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June 2, 1986

The Honorable Karen R. Mills
Arizona State Representative
The Honorable Sterling Ridge
Arizona State Representative
The Honorable Henry H. Haws
Arizona State Representative
State Capitol - House Wing
Phoenix, Arizona 85007

Re: I86-062 (R86-071)

Dear Representatives Mills, Ridge and Haws:

You have inquired whether Governor Babbitt has constitutional or statutory authority to declare the third Monday in January a holiday for state agency employees. The Governor's Executive Order, No. 86-5, signed on the 18th of May of this year, declares:

[T]he third Monday of each January as a holiday honoring the birthday of Dr. Martin Luther King, Jr. for all employees of Agencies, Boards and Commissions within the purview of the Executive Branch of the State of Arizona.^{1/}

^{1/}We are informed by the Governor's Office that the order is intended to cover all state employees of the Executive Department set out in article V of the Arizona Constitution, but that it excludes other constitutional departments of state government. The Executive Department includes the Governor, Secretary of State, State Treasurer, Attorney General and Superintendent of Public Instruction. Ariz. Const., art. V, § 1. The other departments of the Arizona government are the Legislative Department (Ariz. Const., art. IV), the Judicial Department (Ariz. Const., art. VI), the Corporation Commission (Ariz. Const., art. XV), and the Mines (Ariz. Const., art. XIX).

The Honorable Karen R. Mills
The Honorable Sterling Ridge
The Honorable Henry H. Haws
June 2, 1986
I86-062
Page 2

We conclude that the Governor has no constitutional or statutory authority to declare a legal holiday that would be observed by closing state offices and giving state employees a paid day off, although he may, of course, publicly give recognition to Dr. Martin Luther King, Jr. by issuing an executive order providing a general observance in honor of Dr. King.

The Arizona Court of Appeals has summarized applicable law on the powers of the Governor as follows:

It is a basic tenet of our system of government that the governor, or executive, has only such powers as are conferred upon him by our constitution or by validly enacted statute. The lawmaking power is vested in the legislature. Ariz.Const. art. 4, pt. 1, § 1. None of the branches of government may exercise powers which are granted to another branch. Ariz.Const. art. 3. While the governor is charged with the duty of faithfully executing the laws, Ariz.Const. art. 5, § 4 and must be accorded powers reasonably commensurate with such a broad responsibility, this is not a source from which the power to make legislative decisions can be created.

Litchfield Elementary School District #79 of Maricopa County v. Babbitt, 125 Ariz. 215, 220, 608 P.2d 792, 797 (App. 1980) (citations omitted, emphasis added).

While the Arizona Constitution contains specific grants of authority to the Governor which he may not exceed, the constitution contains only limitations on the otherwise plenary powers of the Legislative Department. The Arizona Supreme Court has stated:

The Constitution of Arizona is not, as is the Constitution of the United States, to be considered a grant of power or enabling act to the Legislature, but rather is a limitation upon the power of that body, and that "The Legislature is vested with the whole of the legislative power of the state, and may deal

The Honorable Karen R. Mills
The Honorable Sterling Ridge
The Honorable Henry H. Haws
June 2, 1986
I86-062
Page 3

with any subject within the scope of civil government unless it is restrained by the provisions of the Constitution, and the presumption that the Legislature is acting within the Constitution holds good until it is made to appear in what particular it is violating constitutional limitations." "We do not look to the (state) Constitution to determine whether the Legislature is authorized to do an act, but only to see if it is prohibited."

Earhart v. Frohmler, 65 Ariz. 221, 224-225, 178 P.2d 436, 438 (1947) (citations omitted). See also Kilpatrick v. Superior Court, 105 Ariz. 413, 415, 466 P.2d 18, 20 (1970).

The Arizona Constitution sets out very specific powers of the Governor. For example, the Governor shall be the commander-in-chief of the state military forces. Ariz. Const., art. V, § 3. He shall also transact executive business with other state officers, "take care that the laws shall be faithfully executed," and convene the Legislature in extraordinary session. Ariz. Const., art. V, § 4.^{2/} The general statutory powers of the Governor are set out in A.R.S. § 41-101, which includes seeing that offices are filled and

^{2/}The Governor may also grant reprieves, pardons and commutations for offenses, with restrictions provided by law. Ariz. Const., art. V, § 5. All bills passed by the Legislature must be presented to the Governor for his approval or veto. Ariz. Const., art. V, § 7. The Governor fills vacancies in office when no other method for filling the vacancy is provided by the constitution or law. Ariz. Const., art. V, § 8. The Governor signs all state commissions. Ariz. Const., art. V, § 12. The Arizona Constitution also provides that the Governor shall appoint two members of the commission on salaries for elective state officers and that he shall make recommendations to the Legislature on salaries for officers other than members of the Legislature. Ariz. Const., art. V, § 13. Finally, the Governor has the power to appoint various officers, commissioners and judges. Ariz. Const., art. VI, § 12; art. XI, §§ 3 and 5; art. XV, § 1; art. XIX.

The Honorable Karen R. Mills
The Honorable Sterling Ridge
The Honorable Henry H. Haws
June 2, 1986
I86-062
Page 4

communicating with other states and the United States on behalf
of the State of Arizona.^{3/}

3/A.R.S. § 41-101 provides:

A. The governor has the powers and shall perform the duties as prescribed in this article. The governor:

1. Shall supervise the official conduct of all executive and ministerial officers.

2. Shall see that all offices are filled and the duties performed or, in default, invoke such remedy as the law allows.

3. Shall appoint a private secretary to the governor and shall appoint all officers of this state not made elective, unless otherwise provided.

4. Shall be the sole official means of communication between this state and the government of any other state or the United States.

5. May direct the attorney general to appear on behalf of this state when any action or legal proceeding is pending which affects the title of this state to any property or which may result in a claim against this state.

6. May require the attorney general, or any county attorney, to inquire into the affairs or management of any corporation doing business in this state.

7. May require the attorney general to aid a county attorney in the discharge of his duties.

(Continued Next Page)

The Honorable Karen R. Mills
The Honorable Sterling Ridge
The Honorable Henry H. Haws
June 2, 1986
I86-062
Page 5

The only authority the Governor has pertaining to holidays is limited to making a proclamation of Arbor Days. A.R.S. § 1-304(B). The statute provides, however, that "Arbor Day shall not be a legal holiday." A.R.S. § 1-304(D).

On the other hand, nothing in the Arizona Constitution prohibits the Legislative Department from declaring state holidays and the hours state offices shall be open for business or closed for observance of holidays. Thus, the Legislature has the power to act in this area, and it has done so.

3/ (Footnote Continued)

8. May offer rewards for escaped insane persons, not exceeding five hundred dollars.

9. May require any officer or board to make special reports to him upon demand in writing.

10. May convene the legislature at some other place when the seat of government becomes dangerous from disease or a common enemy.

11. Has such powers and shall perform such other duties as devolve upon him by law.

The Arizona statutes also provide that the Governor may accept and expend certain federal grants, enter into reciprocal aid agreements, designate an agency to administer a ride sharing program, keep certain documents, receive military supplies on behalf of the state, offer rewards for information leading to arrest or conviction of felons, and consent to exchange of offenders pursuant to a treaty. A.R.S. §§ 41-101.01 to -105. Specific statutes grant the Governor power to appoint numerous state officers, boards, commissions, and committees. See e.g. A.R.S. §§ 3-101 (agriculture and horticulture commission), 37-131 (Land Commissioner), 41-511 (parks board), 41-714 (automation oversight committee), etc.

The Honorable Karen R. Mills
The Honorable Sterling Ridge
The Honorable Henry H. Haws
June 2, 1986
I86-062
Page 6

The Legislature has set out the state holidays in A.R.S. § 1-301(A). The statute includes no holiday on the third Monday of January. A.R.S. § 1-301(B) provides:

When any of the holidays enumerated in subsection A falls on a Sunday, the following Monday shall be observed as a holiday, with the exception of the holidays enumerated in paragraphs 1, 5, 7 and 9.^{4/}

(Emphasis added.) A provision for the manner of observance of legal holidays by public offices and the courts has been enacted:

A. Public offices shall not be open, and no court of justice shall be open or any judicial business transacted on a legal holiday, except for the following purposes:

1. To give upon its request, instructions to a jury deliberating on its verdict.

2. To receive a verdict or discharge a jury.

3. For the exercise of the powers of a magistrate in a criminal action or in a proceeding of a criminal nature.

B. Injunctions, attachments, process for claim and delivery and writs of prohibition may be issued and served on any day.

A.R.S. § 1-302. The Legislature has further provided for the times state offices must be open. A.R.S. § 38-401 provides:

Unless otherwise provided by law, and except on holidays, state offices shall be

^{4/}The excluded holidays are Sunday of each week, Mother's Day, Father's Day, and American Family Day.

The Honorable Karen R. Mills
The Honorable Sterling Ridge
The Honorable Henry H. Haws
June 2, 1986
I86-062
Page 7

kept open for transaction of business from eight o'clock a.m. until five o'clock p.m. each day from Monday through Friday.

The Legislature has not provided for observance of the third Monday of January by the closing of offices and courts, and has provided that state offices must remain open on that day.

If Executive Order No. 86-5 was construed to grant time off for state service employees, it would also conflict with applicable administrative rules and regulations promulgated pursuant to the Administrative Procedure Act, A.R.S. §§ 41-1001 to -1015. The Legislature has granted the Director of the Department of Administration the authority to promulgate rules and regulations governing attendance requirements for state service employees. A.R.S. §§ 41-763(6) and 41-783(17). The Director of the Department of Administration has promulgated A.C.R.R. R2-5-601(C)(1) which provides:

State Service employees shall be allowed to be absent with pay for any holiday provided in A.R.S. § 1-301 unless required by an agency to work in order to maintain essential State services.

A.C.R.R. R2-5-601(L) also provides for administrative leave based upon a declaration of a state of emergency by the Governor.^{5/} If, however, a rule declared an additional paid holiday with time off, it would conflict with the Arizona statutes and would, therefore, be invalid. An administrative rule cannot be inconsistent with or contrary to the provisions of a statute. Ferguson v. Arizona Department of Economic Security, 122 Ariz. 290, 292, 594 P.2d 544, 546 (App. 1979).

We have previously opined that the Governor has the power to issue executive orders, stating:

[E]xecutive orders issued by the Governor, insofar as they are not inconsistent with

^{5/}The Governor has "complete authority over all agencies of the state government" during a state of emergency. A.R.S. §§ 26-301(8) and 26-303(E).

The Honorable Karen R. Mills
The Honorable Sterling Ridge
The Honorable Henry H. Haws
June 2, 1986
I86-062
Page 8

Arizona statutory and constitutional provisions, govern state agencies and all other governmental entities which the Governor is required by the Arizona Constitution to insure properly observe the laws of the State of Arizona.

Ariz. Atty. Gen. Op. 77-186 (emphasis added). See also Ariz. Atty. Gen. Op. 76-49. An executive order is binding, however, only to the extent that it is within the powers of the Governor conferred upon him by the constitution and the Legislature. Id.

The power to declare state holidays lies with the Legislature and not with the Governor. Executive Order No. 86-5, therefore, does not have the effect of closing state offices or giving all Executive Department employees a day off with pay. The Governor's executive order must be construed as an executive proclamation of a Dr. Martin Luther King, Jr. Day that is to be observed in ways that serve the public without interfering with the transaction of governmental business.

Sincerely,



BOB CORBIN
Attorney General

BC:JGF:gm