provided similar authority for arts. 6 and 8 of AS 47.30. However, EO 119 repealed arts. 1 and 7 of AS 47.30 and reenacted the articles within AS 44.25 and did not assign either Health or DFCS authority to adopt fee-for-services regulations related to those articles.

In the new draft EO, AS 44.29.022(d), 44.29.024(c), AS 44.30.030(c), and 44.30.040(c) have all been amended to grant agency authority to adopt a regulation that establishes fees for services "that are part of the integrated comprehensive mental health program under AS 44.25.200 - 44.25.295 and AS 47.30" The spanned statute citation (AS 44.25.200 - 44.25.295) is art. 4 (Alaska Mental Health Trust Authority) in the

³ Page 71, line 5 through page 72, line 6. It is unclear why the drafter of the executive order repealed and reenacted AS 47.32.010 instead of amending it, as the amendments to that section are neither numerous nor complicated.

⁴ Sec. 26 ch. 66 SLA 1991; HCS CSSSSB 65(FIN).

⁵ Page 90, line 12.

statutory scheme enacted by the executive order.⁶ Those same statutes are currently enacted in art. 1 of AS 47.30.⁷

It is unclear whether the changes made in this EO address the problem in EO 119 that was identified by this office: that neither DFCS nor Health would have a statutory grant of authority to adopt fee-for-services regulations to implement arts. 6 and 8.

Governor's Council on Disabilities and Special Education (page 92, lines 19 - 31). In the draft EO, sec. 130 enacts an uncodified section of law that explicitly states that the EO "shall have no effect on the substantive work of the Governor's Council on Disabilities and Special Education established under AS 47.80." The intent and effect of this provision is unclear. This language appears to be novel for an executive order.

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⁶ Page 12, line 9 through page 23, line 2.

⁷ AS 47.30.010 - 47.30.061.