THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. **SUPERIOR COURT**
NORTHERN DISTRICT

Representative Mary Jane Wallner, Senator Lou D'Allesandro, Speaker of the House of Representatives Stephen Shurtleff, and Senate President Donna Soucy

v.

Christopher Sununu, Governor of the State of New Hampshire

Docket No. 216-2020-CV-00342

ORDER

Plaintiffs have brought this action seeking writs of mandamus and prohibition, as well as declaratory and injunctive relief. The action arises out of Governor Sununu's public declaration that, pursuant to RSA 4:45, III(e) and RSA 21-P:43, he has the authority to accept and expend funds allocated to the State of New Hampshire via the recent CARES Act without oversight from the legislative branch's Fiscal Committee. Presently before the Court are: (1) the Governor's motion to dismiss or, in the alternative, for summary judgment; and (2) Plaintiffs' motion for summary judgment. For the reasons that follow, Plaintiffs' motion is DENIED and the Governor's motion is GRANTED.

Factual Background

On March 13, 2020, the Governor declared a state of emergency due to the global pandemic caused by the novel coronavirus known as COVID-19. On March 27, 2020, the United States Congress enacted the Coronavirus Aid, Recovery, and

Economic Security (CARES) Act, which provided New Hampshire with $1.25 billion in federal funds. The CARES Act provides that a state "shall use the funds provided . . . to cover only those costs of the State . . . that—(1) are necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19); (2) were not accounted for in the budget most recently approved as of the date of enactment of this for the State . . .; and (3) were incurred during the period that begins on March 1, 2020, and ends on December 30, 2020." Pub. L. No. 116-136, 134 Stat. 281, 503 (2020).

Relying upon the emergency management authority provided by RSA 4:45, RSA 4:47, and RSA 21-P:43, the Governor determined that he was authorized to spend the CARES Act funds without seeking the approval of the Fiscal Committee. Instead, he established the Governor's Office for Emergency Relief and Recovery, which was charged with the investment and oversight of the relief funds. Since then, the Governor has spent a significant portion of the CARES Act funds without input from the Fiscal Committee.

Analysis

In their second amended complaint, Plaintiffs seek writs of mandamus and prohibition against the Governor in connection with his spending of CARES Act funds. Plaintiffs' complaint also seeks declaratory judgments finding that the Governor has violated (1) the following statutory provisions: RSA 9:13-d, RSA 9:16-a, RSA 14:30-a, and RSA 124:4; and (2) the following provisions of the New Hampshire Constitution: Part I, Article 37, Part II, Article 41, and Part II, Article 56. Because the material facts underlying this action are undisputed and the Court is tasked solely with the

interpretation of a number of statutes and constitutional provisions, this matter involves questions of law best resolved via summary judgment. *See Appeal of Cover*, 168 N.H. 614, 617 (2016) (noting that "[s]tatutory interpretation is a question of law").

In ruling on cross-motions for summary judgment, the Court "consider[s] the evidence in the light most favorable to each party in its capacity as the nonmoving party." *Eby v. State*, 166 N.H. 321, 327 (2014). Where "no genuine issue of material fact exists, [the Court] determine[s] whether the moving party is entitled to judgment as a matter of law." *N.H. Ass'n of Counties v. State*, 158 N.H. 284, 287–88 (2009). "An issue of fact is 'material' for purposes of summary judgment if it affects the outcome of the litigation under the applicable substantive law." *VanDeMark v. McDonald's Corp.*, 153 N.H. 753, 756 (2006). To defeat summary judgment, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." *Panciocco v. Lawyers Title Ins. Corp.*, 147 N.H. 610, 613 (2002) (citing RSA 491:8-a, IV).

I. Mandamus/Prohibition

"Mandamus and prohibition are extraordinary writs." *In re CIGNA Healthcare, Inc.*, 146 N.H. 683, 637 (2001). "A writ of mandamus is used to compel a public official to perform a ministerial act that the official has refused to perform, or to vacate the result of a public official's act that was performed arbitrarily and in bad faith." *Id*. "[The] court will, in its discretion, issue a writ of mandamus only where the petitioner has an apparent right to the requested relief and no other remedy will fully and adequately afford relief." *Id*. "A writ of prohibition is used to prevent subordinate courts or other tribunals, officers or persons from usurping or exercising jurisdiction with which they are

not vested." *Id*. The Court "exercises its discretionary power to issue such writs with caution and forbearance and then only when the right to relief is clear." *Id*.

The Governor argues that his spending of the CARES Act funds is authorized by a few specific statutes that operate during states of emergency: RSA 4:45, RSA 4:47, and RSA 21-P:43. Plaintiffs object, arguing the Fiscal Committee retains oversight of the Governor's spending in states of emergency. The Court first considers whether the statutes relied upon by the Governor give him any authority to spend funds without input from the Fiscal Committee.

1. Emergency Management Authority

RSA 4:45 grants the Governor the power to declare a state of emergency by executive order "if the governor finds that a natural, technological, or man-made disaster of major proportions is imminent or has occurred within this state, and that the safety and welfare of the inhabitants of this state require an invocation of the provisions of this section." RSA 4:45, I. A state of emergency is defined as "that condition, situation, or set of circumstances deemed to be so extremely hazardous or dangerous to life or property that it is necessary and essential to invoke, require, or utilize extraordinary measures, actions, and procedures to lessen or mitigate possible harm." RSA 21-P:35, VIII. RSA 4:45 articulates a number of "additional emergency powers" that the Governor may exercise during a state of emergency. RSA 4:45, III. Specifically, the Governor here relies on RSA 4:45, III(e), which states:

> During the existence of a state of emergency, and only for so long as such state of emergency shall exist, the governor shall have and may exercise the following additional emergency powers: . . . [t]o perform and exercise such other functions, powers, and duties as are necessary to promote and secure the safety and protection of the civilian population.

The Governor argues that 4:45, III(e) "permits the Governor to exercise his power to draw his warrant and spend funds during a declared state of emergency as necessary 'to promote and secure the safety and protection of the civilian population.'" (Def.'s Obj. Summ. J. at 12.)

To the extent the Governor claims that RSA 4:45, III(e) alone grants him the power to circumvent the oversight of the Fiscal Committee for his spending during a state of emergency, the Court disagrees. Nothing in the plain language of the statute makes mention of the Governor's ability to spend funds or suggests that any such powers have been expanded. RSA 4:45, III(e) is a catchall provision that is broadly and vaguely written, and the Court will not read into such a provision any significant expansion of the Governor's power that is not specifically delineated. This is consistent with the legislative history of the statute. See Pls.' Mot. Summ. J., Ex. 8 at 724, 971 (noting that the bill "retains the governor's powers relative to the declaration of a state of emergency as well as the governor's general emergency management authority").

RSA 4:47 suffers from this same deficiency. Entitled "Emergency Management Powers," that statute sets out several powers the Governor may exercise during a state of emergency, none of which make reference to spending authority. Therefore, to the extent the Governor claims authority to spend CARES Act funds without Fiscal Committee oversight, he must find it elsewhere.

The Governor identifies a specific grant of spending authority during states of emergency in RSA 21-P:43. That statute provides:

> Each political subdivision may make appropriations in the manner provided by law for making appropriations for the ordinary expenses of such political subdivision for the payment of expenses of its local

> organization for emergency management. Whenever the federal government or any federal agency or officer offers to the state, or through the state to any of its political subdivisions, services, equipment, supplies, materials, or funds by way of gift, grant, or loan for purposes of emergency management the state, acting through the governor, commissioner, or such political subdivision, acting with the consent of the governor and through its executive officer, city council, or board of selectmen, may accept such offer, subject to the terms of the offer and the rules and regulations, if any, of the agency making the offer. Whenever any person, firm or corporation offers to the state or to any of its political subdivisions services, equipment, supplies, materials, or funds by way of gift, grant, or loan for purposes of emergency management the state, acting through the governor, or such political subdivision, acting through its executive officer, city council, or board of selectmen, may accept such offer, subject to its terms.

RSA 21-P:43. In its prior order denying Plaintiffs' motion for reconsideration, the Court observed that use of the word "accept" in this provision implicitly includes the authority to expend. The Court relied on the fact that the statute allows the Governor to accept funds "subject to the terms of the offer and the rules and regulations, if any, of the agency making the offer," RSA 21-P:43, and that the CARES Act expressly provided rules and regulations for the expenditure of its funds. The Court continues to adopt this reasoning, and further notes that interpreting the statute to permit the Governor to only "accept" funds, without any further instruction, is untenable, particularly in the context of an emergency in which swift action is necessary.

The Court further notes that RSA 21-P:43 begins by giving political subdivisions the authority to "make appropriations in the manner provided by law for making appropriations for the ordinary expenses of such political subdivision for the payment of expenses of its local organization for emergency management." This appears to be referring to something other than the legislature's ordinary constitutional power of appropriation, which there would be no need to reference in the statute. This suggests

the legislature contemplated the grant of some form of appropriation to the executive branch for the specific purpose of emergency management. This further supports the interpretation that RSA 21-P:43 gives the Governor the authority to both accept *and* spend federal funds during a state of emergency, consistent with the other terms of the statute.

Accordingly, the Court finds that RSA 21-P:43 grants the Governor authority to accept and spend money received pursuant to its terms during a state of emergency.

2. Fiscal Committee Oversight

In light of the foregoing, the Court now turns to whether this authority conflicts with the powers granted to the Fiscal Committee. "When reasonably possible, statutes should be construed as consistent with each other." *EnergyNorth Nat. Gas, Inc. v. City of Concord*, 164 N.H. 14, 16 (2012). "When interpreting two statutes which deal with similar subject matter, we will construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statute." *Id*. "To the extent two statutes conflict, the more specific statute controls over the general statute." *Id*. This is a well-recognized and longstanding rule of statutory construction. *See Appeal of Plantier*, 126 N.H. 500, 510 (1985) ("It is a well settled rule of statutory construction that in the case of conflicting statutory provisions, the specific statute controls over the general statute."); *Matter of Gamble*, 118 N.H. 771, 777 (1978) ("We recognize the rule that a specific law controls in a specific case over a general law.").

The Fiscal Committee was established by RSA 14:30-a. The stated purpose of the committee is to "consult with, assist, advise, and supervise the work of the

legislative budget assistant, and may at its discretion investigate and consider any matter relative to the appropriations, expenditures, finances, revenues or any of the fiscal matters of the state." RSA 14:30-a, II. Significantly, for purposes of the instant matter, the statute also provides that:

> Any non-state funds in excess of $100,000, whether public or private, including refunds of expenditures, federal aid, local funds, gifts, bequests, grants, and funds from any other non-state source, which under state law require the approval of governor and council for acceptance and expenditure, may be accepted and expended by the proper persons or agencies in the state government only with the prior approval of the fiscal committee of the general court.

RSA 14:30-a, VI.

The Fiscal Committee retains its oversight authority during civil emergencies. RSA 9:13-d provides:

> Should it be determined by the governor that a civil emergency exists, the governor may, with the advice and consent of the fiscal committee, authorize such expenditures, by any department or agency, as may be necessary to effectively deal with said civil emergency and may draw his warrants in payment for the same from any money in the treasury not otherwise appropriated. In determining whether a civil emergency exists, the governor shall consider whether there is such imminent peril to the public health, safety and welfare of the inhabitants of this state so as to require immediate action to remedy the situation. This section shall not be construed to enlarge any of the powers which the governor may possess under the constitution or other statutes.

The parties dispute whether a "civil emergency" is synonymous with a "state of emergency." Plaintiffs argue that RSA 9:13-d's application to states of emergency was codified by the legislature in RSA 21-P:53, which was enacted six years after RSA 4:45 and RSA 21-P:43. RSA 21-P:53 provides, in pertinent part, that:

> The commissioner [of health and human services] may, without the approval of the governor's council or the legislative fiscal committee, and notwithstanding the provisions of RSA 4:45, 9:13-d, and 9:19, and any other law to the contrary, purchase and distribute anti-toxins,

> serums, vaccines, immunizing agents, antibiotics, and other pharmaceutical agents that the commissioner deems to be in the interest of public health.

Plaintiffs argue that "[b]y codifying RSA 9:13-d as 'contrary' to a grant of unfettered executive branch discretion to 'purchase' medicine during a [state of emergency], the legislature crystalized RSA 9:13-d's applicability during a [state of emergency]." (Pls.' Mot. Summ. J. at 12.)

Even assuming that a "civil emergency" and "state of emergency" are synonymous terms, RSA 9:13-d, by its plain language, applies to circumstances distinct from those present here. RSA 9:13-d allows the Governor, with the advice and consent of the Fiscal Committee, to authorize expenditures necessary to address the emergency and "draw his warrants in payment for the same from any money in the treasury not otherwise appropriated." This is a clear grant of authority to draw upon state funds, i.e., money raised via state taxes and other state revenue sources that have not been earmarked for another purpose, when unforeseen emergencies arise and other emergency funds, see *infra*, are either unavailable or insufficient. However, these are not the funds the Governor is spending. Rather, he is spending CARES Act funds that have been appropriated by the federal government and accepted via the express provisions of RSA 21-P:43. Such federal funds are not within the scope of the plain language of RSA 9:13-d. Drawing upon those funds therefore does not require Fiscal Committee oversight.

Plaintiffs also make reference to RSA 9:16-a, arguing it applies during a state of emergency. However, regardless of whether it applies during a state of emergency, it is not applicable to the facts of this case. The statute reads, in pertinent part:

> Notwithstanding any other provision of law, every department as defined in RSA 9:1 is hereby authorized to transfer funds within and among all accounting units within said department, provided that any transfer of $100,000 or more shall require prior approval of the fiscal committee of the general court and the governor and council . . . .

RSA 9:16-a, I. Plaintiffs argue the phrase "'notwithstanding any other provision of law' elevates RSA 9:16-a, I to supersede any potentially contrary law, including RSA 4:45, III(e)." (Pls.' Mot. Summ. J. at 21.) However, the plain language of the statute applies to interdepartmental transfers of funds from one accounting unit to another. This is not what has occurred in this case; Plaintiffs' complaint does not challenge the transfer of funds from one department to another, but rather the general expenditure of funds under the CARES Act. Therefore, the Court finds RSA 9:16-a inapplicable to the current issue.

The final provision on which Plaintiffs rely is RSA 124:4, which states, in pertinent part:

> Notwithstanding any other provision of law, the governor and council are hereby authorized to designate from time to time, as they may deem in the best interest of the state, the proper persons or agencies in the state government to take all necessary action to apply for, receive, and administer any federal benefits, facilities, grants-in-aid, or other federal appropriations or services made available to assist state activities, for which the state is, or may become eligible. All such moneys in excess of $50,000 made available, after designation by the governor and council, may be expended by the proper persons or agencies in the state government only with the prior approval of the joint legislative fiscal committee.

Referring to RSA chapter 124, the New Hampshire Supreme Court has stated that "[o]ur basic laws relating to federal aid were placed on the books in 1933 as a direct result of New Deal legislation in Washington that sought to 'pump prime' the economy by injecting federal money into the State coffers." *Opinion of the Justices*, 118 N.H. 7, 13

(1978). "The present RSA ch. 124 . . . was enacted to allow the Governor and Council to apply for and designate agencies to spend federal money." *Id*. As argued by the Governor and as noted by the Court in its prior order, RSA 124:4 appears to concern federal aid that is made available to the states that must be applied for as needs arise. In contrast, the funds in the CARES Act were affirmatively provided to each state without the need for the Governor to act with the exception of designating the account in which the funds should be deposited and certifying that the funds would be used consistent with the terms of the Act. Pub. L. 116-136, 134 Stat. 281, 502-03 (2020); Pls' Statement of Material Facts ¶ 24, n. 7.

Moreover, RSA 124:4 does not make mention of states of emergency. Plaintiffs argue that such a claim is contrary to the plain text of the statute, relying upon the reference in the statute to "[a]ll such moneys . . . made available." RSA 124:4. In accordance with the standard of statutory interpretation noted above, the Court construes RSA 124:4 and RSA 21-P:43 as being consistent with each other in that they apply to different situations, i.e., non-emergency and emergency scenarios. *See EnergyNorth*, 164 N.H. at 16. To the extent the statutes conflict, the Court finds RSA 21-P:43 is more specific and therefore controls. *Id*. RSA 124:4 applies generally to all federal aid made available to the states, whereas RSA 21-P:43 applies only in states of emergency, and only to federal aid made available for purposes of emergency management.

For these reasons, the Court finds the terms of RSA 124:4 do not modify RSA 21-P:43. Therefore, as with the other statutes relied upon by Plaintiffs, the Court finds

RSA 124:4 either applies to a scenario not at issue here or is superseded by the more specific terms of RSA 21-P:43.

3. History of Statutory Language

In its prior order, the Court placed emphasis on the fact that RSA 4:45 and RSA 21-P:43 were created as part of HB 1461, which was enacted in 2002. Plaintiffs have now submitted numerous exhibits demonstrating that although RSA 4:45, III(e) and RSA 21-P:43 were created by the 2002 legislation, the language included in those statutes was taken from prior statutes enacted decades earlier.

The history of granting the governor additional powers during states of emergency began with RSA 107:8, which was enacted in 1949 as part of the Civil Defense Act. (Pls.' Mot. Summ. J., Ex. 2.) That statute allowed the governor to declare a "civil defense emergency," during which "the governor shall have and may exercise the following additional emergency powers: . . . [t]o perform and exercise such other functions, powers, and duties as are necessary to promote and secure the safety and protection of the civilian population." (Id.) This language is identical to that contained in RSA 4:45, III(e). In 1987, this language was codified in RSA 107-C:5 as part of the Emergency Management Act. (Id., Ex. 5.) RSA Chapter 107-C replaced the term "civil defense emergency" with "state of emergency," and RSA 107-C:5 is largely identical to RSA 4:45, I & III. (Id.)

RSA 21-P:43 has a similar history. Its language was initially contained, with minor variations, in RSA 107:14. (Id., Ex. 2.) It was then transferred to RSA 107-C:12, with the term "civil defense" replaced with "emergency management." (Id.) The language of RSA 107-C:12 is identical to RSA 21-P:43.

The long history of the language contained in RSA 4:45 and RSA 21-P:43 does not change the Court's analysis. The Court's interpretation of the statutes is not dependent on them being relatively new compared to those relied on by Plaintiffs, and there is nothing in their prior forms or their development that suggests the Court's interpretation is inconsistent with legislative intent. To the contrary, the fact that the language has remained largely identical for many decades suggests the legislature is familiar with it and how it relates to other statutory provisions. Significantly, HB 1461 was a broad restructuring of the state's emergency management framework in the wake of the September 11, 2001 terrorist attacks, when the prospect of significant emergency scenarios and the need for streamlined emergency response was likely at the forefront of the legislature's collective thinking. It is therefore extremely telling that when the legislature shifted the language to RSA 4:45 and RSA 21-P:43 in 2002, it declined to insert Fiscal Committee oversight into either statute. Had the legislature intended for the Fiscal Committee to have blanket oversight over expenditures above a certain amount in all circumstances, it could very well have done so at that time. Instead, the Fiscal Committee's authority remains scattered through a variety of statutes that apply to a number of specific scenarios and varying dollar amounts.

4. Other Emergency Funds

Finally, Plaintiffs suggest that the legislature has established funds from which it intended the Governor draw resources to address emergency situations. Specifically, Plaintiffs identify RSA 4:18 and RSA 21-P:46. RSA 4:18 provides:

> There shall be an emergency fund consisting of such sums as may be appropriated for that purpose by the general court, which may be expended by the governor, with the consent of the council, to aid any state department in any emergency which may arise in carrying on the

> essential functions of state government and in protecting the interests of the state which have been impaired by said emergency.

The plain language of this provision limits the Governor's use of the funds to assisting state departments in order to allow them to carry on essential functions during states of emergency. It does not allow the Governor to use those funds for other purposes, such as providing money to struggling businesses, which the CARES Act permits. Further, there is nothing in the language of the statute that suggests this is the only means by which the Governor can provide emergency assistance.

RSA 21-P:46 provides funds for an even narrower purpose. That statute reads as follows:

> There is hereby established a New Hampshire emergency response and recovery fund. The fund shall provide a source for the matching funds required as a commitment to secure Federal Emergency Management Agency relief assistance grants for costs incurred in disasters declared by the President of the United States. The fund shall be nonlapsing and continually appropriated to the department of safety.

RSA 21-P:46. The Governor in this instance is not seeking to match funds for a FEMA relief assistance grant. Moreover, again, nothing in this statute suggests it is the only means by which the Governor can spend funds during an emergency. Instead, as with RSA 4:18, it appears to be one source made available for use in a specific situation that happens to be inapplicable here.

Plaintiffs argue the legislature has previously rejected the notion of giving the Governor the authority to unilaterally spend unappropriated money out of the state treasury. In 1987, as part of the process from transferring provisions from RSA 107 to RSA 107-C, HB 37 originally proposed enlarging the Governor's spending powers to include "any money in the treasury not otherwise appropriated." (Ex. 3 at 18.) The

House Appropriations Committee voted overwhelmingly in favor of amending the proposed law to authorize the Governor to draw money from the "emergency fund" as opposed to the treasury, finding "[t]here are presently adequate emergency funds appropriated." (Ex. 4 at 371; Ex. 5 at 140.) Nevertheless, it is important to focus on the specific issue at hand. The Governor is not seeking authority to unilaterally spend unlimited amounts of money from the state treasury that has not been appropriated by the legislature. Rather, he is claiming authority solely to spend money received pursuant to the CARES Act, which was appropriated by the United States Congress.

All of the statutes discussed herein appear to apply to specific scenarios, and can be interpreted in a manner consistent with one another. The Court's interpretation of RSA 21-P:43 does not conflict with the statutes identified by Plaintiffs.

Accordingly, for the foregoing reasons, Defendant's motion for summary judgment on Counts I and II of Plaintiffs' amended complaint is GRANTED.[1]

II. Declaratory Judgment

Plaintiffs first seek a declaratory judgment that the Governor's expenditure of CARES Act funds violates RSA 9:13-d, RSA 9:16-a, RSA 14:30-a, and RSA Chapter 124. However, for the reasons stated above, the Court finds the Governor's actions are not contrary to those statutes. Accordingly, the Governor's motion for summary judgment on this count is GRANTED and Plaintiff's motion for summary judgment is DENIED.

Plaintiffs next argue that the Governor's actions violate several provisions of the New Hampshire Constitution. Part I, Article 37 provides for separate of powers among the three branches of government, and reads as follows:

[1] The Court notes that Plaintiffs did not move for summary judgment on these counts.

> In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.

Part II, Article 41 establishes the office and power of the Governor, and reads as follows:

> There shall be a supreme executive magistrate, who shall be styled the Governor of the State of New Hampshire, and whose title shall be His Excellency. The executive power of the state is vested in the governor. The governor shall be responsible for the faithful execution of the laws. He may, by appropriate court action or proceeding brought in the name of the state, enforce compliance with any constitutional or legislative mandate, or restrain violation of any constitutional or legislative power, duty, or right, by any officer, department or agency of the state. This authority shall not be construed to authorize any action or proceedings against the legislative or judicial branches.

Finally, Part II, Article 56 governs disbursements from the state treasury, and reads as follows:

> No moneys shall be issued out of the treasury of this state, and disposed of, (except such sums as may be appropriated for the redemption of bills of credit, or treasurer's notes, or for the payment of interest arising thereon) but by warrant under the hand of the governor for the time being, by and with the advice and consent of the council, for the necessary support and defense of this state, and for the necessary protection and preservation of the inhabitants thereof, agreeably to the acts and resolves of the general court.

"One branch of government . . . is not constitutionally permitted to usurp the essential power of another." *In re Petition of Judicial Conduct Committee*, 151 N.H. 123, 125 (2004). "The separation of powers directive is violated by an improper imposition upon one branch of constitutional duties belonging to another, or, an encroachment by one branch upon a constitutional function of another branch of government." *Id*. "When the actions of one branch of government defeat or materially impair the inherent functions of another branch, such actions are not constitutionally

acceptable." *Id*. That being said, the New Hampshire Supreme Court "has long recognized that the separation of powers provided for in the State Constitution is not absolute, but rather permits an overlapping of powers among the branches in certain areas." *Opinion of the Justices*, 129 N.H. 714, 717 (1987).

Plaintiffs cite *Opinion of the Justices*, 118 N.H. 7 (1978), for the proposition that the legislature retains exclusive control over state appropriations of federal funds. In that case, the New Hampshire Supreme Court observed that:

> Unless proper regard is given to the respective roles of the policy-making legislature and the administrative Governor, "the legislative branch of our State government would have little or no role to play with respect to Federal aid programs with the corollary result that the executive branch in the name of supreme executive power would not be faithfully executing the laws of this Commonwealth but rather, as it saw fit, seeking and administering Federal aid programs free of any checks or balances and with little political accountability for such actions."

Opinion of the Justices, 118 N.H. at 15 (quoting *Shapp v. Sloan*, 367 A.2d 791, 797 (Pa. Commw. Ct. 1976)). The supreme court stated that "[t]he legislature may take a variety of approaches to the structuring and spending of federal funds." *Id*. at 15. However, it went on to state that "Part II, Article 56 of the New Hampshire constitution provides that monies coming into the treasury shall not be disbursed by Governor and Council except as 'agreeably to the acts and resolves of the general court.'" *Id*. "It is clear that the governor has no authority to draw his warrant upon the treasury in a particular case, *unless there is some existing act or resolve of the legislature authorizing such payment.*" *Id*. (quoting *Opinion of the Justices*, 75 N.H. 624, 626 (1910)) (emphasis added). The Court has found that RSA 21-P:43 is one such act of the legislature authorizing payment.

It bears emphasizing that the Governor is acting pursuant to authority granted to him by the legislature. By enacting RSA 21-P:43, the legislature deliberately authorized the Governor to accept and spend federal funds made available for purposes of emergency management. Therefore, the Governor's spending of CARES Act funds is done pursuant to an act of the legislature and is agreeable to the acts and resolves of the general court. Should the legislature wish to remove this authority, it may do so by changing the law. In the meantime, the Governor's conduct does not run afoul of Part II, Article 56 or Part I, Article 37 in large part because his actions have been pursuant to this legislative grant of authority.

Accordingly, for the foregoing reasons, Defendant's motion for summary judgment on Counts III and IV is GRANTED, and Plaintiffs' motion for summary judgment is DENIED.

Conclusion

Based on the foregoing, Defendant's motion for summary judgment is GRANTED with respects to Counts I through IV of Plaintiffs' second amended complaint. Plaintiff's motion for summary judgment on Counts III and IV is DENIED. Finally, Count V of Plaintiff's complaint sought expedited preliminary injunctive relief, which the Court addressed and denied in its prior orders. Accordingly, Count V need not be further addressed herein.

SO ORDERED.

October 12, 2020
Date

Judge David A. Anderson

Clerk's Notice of Decision
Document Sent to Parties
on 10/13/2020