



Mille Lacs Band of Ojibwe Indians

Legislative Branch of Tribal Government

TRANSMITTAL VIA E-MAIL

12 May 2022

Caleb Dogeagle
Solicitor General
43408 Oodena Drive
Onamia, MN 56359

Dear Solicitor General Dogeagle:

The Band Assembly is grateful for your prompt, thoughtful responses to the five questions posed by Resolution 20-01-22-22. Having carefully considered the ramifications of Opinion of the Solicitor General 45-22 (“the Opinion”), we have concluded that we must annul in part the Opinion. Statute prescribes a specific timeline within which we must act to annul an opinion. All statutory requirements have been met.¹

Out of a desire to ensure that the public and the government have a clear understanding of which portions of the Opinion were annulled, this letter and the attached document are intended to supplement the formal record of the exact portions of the Opinion that were annulled and will be posted on the Tribal Register alongside the Opinion.²

While we are not required by statute to provide any explanation if an opinion is annulled, we wished to do so out of respect for your necessitated haste in responding to the answers to the questions posed in Resolution 20-01-22-22.

While we agree with the bottom-line conclusion of the Answer to Question 1 that the Assistant Commissioner of Administration may act in the event that the Commissioner of Administration (“the Commissioner”) is suspended by the Joint Session, we reject the legal reasoning of the Opinion as it relates to the answer to the question. Many provisions were overbroad, referencing the Assistant Commissioner of Administration (“the Assistant Commissioner”) acting in the “absence” of the Commissioner, rather than answering the narrow question presented, which referred only to when the Commissioner is “suspended.” Additionally, the hypothetical posed of the Commissioner being “unable to perform his or her duties due to sudden, unforeseen

¹ See 3 MLBS § 20 (requiring that a notice of intent to annul be issued within “five (5) calendar days from the date of receipt” to begin the annulment process, that an annulment hearing be held “[w]ithin ten (10) consecutive days” after said notice was issued, and that any action to annul an opinion be done “within five (5) consecutive days after said hearing”). The Band Assembly received the Opinion on 1 May 2022, issued a notice of intent to annul on 3 May 2022, held the annulment hearing at a special session of Band Assembly on 6 May 2022, and acted to annul in part the Opinion on 11 May 2022.

² The Minutes for the special session of Band Assembly, dated 11 May 2022, reflect the official action of the Band Assembly to annul the Opinion and the exact portions of the Opinion that were annulled were read into the record.

circumstances” is vague and overbroad. Under the legal analysis provided, the delegation requirement in 4 MLBS § 10(g) would be rendered meaningless and greater ambiguity would be injected to the operation of Band government as debate rages over what it means for the Commissioner to be “absent” or whether the circumstances in question were truly “sudden” or “unforeseen.”

The Answer to Question 2 contained no legal analysis of its own and was entirely reliant on the annulled portions of the legal analysis in the Answer to Question 1. Therefore, this answer was annulled.

The Answer to Question 3 implies that the Chief Executive is able to supersede statute by assigning to any commissioner the statutory duties of another commissioner on the sole basis of the “Chief Executive’s authority,” which is not an acceptable construction of laws duly passed by the Band Assembly assigning specific areas of jurisdiction and specific subject matters of Band government to specific commissioners, who are evaluated and confirmed to their position in consideration of their qualifications and skills in said subject matter.

The final sentence of the Answer to Question 4 was annulled because, in the view of the Band Assembly, “historical practice and interpretation” is superfluous to the otherwise reasonable legal analysis of the subsection in question.

We do not have any significant objections to the Answer to Question 5, so no portion of that Answer was annulled.

Miigwech.

Sincerely,



Sheldon Boyd, Speaker of the Assembly



Virgil Wind, District 1 Representative



Marvin Bruneau, District 2 Representative



Wallace St. John, District 3 Representative

CC: Melanie Benjamin, Chief Executive
Syngen Kanassatega, Legal & Policy Counsel



THE MILLE LACS BAND OF
OJIBWE INDIANS

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Office of the Solicitor General

Opinion of the Solicitor General

No. 45-22

May 1, 2022

Title 4 MLBSA § 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 MLBSA § 18 (d) and shall have the force of law subject to the conditions stated in § 18 (d) (2).

Title 3 MLBSA § 33 states should there be any doubt as to the proper interpretation of any part of this title, or of 2 MLBSA Chapter 1, the Speaker of the Assembly or the Band Assembly as an entity 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 in part, by the Court of Central Jurisdiction, or amended by the Band Assembly pursuant to the enactment of the law. On April 27, 2022, the Band Assembly adopted Resolution 20-01-22-22 requesting a Solicitor's Opinion providing thorough legal analysis on five questions regarding the powers of the Assistant Commissioner of Administration:

(1) Under 4 MLBS § 7 or 4 MLBS § 10, do the powers of the Commissioner of Administration devolve automatically to the Assistant Commissioner of Administration when the commission of the Commissioner of Administration has been suspended by the Joint Session?

(2) Under 4 MLBS § 7 or 4 MLBS § 10, do the powers of the Commissioner of Administration devolve to the Assistant Commissioner of Administration in any other circumstance, apart from express delegation?

(3) Under 4 MLBS § 6 or 4 MLBS § 7(k), does the Chief Executive have the authority to delegate to the Assistant Commissioner of Administration the authorities of the Commissioner of Administration when said power of delegation is given expressly to the Commissioner of Administration?

(4) Under 4 MLBS § 10(g), does the term “herein” refer to the language of § 10 or the language of Title 4 when the subsection specifically cites 4 MLBS § 7 as one permissible source of authority outside of § 10, giving a presumption that the use of “herein” refers solely to § 10 itself?

(5) Under 4 MLBS § 9(b), and giving due consideration to the answer to question (4), does the Assistant Commissioner of Administration have the authority to chair the Administration Policy Board when said authority is expressly assigned to the Commissioner of Administration?

Within Resolution 20-01-22-22, Band Assembly provides the following facts and information:

- Assistant Commissioner of Administration Costello has issued eight separate Commissioner’s Orders citing 4 MLBS §§ 7(h) and 9(a) as the sources of her authority.
- Band Assembly does not dispute that 4 MLBS § 7(h) gives the Assistant Commissioner the authority to issue commissioner’s orders because the Assistant Commissioner is an executive officer under 4 MLBS § 4.
- Band Assembly observes that 4 MLBS § 9(a) states that if “the Administration Policy Board is unable to perform its duties due to a lack of quorum, **the Commissioner of Administration** may issue a commissioner’s order to implement any said matter.” (emphasis added).
- The Assistant Commissioner of Administration is not the Commissioner of Administration.
- The Commissioner of Administration has been suspended indefinitely and to the best of Band Assembly’s knowledge, the Commissioner did not expressly delegate any of his authorities to Assistant Commissioner Costello prior to his suspension.
- Band Assembly is seeking a binding interpretation of law to determine whether Band Assembly should annul future orders from the Assistant Commissioner on the basis that the Assistant Commissioner lacks authority to issue such orders.

Resolution 20-01-22-22.


I located five Commissioner's Orders signed by Assistant Commissioner Costello (Commissioner's Order 2022-01 through 2022-04, and 2022-06). Orders 2022-01 through 2022-03 state that "[t]he purpose of this Commissioner's Order is to implement matters related to personnel, contracts, and grants due to the Administration Policy Board's lack of quorum" Commissioner's Order 2022-02 rescinded 2022-01. Order 2022-04 states that its purpose is to "implement matters related to the Department of Community Development's appropriation request due to the Administration Policy Board's lack of quorum." Order 2022-06 rescinds Order 2022-04 to implement the same purpose *i.e.* matters related to Community Development's appropriation request. All five orders cite 4 MLBS §§ 7(h) and 9(a) as the source of the Assistant Commissioner's authority.

Under 4 MLBS § 26, Title 4 is to be liberally construed by the Solicitor General so as to provide for achievement of the purposes thereof. With the foregoing considerations in mind, I provide my opinion on the answers to Band Assembly's five questions.

Question 1: Under 4 MLBS § 7 or 4 MLBS § 10, do the powers of the Commissioner of Administration devolve automatically to the Assistant Commissioner of Administration when the commission of the Commissioner of Administration has been suspended by the Joint Session?


Answer: Yes.





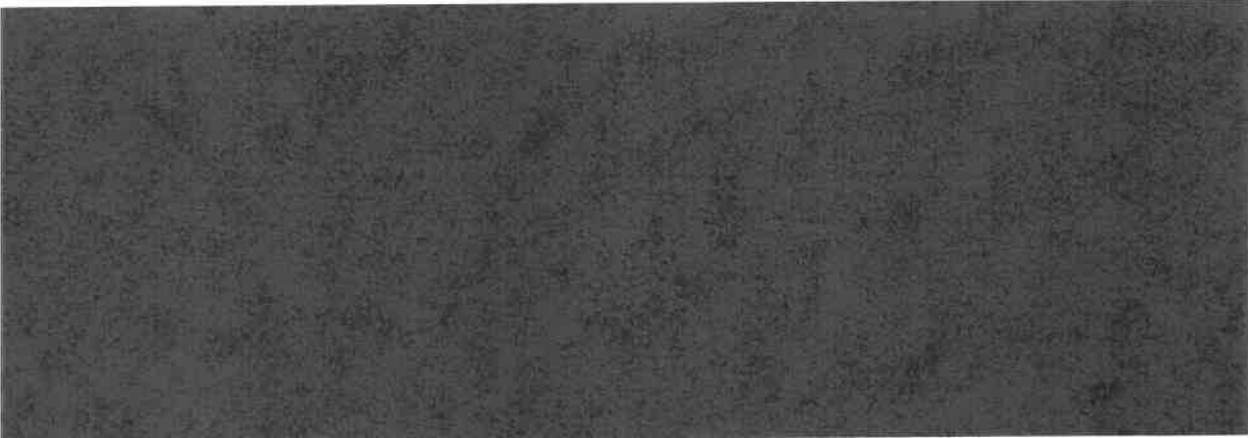
No delegation, express or implied, is needed before the Assistant Commissioner of Administration can issue Commissioner's Orders under 4 MLBS § 7. It is clear that the Assistant Commissioner of Administration has authority to issue Commissioner's Orders" as an Executive Officer. The Assistant Commissioner of Administration shares the powers and duties common to all Executive Officers set forth in 4 MLBS § 7, which include the authority under 4 MLBS § 7(h) "on any subject matter within [her] jurisdiction pursuant to the authority conferred by Band statute, "[t]o authorize expenditure of all appropriated funds within their subject matter jurisdiction," 4 MLBS § 7(c), "[t]o exercise any and all authority conferred pursuant to the provisions of any other Band statute," 4 MLBS § 7(j), and "[t]o perform any duties as may be lawfully assigned by the Chief Executive," 4 MLBS § 7(k). In addition, executive officers have the power "[t]o regulate the performance of their duties by all persons employed within their area of subject matter jurisdiction" and "[t]o take such measures as are deemed necessary to prevent any action which threatens the well-being of programs within their respective jurisdiction, by the issuance of a formal commissioner's order." 4 MLBS §§ 7(d) & (i).

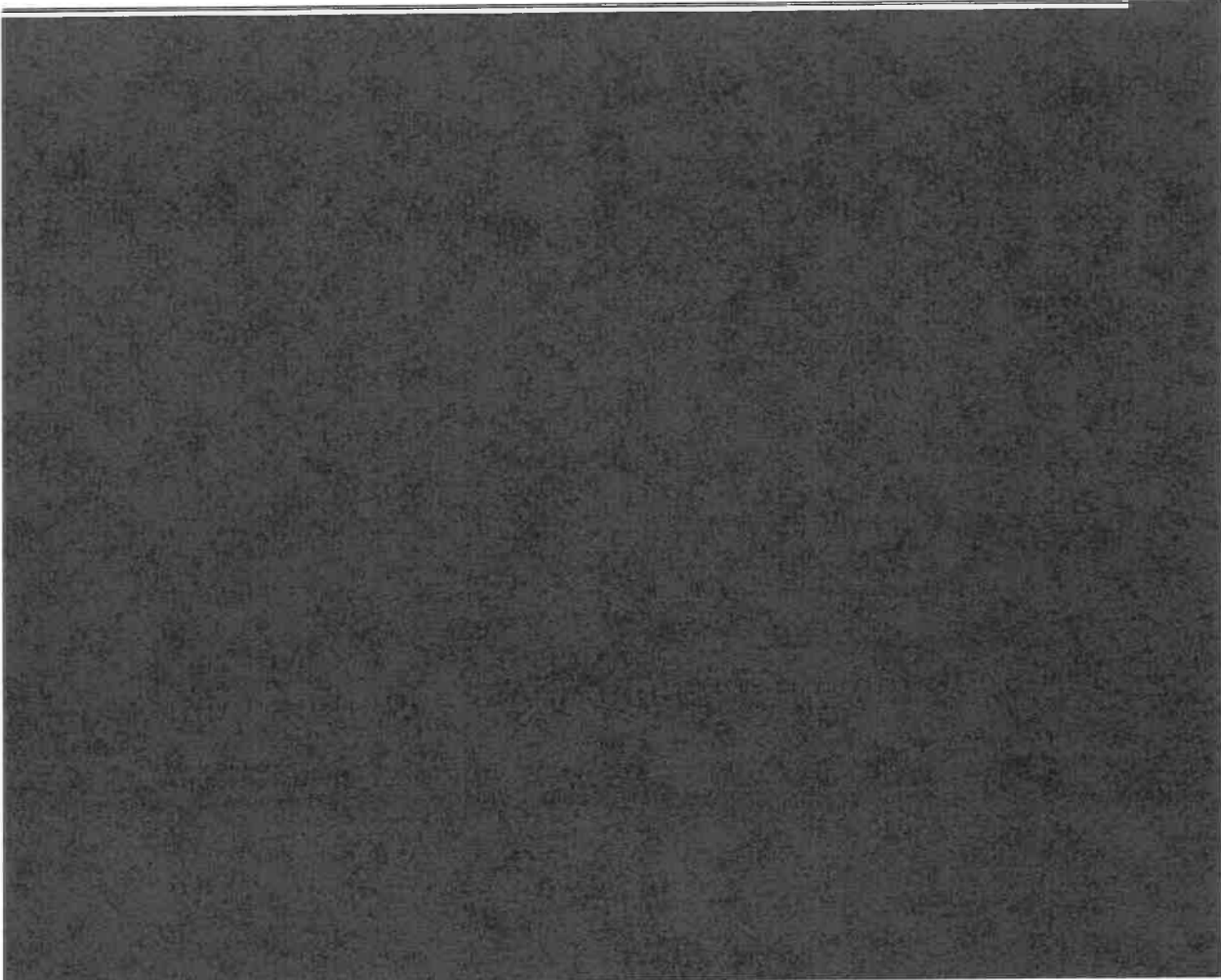
However, the Band Assembly seems concerned with the 2022 Commissioner's Orders invoking 4 MLBS § 9(a) as a source of authority to act in the absence of a quorum of the Administration Policy Board. The Administration Policy Board (APB) was created by Band Statutes. 4 MLBS § 8.




The Chief Executive retains power to veto any APB action. 4 MLBS § 9(f). Band Assembly retains the power to ratify contracts and appropriate all Band revenue. 3 MLBS §§ 3(b), (f).

If the APB is unable to perform its duties due to a lack of quorum, the Commissioner of Administration may issue a commissioner's order to implement any said matter. 4 MLBS § 9(a). All the five Commissioner Orders listed above that Assistant Commissioner of Administration Costello issued were intended to implement APB matters due to lack of an APB quorum.²





Title 4 MLBS does not assign specific, unique duties to the Assistant Commissioner of Administration, yet the Assistant Commissioner is one of the Band's Executive Officers. 4 MLBS § 10 recognizes that the Assistant Commissioner may be called to act in the absence of the Commissioner of Administration. Given the importance of the Commissioner's functions in serving as the Executive Branch's Chief of Staff and chairing the APB, it would frustrate the purpose of Title 4 to strictly construe 4 MLBS § 10(g) as requiring an express delegation from the Commissioner of Administration before the Assistant Commissioner of Administration may act.



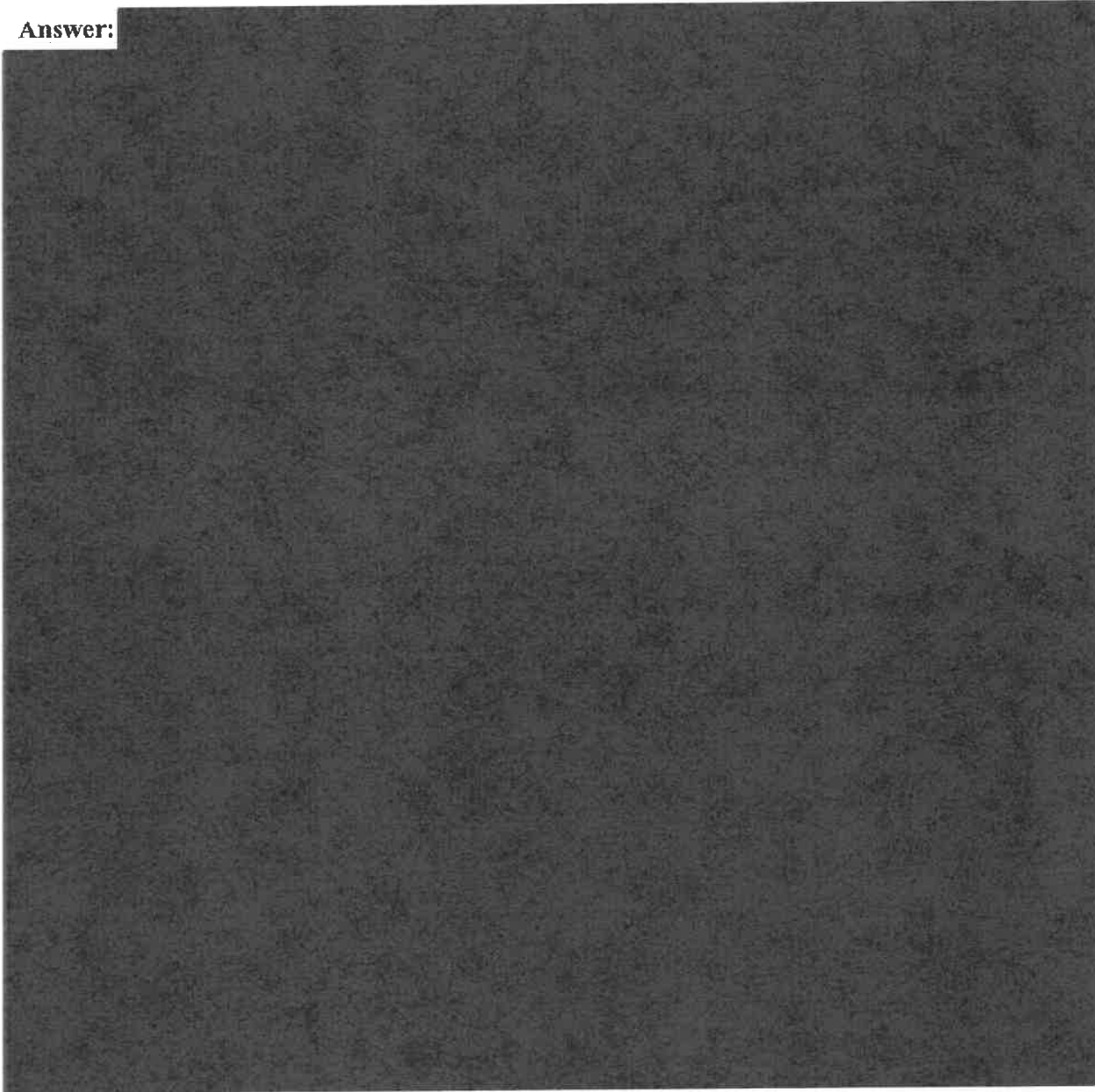
Question 2: Under 4 MLBS § 7 or 4 MLBS § 10, do the powers of the Commissioner of Administration devolve to the Assistant Commissioner of Administration in any other circumstance, apart from express delegation?

Answer:



Question 3: Under 4 MLBS § 6 or 4 MLBS § 7(k), does the Chief Executive have the authority to delegate to the Assistant Commissioner of Administration the authorities of the Commissioner of Administration when said power of delegation is given expressly to the Commissioner of Administration?

Answer:



Question 4: Under 4 MLBS § 10(g), does the term "herein" refer to the language of § 10 or the language of Title 4 when the subsection specifically cites 4 MLBS § 7 as one permissible source of authority outside of § 10, giving a presumption that the use of "herein" refers solely to § 10 itself?

Answer: Either is a reasonable construction of 4 MLBS § 10(g). However, the entire Title 4 is to be liberally construed to effectuate its purposes. Liberal construction of § 10(g) to effectuate the purpose of Title 4 requires that all authority of the Commissioner of Administration under Title 4 can be delegated to the Assistant Commissioner of Administration. That includes the Commissioner of Administration's authority to chair the APB and issues commissioner's orders to implement APB matters in the absence of a quorum. [REDACTED]

Question 5: Under 4 MLBS § 9(b), and giving due consideration to the answer to question (4), does the Assistant Commissioner of Administration have the authority to chair the Administration Policy Board when said authority is expressly assigned to the Commissioner of Administration?

Answer: Yes. See above answer to Question 4.



Caleh Dogeagle
Solicitor General

May 1, 2022

Date of Issuance





THE MILLE LACS BAND OF
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- (1) Under 4 MLBS § 7 or 4 MLBS § 10, do the powers of the Commissioner of Administration devolve automatically to the Assistant Commissioner of Administration when the commission of the Commissioner of Administration has been suspended by the Joint Session?

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- Band Assembly observes that 4 MLBS § 9(a) states that if “the Administration Policy Board is unable to perform its duties due to a lack of quorum, **the Commissioner of Administration** may issue a commissioner’s order to implement any said matter.” (emphasis added).
- The Assistant Commissioner of Administration is not the Commissioner of Administration.
- The Commissioner of Administration has been suspended indefinitely and to the best of Band Assembly’s knowledge, the Commissioner did not expressly delegate any of his authorities to Assistant Commissioner Costello prior to his suspension.
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Under 4 MLBS § 26, Title 4 is to be liberally construed by the Solicitor General so as to provide for achievement of the purposes thereof. With the foregoing considerations in mind, I provide my opinion on the answers to Band Assembly's five questions.

Question 1: Under 4 MLBS § 7 or 4 MLBS § 10, do the powers of the Commissioner of Administration devolve automatically to the Assistant Commissioner of Administration when the commission of the Commissioner of Administration has been suspended by the Joint Session?

Answer: Yes. This has been the historical practice, supported by the structure and liberal interpretation of Title 4 MLBS.

Liberally construing Title 4 requires that the Assistant Commissioner of Administration automatically assumes the authority of the Commissioner of Administration in the Commissioner's absence. This is evident not only from the historical practice, but also in the structure of Title 4 MLBS. Unlike the other Executive Officers listed in 4 MLBS § 4, the Assistant Commissioner of Administration has no express powers and duties conferred by MLBS Title 4 that are unique to that office.¹ It seems unlikely that Band Assembly would create an Executive Office for an Assistant Commissioner of Administration yet fail to vest that Office with any power except those expressly delegated by the Commissioner of Administration. Because the Commissioner of Administration functions as "Chief of Staff" of the Executive Branch itself and has responsibility for many key Executive Branch functions including oversight of the Administration Policy Board, it seems likely that Band Assembly created the Assistant Commissioner of Administration position to ensure that those key Executive Branch functions

¹ See, e.g., 4 MLBS § 6 (powers and duties of the Chief Executive); 4 MLBS § 10 (powers and duties of the Commissioner of Administration); 11 MLBS §§ 2002, 2003 (power and duties of the Commissioner of Natural Resources); 9 MLBS § 15 (powers and duties of the Commissioner of Education); 16 MLBS § 4 (powers and duties of the Commissioner of Corporate Affairs); 12 MLBS § 1 (powers and duties of the Commissioner of Community Development).

perform smoothly in the Commissioner's absence, with or without an express delegation of authority.

No delegation, express or implied, is needed before the Assistant Commissioner of Administration can issue Commissioner's Orders under 4 MLBS § 7. It is clear that the Assistant Commissioner of Administration has authority to issue Commissioner's Orders" as an Executive Officer. The Assistant Commissioner of Administration shares the powers and duties common to all Executive Officers set forth in 4 MLBS § 7, which include the authority under 4 MLBS § 7(h) "on any subject matter within [her] jurisdiction pursuant to the authority conferred by Band statute, "[t]o authorize expenditure of all appropriated funds within their subject matter jurisdiction," 4 MLBS § 7(c), "[t]o exercise any and all authority conferred pursuant to the provisions of any other Band statute," 4 MLBS § 7(j), and "[t]o perform any duties as may be lawfully assigned by the Chief Executive," 4 MLBS § 7(k). In addition, executive officers have the power "[t]o regulate the performance of their duties by all persons employed within their area of subject matter jurisdiction" and "[t]o take such measures as are deemed necessary to prevent any action which threatens the well-being of programs within their respective jurisdiction, by the issuance of a formal commissioner's order." 4 MLBS §§ 7(d) & (i).

However, the Band Assembly seems concerned with the 2022 Commissioner's Orders invoking 4 MLBS § 9(a) as a source of authority to act in the absence of a quorum of the Administration Policy Board. The Administration Policy Board (APB) was created by Band Statutes. 4 MLBS § 8. Its powers include negotiation and administering Band grants and contracts, hiring and dismissal of Band employees, and "recommend[ing] any measure to the Band Assembly for their consideration, upon the advice and consent of the Chief Executive." 4 MLBS §§ 8(b), (d), (f) and (g). The Chief Executive retains power to veto any APB action. 4 MLBS § 9(f). Band Assembly retains the power to ratify contracts and appropriate all Band revenue. 3 MLBS §§ 3(b), (f).

If the APB is unable to perform its duties due to a lack of quorum, the Commissioner of Administration may issue a commissioner's order to implement any said matter. 4 MLBS § 9(a). All the five Commissioner Orders listed above that Assistant Commissioner of Administration Costello issued were intended to implement APB matters due to lack of an APB quorum.²

4 MLBS § 10(g) has been interpreted by the Executive Branch as automatically delegating the Commissioner of Administration's authority to the Assistant Commissioner upon the Commissioner's absence, including the Commissioner's authority to act for the APB in the absence of a quorum under 4 MLBS § 9(a). *See, e.g.*, Commissioner's Order 264-13 (July 24, 2013).

² Chief Executive Benjamin has since clarified that APB approval is not required before appropriation requests may be submitted to Band Assembly and has explained the Executive Branch's internal process for ensuring that only appropriation requests approved by the Chief Executive are submitted to Band Assembly. *See* Chief Executive Benjamin to Speaker Boyd and District Representatives, April 28, 2022 (on file).

Solicitor Opinion 24-02, at page 5, recognized that “Executive Officers perform a vital function for the efficiency of Band Government. Even the temporary loss of a Commissioner could affect the daily executive administration of the Band and the ability of the Chief Executive to perform her daily functions on behalf of the Band.” Although Solicitor’s Opinion 24-02 concluded that the Chief Executive could not make interim appointments to vacant Executive Officer positions absent Band Assembly’s advice and consent, it did not determine that the Chief Executive lacked authority to delegate the Commissioner of Administration’s duties, including oversight of the APB, to another Executive Officer.

Likewise, Solicitor Opinion 35-10 expressly recognizes that “[t]he Chief Executive . . . is ultimately responsible for every single occurrence within the Executive Branch. . . . The Chief must be able to rely on each commissioner to ensure that the day-to-day operation of that commissioner’s department functions in a manner that the Chief desires.” In addition, “[t]he day-to-day issues that arise within Executive Branch departments that need to be addressed with Band Assembly are generally handled at the commissioner level,” *id.* at 2, and a commissioner is an “appointed official [who] is technically an employee of the Band. . . [and] has statutory duties to fulfill,” *id.* at 3.

The functioning of Band Government is greatly impaired in the absence of a Commissioner of Administration, and doubly so when the APB lacks a quorum. Consistent historical interpretation of Title 4 MLBS is that the Assistant Commissioner of Administration automatically assumes the authority of the Commissioner of Administration, including oversight of the APB, upon the absence of the Commissioner of Administration. That interpretation finds support in the structure and purpose of Title 4, and in 4 MLBS § 26 which requires liberal interpretation of Title 4 to achieve its purpose of seeing that the laws of the Band are faithfully executed.

Title 4 MLBS does not assign specific, unique duties to the Assistant Commissioner of Administration, yet the Assistant Commissioner is one of the Band’s Executive Officers. 4 MLBS § 10 recognizes that the Assistant Commissioner may be called to act in the absence of the Commissioner of Administration. Given the importance of the Commissioner’s functions in serving as the Executive Branch’s Chief of Staff and chairing the APB, it would frustrate the purpose of Title 4 to strictly construe 4 MLBS § 10(g) as requiring an express delegation from the Commissioner of Administration before the Assistant Commissioner of Administration may act. What if the Commissioner is unable to perform his or her duties due to sudden, unforeseen circumstances that did not allow the Commissioner to issue a delegation beforehand? Title 4 MLBS should be, and has consistently been, construed liberally to automatically delegate the Commissioner’s authority to the Assistant Commissioner in such situations.

Question 2: Under 4 MLBS § 7 or 4 MLBS § 10, do the powers of the Commissioner of Administration devolve to the Assistant Commissioner of Administration in any other circumstance, apart from express delegation?

Answer: See above answer to Question 1, where historical practice is that when the Commissioner of Administration position is vacant or the Commissioner of Administration is unable to perform their duties for any reason, those duties are assigned to the Assistant Commissioner of Administration by the Chief Executive, either expressly or by implication.

Question 3: Under 4 MLBS § 6 or 4 MLBS § 7(k), does the Chief Executive have the authority to delegate to the Assistant Commissioner of Administration the authorities of the Commissioner of Administration when said power of delegation is given expressly to the Commissioner of Administration?

Answer: Yes. The Chief Executive has “a broad grant of authority. . . to manage the day-to-day affairs of the Executive Branch” under 4 MLBS § 2. Solicitor Opinion 35-10. The Chief Executive accordingly may exercise all Executive Branch authority, including negotiating and administering agreements and contracts, and submitting appropriation requests to Band Assembly. 4 MLBS §§ 2 and 3. Power to recommend agreements and contracts to Band Assembly for ratification, and to give information to Band Assembly and recommend their consideration of such measures that the Chief Executive deems necessary and expedient, lies with the Chief Executive under 4 MLBS §§ 6(d) and (i). The Chief Executive shares some of those powers with the APB and the Commissioner of Administration as set forth in Title 4 MLBS, yet all actions by the Commissioner of Administration are subject to “the advice and consent of the Chief Executive,” 4 MLBS § 10(b), and all APB actions are subject to the Chief Executive’s veto, 4 MLBS § 9(f). Thus, the Chief Executive exercises ultimate authority over the official acts of the Commissioner of Administration and the APB.

The Chief Executive is also an Executive Officer under 4 MLBS § 4 and thus has the authority to “regulate the performance of their duties by all persons employed within their area of subject matter jurisdiction,” and “to exercise any and all authority conferred pursuant to the provisions of any other Band statute.” Because the Commissioner of Administration and the APB are both “within the Executive Branch of Band Government” under 4 MLBS §§ 8 and 10, the regulation of their duties falls within the Chief Executive’s authority.

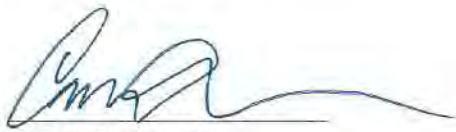
As an Executive Officer under 4 MLBS § 7, the Assistant Commissioner may “perform any duties as may be lawfully assigned by the Chief Executive,” may “take such measures as are deemed necessary to prevent any action which threatens the well-being of programs within their respective jurisdiction, by the issuance of a formal commissioner’s order.” It would frustrate the purposes of Title 4 MLBS if the Chief Executive could not delegate the Commissioner of Administration’s authorities to the Assistant Commissioner in the Commissioner’s absence, as the functioning of the APB and Executive Branch would be severely hampered. Liberal construction of Title 4 MLBS requires the conclusion that the Chief Executive may delegate the Commissioner of Administration’s authorities to the Assistant Commissioner when the Commissioner is unable to do so.

Question 4: Under 4 MLBS § 10(g), does the term “herein” refer to the language of § 10 or the language of Title 4 when the subsection specifically cites 4 MLBS § 7 as one permissible source of authority outside of § 10, giving a presumption that the use of “herein” refers solely to § 10 itself?

Answer: Either is a reasonable construction of 4 MLBS § 10(g). However, the entire Title 4 is to be liberally construed to effectuate its purposes. Liberal construction of § 10(g) to effectuate the purpose of Title 4 requires that all authority of the Commissioner of Administration under Title 4 can be delegated to the Assistant Commissioner of Administration. That includes the Commissioner of Administration’s authority to chair the APB and issues commissioner’s orders to implement APB matters in the absence of a quorum. This also comports with historical practice and interpretation.

Question 5: Under 4 MLBS § 9(b), and giving due consideration to the answer to question (4), does the Assistant Commissioner of Administration have the authority to chair the Administration Policy Board when said authority is expressly assigned to the Commissioner of Administration?

Answer: Yes. See above answer to Question 4.



Caleb Dogeagle
Solicitor General

May 1, 2022

Date of Issuance

