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May 15, 2007

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: Senate Bill 50 / House Bill 161

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality and legal sufficiency Senate Bill 50 and House Bill 161, identical bills which prohibit the Governor's Appointments Office from directing or overruling certain employment decisions of state appointing authorities and which restrict the ability of those appointment authorities to delegate to others employment decisions, including the decision to terminate an employee. We have considered whether the legislation unconstitutionally interferes with the Governor's authority over Executive Branch officers and employees in violation of Article 8 of the Declaration of Rights and Article II, §1 of the Maryland Constitution. In our view SB 50 / HB 161, properly construed, is constitutional.

This legislation is based on recommendations of the Special Committee on Employee Rights and Protections. As introduced, the measure was more sweeping in its restrictions on Executive authority, particularly with respect to the functions of the Governor's Appointments Office and the Governor himself. *See* SB 50 and HB 161 at pages 2-4. Specifically, as to the Governor, the bills stated that:

- (1) Except as provided in paragraph (2) of this subsection, the Governor may not delegate to the Office or any other office, unit, or individual in the Office of the Governor or the Executive Branch of State government any authority or duty regarding the termination of any

employee, including management service and special appointments employees, who are in the principal departments or in any other unit in the Executive Branch of State government.

- (2) The Governor may delegate to an individual in the Office of the Governor or the Executive Branch of State Government any authority or duty regarding the termination of at will employees, including special appointments, who are:
 - (I) In the Executive Pay Plan;
 - (II) Directly appointed by the Governor by an appointment that is not provided for by the Maryland Constitution;
 - (III) Appointment by or who are on the staff of the Governor or Lieutenant Governor; or
 - (IV) Employees assigned to the Government House or the Office of the Governor.

In an advice letter requested by the sponsor, Assistant Attorney General Robert A. Zarnoch addressed the constitutionality of the First Reader version of the bills and looked for guidance from federal decisions dealing with Congress' ability to limit the President's authority over Executive Branch officials and employees except for "purely executive officers". See *Humphrey's Executor v. U.S.*, 294 U.S. 602 (1935); and *U.S. v. Perkins*, 116 U.S. 483 (1886).¹ The letter noted that:

SB 50 / HB 161 carves out an exemption to its prohibition on delegation of removal power for a class of individuals closely associated with executive power and therefore allows the Governor to retain control over "purely executive officers." The bill permits the Governor to delegate termination authority over those in the executive pay plan, direct appointees (not provided for in the Constitution), the Governor's staff, and those assigned to Government House. Under this arrangement the Legislature has left the Governor broad control over those reasonably deemed "purely executive." In addition, the legislation would also not prevent the Governor from directing a cabinet head / appointing authority to fire an at-will employee

¹ A copy of this January 31, 2007 advice letter to the Hon. Thomas McLain Middleton is attached.

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upon pain of removal..... Nor does this legislation affect the Governor's budget powers with respect to funding or not funding positions or his authority to abolish them.

* * * * *

Because of the exemptions in the legislation and because it might not be read to affect core Executive powers and although the issue is not completely free from doubt, it is my view that SB 50 / HB 161 would not violate separation of powers or intrude on the Governor's constitutional authority with regard to State employment.

Subsequent to this advice and after the Governor's Office noted policy objections to the measure, the legislation was substantially amended in committee to eliminate a number of prohibitions with respect to the Appointment's Office and to delete all of the above-quoted restrictions regarding the Governor - - so too were the exemptions tied to the restrictions and relied on in the January 31, 2007 advice letter.

Given the Legislature's attempt to accommodate the Executive and address constitutional issues involving SB 50 / HB 161 and the fact that no provision in the legislation expressly restricts the actions of the Governor himself, we believe the Chief Executive retains his constitutional authority over "purely executive officers". This would include the power to delegate to others authority over the termination of employment of these individuals.

For these reasons, we believe SB 50 and HB 161 are constitutional.

Very truly yours,

/s/

Douglas F. Gansler
Attorney General

DFG/RAZ/as

Attachment

cc: Joseph Bryce
Secretary of State
Karl Aro