

MAINE STATE LEGISLATURE

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STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

for the calendar years

1943--1944

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"

issue the commission. The executive authority then may, when a proper application is submitted, consider not only the necessity for making the appointment, but also exercise their independent judgment in considering the fitness, integrity and character of the person designated in the application before issuing to him a commission and vesting him with the authority to arrest persons charged with violating the law relating to cruelty to animals "the same as any sheriff, deputy sheriff, or constable can do, and whose jurisdiction shall extend throughout the State. . . ."

While, under this section, the executive authority is not free to appoint some other person, it may, however, refuse to appoint the person designated and continue to do so until such person as the Governor and Council feel possesses the essential qualifications to be entrusted with the duties outlined by the statute is designated by the applicants.

I return herewith the letter of the mayor and the other memoranda which you submitted therewith.

ABRAHAM BREITBARD

Deputy Attorney-General

October 12, 1944

David H. Stevens, State Tax Assessor

Taxation

The Maine-New Hampshire Bridge Authority

I have your memo of September 18th. The Portsmouth-Kittery Bridge Authority is an instrumentality of the States of Maine and New Hampshire acting jointly under the provisions of a compact.

The provisions of section 10 of P. & S. 1937 (the Portsmouth-Kittery Bridge Act), together with the language in other parts of the act, indicate clearly that the intent of the legislature to set up, in so far as it could, a public corporation which is within the definition of the phrase "bridge district" as used in R. S. c. 12, §72.

However, inasmuch as any relief from taxation will necessarily redound to the State of New Hampshire, the proposition should be taken up with the State of New Hampshire to determine what, if any, action that State will take. No definite proposition should be made by the State of Maine unless a decision of equal value to the Bridge Authority is made by the State of New Hampshire.

FRANK I. COWAN

Attorney-General

October 12, 1944

William D. Hayes, State Auditor

Audit

Allocation State Highway Funds

I have your memo of September 8, in which you cite transfer of \$1,139.86, on December 7, 1943, from Account 20125 (General Highway Fund) to Account 9016 (Secretary of State.) You cite also, transfer on July 14, 1944, of \$1,000 from the general highway fund surplus to the Motor Vehicle Division of the State Department.

I am answering the questions in the order in which you ask them.

A. Such transfers have to be made by Order of the Governor and Council.