



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL
HARRISBURG, PA. 17120

February 25, 2016

Christopher B. Craig, Esq.
Chief Counsel
Pennsylvania Treasury
129 Finance Building
Harrisburg, PA 17120

Dear Mr. Craig:

On behalf of the State Treasury, you have requested a legal opinion, pursuant to the Commonwealth Attorneys Act, 71 P.S. § 732-204, concerning the authority of the State Treasurer to issue his warrant for the payment of requisitions submitted by the Governor's Office of Budget to pay the continuing operational expenses of the state correctional institutions that exceed the appropriation level established in the Fiscal Year 2015-16 General Appropriation Act, Act of December 29, 2015 (P.L. ___, No. 10A) ("Act 10A of 2015"). After careful review, we have concluded that the prohibition in Article III, Section 24 of the Pennsylvania Constitution and 72 P.S. § 3422 against the Treasury paying any money in excess of that appropriated is superseded to the extent the state law is in direct conflict with the United States Constitution or federal statutes.

As a threshold matter, Section 204(a)(1) of the Commonwealth Attorneys Act provides that, "[u]pon the request of the Governor or the head of any Commonwealth Agency, the Attorney General shall furnish legal advice concerning any matter or issue arising in connection with the exercise of the official powers or the performance of the official duties of the Governor or agency." 71 P.S. § 732-204(a)(1). The Commonwealth Attorneys Act further provides that the State Treasury shall not be considered a Commonwealth Agency for purposes of Section 204(a). 71 P.S. § 732-102 (defining the State Treasury to be a Commonwealth Agency only for purposes of Section 204(b) and 204(f) and 42 Pa.C.S. § 5110). As a result, this legal opinion is not binding on the State Treasury. Furthermore, please be advised that the protection from liability afforded recipients of binding opinions from the Attorney General under Section 204(a)(1) also does not apply to the State Treasury; therefore, reliance on this opinion is at the Treasury's discretion.

Factual Background

On December 29, 2015, Governor Wolf partially approved and signed Act 10A of 2015. As it pertains to this matter, the appropriation for state correctional institutions was reduced by the Governor from \$1.89 billion to the sum of \$956 million. You have indicated that the Treasury imminently expects the Department of Corrections to exhaust all funds appropriated for the

continued operations of the state correctional institutions. Despite this anticipated appropriation shortfall, you also indicated that the Treasury anticipates the receipt of requisitions from the Office of Budget to pay for continued operations of the state correctional institutions, including requisitions for salaries and benefits for employees, as well as food service, facility maintenance, health care, mental health care, drug interdiction programs, security operations, utility service, and safety systems.

State Law

Article III, Section 24 of the Pennsylvania Constitution provides:

No money shall be paid out of the treasury, except on appropriations made by law and on warrant issued by the proper officers; but cash refunds of taxes, licenses, fees and other charges paid or collected, but not legally due, may be paid, as provided by law, without appropriation from the fund into which they were paid on warrant of the proper officer.

Pa. Const. Art. III, § 24.

This provision establishes a constitutional requirement that the Treasury not disperse any money without an appropriation made by law and a warrant issued by the proper officer. These requirements are further supported and supplemented by Section 3422 of the Fiscal Code which provides, in relevant part, that, “[i]f the state treasurer shall pay out for any appropriation named in an appropriation bill, a greater sum than is named therein for each appropriation, . . . they shall be deemed guilty of a misdemeanor, punishable by a fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, for each and every offence.” 72 P.S. § 3422.

The Fiscal Code also establishes the procedures by which expenditure requisitions are submitted to the Treasury and by which the Treasury evaluates such requisitions. Of particular importance to the issue at hand, Section 1502 of the Fiscal Code provides that, “[r]equisitions shall be audited by the Treasury Department in accordance with generally accepted auditing standards and if they appear to be lawful and correct, the State Treasurer shall issue his warrant for the payment thereof.” 72 P.S. § 1502.

The United States Constitution and Federal Statutes Have Supremacy Over Conflicting Provisions of State Constitutions and State Statutes.

The Supremacy Clause of the United States Constitution, U.S. Const. Art. VI, Cl. 2, makes the United States Constitution and federal laws the supreme law of the land governing anything to the contrary in state laws or state constitutions. *Testa v. Katt*, 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947); *Knoll v. White*, 141 Pa. Cmwlth. 188, 194, 595 A.2d 665, 668 (1991). It is a

fundamental principle that state law that conflicts with federal law is without effect. *Council 13, AFSCME, AFL-CIO v. Rendell*, 604 Pa. 352, 380, 986 A.2d 63, 80 (2009). (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 4 L.Ed. 579 (1819)). Such a conflict arises where compliance with both state and federal laws or regulations is an impossibility or where state law stands as an obstacle to the accomplishments and execution of the full purposes and objectives of Congress. *Id.* at 81 (citing *Hillsborough County, Fl. v. Automated Med. Laboratories, Inc.*, 471 U.S. 707, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985)). Accordingly, if a conflict exists between the United States Constitution or federal statutes and the Pennsylvania Constitution or Pennsylvania Laws where it is impossible to comply with both federal and state law, the United States Constitution or federal statute would supersede the conflicting provision of the Pennsylvania Constitution or state law. However, the state law is displaced only to the extent that it actually conflicts with federal law. *Dalton v. Little Rock Family Planning Services*, 516 U.S. 474, 116 S.Ct. 1063, 134 L.Ed.2d 115 (1996).

In this matter, strict adherence to Article III, Section 24 of the Pennsylvania Constitution and 72 P. S. § 3422 would act as a complete bar to any and all payments for the Department of Corrections once it has completely exhausted all appropriated funds. However, from that moment going forward until such time as a new appropriation is made, zero payment would result in complete cessation of operation of the Department of Corrections and its state correctional institutions. Complete cessation of operation of the Department of Corrections would undoubtedly conflict with the requirements set forth by the United States Constitution. To the extent that the United States Constitution or federal statutes require action of the Department of Corrections, those provisions would supersede Article III, Section 24 of the Pennsylvania Constitution and 72 P. S. § 3422 and would be limited to the time period in which the Department of Corrections has completely exhausted all appropriations and to the scope of the actual conflict with the federal law.

The Pennsylvania Commonwealth Court has held that budget impasses and the absence of state funding appropriations do not allow the Commonwealth to forego its obligations with regard to certain federal programs. *Knoll*, 141 Pa. Cmwlth. at 195. In *Knoll*, the Commonwealth Court found it lawful for the Treasury to continue payment for distribution of benefits to recipients of federal programs based on the supremacy of federal law over Article III, Section 24 of the Pennsylvania Constitution. *Id.*

The Department of Corrections, likewise, has duties mandated by the United States Constitution and federal statutes that would be impossible to meet with complete cessation of operation. “When the state takes [a person] into custody and holds him there against his will, [both the United States and Pennsylvania Constitution impose] upon it a corresponding duty to assume some responsibility for his safety and general well-being.” *DeShaney v. Winnebago County Dept of Soc. Servs.*, 489 U.S. 189, 199-200, 109 S.Ct. 998, 1005, 103 L.Ed.2d 249 (1989); Pa. Const. Art. I, § 13. This affirmative duty to protect arises “from the limitation which [the state] has imposed on the [inmate’s] freedom to act on his own behalf.” *Id.* at 190.

The principle behind the Commonwealth’s obligation to provide for an inmate’s basic needs is relatively straightforward – the state “so restrains an individual’s liberty that it renders him

unable to care for himself, and at the same time fails to provide for his basic human needs – *e.g.*, food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.” *Id.* at 200. Specifically, the Eighth Amendment’s proscription against cruel and unusual punishment guarantees that prison officials “must provide humane conditions of confinement.” *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S.Ct. 1970, 1976, 128 L.Ed.2d 811 (1994); US Const. amend. VIII. To that end, prison officials have an obligation to ensure that inmates receive basic needs including “adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee [their] safety.” *Id.*

Courts have held that “deliberate indifference” to the basic human needs of prisoners will be considered a violation of the Eighth Amendment. *See e.g. Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d. 251 (1976) (holding that the deliberate indifference to serious medical needs of prisoners violates the Eighth Amendment proscription against cruel and unusual punishment.); *See also Inmates of Allegheny Cty. Jail v. Pierce*, 612 F.2d 754, 762 (3d Cir. 1979) (finding that deliberate indifference to serious medical needs is shown when prison officials have prevented an inmate from receiving recommended treatment or when an inmate is denied access to medical personnel capable of evaluating the need for treatment.).

Additionally, the Department of Corrections has certain obligations under the First Amendment to protect expressive activities for all inmates including speech, the free exercise of religion and access to courts. *See* US Const. amend. I; *see also Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987); *Cruz v. Beto*, 405 U.S. 319, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972).

Taken together, these myriad of duties impose inescapable requirements on the Department of Corrections to provide a minimum level of basic service and protection to inmates in its custody and control. If the Department of Corrections was forced to completely cease operation of state correctional institutions as a result of the application of Article III, Section 24 and 72 P. S. § 3422 prohibiting any payments following exhaustion of appropriated funds, it would be impossible to comply with these minimum requirements of federal law. *Council 13*, 604 Pa. at 380. Due to this conflict between the Pennsylvania Constitution and the myriad of applicable federal laws during the period once the Department of Corrections has completely exhausted its appropriations until any new appropriation is made, the applicable federal law supersedes Article III, Section 24 of the Pennsylvania Constitution and 72 P. S. § 3422.

Treasury Has Authority to Issue a Warrant for the Payment of any Requisition that Appears to be Lawful and Correct.

Pursuant to the Pennsylvania Fiscal Code, the Treasurer shall issue a warrant for the payment of a requisition only if it “appear[s] to be lawful and correct.” 72 P.S. § 1502. The statutory standard employed by the Treasurer is not one of absolute legal certainty, but rather, if the requisition “appears” to the Treasurer, in his sole discretion, to be “lawful and correct.” The

legislature's purposeful use of the conditional term "appears" is noteworthy, as it is an acknowledgment of the large number of expenditure requisitions that are presented daily to the Treasurer often accompanied by little legal guidance and lack in absolute legal certainty. As a consequence, the Fiscal Code permits the Treasurer to exercise his independent judgment when considering the legality of an expenditure requisition. This independent judgment would certainly apply to his analysis of whether an individual requisition for payment of a Department of Correction's operating expense would be authorized due to the supremacy of the United States Constitution or federal statute over Article III, Section 24 of the Pennsylvania Constitution or 72 P. S. § 3422.

It will be at the discretion of the Treasury whether any individual requisition "appear[s] to be lawful and correct" based on the supremacy of the United States Constitution or federal statute superseding Article III, Section 24 of the Pennsylvania Constitution and 72 P. S. § 3422.

Conclusion

As the Department of Corrections must continue to operate to the level required by the United States Constitution and any applicable federal statutes, the prohibition in Article III, Section 24 of the Pennsylvania Constitution or 72 P. S. § 3422 against the Treasury paying any money in excess of that appropriated is superseded to the extent the state law is in direct conflict with the United States Constitution or federal statutes.

Finally, you are advised that, in accordance with Section 204(a) (1) of the Commonwealth Attorneys Act, 71 P.S. §732-204 (a) (1), you are not required to follow the advice set forth in this Opinion and are not protected from liability for doing so in any way.

Sincerely yours,



Bruce R. Beemer
First Deputy Attorney General

Cc: Honorable Timothy A. Reese
Honorable Randy C. Albright
Honorable John E. Wetzel
Honorable Denise J. Smyler
Brian D. Zweiacher, Esquire
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