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MEMORANDUM

TO: Honorable Myron D. Jackson
President, 32nd Legislature

FROM: Yvonne L. Tharpes *YLT*
Deputy Chief Legal Counsel

DATE: August 6, 2018

SUBJECT: Validity of Executive Order No. 483-2018

This memorandum addresses the validity of Executive Order No. 483-2018, titled "Executive Order to Provide for The Implementation of New Starting Base Salaries for Employees and Critical Hire Positions in the Executive Branch of the Government of the Virgin Islands of The United States". This memorandum briefly discusses the starting salary increases granted to certain employees within several departments and agencies of the executive branch under sections 1 through 9 of Executive Order 483-2018 and the new minimum base salary for government employees under section 10 of the Executive Order.

Sections 1 through 9 of the Executive Order grant base starting salary increases to employees of several departments and agencies. These increases include the starting salaries of: teachers in the Department of Education;

firefighters with the V.I. Fire Services; correction officers and the director of the Bureau of Corrections; medical emergency technicians, paramedics and environmental officers of the Department of Health; enforcement officers with the Department of Planning and Natural Resources; enforcement officers with the Department of Licensing and Consumer Affairs; police officers with the V.I. Police Department; and social workers, Headstart teachers, and preschool teacher assistants with the Department of Human Services.

Unless the funding of the salary increases granted in sections 1 through 9 of the Executive Order is allocated from funds already appropriated in the Fiscal Year 2018 Budget under Act No. 7897 for salaries and fringe benefits and is available for salary increases, the salary increases in Executive Order 483-2018 are in violation of applicable laws. Act No. 7897 appropriated the following amounts for personnel and fringe benefits costs to the following departments and agencies, all of which were granted salary increases under Executive Order 483-2018.

1. VI. Fire Service	\$19, 589,489
2. Licensing & Consumer Affairs	\$3,191,602
3. Department of Education	\$92,807,623 plus Fringe
4. V.I. Police Department	\$52,070,863
5. Department of Health	\$18,072,767
6. Department Human Services	\$28,832,636

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|-----------------------------------|--------------|
| 7. Planning and Natural Resources | \$5,719,460 |
| 8. Bureau of Corrections | \$21,011,341 |

The Governor can use only the funds appropriated to the respective agency for salaries within that agency. For instance, if sufficient funds remain from the \$21,011,341 appropriated for salaries and fringe benefits for the Bureau of Corrections under Act No. 7897, the Governor may raise the starting base salaries of the director and the corrections officers. However, if there are insufficient funds remaining in the Bureau's budget, the Governor is prohibited under applicable Virgin Islands law from dipping into the funds of another agency or the funds appropriated for another purpose to make up the difference.

Under title 33, section 3112 of the Virgin Islands a Code, sums appropriated "shall be applied solely to the objects for which they are made, and for no others". Title 2, section 28 (b) of the Virgin Islands Code in part provides that "no part or portion of any item of the Executive Appropriation Act, or in any other appropriation bills for operating expenses of any departments, agency or special fund, shall be expended for any other purpose but that specified, or any transfer between items made, without the expressed consent of the Committee on Finance of the Legislature. Transfer of amounts between departments shall be effected only by special appropriations...."

The foregoing provisions make it abundantly clear that the Governor can provide for salary increases only if the money has already been appropriated to

the respective department or agency for salaries and fringe benefits. Title 33, section 3101 of the Virgin Islands Code prohibits any officer of the Government from making or authorizing an expenditure from any appropriation or fund in excess of the amount available therein, or from involving the government in any obligation for the payment of money for any purpose, in advance of appropriations made for such purpose. *See McBean v. Government of the Virgin Islands*, 32 V.I. 120128-131 (Terr. Ct. 1995).

Section 3 of the Revised Organic Act, 48 U.S.C. §1561 provides in pertinent part that: “[n]o money shall be paid out of the Virgin Islands treasury except in accordance with an Act of Congress or money bill of the legislature....” Section 20 of the Revised Organic Act provides that “salaries...of... officers and employees of the government of the Virgin Islands...shall be paid by the government of the Virgin Islands at rates prescribed by the laws of the Virgin Islands”.

Executive Order 483-2018 is devoid of any information on the source of the funding for the base salary increases and the increase in the minimum salary of government employees. It is axiomatic that only the Legislature has authority over providing for appropriations.

The control of the finances and the authorized spending of the Government of the Virgin Islands is entirely in the legislature, subject only to any limitations prescribed in the Revised Organic Act; and, except as thus restricted, is

absolute. As explained above, the executive branch is not empowered to transfer funds from appropriated items to non- appropriated items, reallocate funds, or deviate from the approved budget without legislative approval. Moreover, the executive branch may not of its own initiative use funds appropriated for one program in carrying out another 2 V.I.C. §28 (b); 33 V.I.C. §3112 and may not spend on any program more than its designated amount. 33 V.I.C. §3101. “It is in this way that the doctrine of separation of powers functions”. *Jubelirer v. Rendell*, 953 A.2d 514, 530 (Pa. 2008).

Executive Order 483-2018 may potentially violate the Virgin Islands Public Employees Relations Act. If the changes to the salaries violate an existing or pending collective bargaining agreement wherein the union employees in return for concessions had expectations of receiving their bargained-for salaries, the Executive Order would be an impairment of contract in violation of section 3 of the Revised Organic Act, and in violation 33 V.I.C. § 378 (a) (8), which makes it unlawful for the government to violate or fail to comply with any of the terms of a valid collective bargaining agreement to which it is a party. Generally, the Government would violate its duty to bargain collectively when it implements unilateral changes in wages for bargaining unit employees while a collective bargaining agreement is in effect. It is unclear as to whether the base salaries in sections 1 through 9 of the Executive Order are in addition to or in lieu any bargained for salary increases.

The first Whereas Clause in the Preamble to Executive Order 483-2018 correctly declares that pursuant to Section 11 of the Revised Organic Act, the Executive Power in the Virgin Islands is vested in the Governor who holds general supervisory power and control over the departments, bureaus, agencies and instrumentalities of the Executive Branch of the Government of the Virgin Islands. The Governor expressly acknowledges that the minimum base salary for government employees is \$20,000 per annum. However, contrary to the Governor's assertions made in the Executive Order, the Governor of the Virgin Islands is without power to increase the minimum salary established in title 3, section 555b of the Virgin Islands Code.

Section 10 of Executive Order 483-2018 provides that the starting base minimum wage for all Government employees of the Executive Branch of the Government of the Virgin Islands is \$13.00 an hour \$27,040.00 per annum. Nonetheless, it is the Legislature, and not the Governor, who can amend the minimum salary of government employees. Executive Order No. 483-2018 violates section 11 of the Revised Organic Act of the Virgin Islands, because it is "in conflict" with valid and existing law enacted by the Legislature. Section 11 of the Revised Organic Act grants the Governor the power to issue only executive orders and regulations not in conflict with any applicable law.

Under existing, applicable law enacted by the Legislature, title 3, section 555b of the Virgin Islands Code provides that:

Notwithstanding any provision to the contrary in this subchapter, [the] minimum salary of fulltime employees of the Government of the Virgin Islands semi-autonomous agencies and independent instrumentalities of the Government of the Virgin Islands [is] \$20,000 per annum. No full time employee of the Government of the Virgin Islands semi-autonomous agency or independent instrumentality of the Government of the Virgin Islands may be paid less than \$20,000 per annum.

Inasmuch as section 555b sets the minimum wage for fulltime government employees, at \$20,000 per annum, this minimum salary can be neither increased nor decreased by executive order. Inasmuch as section 10 conflicts with existing law, it violates section 11 of the Revised Organic Act, and is therefore void. *Bell v. Luis*, 18 V.I. 633 (D.V.I. 1982) (where the court ruled that an executive order issued by the governor to create new agencies to administer funding of antipoverty programs to replace agency established by 3 V.I.C. §26 for that purpose, was in conflict with existing law enacted by the legislature and was null and void); *see also Brian v. Turnbull*, 46 V.I. 167 (V.I. Super. 2005) (where the court held that an Executive Order authorizing the collection and expenditure of administrative fees was an unlawful encroachment on legislative power to make laws regarding taxation and appropriation granted by §§ 3 and 9(c) of the Organic Act).

As stated in *Shapp v. Butera*, 348 A.2d 910, 914(Pa. 1975). [t]he Governor's power is to execute the laws and not to create or interpret them". Executive Order 483-2018 purportedly creates new law by amending the \$20,000 minimum base salary for government employees established in 3 V.I.C. §555b.

Clearly, the mandate in section 10 of Executive Order 483-2018 that the minimum wage for government employees of the executive branch “shall be \$13.00 per hour or \$27,040.00 per annum” conflicts with 3 V.I.C. § 555b. Consequently, the Governor violates section 11 of the Revised Organic Act of the Virgin Islands and the separations of powers in promulgating Executive Order 483-2018.

There is a little-known act of the Legislature that may be of interest. The Executive Order Act of March 28, 1972, No. 3197, § 14, provides:

Any executive order issued by the Governor relating to this Act [amending sections 24-26 of Title 3] **or any other executive order issued by the Governor relating to any other subject** shall be reviewed by the Legislature within 15 days after issuance. The President of the Legislature shall refer such executive order to the appropriate legislative committee to determine whether such executive order conflicts with any applicable law and for recommendations for appropriate legislation on the same subject of the executive order, if the Legislature is in agreement with the provisions of said executive order.”(emphasis added).

Hence, the Legislature has commanded itself to review all executive orders within 15 days of their issuance. If the members of the Legislature so desire, the Committee of Rules and the Judiciary is the appropriate legislative committee to determine the validity of Executive Order 483-2018.

xc: All Senators