COMMONWEALTH of VIRGINIA

Joint Legislative Audit and Review Commission
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Philip A. Leone
Director

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June 11, 2001

MEMORANDUM

TO: The Honorable Vincent F. Callahan, Jr.
The Honorable Kevin G. Miller

FROM: Philip A. Leone

SUBJECT: Review of Gubernatorial Separation Authority

At its May 2001 meeting, the Joint Legislative Audit and Review Commission directed staff to complete a study of the Governor's authority to provide separation packages for agency heads and gubernatorial appointees. This letter report addresses that mandate.

Summary

There are no evident restrictions on separation packages that can be provided by the Governor to agency heads and other gubernatorial appointees. The Governor has broad powers in the areas of personnel and finance laid out in the *Constitution of Virginia*, the *Code of Virginia*, and the annual Appropriation Act. Nothing in these sources of authority can be construed as limiting the Governor's authority to provide separation packages or severance pay. This lack of limitation, combined with existing statutory authority and precedent, essentially means that the only constraints on the Governor in this area are his judgment and public opinion.

Governors' uses of separation packages have varied somewhat, but most have appeared reasonable. A few packages reviewed by JLARC staff appeared to be generous -- even questionable -- when compared to the usual packages that have been provided. Based on the overall practices of Virginia Governors to date, however, there appears to be no compelling reason to restrict the Governor's flexibility in this area. If the General Assembly wishes to limit the Governor's authority in this area in order to preclude the occasional questionable separation package, it will need to do so with legislation. Several options for consideration are presented at the end of this report.

Background for this Report

In August of 2000, the Director of the Department of Minority Business Enterprise resigned during reviews of the agency's finances by the State Police and the Auditor of Public Accounts. At the time of the resignation, the Director received a severance and consulting package valued at approximately $50,000, more than half of the Director's $90,000 per year salary. The Director had served for approximately two years. The package was reported widely and criticized in the press. Several legislators requested that the Chairman of the Joint Legislative Audit and Review Commission initiate a study of the situation. At its November 2000 meeting, the Commission directed its staff to broadly "review gubernatorial authority to establish agency head separation packages" as opposed to a specific review of a particular separation package. The Commission reiterated its support of the study at its May 2001 meeting and directed a staff report in June.

During the 2001 Session of the General Assembly, several bills were introduced that would have clarified and limited gubernatorial authority in this area. This legislation ranged from eliminating severance packages (HB2837) to providing up to sixteen weeks of severance pay (SB 848 and HB 1757). All of these bills failed. In addition, Appropriation Act language was included in the House version of budget amendments that would have limited severance benefits to appointees of the Governor to those benefits available to full-time State employees (Item 4-6.03#2h). As an Appropriation Act was not passed, this language also failed.

Sources of Gubernatorial Authority to Establish Separation Packages

The Governor's authority to establish separation packages for gubernatorial appointees is based on extensive personnel and budgetary powers provided to the Governor in the *Constitution of Virginia*, the *Code of Virginia*, and the Appropriation Act. In addition, past practices dating back at least as far as the administration of Governor Mills E. Godwin, Jr. have established extensive precedent. The first explicit reference to separation packages for gubernatorial appointees is found in a memorandum signed by Governor Godwin on November 29, 1977. Moreover, there are no stated restrictions on the Governor's authority in this area. This lack of restriction, coupled with the Governor's broad personnel and budgetary authority gives the Governor extensive flexibility to tailor separation packages as he sees fit.

Article V, Section 7 of the *Constitution of Virginia* states that "The Governor shall have power to fill vacancies in all offices of the Commonwealth for the filling of which the Constitution and laws make no other provision." In addition, Article V, Section 10 provides the Governor with broad powers to appoint and remove State officials.

> **§10. Appointment and removal of administrative officers.** – Except as may be otherwise provided in this Constitution, the Governor shall appoint each officer serving as the head of an administrative department or division of the executive branch of the government, subject to such confirmation as the General Assembly may prescribe. Each officer appointed by the Governor pursuant to this section shall have such professional qualifications as may be

> prescribed by law and shall serve at the pleasure of the Governor.

The *Code of Virginia* further enhances the Governor's power in personnel matters. Section 2.1-113 of the *Code* specifies, "The Governor shall be the Chief Personnel Officer of the Commonwealth. He shall direct the execution of this chapter." This section of the *Code* references the Governor's uses of his personnel powers with such terms as "at his discretion" and "as he sees fit," making it clear that he has considerable flexibility in personnel matters. Later, §2.1-114.2 of the *Code* enumerates powers and duties of the Governor including the power to "establish and administer a compensation plan for all employees, and make such amendments thereto as may, from time to time, be necessary." This broad, general authority – coupled with the absence of any relevant restrictions – suggests that the establishment of separation packages for gubernatorial employees is consistent with his rather extensive powers in the personnel area.

JLARC staff discussed the Governor's authority to establish separation packages with officials at the Department of Planning and Budget, the State Comptroller, the Secretary of the Commonwealth, the Governor's Deputy Chief of Staff, and other knowledgeable executive and legislative branch officials. All were in agreement that the Governor had broad authority to establish separation packages for gubernatorial appointees. None of the officials interviewed by JLARC staff could cite any restrictions on the Governor's authority to establish separation packages.

On the question of the amounts of such packages, none of the officials interviewed by JLARC staff could identify any restrictions of amount. When asked if the Governor could theoretically direct a severance package of a million dollars, all these officials answered that they knew of no restrictions of amount. When asked if an official's annual salary could be construed as an upper limit, they generally said no, that severance was different from salary and so could theoretically exceed even the appointee's annual salary. The sole limitation referenced by anyone was that funds would have to be available from some source. In every case reviewed, funding was said to have been provided by the agency in which the agency head or gubernatorial appointee served.

Were funding not available from the appointee's agency, the Governor (or his appointee, the Director of the Department of Planning and Budget) has sufficient authority under the general provisions of the Appropriation Act to provide funding for separation packages from other sources. Specifically, §4-1.02 authorizes transfers "up to a total of 15 percent of the total appropriation … for a closely and definitely related purpose."

In the case of the separation package for the Director of the DMBE, funds were provided from the agency budget. Three quarters of the severance paid was from the Commonwealth Transportation Fund and one quarter was from General Funds. (This is roughly proportional to the fund sources in the agency's appropriation in the 2000-2002 Appropriation Act, Item #120.)

No Attorney General opinions on this subject have been identified. The Director of JLARC requested on May 18th that the Attorney General provide "any Attorney General opinions on the subject of the Governor's authority to provide separation packages" as well as any requests for opinions on this subject. To date, none have been provided. Absent a reply to this request, JLARC staff put this question to several legal authorities. None were aware of any opinions on this subject, nor were staff able to identify any directly applicable court cases. One case brought to the attention of JLARC staff (Small v. Burnette, 1991) upheld the Governor's power to reduce a faculty member's salary despite the plaintiff's signed contract for a greater amount.

The Current Governor's Use of Separation Packages

According to information provided to JLARC staff on June 1, 2001, the current Governor has had 109 gubernatorial appointees leave State service from the beginning of his tenure through May 1, 2001. Of these, four were deaths and are not included in this analysis. Seventeen departing employees received no severance whatsoever. The typical severance package was one month's pay, which was provided to 46 separating appointees. Another 17 received compensation equivalent to less than one month's pay and 25 received compensation of more than one month's pay. Of these 25, five employees received separation compensation equivalent to more than three months pay.

While a typical appointee simply received a compensation package consisting of a month of salary, some packages consisted of compensation that included payments toward retirement (9) and life and health insurance (12), or compensation value in some form of leave (annual, sick or compensatory time). A total of 21 separating employees were afforded some type of leave compensation.

Of the five employees who received over three months compensation value, two received slightly more than three months value, and three received from six to eight months' compensation value. One of the three high value packages was provided to the former director of the DMBE, a situation that has been widely reported. The DMBE director received three months separation pay and was kept on the payroll an additional three months to "provide support during transition." The total value of the package was $49,061.40.

One of the other high-value packages involved an agreement between the separating agency head and the governing board of the Virginia Resources Authority. This package (valued at $64,025) was negotiated during the previous Governor's administration and was implemented at the beginning of the current administration. The other agreement (valued at $80,966) involved keeping a former Superintendent of Education on the payroll in lieu of severance "to provide support during transition" and to conduct a study on rural schools.

When all 105 departures are evaluated, the average compensation package provided amounts equal to approximately 1.10 months of salary value per employee. This amount is comparable to the lowest amount (four weeks pay) that a separated employee would receive under the Workforce Transition Act. A separating classified employee could also receive the value of some unused leave. (In 21 cases, separating gubernatorial appointees were provided some compensation for unused leave.)

Gubernatorial appointees interviewed on this subject were generally supportive of providing the Governor with the maximum flexibility to tailor separation packages according to his best judgment. Some long-term State employees serving as gubernatorial appointees noted that they would personally fare much better under the provisions of the Workforce Transition Act, but thought gubernatorial flexibility in this area should be preserved.

According to some executive branch personnel, the ability of the Governor to offer separation packages is valuable both at the beginning and the end of his term. One cabinet secretary stated that the decision to take an appointive position was extremely stressful, “a period of incredible anxiety.” The Secretary stated that the absence of a separation package would “discourage people from stepping up to the plate and taking an appointive position and also discourage people from staying until the end of a term.” The Secretary noted that agency heads and Secretaries are not permitted to accrue leave. The separation package was one way of addressing this limitation, he said.

Several explanations were given in defense of the provision of the few unusually generous packages. In one case, a package was defended by a senior staff member on the basis that the experience with the agency head was a drain on gubernatorial time and resources and it was necessary “to allow the Commonwealth to move on.” Another generous package was defended on the grounds that the agency head had employed legal counsel and the package was essentially a settlement. Such packages are relatively rare, and – without getting into the specific personnel circumstances surrounding them – did not appear to be of sufficient magnitude or regularity to require a major change in policy.

Comparison with Gubernatorial Separation Packages in Previous Administrations

According to long-time State employees, most Governors of Virginia have authorized relatively modest separation packages for agency heads and other gubernatorial appointees. There are various rationales for the provision of severance. One rationale for such separation packages is that appointees of the Governor are exempt from the Virginia Personnel Act. Because of this exemption, gubernatorial appointees are not eligible for the separation benefits available to classified employees.

In 1977, Governor Mills E. Godwin, Jr. authorized "for appointees of the Governor serving on a full-time basis, severance pay upon termination of appointment equivalent to, but not in excess of, one month's salary at the established annual rate." As recently as the Allen administration, the Governor used the Godwin memorandum as the basis for providing separation payments of one month's salary.

The 1977 Godwin memorandum is reported to have been generally used by Governors since that time. It was also reported to JLARC staff that one Governor provided separation bonuses of one month's salary to individuals who stayed until the end of the term. This was said to have been done as an incentive to keep sufficient staff through the transition period until the end of the term. Many administrations experience a high level of turnover towards the end of an administration. A 1998 JLARC report *The Secretarial System in Virginia State Government* noted that new Governors replace almost all cabinet members and many agency heads. Subsequent to Governor Wilder's term, Governor Allen replaced 75 percent of agency heads during the first year of his term. In addition, most staff in the Governor's office are replaced. Knowing that they are unlikely to be reappointed by a new Governor, many appointees begin looking for new jobs during the last year of an administration. Separation payments are viewed both as a means of retaining staff until the end of the administration and as a means of helping appointees who are likely to lose their jobs.

Governor Gilmore’s Chief of Staff issued the most recent separation policy to administration agency heads on March 16, 1999 (“Policy for ‘At-Will Positions’”). This policy states that “severance pay is one month’s pay, and any variances from this must receive prior approval from the Chief of Staff.” As noted earlier, there have been some variances from this policy, but the typical separation payment remains one month’s pay.

Normal Severance for Classified Employees

Prior to the passage of the Workforce Transition Act (WTA) in 1995, there was no system of severance for State employees. Employees terminated from State service were allowed to cash out annual leave balances and sick leave balances up to limits in the Appropriation Act. It is probable that agencies made some allowances on a case-by-case basis. For example, some agency heads may have kept a terminated employee on the payroll for a week or two after being informed of their separation. The nature of such informal severance activities is beyond the scope of this review.

Under the provisions of the Workforce Transition Act of 1995, classified employees are eligible for a “transitional severance benefit” that is directly tied to the employee’s length of service. Under the provisions of this act, employees are eligible for such a benefit if they “are involuntarily separated from their employment with the Commonwealth.” The WTA states:

> The purpose of this chapter is to provide a transitional severance benefit, under the conditions specified, to eligible state employees who are

> involuntarily separated from their employment with the Commonwealth. "Involuntary separation" includes, but is not limited to, terminations and layoffs from employment with the Commonwealth, or being placed on leave without pay-layoff or equivalent status, due to budget reductions, agency reorganizations, workforce down-sizings, or other causes not related to job performance or misconduct of the employee, but shall not include voluntary resignations. § 2.1-116.20 *Code of Virginia*.

Benefits under the Workforce Transition Act are available principally to full-time employees of the Commonwealth whose positions are covered by the Virginia Personnel Act. The act provides for the payment of between four and thirty-six weeks of salary, depending on the years of service of the employee. Agency heads are exempt from these provisions. In addition, agency heads do not accumulate leave. Consequently, most agency heads are only eligible for whatever severance the Governor determines to provide them. (Statutory provisions do exist in §51.1-155.1 of the *Code* for appointees who have over 20 years of service to receive early retirement from the Virginia Retirement System "upon attaining age fifty" if they are "involuntarily separated from service….")

Gubernatorial practice seems to have varied from the provisions of the WTA in two main regards. First, the Governor seems to have followed no firm rules on the amounts of severance paid. The typical amount paid, however, is a little over one month's pay, which is roughly comparable to the lower end (four weeks pay) of the WTA. Second, the Governor has given severance pay to persons who have left State service under conditions that would not always qualify under the provisions of the WTA. For example, severance pay has been given both to persons voluntarily leaving State service (e.g. to take another job) and to persons whose performance did not meet the expectations of the Governor. It should be noted that while such cases would not qualify for WTA, classified employees leaving under such circumstances would be eligible to cash in unused leave. It addition, it is possible that some might benefit from informal separation arrangements, such as being left on the payroll until the end of a pay period.

Conclusions and Options for Consideration

Governors of Virginia have no restrictions on their authority to provide separation packages to appointees. For the most part, packages provided by Governors have been modest, the most frequent being the provision of one or two months' pay. In a few cases, however, more generous severance payments and accompanying consulting contracts have raised questions about the lack of limitation on the Governor's authority. As a result, legislation was introduced at the 2001 Session of the General Assembly to prohibit or limit severance payments by the Governor.

The magnitude and frequency of a few unusually generous packages may not be sufficient reason for substituting binding guidelines for the Governor's judgment. Moreover, prohibiting the Governor from providing reasonable separation packages to agency heads could create hardships for appointees and could provide a disincentive for qualified individuals to serve in a position that will likely end with the Governor's term.

The absence of the ability to provide separation packages might contribute to what JLARC found in its 1998 study *The Secretarial System in Virginia State Government* to be an already weak transition process. For a Governor to provide any kind of safety net to most of his appointees, the appointee must leave during the sitting Governor's term. A new Governor would have little incentive to provide severance to the appointees of a former Governor. Appointees of the departing Governor would have little incentive to stay in a temporary capacity to help the new Governor with transition activities. As one high level appointee told JLARC staff "it's a four year term, but really after three years you have to start looking."

Additional accountability in the area of separation packages could be achieved without limiting gubernatorial flexibility or prohibiting the Governor from providing such packages. Alternatives for increased accountability could include requirements that the terms of separation packages be subject to regular audit or regularly reported to the Chairmen of the Senate Finance Committee and House Appropriations Committee. Were the General Assembly to determine that gubernatorial flexibility and authority are too extensive, guidelines could be established for the amounts of severance allowable. Options to address the issues raised in this report and a brief explanation of each are detailed below.

Option 1. Retain the Status Quo. While the Governors of Virginia have virtually unlimited flexibility in the provision of separation packages, they have rarely used their authority in an unreasonable manner. Several questionable packages have been provided in different administrations, but the occurrence of such packages has been rare. The typical package has been one month’s severance pay. An advantage of the current system is that it allows the Governor the flexibility to address special needs of individuals as he sees fit. Limitations would remove some of the Governor’s flexibility in this regard. Moreover, limitations on the amount of pay provided could theoretically be circumvented by allowing departing agency heads to stay on the payroll after their actual departure, providing consulting contracts, providing performance bonuses, or other mechanisms that would be difficult to monitor.

Option 2. Apply the Provisions of the Workforce Transition Act (WTA) to Gubernatorial Appointees. Gubernatorial appointees are currently excluded from the provisions of the WTA. The provision of severance payments has been one way in which Governors have attempted to provide some employment security to appointees. Separation packages have also been used to encourage high-level staff to stay until the end of a Governor’s term. Amendment of the WTA to include gubernatorial appointees would have the positive effect of rewarding long-term State employees who took the risks associated with accepting an at-will position. It should be noted, however, that some long-term State employees would receive substantial separation packages. For example, a cabinet secretary with 18 years of State service, receiving a salary of $128,479, could receive a WTA benefit of $88,947. In addition, application of the WTA could limit gubernatorial flexibility in cases of short-term appointees or in the removal of problematic employees. Further, the WTA does not permit severance payments to individuals leaving State government to take other jobs.

Option 3. Allow Gubernatorial Flexibility within Specified Parameters. Under some bills introduced during the 2001 Session, the Governor would be limited to a set amount of severance pay he could provide (i.e. no more than sixteen weeks pay). A 16-week restriction would have reduced payments to only three of 109 employees whose separation packages were reviewed by JLARC staff. Should such a provision be adopted, it is possible that overall payments to gubernatorial appointees would increase. Further, it is unclear what effect such a provision might have on appointees seeking a larger amount through litigation.

Options for Improving Accountability

Option 4. Regular Reports of Separation Packages. The General Assembly could require that terms of gubernatorial separation packages be reported in writing to the Chairmen of the House Appropriations Committee and Senate Finance Committee. This requirement could include a provision that the Comptroller or other disbursing authority (in the case of a consulting contract or similar arrangement) determine that certain conditions have been met prior to making any directed payments or issuing any contracts for services. Such a provision would not limit gubernatorial flexibility, but would promote accountability.

Option 5. Regular Audits of Separation Packages. The General Assembly could require that the terms of gubernatorial separation packages be documented in writing and subject to regular review by the Auditor of Public

Accounts. The Auditor of Public Accounts could report to the General Assembly on any packages that appeared excessive or did not appear appropriate in some other regard.

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COMMONWEALTH *of* VIRGINIA

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James S. Gilmore, III
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Anne P. Petera
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June 6, 2001 JUN 6 2001

Mr. Philip A. Leone, Director
Joint Legislative Audit and Review Commission
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Richmond, VA 23219

HAND DELIVERED

Dear Mr. Leone:

Thank you for the opportunity to review the Exposure Draft of your commission's report on its *Review of Gubernatorial Separation Authority* in advance. We do not wish, at this time, to provide any comment.

Again, thank you for your consideration. Please let me know if I can be of any further assistance to you or your staff.

Sincerely,

Anne P. Petera

Anne P. Petera
Secretary of the Commonwealth

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