



THE MILLE LACS BAND OF  
*OJIBWE INDIANS*

43408 Oodena Drive, Onamia, MN 56359  
Phone (320)532-7894 Fax (320)532-7836

Office of the Solicitor General

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**Opinion of the Solicitor General**

**No. 48-24**

**May 7, 2024**

Title 4 MLBS § 18 reads the Solicitor General shall have the following responsibilities, obligations and authority on behalf of the Non-Removable Mille Lacs Bands of Chippewa Indians: (d) To interpret all laws and executive, legislative, secretarial and commissioner's orders and policies on behalf of the Non-Removable Mille Lacs Bands of Chippewa Indians. (1) All said interpretations shall be titled in the form of Opinion of the Solicitor General, be consecutively numbered, dated as to the date of issuance, and contain the official seal of the Band. (2) All said opinions of the Solicitor General shall have the force of law and shall be binding until annulled by the Court of Central Jurisdiction or amended pursuant to legislative order of the Band Assembly. This opinion is issued pursuant to the authority conferred upon the Solicitor General in 4 MLBS § 18 (d) and shall have the force of law subject to the conditions stated in § 18 (d) (2).

Title 4 MLBS § 25 states should there be any doubt as to the proper interpretation of any part of this title, the Chief Executive may submit such question to the Solicitor General who shall give his or her written opinion thereon, and such opinion shall be binding unless annulled, in whole or part, by the Court of Central Jurisdiction, or amended by the Band Assembly pursuant to enactment of law.

On April 29, 2024, Chief Executive Benjamin made the following request for a Solicitor Opinion:

I hereby request your opinion regarding the following:

Do Sections 1.02, 1.09, and 1.10 of Ordinance 19-24 exceed the Band Assembly's authority in the context of:

- a) the division of powers (*see* 2 MLBS §3),
- b) the ability of Commissioners to manage their departments (*see* 4 MLBS §7 and §10), and

c) the prohibition against District Representatives exercising authority properly belonging to commissioners (*see* 3 MLBS § 9(b)),

by giving the Band Assembly the authority to control all salary and wages for individual employees within approved executive branch budgets?

This is part of an ongoing dispute between the branches that began after Ordinance 59-22 (the biennial appropriations bill for governmental operations for the fiscal years ending September 30, 2022 and September 30, 2023) was introduced, passed and signed into law on July 6, 2022. Sometime after Ordinance 59-22 was enacted, Commissioner of Finance Towle notified persons within the Executive Branch that he was concerned about recent payroll action notices received by the Office of Management and Budget “plac[ing] the persons['] rate of pay at an amount in excess of that which is in the approved biennium budget (Ord. 59-22).” Commissioner Towle indicated that he had instructed OMB staff to “immediately cease processing any PPAAN’s not already processed, that they are aware will result in the person’s rate of pay exceeding that which is in the approved biennium budget.” Commissioner Towle cited section 1.02 of Ordinance 59-22 as the authority for his position: “Absent any other lawful guidance, salary, wages, and the associated fringe benefits are only permitted to be expended for the Position Titles listed in the budget detail submitted with the biennium budget.” Commissioner Towle then advised that changes to position rates of pay within the Executive Branch must be first approved by APB, and then submitted to Band Assembly for approval.

I issued Solicitor Opinion 47-22 which concluded that the plain language of Ordinance 59-22 does not limit Executive Branch salary levels to the amounts associated with individual position titles in the budget narrative based on the plain language of the act. Band Assembly annulled that Solicitor’s Opinion on November 2, 2022.

Subsequently, Band Assembly passed Act 19-24 to appropriate for government operations for the 2024 and 2025 fiscal years on March 13, 2024. Section 1.02 contains limiting language that “[s]alary and wages are only permitted to be expended for the Position Titles listed in the budget (Exhibit A), at the corresponding hourly rates or below, unless approved through the Payroll Budget Revision process.” (Emphasis added) Sections 1.09 and 1.10 provide Executive Branch budget revision authority but excludes salary and wage revisions. Thus, under the Act, any increases to salary and wage rates must go through the Payroll Budget Revision process. This language is different than Section 1.02 of Ordinance 59-22 in that it expressly forbids Executive Branch revision of wage and salary amounts to rates above those listed within the approved budget without Band Assembly approval.

The Chief Executive vetoed the bill on March 19, 2024. Her veto message states in part:

Sections 1.02, 1.09, and 1.10 propose an extraordinary overreach of the Band Assembly into the Executive Branch by granting the Assembly inappropriate

decision-making authority over approved budgets of Executive Branch divisions, as well as power over individual salaries of Executive Branch employees. Many Band employees have had their duly earned salary increases delayed by as much as two years. Individual Band employees, including Band Members, have had their salaries challenged and qualifications questioned in public Band Assembly proceedings, which has had a chilling effect on the workforce and created a negative workforce environment. Some of our highest performing employees have left Band employment due to these issues.

Specifically, Section 1.02 requires ... salary and wage adjustments of Executive Branch employees to be approved by the Assembly.

Sections 1.09 and 1.10 allow for some flexibility in budget revisions, but even they make exceptions for salary and wages of Executive Branch employees.

After the Chief Executive's veto, Band Assembly responded via letter on April 25, 2024 that the section requiring Band Assembly approval for salary and wage adjustments "is related to economic pressures and the lack of an updated compendium or salary schedule for Band employees. We believe the Assembly can provide helpful checks and balances until those conditions are resolved." Subsequent compromise discussions failed to yield mutually acceptable language, resulting in the Chief Executive's request for a legal opinion.

I conclude that Act 19-24 does not exceed Band Assembly's authority or violate the Band's separation of powers because limitation of Executive Branch salary expenditures to an established budget narrative is a valid exercise of the Legislative Branch's appropriations power. The Legislative Branch's power to appropriate Band revenue, and its duty to keep all such monies in the Band treasury until lawfully disbursed by formal appropriation, means that the Executive Branch may not expend funds beyond what the Legislative Branch has approved. Thus, the limitations contained in Act 19-24, if enacted into law, would not encroach on the Executive Branch's authority.

#### **1. Act 19-24 Does Not Exceed Band Assembly's Authority in the Context of the Band's Division of Powers.**

The Legislative Branch has the exclusive authority to appropriate Band revenue. 3 MLBS § 3(b). The Executive Branch has exclusive authority to prepare biennial budget requests for all executive functions and submit the same to Band Assembly for appropriation. 4 MLBS § 3(d). Executive officers within the Executive Branch have authority to authorize the expenditure of all appropriated funds within their subject matter jurisdiction. 4 MLBS § 7(c). The executive branch's "discretion to spend appropriated funds is cabined only by the text of the appropriation, not by [the legislature's] expectations of how the funds will be spent . . ." *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 200 (2012) (internal quotation marks omitted). When examining Executive compliance with appropriation laws, "legislative intention, without more, is not legislation." *Train*

*v. City of New York*, 420 U.S. 35, 45 (1975). The issue “is not how [the legislature] expected or intended the [executive] to behave, but how it required [the executive] to behave, through the only means by which it can (as far as the courts are concerned, at least) require anything -- the enactment of legislation.” *Int'l Union, UAW v. Donovan*, 746 F.2d 855, 860-61 (D.C. Cir. 1984). Thus, the focus “must be upon the text of the appropriation.” *Id.* If the legislature “does not intend to permit agency flexibility, but intends to impose a legally binding restriction on an agency’s use of funds, it does so by means of explicit statutory language.” *Id.* at 861 (quoting *LTV Aerospace Corp.*, B-183851, Oct. 1, 1975, 55 Comp. Gen. 307, 318, 75-2 CPD para. 203).

The language of Section 1.02 in Act 19-24 differs from the language in Section 1.02 of Ordinance 59-22 in one key respect, which is underlined below:

Ordinance 59-22, Section 1.02	Act 19-24, Section 1.02
<p>All funds appropriated are maximum fund amounts and shall not be exceeded within any line item. Funds must be utilized for the purposes for which they were requested, notwithstanding any exceptions provided in this Ordinance or any other active Band Ordinance. No expenditure that causes a budget line item to be exceeded may be paid without further Band Assembly action, except that the Office of Management and Budget leadership is authorized to exercise reasonable discretion regarding line-item budget overages such as to avoid unintended outcomes that would result in an adverse impact to the Band. Examples include, but are not limited to: paying a utility bill to avoid discontinuance of service/utility shut-offs; paying on an invoice to prevent incurrence of late payment charges; and, authorizing expenditures for emergency situations such as a broken water main or heating unit. Absent any other lawful guidance, salary, wages, and the associated fringe</p>	<p>All funds appropriated are maximum fund amounts and shall not be exceeded within any line item <u>unless otherwise permitted by Band law.</u> Funds must be utilized for the purposes for which they were requested, notwithstanding any exceptions provided in this Bill or any other active Band law. No expenditure that causes a budget line item to be exceeded may be paid without further Band Assembly action, except that the Office of Management and Budget leadership is authorized to exercise reasonable discretion regarding line-item budget overages such as to avoid unintended outcomes that would result in an adverse impact to the Band. Examples include, but are not limited to: paying a utility bill to avoid discontinuance of service/utility shut-offs; paying on an invoice to prevent incurrence of late payment charges; and, authorizing expenditures for emergency situations such as a broken water main or heating unit. <u>Salary and wages are only permitted to be expended for the</u></p>

benefits are only permitted to be expended for the Position Titles listed in the budget detail submitted with the biennium budget.	<u>Position Titles listed in the budget (Exhibit A), at the corresponding hourly rates or below, unless approved through the Payroll Budget Revision process.</u>
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The final sentence of Section 1.02 reads that salary and wages are only permitted to be expended for the Position Titles listed in the budget, at the corresponding hourly rates or below, unless approved through the Payroll Budget Revision (PBR) process. The plain language of this provision prohibits the Executive Branch from increasing salaries and wages above the rates listed in the submitted budget without going through the PBR process, which culminates with Band Assembly review of the budget change and approval via bill.<sup>1</sup> Unlike Ordinance 59-22, which lacked such explicit statutory language and thus did not prevent the Executive Branch from increasing salary amounts above those listed in the budget narrative accompanying that Act, the final sentence of Act 19-24’s Section 1.02 is plainly a limitation on the spending authority exercised by the Executive Branch. Thus, the question is whether such a limitation violates the Band’s separation of powers.

2 MLBS § 3 provides that Band government authority shall be balanced by dividing such authorities so that no one person or governmental entity shall have absolute power. This is the codification of the Band’s separation of powers. With regards to division of power over fiscal matters, the Executive Branch is responsible for preparing the biennial budget, and spending appropriated funds, while the Legislative Branch is responsible for appropriating Band revenue and ensuring that monies do not leave the Band treasury without lawful appropriation. Under 3 MLBS § 3(b), Band Assembly has the power to appropriate all Band revenue regardless of source. The Secretary-Treasurer has the power to superintend and manage all fiscal operations, planning and budgeting of the Band as authorized by Band Assembly. 3 MLBS § 8(a). The Secretary-Treasurer has the duty to keep all monies paid into the Band treasury until lawfully disbursed by formal appropriation. *Id.* § 8(c). Under 4 MLBS § 3, the Executive Branch has the authority to faithfully execute Band laws, and to prepare biennial budget requests for all executive functions and submit the same to Band Assembly for appropriation. Under 4 MLBS § 7(c), executive officers

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<sup>1</sup> The “Payroll Budget Revision Form Aug 2023” Excel spreadsheet. The “Instructions” section of the spreadsheet states: “The Payroll Budget Revision Form must be approved by Band Assembly and the Chief Executive, which is achieved by the Payroll Budget Revision being referenced in a bill. Personal information is treated in a confidential manner. No names or job titles are listed in the bill. Only the fund number, department number, and dollar amount are listed.”

within the Executive Branch have authority to authorize the expenditure of all appropriated funds within their subject matter jurisdiction.

There is a lack of Band law interpreting the legal consequences of the Band's separation of powers. By analogy, Federal law interpreting the United States' separation of powers may be helpful given the similarities between the two government's separation of fiscal powers. Like the Band, the Federal government's separation of powers includes vesting appropriation power in the legislative branch (i.e. Congress) under Article I, § 9 clause 7 of the U.S. Constitution. ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.") As a result, the Appropriations Clause has been viewed as a critical aspect of the separation of federal powers:

The Appropriations Clause thus embodies the Framers' objectives of maintaining "the necessary partition among the several departments," *The Federalist No. 51* (J. Madison), and ensuring transparency and accountability between the people and their government. The clause's role as "a bulwark of the Constitution's separation of powers" has been repeatedly affirmed. *U.S. Dep't of Navy v. Fed. Lab. Rels. Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (Kavanaugh, J.); *see id.* ("The Appropriations Clause prevents Executive Branch officers from even inadvertently obligating the Government to pay money without statutory authority.") (citations omitted); *see also, e.g., Sierra Club v. Trump*, 929 F.3d 670, 704 (9th Cir. 2019) ("The Appropriations Clause is a vital instrument of separation of powers ...."); *City of Chicago v. Sessions*, 888 F.3d 272, 277 (7th Cir. 2018) (discussing the power of the purse as an important aspect of the separation of powers created by "[t]he founders of our country"); *United States v. McIntosh*, 833 F.3d 1163, 1175 (9th Cir. 2016) ("The Appropriations Clause plays a critical role in the Constitution's separation of powers among the three branches of government and the checks and balances between them.").

*Cnty. Fin. Servs. Ass'n of Am., Ltd. v. Consumer Fin. Prot. Bureau*, 51 F.4th 616, 637 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 978, 215 L. Ed. 2d 104 (2023), and *cert. denied sub nom. Cnty. Fin. Servs. Ass'n of Am. v. Consumer Fin. Prot. Bureau*, 143 S. Ct. 981, 215 L. Ed. 2d 106 (2023). Federal statutes reinforce Congress's control over appropriated funds, including the "Purpose Statute," which provides that appropriated funds may be applied only "to the objects for which the appropriations were made," 31 U.S.C. § 1301(a), and the Anti-Deficiency Act, which makes it unlawful for government officials to "make or authorize an expenditure or obligation exceeding an amount available in an appropriation" or to involve the Federal Government "in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S.C. § 1341(a)(1)(A)-(B).

Because of this, Congressional use of appropriations power to limit executive branch spending authority does not violate the separation of powers, but operates as a vital part of the system of checks and balances inherent in the separation of powers. “Any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury.” *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 425 (1990); *see also Knote v. United States*, 95 U.S. 149, 154 (1877) (“However large, therefore, may be the power of . . . the President, and however extended may be its application, there is this limit to it, as there is to all his powers,—it cannot touch moneys in the treasury of the United States, except expressly authorized by act of Congress.”)

Under Band law, the Legislative Branch appropriates all Band revenue via appropriations acts, which are required to lawfully disburse monies from the Band treasury. 3 MLBS § 3(b); 3 MLBS § 8(c) (Secretary-Treasurer, as part of the Legislative Branch, must ensure that money is not paid out of the Band treasury “until lawfully disbursed by formal appropriation.”) 3 MLBS § 17(f) (appropriations bills, like any bill, become law upon passage and presentment without veto). This places the “power of the purse” in the Legislative Branch, which may use this power as a check on Executive spending power. Thus, legislation that limits Executive Branch spending authority to amounts set forth in a budget narrative incorporated into an appropriations bill, provided it has been passed by Band Assembly and not vetoed by the Chief Executive, is a valid exercise of the Legislative Branch’s “power of the purse.” Therefore, it does not intrude upon the Executive Branch’s authority.

## **2. Act 19-24 Does Not Exceed Band Assembly’s Authority in the Context of the Ability of Commissioners to Manage Their Respective Departments.**

Under 4 MLBS § 7(c), executive officers within the Executive Branch have authority to authorize the expenditure of all appropriated funds within their subject matter jurisdiction. However, executive officers also have the duty to faithfully execute Band law. *Id.* § 7(a). As discussed above, Band Assembly’s appropriations power includes the power to legislatively place limits on Executive Branch spending. Expenditure of funds in violation of a limit set in an appropriations act would not be within the lawful scope of a Commissioner’s authority. Because Act 19-24 states that salaries and wages cannot be raised above the levels in the biennial budget narrative without going through the PBR, and the PBR culminates in Band Assembly deciding whether to pass an additional appropriation bill to pay for such raises, the funding for the raises cannot be considered appropriated by Act 19-24.

4 MLBS § 10 sets forth the Commissioner of Administration’s powers and duties. They include the power to sign by authorization all vouchers and expenditures of appropriated funds of the Executive Branch pursuant to provisions of Band statute (§ 10(c)), and to be responsible for the preparation of the Executive Branch’s biennial budget and its submission to Band Assembly (§ 10(e)). Thus, as stated above, the Commissioner of Administrations cannot lawfully authorize expenditure of funds that have not been appropriated.

Act 19-24 does not say that executive officers may never, in the management of their respective departments, raise salaries. Instead, it provides that executive officers wishing to do so must ultimately seek additional appropriations from Band Assembly to pay for those raises. Thus, the Act does not intrude upon Executive Branch authority since it is a valid exercise of Band Assembly's appropriation power.

**3. Act 19-24 Does Not Exceed Band Assembly's Authority in the Context of the Prohibition Against District Representatives Exercising Authority Properly Belonging to Commissioners.**

3 MLBS § 9(b) is best interpreted as limiting the authority of District Representatives as individuals, because section 9(a) lists the "individual authority" of District Representatives in exercising legislative power. Section 1.02 of Act 19-24 does not vest authority over salary and wage increases in any individual District Representative but instead requires increases to go through the Payroll Budget Revision process. Because the PBR process culminates in a legislative process whereby Band Assembly as a legislative body considers and then votes on whether to approve the increase and appropriate the necessary funds, it does not involve the exercise of individual District Representative authority under 3 MLBS § 9. Thus, nothing in Act 19-24 involves individual District Representatives exercising authority other than their collective legislative authority as Band Assembly.

Based upon the foregoing, I conclude Act 19-24 does not exceed Band Assembly's authority in the context of the division of powers, the ability of Commissioners to manage their departments and the prohibition against District Representatives exercising authority properly belonging to Commissioners.



Caleb Dogeagle  
Solicitor General

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May 7, 2024

Date of Issuance



As to form and numbering according to MLBS Title 25 § 4(f);

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*Hanna Valento*

Hanna Valento  
Revisor of Statutes

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May 7, 2024

Date