

GENERAL ASSEMBLY:
REORGANIZATION PLANS:
CONSTITUTIONAL LAW:
GOVERNOR:

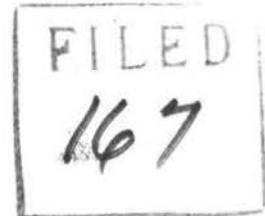
1. Reorganization Plan No. 1 of 1971 providing for a Board of Environmental Control does not exceed the authority conferred by Section 26.540, RSMo 1969.

2. Reorganization Plans Numbers 2, 3 and 4 of 1971, placing the employees of certain agencies under the merit system, involve "changing the organization" of state agencies within the meaning of Section 26.540, RSMo 1969, as provided by such section. 3. Sections 26.500 to 26.540, inclusive, RSMo 1969, empower the Governor to remove from the merit system personnel of an agency of the executive department regardless of whether such personnel was placed under the system by prior legislation or through a plan for reorganization. 4. Section 26.530, RSMo 1969, does not constitute an unconstitutional delegation of legislative power to the executive branch. 5. The Governor may comply with the provisions of Section 26.530, RSMo 1969, in submitting a reorganization plan to the legislature by delivering such plan to the secretary of the senate and the chief clerk of the house during a regular session of the legislature.

March 1, 1971

OPINION NO. 167

Honorable J. F. Patterson
President pro tem
Honorable William J. Cason
Majority Floor Leader
Honorable A. Clifford Jones
Minority Floor Leader
Missouri Senate
Jefferson City, Missouri 65101



Gentlemen:

This official opinion is issued pursuant to the request contained in your letter concerning the legality of Reorganization Plans Numbers 1 to 4, inclusive, transmitted to each house of the General Assembly of Missouri by the Governor in 1971.

More specifically, the questions raised by your letter are as follows:

"1. Does the creation of a new Board of Environmental Control under Reorganization Plan No. 1 of 1971 and the transfer to it of func-

Honorable J. F. Patterson
Honorable William J. Cason
Honorable A. Clifford Jones

tions, powers and duties vested by law in certain existing state agencies exceed the authority conferred by Section 26.540, RSMo 1969, that 'Reorganization plans shall relate only to abolishing or combining agencies in the executive branch of state government or to changing the organization thereof or the assignment of functions thereto'?

"2. Can Reorganization Plans Nos. 2, 3 and 4 of 1971, placing the employees of certain state agencies under the merit system be construed as coming within the purview of 'changing the organization' of a state agency as provided in this same section?

"3. Do Sections 26.500 to 26.540, RSMo 1969, empower the governor to remove employees from the merit system (other than those in the system pursuant to the provisions of the state constitution) or can he, under these statutes, submit a subsequent plan removing from it those employees placed under the merit system by a prior reorganization plan?

"4. Is the provision of Section 26.530, RSMo 1969, that 'A reorganization plan not disapproved by one or the other house of the legislature.....shall be considered for all purposes as the equivalent in force, effect and intent of a public act of the state upon its taking effect by executive order.....' a delegation of the legislative power and hence invalid?

"5. Is the provision of this same section that the 'governor may submit to both houses' satisfied by a delivery of the reorganization plan to the secretary of the senate and the chief clerk of the house, or is a delivery to the senate and house when in session required?"

Response to the questions will be made in the order in which they have been presented.

1. Reorganization Plan No. 1 of 1971 in pertinent part provides as follows:

"Section 1. There is hereby established a Board of Environmental Protection consisting of seven members who shall be selected for their knowledge of ecology, air and water pollution control, wild-

Honorable J. F. Patterson
Honorable William J. Cason
Honorable A. Clifford Jones

life, parks and recreation and similar fields which are concerned with environmental quality. The members of the Board shall be appointed by the Governor with the advice and consent of the Senate for a term of four years. Of the members first appointed two shall be appointed for a term of two years, two for a term of three years and three for a term of four years. Members may be removed only for good cause. If a vacancy occurs, the Governor shall fill the vacancy for the unexpired term. The members shall serve without compensation, but shall be reimbursed for their actual and necessary expenses incurred in the performance of their duties. The Governor shall nominate the chairman.

"Section 2. All of the functions, powers and duties vested by law in (1) the air conservation commission of the state of Missouri under chapter 203, RSMo, 1969, (2) the water pollution board under chapter 204, RSMo, 1969, (3) the water resources board, under sections 256.180-256.260, RSMo, 1969, (4) the division of health insofar as such functions relate to the disposal of solid waste material, are hereby transferred to the Board of Environmental Protection.

"Section 3. The existing agencies shall continue to perform administrative and staff functions as heretofore."

Statutory authority for submission of plans for reorganization of agencies of the executive department by the Governor is contained in Sections 26.500 to 26.540, inclusive, RSMo 1969.

Section 26.500 provides, in part, as follows:

"Within the first thirty days of any regular legislative session, the governor may submit to both houses of the legislature, at the same time, one or more formal and specific plans for the reorganization of executive agencies of state government."

Section 26.540 provides:

"Reorganization plans shall relate only to abolishing or combining agencies in the executive branch of the state government or to changing the organization thereof or the assignment of functions thereto. Each plan

Honorable J. F. Patterson
Honorable William J. Cason
Honorable A. Clifford Jones

shall contain such provisions as are necessary to assure the uninterrupted conduct of the governmental services and functions affected by the proposed reorganization plan."

The effect of Section 2 of Reorganization Plan No. 1 is to consolidate the functions, powers and duties of four administrative agencies of the state dealing with environmental control in a Board of Environmental Protection for the express purposes of more efficient operation of the government of the state and promotion of uniform policies and procedures in the various agencies of the state which deal with environmental pollution.

Among other things, the law expressly provides that a plan may relate to the combination of agencies or change the organization thereof (Section 26.540, RSMo 1969). Where such a combination or consolidation takes place, it would be ineffective, as a practical matter, unless an entity be established or found with which the combined agencies can be identified and within which they can operate. The Board of Environmental Protection affords the framework for proper functioning of the combined or consolidated agencies and is necessary to assure the uninterrupted conduct of their business as required by Section 26.540. The functions, powers and duties of the combined agencies are not changed and no new functions, powers or duties are established or created. In construing a similar provision of a New Hampshire reorganization statute, the Supreme Court of that state in Opinion of the Justices, 96 N.H.517, 83 A.2d 738,744,745, said:

"The Governor has no power whatsoever under the act to create entirely new agencies or functions without regard to those existing. He must deal with the existing framework of the executive department and the activities now authorized.

* * *

"So, the power to provide for the appointment, term of office and compensation of the heads and assistant heads of agencies is limited to carrying out the purposes of the act. Such power exists only where action under the statute makes it reasonably necessary. It is not a general power but incidental and subordinate to the provisions of the act. It is made necessary because of the fact that the duties and responsibilities of the heads and assistant heads may be quite different under the reorganization. * * *"
(Emphasis supplied)

It is our opinion that the designation of an agency within which the combined agencies can function is a necessary implication of the

Honorable J. F. Patterson
Honorable William J. Cason
Honorable A. Clifford Jones

right to combine and change the organization thereof and that Reorganization Plan No. 1 does not exceed the legal empowerment of Section 26.540, RSMo 1969.

2. Reorganization Plans Numbers 2, 3 and 4 of 1971 provide for selection or employment in accordance with and subject to the State Merit System Law of employees of the Public Service Commission, the Department of Liquor Control, and certain employees of the office of the State Purchasing Agent respectively.

The State Merit System Law is contained in Chapter 36, RSMo 1969, and by the terms of Section 36.030, its provisions apply to the State Department of Public Health and Welfare, the Department of Corrections, the personnel division of the Department of Business and Administration, and the Division of Employment Security of the Department of Labor and Industrial Relations. No provision is made in the law for including thereunder employees of other departments or agencies of the state government.

The apparent effect of placing personnel covered by Reorganization Plans Numbers 2, 3 and 4, under the merit system law is to substitute the standards of employment, term of service, retirement and separation from service established by the merit system law for the system currently in use by such agencies. This is a change in the organization of these agencies. The plan deals with the terms of employment of personnel of these certain agencies and amounts to an assignment of certain functions theretofore performed by each affected agency respecting methods of hiring and firing, wage and salary scales, promotion, retirement and similar matters to those established by the merit system. In substance this is an assignment of a function as well as changing the organization of the agencies in question within the meaning of Section 26.540.

3. As we understand the third question presented, you have requested our opinion as to (1) whether Section 26.500 to Section 26.540, RSMo 1969, empower the Governor by a plan of reorganization to remove from the merit system employees who are subject to the system by virtue of prior legislation and (2) whether, under this statute, he may lawfully submit a subsequent plan removing from the merit system employees placed thereunder by a prior reorganization plan.

Based upon the considerations set forth in the discussion concerning Question 2 heretofore set forth, it is our view that the Governor may remove from the State Merit System personnel of an agency of the executive department regardless of whether such personnel was placed under the system by prior legislation or through a plan for reorganization. Such removal would be accomplished by virtue of the plan becoming effective in the manner provided by the reorganization statute.

4. There are certain well established principles which must be observed in considering whether Section 26.530, RSMo 1969, is an un-

Honorable J. F. Patterson
Honorable William J. Cason
Honorable A. Clifford Jones

constitutional delegation of legislative power. These are that the supreme legislative power of the state is vested in the General Assembly; the provisions of our state constitution are not a grant but a limitation of legislative power so that the General Assembly may enact any law not expressly, or by clear implication, prohibited by the state or federal constitutions; a statute will, if possible, be construed so as to render it valid; every presumption will be made in favor of the constitutionality of a legislative enactment; and a statute will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the constitution. Missouri Constitution, Article III, Section 1; State ex rel. Jones v. Atterbury, 300 S.W. 2d 806 (Mo.Banc 1957); State ex rel. Holekamp v. Holekamp Lumber Co., 340 S.W.2d 678 (Mo.Banc 1960), app.dism.316 U.S.715; State ex rel. Hughes v. Southwestern Bell Telephone Co., 179 S.W.2d 77 (Mo.S.Ct. 1944); Kansas City v. Fishman, 241 S.W.2d 377 (Mo.S.Ct.1951); State ex rel. Missouri Southern R.Co., v. Public Service Commission, 168 S.W.1156,1164 (Mo.S.Ct.1914); Birmingham Drainage Dist. v. Chicago B.&Q.R.Co., 202 S.W.404,409 (Mo.S.Ct.1918); State ex rel. Eagleton v. McQueen, 378 S.W.2d 449 (Mo.Banc 1964); Williams Lumber & Mfg. Co. v. Ginsburg, 146 S.W.2d 604 (Mo.S.Ct.1940).

It is recognized that while the legislature cannot delegate its power to make law, it may empower boards and commissions to make rules and regulations for administering the law and may vest them with discretionary powers. If the law itself is full and complete as it comes from the lawmaking body, it may be and frequently must be left to agents in one form or another to perform acts of executive administration which are in no sense legislative. Port Royal Mining Co. v. Hagood, 30 S.C.519,524,525, 9 S.E.686,3 L.R.A.841. In its opinion the court said:

" * * * The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend, which cannot be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation."

The General Assembly in large measure patterned its reorganization statute upon the Act of Congress then in effect providing for reorganization of the executive agencies of the federal government with the Governor designated to make the studies and perform the reorganizational functions which the congressional legislation provided should be done by the President. Under the circumstances it is pertinent to discuss generally the validity of reorganizational powers vested in the chief executive by the legislative branch of government. In 1 Am.Jur.2d, Administrative Law, Section 25, the following statement

Honorable J. F. Patterson
Honorable William J. Cason
Honorable A. Clifford Jones

is made:

" * * * The powers of departments, boards, and administrative agencies are subject to expansion, contraction, or abolition at the will of the legislative and executive branches of the government. * * *

"Congress has at various times vested power in the President to reorganize executive agencies and redistribute functions, and particular transfers under such statutes have been held to be within the authority of the President. Any doubt as to the authority of the President under power given him by Congress to transfer the functions of one agency to another by executive order and the question of the compliance with the conditions of the exercise of such authority, and the validity of the performance of those functions by the transferee, is determined by congressional approval and ratification in subsequently recognizing the validity of the transfer by making appropriations for the purposes of carrying out the transferred functions."

In the case of *Isbrandtsen-Moller Co., Inc., v. United States*, 14 F.Supp.407, 57 S.Ct.407,300 U.S.139, 81 L.Ed.565, the Supreme Court upheld the validity of the Executive Department's Reorganization Act. The court held that Congress had the power to authorize the President to abolish boards and transfer their functions and acts under the Reorganization Act, where Congress subsequently adopted the construction given the act by permitting the reorganization order of the President to become effective and by making appropriations for the department to which the duties were transferred. The court further held that a Presidential order abolishing a board was not invalid on the ground that the President acted without adequate hearings and findings where the order of transfer stated he had investigated, and the absence of any showing to the contrary. See also 73 C.J.S., Public Administrative Bodies and Procedure, Section 23.

Although reference is made to the federal reorganization plan, the following comment found in 48 *Columbia Law Review* 1221 to 1224, inclusive, is pertinent to the present inquiry:

" * * * In recent years there has been increased appreciation of the necessity for permitting Congress to designate another body to fill in the details of its legislative policy and the courts have found the standards in legislation involving delegation to be adequate. * * * Indeed, it is questionable whether the courts today would even

Honorable J. F. Patterson
Honorable William J. Cason
Honorable A. Clifford Jones

subject the standards in reorganization legislation to severe scrutiny. * * *
Where, as here, the Government is directing its action inward, toward its own structure and procedure, there is less need for clearly defined standards."

What the Missouri statute plainly seeks to accomplish is delegation to the Governor of the power to reorganize the departments and agencies of the executive branch of the government for the purpose of promoting efficiency and economy in that branch. The delegation of subsidiary legislative power to the executive is nothing new. We observe this type of delegation in connection with numerous executive and administrative agencies operating in this state and, as we have seen, the same kind of delegation to the chief executive to reorganize that branch of the government in furtherance of efficiency and economy that is granted in our reorganization statute has been upheld in the federal courts. *Isbrandtsen-Moller Co., Inc., v. United States*, supra, l.c. 412 [8]. In the opinion of this case it is said:

" * * * The result (of power granted to the President in furtherance of efficiency and economy) was to abolish a board whose existence was dependent upon the will of Congress and to delegate to the Department of Commerce the same powers and duties the board had possessed. This seems in accord with correct standards as to delegation of authority to act within proper limits prescribed by Congress. * * * "

The conclusion reached in this case was approved in *Swayne & Hoyt v. United States*, D.C., 18 F.Supp.25.

In *Ferretti v. Jackson*, 88 N.H.296,299, 188 A.474,477, the court said:

" * * * the Constitution permits the Legislature to empower the executive department to enact legislation of a subordinate nature to a general law to meet the necessities of government. 'The supreme legislative power' (Const. pt.2,art.2) is vested in the Legislature, but not the sole and exclusive power in respect to incidental and subsidiary legislation. * * * " l.c.477

In *American Power & Light Company v. Securities and Exchange Commission*, 329 U.S.90, 56 S.Ct.133,142,91 L.Ed.103, the court declares the constitutional requirements as follows:

" * * * Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it

Honorable J. F. Patterson
Honorable William J. Cason
Honorable A. Clifford Jones

then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. * * * " l.c.105

In Opinion of the Justices, supra, it was said:

" That there is need of some body other than the Legislature to deal with this broad and complex subject of reorganization of the executive part of the government that requires so much time detailed work and expert knowledge and that involves so many diverse and conflicting interests, may well have prompted the enactment of the measure. * * * " l.c.743

Furthermore, we think it is important that the Reorganization Plans submitted by the Governor and the Executive Reorganization statute itself do not deal with private rights or personal liberties but with the structure and functions of that branch of the state government of which the Governor is head. Under these circumstances the statute may have wider latitude than otherwise would be the case. (See Opinion of the Justices, supra, page 745). In U. S. v. General Petroleum Corp., D. C., 73 F.Supp. 225,250, the court said:

"The authorities which the defendants cite upon the question of requisite standards in statutes are those involving action by the government in its sovereign capacity, that is, where it reaches out to deal with, direct, or regulate the conduct of the citizen; in some instances against the will of the citizen, and often in interference with the citizen's own property or contract rights. * * * There the law requires strict boundaries to be erected by the statute around the exercise of power by official or board to whom is surrendered so much of the Congressional power as is necessary to fill in the details of the statute enacted. * * * "

Reorganization plans must be submitted to the legislature within the first thirty days of any regular legislative session and cannot become effective until ninety days after the final adjournment of the session of the legislature and then only if there has not been a disapproval by a senate or house resolution adopted within sixty days of the time the plan was submitted. We do not believe that this provision was intended by the legislature as an enactment into law of the proposed plan. It is merely one of the checks or restraints upon the exercise of the subordinate legislative power delegated to the

Honorable J. F. Patterson
Honorable William J. Cason
Honorable A. Clifford Jones

Governor. Therefore, Section 21 et seq., Article III of the Missouri Constitution relating to legislative proceedings in the enactment of laws have no application. These provisions relate to the supreme legislative power when used for the passage of statutes as for example in the enactment of Sections 26.500 to 26.540, RSMo 1969, being the statute here under consideration.

Based upon the foregoing considerations, it is our opinion that Section 26.530, RSMo 1969, is not an unlawful delegation of legislative power to the executive branch.

5. It is assumed that the fifth question presented in your request makes reference to Section 26.500, RSMo 1969. This section, repeated for convenience, reads as follows:

"Within the first thirty days of any regular legislative session, the governor may submit to both houses of the legislature, at the same time, one or more formal and specific plans for the reorganization of executive agencies of state government."

Sessions of the legislature are fixed by Article III, Section 20, and Section 20(a) of the Constitution of Missouri where it is provided that:

"The general assembly shall meet on the first Wednesday after the first Monday in January following each general election. * * *

"The general assembly shall reconvene on the first Wednesday after the first Monday of January in even-numbered years after adjournment at midnight on June thirtieth of the preceding odd-numbered years. A majority of the elected members of each house shall constitute a quorum to do business, but a smaller number may adjourn from day to day, * * *" Art. III, Sec. 20.

"The general assembly shall adjourn at midnight on June thirtieth in odd-numbered years until the first Wednesday after the first Monday of January of the following year, unless it has adjourned prior thereto. * * * The general assembly shall automatically stand adjourned sine die at midnight on May fifteenth in even-numbered years, unless it has adjourned sine die prior thereto. * * * " Art. III, Sec. 20(a)

It is apparent that regular sessions of the General Assembly begin on the first Wednesday after the first Monday of January and the

Honorable J. F. Patterson
Honorable William J. Cason
Honorable A. Clifford Jones

legislature continues in session until adjournment by action of the legislature itself or by virtue of the constitutional provision quoted above. Thus, the general session of the legislature continues from the time it is convened in January until it adjourns, ordinarily June 30 in odd-numbered years and May 15 in even-numbered years.

The Constitution provides the manner for returning bills by the Governor to the legislature when it is adjourned or in recess for more than thirty days, stating that he may return bills to the Secretary of State in this case. (Article III, Section 31). In cases where there is an adjournment or recess for more than fifteen but less than thirty days, Section 21.270, RSMo 1969, states that such bills may be returned to the office of secretary of the senate or the office of the chief clerk of the house, as the case may be. There appears to be nothing in the Constitution or statutes requiring the Governor to deliver bills or other documents, including plans for reorganization, to the assembled members of each house or to the presiding officer thereof.

The Constitution recognizes the fact that there is a difference between calendar days of a general session of the legislature and legislative days of such a session. Article III, Section 25, places a limitation on introduction of bills providing that no bill other than an appropriation bill shall be introduced in either house after the sixtieth legislative day of any odd-year session or after the thirtieth legislative day of any even-year session.

It will be observed that Section 26.500, RSMo, does not use the term "legislative day." On the contrary it states, "Within the first thirty days of any regular legislative session,".

It is recognized also that while the legislature may be in session at any given time, it does not necessarily mean that either or both houses of the legislature are meeting to do business with a quorum present. In practice each house meets according to its own dictates and calendar within the bounds provided by the Constitution, the law and its own rules of order. The reorganization statute requires that the Governor submit plans for reorganization to both houses of the legislature at the same time. As a practical matter it might be difficult for the Governor to present the plans within the time allowed if it were necessary that both houses be then meeting and conducting business.

It is our view that this statute should be interpreted to mean that the Governor may submit reorganization plans to both houses of the legislature within thirty calendar days from the beginning of any regular legislative session and that submission by delivery to the secretary of the senate and to the chief clerk of the house satisfies the requirements of law. To reach the opposite conclusion would conceivably result in the Governor's inability to submit plans of reorganization at all.

Honorable J. F. Patterson
Honorable William J. Cason
Honorable A. Clifford Jones

CONCLUSION

It is the opinion of this office that:

1. Reorganization Plan No. 1 of 1971 providing for a Board of Environmental Control does not exceed the authority conferred by Section 26.540, RSMo 1969.

2. Reorganization Plans Numbers 2, 3 and 4 of 1971, placing the employees of certain agencies under the merit system, involve "changing the organization" of state agencies within the meaning of Section 26.540, RSMo 1969, as provided by such section.

3. Sections 26.500 to 26.540, inclusive, RSMo 1969, empower the Governor to remove from the merit system personnel of an agency of the executive department regardless of whether such personnel was placed under the system by prior legislation or through a plan for reorganization.

4. Section 26.530, RSMo 1969, does not constitute an unconstitutional delegation of legislative power to the executive branch.

5. The Governor may comply with the provisions of Section 26.530, RSMo 1969, in submitting a reorganization plan to the legislature by delivering such plan to the secretary of the senate and the chief clerk of the house during a regular session of the legislature.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John E. Park.

Very truly yours,



JOHN C. DANFORTH
Attorney General