

MAINE STATE LEGISLATURE

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STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

for the calendar years
1951 - 1954

January next after election aforesaid. Under these statutory and constitutional provisions, the vacancy in the office of Register of Probate may be temporarily filled by appointment of a suitable person by the Judge of Probate, such person serving until the individual appointed by the Governor and Council qualifies for the position.

In this case Mr. McClure, by accepting and qualifying for the office of Governor's Councilor, thereby vacated his office as Register of Probate. Should he now be appointed and qualify as Register of Probate pro tem., the two offices being incompatible, he would thereby vacate his office as Executive Councilor.

NEAL A. DONAHUE
Assistant Attorney General

January 16, 1953

To Honorable Burton M. Cross, Governor of Maine
Re: Eligibility of Councilor for Appointment to Public Office

This office has been requested to advise you as to the legality of appointing a member of the Executive Council to the Board of Commissioners of Pharmacy.

We draw your attention to Article V, Part Second, Section 4, of the Maine Constitution, and to the last sentence of this section, which reads as follows:

“And no counsellor shall be appointed to any office during the time, for which he shall have been elected.”

There is no question but that a member of the Board of Commissioners of Pharmacy is an office, as it has some permanence and continuity and possesses a delegation of a portion of the sovereign power of the government, to be exercised for the benefit of the public.

For the above reasons it is our opinion that a member of the Executive Council may not be appointed to the Board of Commissioners of Pharmacy.

JAMES G. FROST
Deputy Attorney General

January 30, 1953

To Ernest H. Johnson, State Tax Assessor
Re: Property Tax – Indian Township

In reply to your memorandum of January 5, re the State property tax assessment in Indian Township, please be advised that the Attorney General has rendered an opinion to the Department of Education that the transportation of Indian children in Indian Township is properly within the jurisdiction of the Department of Health and Welfare and not the Department of Education. The expenditure for transporting Indian children in Indian Township made by the Department of Education was included in the statement of expenditures for school purposes in Indian Township furnished to your office by the Commissioner of Education. We think this amount was not properly chargeable to the residents of Indian Township. We understand that of some

thirty taxpayers in Indian Township all but two have paid the tax voluntarily. As to these two, your office is required to institute lien proceeding on February 1, 1953, to enforce collection of the tax assessed.

We would note that under Sec. 72 of Chapter 14 "The State Tax Assessor may, subject to the approval of the governor and council . . . if justice requires, make an abatement of any state, county or forestry district taxes." Without attempting to limit or define in any way the authority of your office to abate taxes, we think it clear that such power exists in those instances where the courts would be authorized to act.

Upon the facts we would advise the following in answer to your questions. We think the imminence of legal steps to enforce a lien on the property of Mr. McDowell constitutes legal duress and would justify equity action in enjoining the collection of the tax. This being so, we think you would be justified in abating that portion of the tax assessed against him as is excessive. This will leave the way clear for you to carry out your duty to enforce collection of the tax by lien proceedings. In regard to that portion of the tax paid voluntarily by other residents, we are of the opinion there is no remedy at law or in equity available to them and that reimbursement for them would be legally an act of grace better left to the Legislature. We would add that we think the situation would justify a resolve presented to the Legislature on behalf of these taxpayers since the State is morally obligated to refund the excessive amount though not legally so obligated.

We understand that the customary procedure in the case of abatement of such a State tax is to distribute the abatement pro rata against the various levies going to make up the total tax; however, in view of the peculiar facts of this situation, it is our opinion that the entire amount of the abatement in question should be charged against the Unorganized Territory School Fund.

MILES P. FRYE

Assistant Attorney General

February 2, 1953

To Earle R. Hayes, Secretary, Maine State Retirement System

Re: Two Beneficiaries

We have your memo of January 22, 1953, in which you state that an employee of the State Highway Commission had attained eligibility for retirement, due to the fact that she had attained age 60, but died while still in service. She had designated her two sons as beneficiaries at the time she filed her original application for membership in the System and this designation had never been changed.

Under the provisions of section 10 of Chapter 60 of the Revised Statutes, it is provided that under such circumstances Option 2 becomes effective.

You ask if, in our opinion, two persons can receive a benefit under the provisions of Option 2, or is only one person entitled to a benefit under Option 2.

It is our opinion that the Retirement Board should make payments to both sons of the deceased under the provisions of Option 2.