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April 29, 2010

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

RE: Senate Bill 887

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality and legal sufficiency Senate Bill 887, "Correctional Services - State Correctional Officers' Bill of Rights." While we approve the bill, we write to suggest that a portion of it be administered carefully in order to avoid violations of due process. We also note an inaccuracy in the title.

Senate Bill 887 creates a State Correctional Officers' Bill of Rights. The bill specifies that it does not prohibit emergency suspension of correctional officers with pay if it appears that the emergency suspension is in the best interest of the inmates, the public, and the correctional facility. A correctional officer suspended under this provision is entitled to a "prompt hearing." The bill further provides that a correctional officer who is charged with a felony may be suspended without pay, and, if so suspended, is entitled to a "prompt hearing, held no more than 90 days after the suspension." Page 21, line 29 to page 22, line 20.

The requirements of Due Process with respect to emergency suspensions and the sufficiency of post-suspension process are flexible, and vary with the situation presented in an individual case. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). In *Gilbert v. Homar*, 520 U.S. 924 (1997), the Supreme Court held that emergency suspension of a police officer arrested for felony drug charges was appropriate, applying the balancing test set out in *Mathews v. Eldridge*, 424 U. S. 319, 335 (1976):

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest.

Specifically, the Court found that temporary suspension without pay is a lesser private interest than that in avoiding loss of employment, while the "the State has a significant interest in immediately suspending, when felony charges are filed against them, employees who occupy positions of great public trust and high public visibility, such as police officers." *Gilbert v. Homar*, 520 U.S. at 431. The Court further found that, so long as there has been an arrest and charges are pending, the risk of erroneous deprivation was not great, and the value of additional procedural safeguards minimal. Thus, the Court held that emergency suspension on this ground did not violate due process rights.

It is our view that the *Homar* case clearly supports emergency suspensions based on pending criminal charges against correctional officers. Moreover, the State's enhanced interest in the efficient operation of correctional facilities, *Turner v. Safley*, 482 U.S. 78 (1987), makes it likely that other emergency suspensions based on the best interests of the inmates, the public, and the correctional facility would be upheld, especially where these suspensions are with pay with the result that the private interest of the officers is less.

The *Homar* case did not take up the issue of whether the post-deprivation hearing in that case had been sufficiently prompt to comport with Due Process, but remanded the case for that determination. On remand, the district court also relied on the test from *Mathews v. Eldridge*, and further noted that the Supreme Court had upheld a delay as long as 90 days where a bank president was suspended by the FDIC without a hearing after he was indicted on felony charges relating to making false statements to the FDIC. *FDIC v. Mallen*, 486 U.S. 230, 242 (1988). The court concluded that the hearing in *Homar*, which was held 23 days after the suspension and 17 days after the criminal charges were dismissed, was sufficient. In light of the holding of the Supreme Court in *Mallen* and of the lower court in *Homar*, it would seem clear that the requirement that a hearing be held within 90 days where the correctional officer is charged with a felony and suspended without pay would also be sufficient under the Due Process Clause, at least so long as the charges were pending. We strongly suggest, however, that hearings be held fairly quickly if charges are dismissed. The bill sets no time limit for a hearing when a suspension is with pay. While the availability of pay clearly lowers the interest of the correctional officer in relation to that of the State, we would recommend that these hearings also be held as soon as it is practicable to gather the necessary evidence and give

reasonable notice. So long as these guidelines are followed, we do not anticipate a constitutional challenge to this statute.

The title of the bill states, in part, that it "provid[es] that this Act supersedes inconsistent provisions of any other State or local law that conflict with this Act to the extent of the conflict." The provision referred to appears at page 4, lines 18-21. At page 18, lines 3-5, however, the bill provides, in § 10-909(k):

> To the extent that any provision of this section is inconsistent with the Administrative Procedure Act, the Administrative Procedure Act shall govern.

Thus, the title is not completely accurate. It is our view, however, that this minor discrepancy does not render the title unconstitutional.

Very truly yours,

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Attorney General

DFG/KMR/kk

cc: The Honorable Donald F. Munson
The Honorable John P. McDonough
Joseph Bryce
Karl Aro