

February 13, 1974

HONORABLE BRENDAN T. BYRNE
Governor of New Jersey
State House
Trenton, New Jersey 08625

FORMAL OPINION NO. 1-1974

Dear Governor Byrne:

Chapter 357 of the Laws of 1973, approved December 28, 1973, established the Governor's salary at \$65,000, whereas Chapter 194 of the Laws of 1969 had established the salary at \$50,000. You have asked us to consider the legal propriety of your proposal to take the \$15,000 salary increase in increments of \$5,000 over a period of three years rather than to take the entire increase immediately as provided by the statute. We have concluded based upon our review of State law and precedents and the ruling of the Federal Cost of Living Council attached hereto that it would be proper for you to take the \$15,000 salary increase provided by Chapter 357 of the Laws of 1973 in increments of \$5,000.

An analysis of your proposal must begin with a consideration of the New Jersey Constitution which provides that:

"The Governor shall receive for his services a salary, which shall be neither increased nor diminished during the period for which he shall have been elected." Art. V, § 1, par. 10.

There does not appear to be any discussion of this provision in any proceedings of constitutional conventions. The provision appeared first in the 1844 Constitution, and there are no New Jersey cases construing it. Nonetheless, the same type of provision appears in the United States Constitution and in many other state constitutions regarding chief executive officers, legislators and judges.

The leading case construing such constitutional language is *O'Donoghue v. United States*, 289 U.S. 516, 53 S. Ct. 740, 77 L. Ed. 1356 (1932), which involved the provisions of Article 3, Section 1 of the United States Constitution. The Court in *O'Donoghue* stated that "the great underlying purpose which the framers of the Constitution had in mind" when they adopted this provision of the federal constitution was to prevent the commingling in the same hands of the essentially different powers belonging to distinct and separate branches of government. 289 U.S. at 529-530. The Court said:

"[E]ach department should be kept completely independent of the others— . . . in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments." 289 U.S. at 530.

The Court added that the provision denying the power to diminish the compensation of federal judges was made explicit:

"[I]n order, *inter alia*, that their judgment or action might never be swayed

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in the slightest degree by the temptation to cultivate the favor or avoid the displeasure of that department which, as master of the purse, would otherwise hold the power to reduce their means of support." 289 U.S. at 531.

The principle underlying Article V, Section 1, Paragraph 10 of the New Jersey Constitution is essentially the same as that discussed by the Supreme Court of the United States in *O'Donoghue*. The delegates to the 1844 Constitutional Convention no doubt concluded that if the Legislature could enact legislation during the term of a Governor which affected his salary, it could use this power to control or influence the Governor's actions as head of the executive branch of government. The constitutional prohibition against increasing or decreasing the salary of the Governor was therefore added to insulate him from such pressure.

In this instance, since the Legislature has fixed the salary of the Governor and could not itself either reduce or increase the stated amount, it would not undermine the independence of the office of the Governor if you were unilaterally to accept a lesser salary. Therefore, it is our opinion that you would not be acting in contravention of Article V, Section 1, Paragraph 10 by agreeing to take less than the \$65,000 salary established for your office.

There are also statutory provisions regarding the Governor's salary which must be considered before an answer to your inquiry can be given. N.J.S.A. 52:15-1 provides that, "The Governor shall receive such salary as shall be provided by law." Chapter 357 of the Laws of 1973 (N.J.S.A. 52:14-15. 104) provides that "...the annual salary of the Governor shall be fixed and established at \$65,000.00." And, with respect to the obligation of the State Treasurer to pay salaries, N.J.S.A. 52:14-15 provides that "...all officers and employees paid by the State shall be paid their salaries or compensation bi-weekly in a bi-weekly amount." Although there is authority for the proposition that a governmental official may not agree to accept less than the salary established by law for his office, (see, e.g., "Public Officers and Employees," 63 Am. Jur. 2d (1972), §§ 392-98; Annotation, *Validity and effect of agreement by public officer or employee to accept less than compensation or fees fixed by law, or of acceptance of reduced amount*, 160 A.L.R. 490 (1946)), it is our opinion that this principle, as articulated by the courts of this state, does not prohibit the implementation of your plan to voluntarily accept less than the full statutory salary of the office of Governor.

In *Vander Burgh v. County of Bergen*, 120 N.J.L. 444 (E. & A. 1938), a judge of an inferior court entered into a written agreement with Bergen County to accept a graduated deduction from his salary as set by statute, when, during the Depression, a state enabling statute made such agreements lawful. The judge later sued the County for the difference between what he had been paid and his statutory salary. The Court of Errors and Appeals held that the judge was estopped from claiming that his agreement to accept a reduced salary was unlawful as a violation of public policy. The court said:

"What is public policy as between a public officer and . . . an agency of government in normal times, does not as of course control the question of the salary or wage of a person in the public employ, payable from public funds, in a time of grave financial peril when the whole economic structure is trembling. Far from being against public policy, we think that, the constitution and the statutes permitting, the participation of those on the public

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payroll in the reductions submitted to by employees generally was an eminently patriotic, fitting and serviceable act." 120 N.J.L. at 451-52.

In a later case, the Supreme Court of New Jersey held that emergency conditions, such as the Depression, were not a prerequisite to the relinquishment of the full amount of a statutory salary. *Long v. Board of Chosen Freeholders of the County of Hudson*, 10 N.J. 380 (1952). However, the court in *Long* noted that a type of unfavorable economic condition existed even in that case, since the period of the claim for partially unpaid salaries was during the Second World War, and the court asked, rhetorically:

"Was it not for the common good for these jail guards, who accepted salary without complaint, to relinquish their claims to additional salary in order to ease the heavy burdens of the taxpayers in those emergent years?" 10 N.J. at 388.

It is of course apparent that in taking less than the full \$65,000 in 1974, you would be responding to the well-known economic ills affecting New Jersey at the present time. You have made it clear that you believe the entire \$15,000 salary increase is unjustified because it constitutes, in inflationary times, a 30% raise over the \$50,000 salary of your predecessor, and you have publicly questioned the impact such a raise would have on the demands of other public employees and on the overburdened taxpayers. It is beyond question that the reasons you have presented for accepting less than your full salary are similar to those discussed in the *Vander Burgh* and *Long* cases and that your decision therefore may be viewed, in the language of the court in *Long*, as "for the common good."

This conclusion draws additional support from the fact that the payment of the full salary provided by Chapter 357 of the Laws of 1973 might conflict with the Economic Stabilization Regulations adopted by the Federal Cost of Living Council. Since these regulations generally limit wage increases to 5.5%, the Cost of Living Council was asked to review the provisions of Chapter 357 increasing the salary of the Governor. In response to this inquiry, the Council replied:

"Upon consideration of the facts concerning this matter, including the fact that the salary of this position has not been increased since 1969, it is found that pursuant to Section 201.30 of the Economic Stabilization Regulations an exception to the general wage and salary standard is warranted sufficient to permit payment of the following increases: \$5,000 per year for the calendar year commencing January 1, 1974; \$5,000 per year for the calendar year commencing January 1, 1975; and \$5,000 per year for the calendar year commencing January 1, 1976."

It is of course well established that under the Supremacy Clause of the United States Constitution such provisions in a federal statute or regulation take precedence over conflicting provisions of state law. *Carleson v. Remillard*, 406 U.S. 598, 92 S. Ct. 1932, 32 L. Ed. 2d 352 (1972); *Swift & Co. v. Wickham*, 382 U.S. 111, 86 S. Ct. 258, 15 L. Ed. 2d 194 (1965). It also is well established that state law ordinarily should be interpreted so as to avoid any possible federal constitutional question.

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State v. Profaci, 56 N.J. 346 (1970); *Ahto v. Weaver*, 39 N.J. 418 (1963). However, since we have concluded that the action you propose is not inconsistent with state law in any event, it is unnecessary to explore further the impact of the Economic Stabilization Regulations.

Accordingly, it is our opinion that you may legally agree to accept less than the Governor's \$65,000 statutory salary. The appropriate action for you to take to effectuate a temporary reduction in the Governor's salary would be to execute a written instrument similar to that involved in *Long v. Board of Chosen Freeholders of the County of Hudson*, *supra*, indicating that you intend to temporarily waive a portion of the statutory salary in recognition of the prevailing adverse economic conditions and pursuant to the ruling of the Federal Cost of Living Council. The instrument should then be served upon the State Treasurer and a certified copy should be served upon the Director of the Division of Budget and Accounting. By acting in this manner, you would not be changing the statutory terms of the Governor's salary. Therefore, when the temporary reduction established by your unilateral waiver expires, you would be able to take the full Governor's salary of \$65,000 without violating the provisions of Article V, Section 1, Paragraph 10 of the State Constitution, which prevents the Governor's salary from being increased during his term of office.

Respectfully,

WILLIAM F. HYLAND
Attorney General

July 31, 1974

JOANNE E. FINLEY, M.D., *Commissioner*
New Jersey State Department of Health
Health and Agriculture Building
Trenton, New Jersey 08625

FORMAL OPINION NO. 2-1974

Dear Dr. Finley:

The Department of Health has asked for advice as to the extent to which health care facilities owned and operated by recognized religious organizations are exempted from the certificate of need requirements of N.J.S.A. 26:2H-1, *et seq.*, the "Health Care Facilities Planning Act."

The Legislature has conferred on the State Department of Health "the central, comprehensive responsibility for the development and administration of the State's policy with respect to . . . hospital and related health care services . . ." N.J.S.A. 26:2H-1. Almost every conceivable type of health care facility has been included by the Legislature within the Department's jurisdiction. The only kinds of facilities specifically excluded from the statute are those "institutions that provide healing