

MAINE STATE LEGISLATURE

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May 14, 1940

To the Attorney General from Assistant Attorney General Fessenden
Re: Auditor's Question about State Agencies

Mr. Hayes has asked us to define "agency" of the State. I do not believe that it is possible to give a categorical definition of an "agency". I believe it would be well for him to give us a list of the so-called agencies about which he is doubtful, so that we can attempt to tell him specifically which ones are agencies of the State government.

Inquiry as made as to the Port of Portland Authority. As noted in our previous correspondence, the Port of Portland Authority is specifically excluded from the provisions of the Administrative Code. Mr. Hayes refers to the fact that it has "always, or at least sometimes, been audited by the Department". The Port of Portland Authority is created by Chapter 114 of the Private and Special Laws of 1929, Subsection B of Section 1 of this chapter provides, in part, that the Port Authority

"shall keep account of its income and expenditures, property and liabilities, in a manner approved by the State Auditor, who shall audit its books of accounts at least once a year."

This provision is authority certainly, until the adoption of the Administrative Code, for an audit of the Port Authority by the State Auditor.

As indicated, the Port Authority is excluded from the terms of the Code, and such exclusion would be complete, were it not for the provisions of section 3, subsection 1, of Article 6 of the Administrative Code. This section provides for the post-audit of the State government, or any department, or agency thereof. If the Port Authority is an agency of the State government, there would be at least some authority for the audit of the Port Authority by the State Auditor. I have compared the law creating the University of Maine (Chapter 532, Private and Special Laws of 1865) with the law creating the Port of Portland Authority and have studied the decision in the case of Orono v. Sigma Alpha Epsilon Society, 105 Maine 214. In the law creating the Port Authority, the Legislature declares,

"The said Port Authority is constituted a public agency of the State of Maine for the general purpose of acquiring, etc."

It is possible that the declaration by the Legislature that the Port Authority is a "public agency" might be interpreted to place the Port Authority on a different status than the University of Maine. However, I do not believe that such an interpretation would be correct, because if the court adheres to its decision in the Orono case, it would be inclined to interpret the words "public agency" as meaning just that, and not agency of the State government in the sense of an instrumentality of the government.

The Code creates the Department of Audit. It provides that the State Auditor shall be the head of the department. The Code then sets forth the authority of the Department of Audit. The last section of the Code repeals Acts or parts of Acts inconsistent with the provisions of the Code. There is a question in my mind as to whether the State Auditor has a duty to continue to audit specially created Agencies, or whether the specification of the duties of his department in the Code would repeal his duty with respect to specially created Agencies created prior to the Code. Amending the Code is the only satisfactory answer, if it is desired to have the State Auditor audit such non-governmental agencies.

With respect to the last paragraph of Mr. Hayes' letter of May 10th, it is my opinion that there is no provision in the statutes for the audit of the courts, and that if he does not audit the courts, no one will audit the courts. That is why I specifically recommended that serious consideration be given to providing by law for the audit of the Judiciary.

In accordance with your request, I will ask Mr. Hayes to give us a list of the "agencies" about which he has a doubt, and I will also ask him to be more specific with respect to the fourth paragraph of his letter of May 10th*.

John S. S. Fessenden
Assistant Attorney General

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* "Relatively minor lines".