

# MAINE STATE LEGISLATURE

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September 12, 1924

To Honorable Percival P. Baxter, Governor of Maine  
Re: Discharge of Chief of the State Police

Your inquiry received regarding the power of the State Highway Commission to discharge Capt. Miller of the Motor Division without the consent of the Governor and Council. The question is a difficult one to answer. The answer cannot be given with assurance, but I am inclined to the opinion that the consent of the Governor and Council is necessary before Capt. Miller can be dismissed as a State Highway Policeman, although such consent is not necessary before demoting him from his position as Chief to the position of a highway policeman. I am clearly of the opinion, however, that the confirmation by the Governor and Council of the appointment of a successor to Capt. Miller would operate as a dismissal of Capt. Miller.

The appointment of Capt. Miller appears to be virtue of Section 25 of the Motor Vehicle Law. The Highway Commission has the right to employ inspectors, and their employment is, I should say, wholly within the discretion of the commission and they can dismiss them without anyone's consent, although the approval of the Governor and Council under general provisions of law is, of course, a prerequisite to the collecting of pay for the services of any of these employees.

This section further provides that "the commission with the consent of the governor and council may also commission inspectors as state highway police." There is nothing expressly within the section as to the appointment of the Chief of the Motor Division. I understand, therefore, that his designation as Chief is a matter of administrative detail in the organization of the department and I should be of the opinion that this designation of Chief might be cancelled and Capt. Miller reduced to the grade of a highway policeman by the highway commission of its own act and without consulting with the Governor and Council.

The difficult point in the case is whether his commission as a state highway policeman can be cancelled by the State Highway Commission without the approval of the governor and council. As such a policeman he is appointed by the Commission with the consent of the Governor and Council. The general rule of law is that the power to appoint carries with it the power to discharge, (See 29 Cyc. page 1371, 1408; 15 L.R.A. 95, note.)

In the Federal organization the question early arose whether the power of the President to appoint certain officials by and with the consent of the Senate carried with it the power to remove those officials without consulting the Senate. This was one of the most important questions presented before the first Congress of the United States and it was decided after a brilliant discussion participated in by those who had had a share in drawing up the Constitution that this power was vested in the President. The casting vote of Vice-President John Adams decided this question in favor of this presidential power. Mr. Adams felt the question was so important that, contrary to his custom, he stated his reasons. One principle reason was that the

Senate was not in session throughout a great part of the year and if the President did not have this power, malfeasance in office might go on for many months. This power on the part of the President was doubted by Chief Justice Marshall in the famous case of Marbury v. Madison, but has become fixed in practice. The tenure of office act for a few years during and after the administration of President Johnson took away this power, but it is now reinstated. (See Parsons vs. U. S., 167 U. S. 324.)

This analogy in the Federal practice has not, however, been extended to our State as far as concerns the power of the Governor alone to remove an official appointed by the Governor and Council. This was expressly ruled by the Justices of our Supreme Court in answer to inquiries put to them by the Council in 1881. (See 72 Me. 541 et seq.) The removal by the then Governor of the Reporter of Decisions without the consent of the Council, whose consent was necessary for the appointment of the Reporter, was disapproved by the Court. The Court distinguishes the Federal practice above referred to and relies on the wording of the Maine Constitution, Article IX, Section 6, which provides as follows:

"The tenure of all offices, which are not or shall not be otherwise provided for, shall be during the pleasure of the Governor and Council."

This being the rule of our Court with reference to the power of the Governor alone to remove an officer appointed by himself with the consent of the Council, I am inclined to the opinion that the same ruling would be extended to the case now under consideration. The analogy is plain and the reasoning of the Law Court is applicable.

It has, however, been ruled in a number of cases that the appointment of a successor to an office whose term is not fixed by law operates as a removal of the prior incumbent. 29 Cyc. page 409. I find no requirement that causes must be stated or a hearing granted before removing a State Highway Policeman from office.

William H. Fisher  
Deputy Attorney General