

ALASKA STATE LEGISLATURE
HOUSE HEALTH AND SOCIAL SERVICES STANDING COMMITTEE

February 19, 2022

3:06 p.m.

MEMBERS PRESENT

Representative Liz Snyder, Co-Chair
Representative Tiffany Zulkosky, Co-Chair (via teleconference)
Representative Ivy Spohnholz
Representative Ken McCarty (via teleconference)
Representative Mike Prax

MEMBERS ABSENT

Representative Zack Fields
Representative Christopher Kurka

COMMITTEE CALENDAR

EO 121: DEPARTMENT OF HEALTH AND SOCIAL SERVICES REORGANIZATION

PREVIOUS COMMITTEE ACTION

No previous action to record

WITNESS REGISTER

ADAM CRUM, Commissioner
Department of Health and Social Services
Juneau, Alaska

POSITION STATEMENT: Provided comments and responded to questions during the hearing on EO 121.

ANDREW DUNMIRE, Legislative Counsel
Legislative Legal Services
Legislative Affairs Agency
Juneau, Alaska

POSITION STATEMENT: Provided information and responded to questions during the hearing on EO 121.

STACIE KRALY, Director
Civil Division (Juneau)
Department of Law
Juneau, Alaska

POSITION STATEMENT: Answered questions during the hearing on EO 121.

ACTION NARRATIVE

[3:06:04 PM](#)

CO-CHAIR LIZ SNYDER called the House Health and Social Services Standing Committee meeting to order at 3:06 p.m. Representatives Prax, Spohnholz, McCarty (via Teams), Zulkosky (via Teams), and Snyder were present at the call to order.

EO 121: Department of Health and Social Services Reorganization

[3:07:11 PM](#)

CO-CHAIR SNYDER announced that the only order of business would be Executive Order 121: Department of Health and Social Services Reorganization.

CO-CHAIR SNYDER reviewed that EO 121 would bifurcate the Department of Health and Social Services (DHSS) to the Department of Health (DOH) and the Department of Family and Community Services (DFCS). A previous version had been introduced last session [as EO 119], but it was withdrawn. The committee heard an overview of EO 121 on 2/8/22. Referring to the memorandum ("memo") from Legislative Legal Services and to the response documents received from the Department of Law (DOL) and DHSS, she stated that a great deal of information is before the committee. She said the focus of the hearing would be on the legality and impact of EO 121. She reviewed the process the committee takes when evaluating an executive order.

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CO-CHAIR SNYDER introduced the five categories directly related to EO 121: board and commission compositions; potential broadening of authority; precedent on the scope of an executive order; drafting errors on potential policy changes and implications; and other potential substantive changes.

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ADAM CRUM, Commissioner, Department of Health and Social Services, expressed that the bifurcation of DHSS is a substantial undertaking that is important for Alaska. He said the department had considered the feedback of stakeholders, the legislature, and Legislative Legal Services when drafting EO

121. He commended DOL for its efforts. He emphasized the need DHSS has for separate departments.

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ANDREW DUNMIRE, Legislative Counsel, Legislative Legal Services, Legislative Affairs Agency, acknowledged that he had drafted the aforementioned memo analyzing EO 121. He specified that Legislative Legal Services takes no position on EO 121. He explained that reviewing an executive order would mirror the process of editing and revising bills. Errors or issues would be identified for consideration by the legislature, in regard to its decision-making process. He said, this is done "with a fine-tooth comb."

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CO-CHAIR SNYDER asked Commissioner Crum to address issues regarding the composition of boards and commissions. She directed attention to the following boards and commissions: Section 14, regarding the emergency response commission; Section 27, regarding the Alaska Mental Health Trust Authority in an advisory role; Section 35, regarding the Governor's Council on Disabilities and Special Education and the creation of an annual plan; Section 35, regarding the Alaska Commission on Aging; and Section 116, regarding the Interdepartmental Coordinating Committee. She observed that these would involve the new commissioner of DOH, as opposed to DFCS. She questioned the implications of the new arrangement and the roles each commissioner would assume.

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COMMISSIONER CRUM replied that EO 121 was drafted by alignment. He explained that DOH would be assigned aspects of processing and payments for Medicaid, while direct care and facility-based functions [for Medicaid] would be assigned to DFCS. He stated that DFCS would be assigned the Pioneer Homes and the Alaska Psychiatric Institute, which he characterized as being licensed hospitals. He added that these institutions must abide by specific state and federal rule sets. He said because DOH deals with programs and program management, it would be tasked with managing the services and grants while setting up the community providers. Considering the aforementioned boards, he said, the decision was made to keep them in DOH. He explained that the thought was to have two commissioners holding seats on the boards; however, adding a second commissioner was called into

question. It was decided that the most appropriate commissioner would be chosen, even though a "gap" would be left in the system.

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REPRESENTATIVE PRAX concurred with Commissioner Crum. He expressed the understanding that adding more commissioners could happen at a later time.

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MR. DUNMIRE, in response to Representative Spohnholz, stated it is not disputed that the governor has the authority under the Constitution of the State of Alaska to move positions around within the executive department. He voiced that this is a permissible use of power; however, the legislature would be able to decide whether to disapprove of the executive order or to introduce legislation to amend it in some way.

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MR. DUNMIRE, in response to Representative Prax, stated that it is the legislature's prerogative to create boards and commissions and define them in statute. In response to a follow-up question, he confirmed it would be permissible to use executive power to switch the roles of the commissioner within a principle department.

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CO-CHAIR ZULKOSKY questioned what the implications would be if the executive order made substantive changes to law.

MR. DUNMIRE responded that the question is difficult. He offered his understanding that there has never been an executive order which has been challenged in a meaningful way.

CO-CHAIR ZULKOSKY, clarifying the question, asked whether Mr. Dunmire's memo had alluded to the possibility of the executive branch unintentionally usurping legislative authority.

MR. DUNMIRE confirmed that this is a concern; however, the line where the governor would have gone too far is not well defined.

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CO-CHAIR SNYDER, following the line of questioning, asked whether the legislature would determine its own "comfort level" in terms of approving a particular executive order.

MR. DUNMIRE responded in the affirmative. He specified that in his position the issue is a legal question, while for the legislature it is a political question.

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STACIE KRALY, Director, Civil Division (Juneau), Department of Law, offered clarification regarding the idea of a substantive change. She said executive orders change law, which means there will be changes to a number of statutes. The Constitution of the State of Alaska allows the executive branch to make changes to the organization of the executive branch or in the assignment of function. She emphasized that EO 121 would reorganize a function; however, EO 119 was problematic because it would have added a commissioner to a board or commission, and this would have changed state law, which is not an assignment or a reorganization. She indicated the addition of another commissioner should be done through a bill. She explained that the substantive change is not the legal standard on whether EO 121 is constitutional; the standard is whether the change in statute results in a reorganization or reassignment of a function.

MR. DUNMIRE concurred that the permissible scope according to the constitution is "resetting functions and moving departments around and things like that." However, he stated that he only partially agrees with Ms. Kraly's comments about the term "substantive." He said it is the legislature's prerogative to write statute, and the governor can amend statute by executive order. He stated that the question would be whether this becomes substantive to the point that the legislature or the court would take action to invalidate the executive order. He described this as "a large gray area."

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REPRESENTATIVE SPOHNHOLZ requested that Mr. Dunmire speak about the differences between the responsibilities of the legislature versus that of the administration.

MR. DUNMIRE, in response, gave an example of a governor creating new law, which would be unconstitutional. On the other hand, he said, the governor can move people, positions, and assign

functions, but to do this would require a change in statute. He said this is the "gray area."

REPRESENTATIVE SPOHNHOLZ expressed the opinion that there is not a disagreement between the administration and Legislative Legal Services regarding the need for legal changes to ensure the executive order can be moved forward. She stipulated there would need to be clarity. She requested background information, or case law examples, in order to understand "the bright line between ... what is administrative in nature and what is policy in nature."

MR. DUNMIRE answered that he has done research and found there is "not authority out there establishing a bright line rule."

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MS. KRALY, in response to Representative McCarty, confirmed that the legislature is given 60 days to respond to an executive order, and if it does not respond, the executive order [is signed into law]. In response to a follow-up question regarding reorganization versus reassignment, she explained that under statute this is the standard as to what can happen via an executive order.

CO-CHAIR SNYDER added that it is up to the legislature to decide whether this is the best course of action.

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REPRESENTATIVE PRAX, regarding the choice of a commissioner, observed that either commissioner would be appropriate. He expressed the opinion that at this stage "we should let it go at that."

[3:45:12 PM](#)

REPRESENTATIVE SPOHNHOLZ asked whether the administration had considered introducing legislation which would address the issues of the "dividing line."

MS. KRALY responded in the negative. She talked about allowing the executive branch the ability to manage itself. She suggested the introduction of a bill could affect Medicaid, foster care, and other programs. She spoke about the separation of powers. Concerning a bill, she said, the governor would have veto power; concerning an executive order, the legislature would

have veto power. She stated that the language in EO 121 exemplifies appropriate use of an executive order.

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CO-CHAIR ZULKOSKY gave an example of an executive order in Washington State. She questioned the work done on the executive order during the interim and suggested more work would have made sure everyone was on the same page.

MS. KRALY responded that the administration has been working on EO 121 for 15 months with robust stakeholder engagement. She said that the administration withdrew EO 119 because it needed work. She acknowledged that a lot of effort could have occurred in the last six months; however, DOL did not receive questions from Legislative Legal Services or others. She cautioned against comparing Alaska with Washington.

CO-CHAIR ZULKOSKY, to ensure legislators and policy makers were included in the executive order, questioned DOL's intention regarding "the ambiguity around the separation of powers."

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COMMISSIONER CRUM responded that the plan has not changed from EO 119, rather the changes concerned the drafting aspects. He said this is not a policy call, rather it would be taking "the exact definition of Article III, Section 23, and putting together the executive branch for the best administration of function." He said the administration made its intent clear.

CO-CHAIR ZULKOSKY, addressing Mr. Dunmire, questioned whether choosing one commissioner over the other would be substantive.

MR. DUNMIRE answered it is substantive in the sense that the legislature gets to pick who sits on a board or commission.

CO-CHAIR SNYDER remarked that adding or subtracting programs, or the authorities under them, could be considered "sticky areas." She indicated that the question is whether the legislature is comfortable setting the precedent of EO 121, given its size and scope.

[4:00:18 PM](#)

MS. KRALY, regarding the timing of EO 121, responded to Representative Spohnholz that the executive order had been

introduced on the first day of the [2022] session. After EO 119 had been withdrawn in 2021, the administration agreed that everyone would work collaboratively with Legislative Legal Services on drafting issues and concerns. She said the administration gave Legislative Legal Services a draft on October 30, 2021, with the instructions to meet with DHSS and DOL. She said Legislative Legal Services answered some questions from [the administration] on January 14, 2022, but did not give a full review until February 14, 2022. She clarified that when the executive order was 90 percent done and essentially finished, it was shared with Legislative Legal Services; it only needed to be proofed and reviewed.

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MS. KRALY, in response to Co-Chair Zulkosky, said the draft was provided to Senator David Wilson's office.

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COMMISSIONER CRUM added that there was an opportunity to reach out formally and informally. He spoke about sharing the executive order with the leadership of both bodies.

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MR. DUNMIRE confirmed [Legislative Legal Services] is the attorney for the legislature and does not draft or advise DOL. He said he takes issue with the timing laid out by Ms. Kraly. He stated that it is not the job of Legislative Legal Services to endorse executive orders - a disclaimer that is included with every memo.

MS. KRALY, in response to Co-Chair Snyder, offered her understanding that Senator Wilson had received a copy of the memo on October 30, 2021. She added there is an e-mail which reflects that the copy was sent to the Legislative Affairs Agency.

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REPRESENTATIVE SPOHNHOLZ asked whether there was a reason the memo was not supplied to the chairs of the House Finance Committee.

COMMISSIONER CRUM, in response, explained that Senator Click Bishop had requested that he and Legislative Legal Services work

together during the interim to put together information which could be shared in advance. To a follow-up question, he expressed that he has tried to be "open on this" and addressed questions which have arisen from legislators. He reiterated that EO 121 presents the same plan as EO 119, and it was the legal aspects which were in question. He said this is why [the administration's] primary efforts were "working with Legislative Legal [Services]."

REPRESENTATIVE SPOHNHOLZ expressed disappointment that the information was shared with the Senate and not the House.

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CO-CHAIR SNYDER said she would like more information regarding the broadening of authority.

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MR. DUNMIRE expressed the opinion that broadening the authority of a commission would be a permissible use of executive-order power. He added that whether this would rise to the level of "being so blatantly unconstitutional that it renders the executive order void" is a separate question. He mentioned Section 133 which grants the department the authority to adopt regulations to implement the executive order. He said rule making and administrative code derive power from the legislative branch. He noted Section 18 has a drafting change. He said, removing this qualifier would permit DOH to run any state program, not just those enumerated in the current state statute. He indicated this is a "gray area."

CO-CHAIR SNYDER, in terms of the issue of scope of authority, mentioned Section 29-32 and Section 65. She asked whether expanding authority would be disallowed under an executive order.

MR. DUNMIRE responded in the affirmative.

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MS. KRALY reiterated that any addition or subtraction would be unconstitutional and concurred regarding the issue of expansion of authority. She expressed disagreement that the executive order has expanded authority. In particular, she pointed out the transitory language in regulation. She stated that the language in the back of [Section 133] does not include any

additional regulatory authority. She clarified that it allows the departments to amend and fix the regulations which currently exist, so they are properly assigned going forward. She emphasized this would be a necessary function to achieve the intent of EO 121, as it is the same regulatory authority that exists today.

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CO-CHAIR SNYDER, in response to Representative McCarty, assessed the legislature's process of reviewing executive orders. She stated that changes would have to be proposed through separate legislation.

MR. DUNMIRE, in response to Representative McCarty, clarified that although the personal bill deadline has passed, committees could still introduce bills.

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CO-CHAIR ZULKOSKY, regarding the expansion and broadening of powers, referred to Mr. Dunmire's memo and his remarks about Section 28, which would amend the statute allowing DOH to administer any state program, not just those in statute. She asked for Mr. Dunmire's perspective on the issue.

MR. DUNMIRE responded that this is an example of how Legislative Legal Services would not draft a statute. He explained that the language using "including" would mean "not limited to", and the changes effected by EO 121 would relate that DOH would administer state programs under the definition of "including" without a qualification. He stated that this would mean there is no limit to what could be included in the future.

CO-CHAIR ZULKOSKY, with a follow up, referred to the ambiguity in the current language in EO 121. She questioned whether the ambiguity could result in the unintentional expansion of authority of the commissioner of DOH.

MR. DUNMIRE responded that her interpretation is fair; however, this may not happen. He spoke to the specifics that Legislation Legal Services would follow.

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CO-CHAIR ZULKOSKY requested a follow-up question for clarification. She referred to AS 47.06.112 in the executive

order, which would drastically reduce the selection of documents DFCS would be able to use to adopt or amend regulations. She asked for Mr. Dunmire's and Ms. Kraly's assessments as to whether this would be considered a substantive change.

MR. DUNMIRE said he considers this to be substantive because it does not involve moving divisions around or reassigning functions. He said this would change the statute which authorizes the department to incorporate reference material when regulations are adopted.

MS. KRALY expressed the opinion that it would not be a substantive change, rather a reassignment of function. She advised that AS 47.05 is the "adoption by reference" statute. This statute provides a list of documents which do not need re-adoption every time a new version is introduced. She explained that departments are reassigned in regard to how those documents apply to the respective departments. She continued that this is a classic example of the reassignment of a function and the efficiency of an administration.

CO-CHAIR ZULKOSKY, regarding AS 47.0[5].112, asked whether this remains unchanged for the commissioner of DOH. She clarified that she would like to know whether DOL made changes to the current documents that the commissioner of DHSS is able to utilize. She added that while she appreciates the department's perspective regarding the assignment of documents to DFCS, excluding powers the statute provides seems to tread on legislative purview.

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CO-CHAIR SNYDER, in response to Representative Prax, clarified that the discussion involves page 62 of EO 121 and refers to the comparison of language in respect to materials which could be referenced by the two new departments.

MS. KRALY offered her understanding that AS 47.05.012 would not be amended under EO 121, rather it would remain as is. She said that DOH would need all of the documents incorporated by reference in the back of the bill. Looking to page 62, she said that the new statute, AS 47.06.030, pertains to the documents incorporated by reference for DFCS, which includes federal poverty guidelines and the diagnostic and statistical manual for mental disorders. Directing a response to Co-Chair Zulkosky, she stated that medical documents are added because they would be used for Medicaid related billing and program issues, which

would be under DOH. She added that these documents would not be used in the same context as they are now. The documents would apply to DOH and the billing side, whereas the same things would not be necessary for DFCS.

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The committee took an at-ease from 4:37 p.m. to 4:39 p.m.

[4:39:10 PM](#)

CO-CHAIR SNYDER clarified that a change in EO 121 would shorten the list of materials incorporated by reference to be utilized by DFCS, as compared to the existing list used currently by DHSS. She observed that the existing list would be maintained in its entirety for DOH. She restated that the question is whether the shortened list is appropriate and whether anything would be lost.

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CO-CHAIR ZULKOSKY spoke about the importance of DHSS, as it exists, and the removal of authority which had been granted originally by the legislature. She emphasized her concern about "protecting the institution and the precedence that would be set through such a substantive, meaty, executive order for future legislatures, for future administrations."

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REPRESENTATIVE SPOHNHOLZ requested that the administration provide a list of all legislators who had been provided a draft of EO 121, and the date each received the draft.

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REPRESENTATIVE PRAX shared his interpretation of AS 44.29.20, along with the executive order. He expressed the understanding that, in this context, DOH would not run anything more than itself. He questioned why Legislative Legal Services would interpret otherwise.

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MR. DUNMIRE answered by reiterating his previous statement which explained the interpretation of the word "including". In

response to a follow-up question, he explained that the word "including" broadens provisions rather than restricts them.

REPRESENTATIVE PRAX opined that "a reasonable person would not infer from this that [the Department of] Health could get into the business of the Department of Transportation." He opined that "we're tripping over words unnecessarily." He concluded that he has "agreed with the drafting process all along."

[4:51:07 PM](#)

CO-CHAIR SNYDER indicated that the committee may revisit some of these issues in the future.

CO-CHAIR ZULKOSKY expressed appreciation for the process.

[4:55:16 PM](#)

ADJOURNMENT

There being no further business before the committee, the House Health and Social Services Standing Committee meeting was adjourned at 4:55 p.m.