STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

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for the calendar years

1943--1944

"The question has arisen as to my authority in connection with the postwar building program for other departments. I would definitely like to know 'Do I have the authority to approve the selection of architects for these buildings, which shall include the fee paid these architects and how they shall prepare these plans; that is, to state to the architects whether or not they shall hire competent heating, structural, and electrical engineers to work with them on plans."

Your duties are specifically defined by Chapter 176 of the Laws of 1943. With respect to your authority so far as buildings and property under the control of department heads are concerned, paragraph two of Section 4 is as follows:

"Upon the request of department heads concerning buildings and property under their control, the superintendent shall supervise the construction, repairs, alterations and improvements to said buildings and property. The superintendent shall regularly inspect all buildings and property in the state and report to the department head concerned whatever construction, repairs, alterations and improvements are necessary, and he shall, if he deems it advisable, make a similar report to the governor and council."

You would thus have no duty or authority to supervise the construction, etc., of these buildings, unless you were requested to do so by the department head. Without such request you have only the duty of inspection and of reporting to the department head, and, if you deem it advisable, to the governor and council.

I think, however, that under Section 5, which provides that

"All contracts for repairs and construction of state buildings shall be examined and approved by the superintendent of public buildings prior to their submission to the governor and council for their final approval and acceptance,"

you have a duty to examine and approve all contracts for repairs and construction of all State buildings, and you might refuse to approve a contract which you felt was not proper, beneficial to, or in the interests of the State, and submit your criticism thereof to the governor and council.

While this would not involve the selection of the architect, the question of the reasonableness of the fee and all the other elements in your question would be involved in the approval of the contract.

ABRAHAM BREITBARD
Deputy Attorney-General

September 28, 1944

Harold B. Emery, Chairman, Liquor Commission

You inquire as a member of the Liquor Commission as to your status after October 1, 1944, which date marks the end of the third year since your appointment. This question now arises because no appointment has been made by the Governor of a successor to assume the duties of the office now held by you.

Your inquiry is a most proper one, and I think you would have been remiss in your duty if you had not availed yourself of the statutory right to seek the advice of the Attorney-General's department as to your status.

The statute creating the liquor commission provides that the board "shall consist of 3 members, to be appointed by the governor, with the advice and consent of the council, to serve for 3 years, or during the pleasure of the governor and council . . . any vacancy shall be filled by appointment for a like term." No provision is made that the incumbent shall hold over until his successor is appointed and qualifies, nor are there any words of limitation such as are contained in the general statute fixing the tenure of certain public officers to four years "and no longer, unless re-appointed." R. S. 2, §54.

In authoritative texts we find the principle enunciated by the courts that even in the absence of provisions for holding over " . . . there seems to be a general rule that an incumbent of an office will hold over after the conclusion of his term until the election and qualification of a successor." 43 Am. Jurisprudence, p. 20, §162.

And in *Heyward* v. *Long*, 178 S. C., 351, the court quotes from an annotation in 50 L. R. A. (N. S.) 365, as follows:

> "It has been held that it is the general rule of law that an incumbent of an office will hold over after the conclusion of his term until the election and qualification of a successor, even although there is no express provision of law to that effect."

Our own court in *Bath* v. *Reed*, 78 Maine 280, refers to this rule as follows:

> "Even in the absence of any charter or statute provision that the officer of a municipal corporation shall hold over until his successor is elected and qualified, the doctrine of the American courts has strongly inclined to guard against lapses, sometimes unavoidable, and to adopt the analogy of other corporate officers who hold over till their successors are elected, unless the legislative intent to the contrary is clearly manifested."

And in *Bunker* v. *Gouldsboro*, 81 Maine 194:

> "The language of the statutes may show an intention to precisely fix and limit the tenure of a municipal officer, so that on a fixed day, his authority will cease, even if an entire vacancy and absence of authority be the result. Unless such an intention appears, however, the better opinion is, that the officer should continue to exercise his functions until another person is qualified to assume them. As the natural law is said to abhor a vacuum in physics, the municipal law may be said to dislike a vacancy in authority."

It is common knowledge that the commission in the performance of its duties carries on a wholesale and retail business of large volume. Besides licensing manufacturers, distillers, dealers and dispensers of liquor, it is also charged with the duty of supervising, regulating and enforcing the law and appointing a large number of employees and enforcement officers. It is not reasonable that these most important functions shall cease and come to an end pending the appointment and qualification of a successor to an incumbent whose term has expired. Nor would it be in the public interest, if that should be the result.

In the present situation, since your own term and that of Edward J. Quinn, another member, expire at the same time, there would not remain a majority of the commission.

The legislature not having clearly manifested that the term was to come to an end, although no new appointment was made to carry on the functions of the office, I am of the opinion that these officers hold over, and I advise you that you are to continue to perform the duties of the office until a successor is named and qualifies.

This ruling also applies to the other member, Edward J. Quinn.

ABRAHAM BREITBARD
Deputy Attorney-General

October 6, 1944

F. K. Purinton, Executive Secretary, Executive Department

Appointment of State Humane Agent

1) The letter written by the mayor of the city of Waterville, addressed to the Governor, which you have submitted to me is insufficient. The statute provides that "Upon application by the mayor and aldermen of any city, the selectmen of any town, the county commissioners of any county, or the president and three directors of any society for the prevention of cruelty to animals, the governor and council shall issue a badge and commission to any person designated. . . . " (Chapter 135, §70, R. S. 1930.) This address to the Governor and Council must be by a document in the form of an application and should be signed by all the persons enumerated in the statute.

What has been submitted here is a letter signed by the mayor alone. If it is to be treated as an application, it is insufficient because all that he says is that the Board of Aldermen at a regular meeting recommended the person named for appointment as humane agent. The concluding sentence is: "I respectfully call your attention to their recommendation." He does not say that he joins, but submits it as their recommendation. This is not in conformity with the statute, which provides that the application in the case of a city is to be made by the mayor and the board of aldermen. The action must be joint.

2) As to the substance of your inquiry as to whether the Governor and Council have any choice, or whether they must accept and issue a commission to the person designated, because of the use of the auxiliary verb "shall," I advise you that, "The word may be construed without intending that it be taken literally, so that it is not always imperative, or mandatory; but may be consistent with an exercise of discretion . . . the word may be construed as being merely permissive or an meaning 'may'." (57 C. J., page 552.)

It has also been stated that "shall" is also construed in the permissive sense to mean "may," where it is necessary to sustain the constitutionality of a statute (Note 25, 57 C. J., page 553.) If "shall" in the statute under consideration were to be interpreted to be mandatory, or used in the sense of a command, the statute would be unconstitutional as an encroachment upon the powers vested in the executive branch of the government under the Constitution. I must therefore advise you that it was used in the sense that the Governor and Council "may"