

OFFICIAL OPINION NO. 91-1

State System of Higher Education—Governor's Authority to Reduce System's Appropriation.

1. The Governor does not have the constitutional or statutory authority to order the reduction of the State System of Higher Education's appropriation in aid of efforts to maintain a balanced operating budget for Commonwealth government.
2. The Board of Governors of the State System of Higher Education is authorized to cooperate with the Governor in addressing budget difficulties as long as doing so is not inconsistent with the State System's objectives.

July 9, 1991

F. Eugene Dixon, Jr.
Chairman
Board of Governors
State System of Higher Education
P.O. Box 178
Lafayette Hill, PA 19444

Dear Chairman Dixon:

On behalf of the Board of Governors of the State System of Higher Education, you have requested my opinion concerning the Governor's legal authority to direct the reduction of the System's appropriation after its enactment and the extent of Board members' personal liability should they draw the full appropriation from the State Treasury notwithstanding such direction from the Governor.

The State System of Higher Education is established by statute as "a body corporate and politic constituting a public corporation and government instrumentality. . . independent of the Department of Education." 24 P.S. § 20-2002-A. It consists of the fourteen state-owned universities and is governed by the Board of Governors who are authorized by statute to exercise all of its corporate powers. 24 P.S. § 20-2003-A.1. Funds for the operation of the System and its member universities are appropriated annually by the General Assembly. 24 P.S. § 20-2006-A.

At the request of the Governor, the Board of Governors voted on April 18, 1991, to transfer \$18.1 million to the Commonwealth's General Fund principally by means of a partial lapse of the System's remaining 1990-91

subsidy. The lapse is accomplished by a Board decision not to draw a specified sum from the State Treasury. The amount not drawn returns to the General Fund at the end of the fiscal year.

The Board acted consistent with a legal opinion provided by the System's Chief Counsel who advised the Board that, faced with projected revenue shortfalls, the Governor is authorized to impose a limited budget cut upon the State System as part of an overall effort to maintain a balanced operating budget for all of Commonwealth government. The Chief Counsel interpreted the Pennsylvania Constitution, Article VIII, Sections 12 and 13, to require "the development and maintenance of a balanced operating budget for Commonwealth government" and to "place a corresponding duty upon the three co-equal and independent branches of government to ensure that deficits do not occur." This duty, the Chief Counsel reasoned, confers upon the Governor "implied authority" to adjust the appropriated expenditures of Executive Branch agencies and instrumentalities, including the State System of Higher Education, as necessary to avoid a deficit.

Article VIII, Sections 12 and 13, provide in relevant part as follows:

§ 12. Governor's Budget and Financial Plan

Annually, at the times set by law, the Governor shall submit to the General Assembly:

(a) A balanced operating budget for the ensuing fiscal year setting forth in detail (i) proposed expenditures classified by department or agency and by program and (ii) estimated revenues from all sources. If estimated revenues and available surplus are less than proposed expenditures, the Governor shall recommend specific additional sources of revenue sufficient to pay the deficiency and the estimated revenue to be derived from each source;

§ 13. Appropriations

(a) Operating budget appropriations made by the General Assembly shall not exceed the actual and estimated revenues and surplus available in the same fiscal year.

By their terms, these provisions require the Governor to propose and the General Assembly to enact a balanced operating budget. They say nothing about the "maintenance" of a balanced operating budget following the enactment of operating budget appropriations. Thus, for the Chief Counsel's

opinion to be correct, the duty of the Governor to maintain a balanced operating budget must be implied; and from that implied duty in turn must be implied the authority of the Governor to reduce Executive Branch expenditures.

In my opinion, there is no basis, either in the text of the Constitution or in case law interpreting the Constitution, on which to imply a duty of the Governor (or the General Assembly for that matter) to maintain a balanced operating budget following the enactment of operating budget appropriations. Indeed, the New York Court of Appeals, interpreting comparable provisions of the New York Constitution, squarely held in *County of Oneida v. Berle*, 49 N.Y.2d 515, 404 N.E.2d 133, 427 N.Y.S.2d 407 (1980), that the Governor had no such duty and therefore no inherent constitutional authority to reduce a lawful appropriation. Although obviously not binding upon the Pennsylvania courts, this decision by New York's highest judicial tribunal is, in my judgment, persuasive.

Like the Pennsylvania Constitution, the New York Constitution requires the Governor to propose a balanced budget, which upon passage by the Legislature and approval by the Governor becomes law. N.Y. Const. art. VII, §§ 2 and 4, art. IV, § 7; Pa. Const. art. VIII, § 12, art. IV, § 16. Acting as the Governor's agent, the New York State Budget Director had ordered the reduction of an appropriation for the maintenance and operation of local sewage treatment systems. Describing his action as one part of a comprehensive effort to tighten State spending, the Director argued that the Governor has a constitutional duty to maintain a balanced budget throughout the fiscal year and that such duty implies the constitutional power to reduce duly enacted appropriations. The Court rejected the argument as follows:

The constitutional argument, while simple, is fatally flawed. It is true, as respondents maintain, that opinions of this Court have recognized the Governor's constitutional obligation to propose a balanced budget. But at no time has the Court suggested that, once a budget plan is enacted, revenues and expenditures must match throughout the fiscal year. At any isolated point in time in the spending year, there must, as a practical matter, be some gap between the two. Recognizing this reality, the Court has but recently disclaimed any obligation on the part of the State to maintain a balanced budget. "[I]t is unattainable for any budget plan, perfectly and honestly balanced in advance, to remain in balance to the end of the fiscal year. There must . . . in every year be either a deficit or a surplus." Thus, respondent's premise is untenable.

Given the absence of an obligation to maintain a balanced budget, the constitutional argument falters. For if the Executive Branch is under no duty to reduce expenditures or raise revenues in order to retain an equilibrium as the year progresses, it can hardly possess implied power unilaterally to “reduce” a lawful appropriation. It is not possible to speak of the necessity for implying power to perform a nonexistent duty.

Berle, 49 N.Y.2d at 521-22, 404 N.E.2d at 136, 427 N.Y.S.2d at 411-12 (citations omitted, footnote omitted). The Court further explained that the implication of executive power to impound funds is inconsistent with the constitutional doctrine of separation of powers. *See also Community Action Programs Exec. Dir. Ass’n v. Ash*, 365 F. Supp. 1355 (D.C.N.J. 1973) (executive required to spend funds appropriated for a specific program).

My conclusion that the Governor has no constitutionally mandated duty to maintain a balanced budget should not be read to mean that the maintenance of a balanced budget is not an appropriate goal or that the Governor is powerless to pursue its accomplishment. Again, as the New York Court observed: “From a fiscal standpoint, it may be desirable to attempt to maintain revenues and expenditures in rough balance throughout the year. And it is not suggested that State government is powerless to do so by appropriate and constitutional means.” *Berle*, 49 N.Y.2d at 523-24, 404 N.E.2d at 138, 427 N.Y.S.2d at 412. In addition to the obvious alternative of requesting additional revenues from the General Assembly, the Governor of this State has substantial statutory power to control spending by executive agencies.

As I observed in Official Opinion No. 90-2, Article VI of the Administrative Code, 71 P.S. §§ 229-240.1, confers upon the Governor expansive authority with respect to budget preparation and expenditure review and approval. In particular, Section 615, 71 P.S. § 235, provides the Governor with ongoing authority throughout the fiscal year to oversee expenditures by administrative departments, boards and commissions. Specifically, it authorizes the Budget Secretary, at such times as the Governor determines, to review and approve and to require revision of estimates of expenditures for each program carried on by such departments, boards and commissions. It further prohibits expenditures in excess of the estimates approved by the Secretary. As I concluded in Opinion 90-2, the power conferred by Section 615 is properly exercised not merely to assure the fiscal integrity of particular programs but also to mitigate adverse budgetary consequences resulting from projected revenue shortfalls.

Of critical importance to this Opinion, however, is that Section 615 does not apply to every Executive Branch department, board and commission. By its terms, it does not apply to the Auditor General, the State Treasurer or the Attorney General. And, as provided specifically in the act establishing the State System of Higher Education, “the System shall be subject to Article VI of [the Administrative Code] *except for Section 615.*” 24 P.S. § 20-2006-A(7) (emphasis added).

Since I have found no other source of authority for the Governor to reduce the appropriation of the State System of Higher Education, it is my opinion, and you are so advised, that the Governor has no constitutional or statutory authority to order the reduction of the System’s appropriation after its enactment. You are further advised, in accordance with Section 204(a)(1) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(a)(1), that members of the Board of Governors are protected from personal liability if, in the future, the Board decides to draw the full amount of the System’s subsidy from the State Treasury notwithstanding contrary direction from the Governor.

Having concluded that the Governor had no authority to compel the action taken by the Board on April 18, 1991, I would be remiss if I did not further address the issue of whether the Board acted lawfully within its own powers when it voted to lapse a part of the System’s 1990-91 subsidy. The System’s enabling act describes its purpose as “to provide high quality education at the lowest possible cost to the students” and its primary mission as “the provision of instruction for undergraduate and graduate students to and beyond the master’s degree in the liberal arts and sciences and in applied fields, including the teaching profession.” 24 P.S. § 20-2003-A. In fulfillment of that purpose and mission, the Act confers upon the Board of Governors “overall responsibility for planning and coordinating the development and operation of the System.” 24 P.S. § 20-2006-A.

Courts have held that an executive official is authorized to spend less than the full amount appropriated for a particular purpose when the statute describing that purpose confers discretion upon the official to determine expenditures. *See Campaign Clean Water, Inc. v. Train*, 489 F.2d 492 (4th Cir. 1973), *vacated on other grounds*, 420 U.S. 136 (1975) (Water Pollution Control Act conferred discretion on Administrator, in the interest of efficiency and economy, to spend only 45 percent of funds authorized); *Housing Auth. v. HUD*, 340 F. Supp. 654 (N.D. Cal. 1972) (non-mandatory language of Housing Act conferred discretion on Secretary to spend less than amount appropriated). *Cf. State Highway Comm’n v. Volpe*, 479 F.2d 1099 (8th Cir. 1973) (spending discretion conferred by Highway Act did not authorize Secretary to withhold funds for anti-inflationary purposes).

Even absent such express authority, moreover, a compelling case can be made that executive officials have inherent authority, in the interest of efficient and economical management, to spend less than the full amount appropriated when doing so will not frustrate the underlying legislative purpose. *See Opinion of the Justices to the Senate*, 375 Mass. 827, 376 N.E.2d 1217 (1978) (proposed act prohibiting less than full expenditure by executive infringes upon executive prerogative to avoid wasteful spending in circumstances not compromising purpose of underlying legislation).

The power given to the Board of Governors to carry out its statutory responsibility is all but plenary. In provisions particularly relevant to this Opinion, the Board is empowered to establish broad fiscal policies under which the institutions of the System shall operate, to review, amend and approve the annual operating budgets of the individual institutions, to represent the System before the General Assembly, the Governor and the State Board of Education, and generally to do all things necessary to accomplish the objectives of the System. 24 P.S. § 20-2006-A.

While these powers certainly are not without limits, they are sufficient in my judgment to authorize the Board of Governors to cooperate with the Governor in addressing budget difficulties when doing so is consistent with the State System's objectives. In this regard, the Board's vote to lapse part of its 1990-91 subsidy is presumptively lawful and therefore entitled to the protection from liability that results from the request and observance of an Opinion of the Attorney General. 71 P.S. § 732-204(a)(1).

Finally, you are further advised in accordance with Section 204(a)(1) of the Commonwealth Attorneys Act that you are required to follow the advice set forth in this Opinion and shall not in any way be liable for doing so.

Sincerely yours,

Ernest D. Preate, Jr.
Attorney General

OFFICIAL OPINION NO. 91-2

Civil Service Commission—Appointment of Hearing Examiners—Eligibility of Former Commissioners to Serve as Hearing Examiners.

1. The Civil Service Commission has the authority to appoint hearing examiners as designees of the Commission to conduct hearings and submit reports to the Commission.