

MAINE STATE LEGISLATURE

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STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

for the calendar years

1957 - 1958

positions of teachers, policemen, and firemen, and the other of the positions of all employees other than teachers, policemen and firemen.

The Maine Social Security Act (Chapter 65, R. S. 1954) was originally enacted to enable employees of political subdivisions of the State to participate in the benefits of Social Security in cases where such employees were not members of an existing retirement or pension system.

Subsequently, this Act was amended to permit participation by such employees whether they were members of existing retirement or pension plans or not. Teachers, policemen and firemen, however, were expressly excluded from participation in Social Security.

It is our opinion, inasmuch as such legislation was enacted with full knowledge that certain local subdivisions were members of the Maine Retirement System, that the Maine Retirement System may be deemed to be separate systems with respect to any one or more of the local subdivisions and to all other positions covered by the Maine Retirement System.

Because of the provision that the chapter shall not apply to teachers, policemen or firemen, who are under a state or local government pension or retirement plan, we are compelled to conclude that our system may be deemed to be a separate system as to teachers, as defined in section 316 of the Federal Law, policemen and firemen, and a separate system as to other employees of a local subdivision.

In enacting our Social Security Act, the Legislature said:

“ . . . It is declared to be the policy of the Legislature, subject to the limitations of this chapter, that such steps be taken as to provide such protection to such employees on as broad a basis as is permitted under the Social Security Act.”

Chapter 65, Section 1, R. S. 1954.

We have been (Opinion of Attorney General, October 21, 1954) and are now of the opinion that such statement is adequate authority for the Governor to direct the proper officials to conduct the necessary referendum required by Federal law.

JAMES GLYNN FROST
Deputy Attorney General

December 29, 1958

To R. W. MacDonald, Chief Engineer, Water Improvement Commission

Re: Chapter 79, Revised Statutes of 1954, as amended

We have your memorandum of December 2, 1958, in which you ask this office for an opinion on two questions.

Question No. 1:

“1. Interpretation of “grandfather clause” contained in Section 8.

a. Does an industry moving onto a site formerly occupied by another industry acquire an automatic and unrestricted license if the manufacturing process, and consequently the waste, is (1) entirely different as is the case between a plating

process and a cannery; (2) in the same general category as in the case of two wastes which are oxygen demanding; or (3) in the case of industries have approximately identical wastes as in the case of one paper mill replacing another.”

Question No. 2:

“2. Can the Water Improvement Commission issue a conditional license; that is, a license, the validity of which, depends upon modification of the ordinary waste to meet certain conditions

a. If not, can a license be issued upon proposals made by the applicant in his application which the Commission is willing to accept.

b. Is the procedure now used by the Commission of withholding final licensing until necessary treatment facilities are in place in accordance with statute.”

We consider the second question first. The answer to this question may be more clearly seen if one considers what action the Commission might take against a licensee who, in the opinion of the Commission, is in violation of the Water Improvement Commission law.

Initially, we would note that, though any license granted by the Legislature could be revoked, if so provided, no authority rests in the Commission to revoke or suspend a license, no matter what the provocation might be.

General Principles re licenses and Administrative bodies

A licensee takes his license subject to such conditions as are imposed by the Legislature.

State v. Cote, 122 Me. 450

State v. Pulsifer, 129 Me. 423

Bornstein, Appellant, 126 Me. 532

See generally—33 Am. Jur. 371

While the Legislature may not delegate strictly Legislative duties to an Administrative body, it may require such a body to perform the ministerial acts necessary to the performance of its duties. *McKenney v. Farnsworth*, 121 Me. 450. *Statutes to be considered in determining whether the Water Improvement Commission has the right to impose conditions, either precedent or subsequent*

Section 1.

“ . . . It shall be the duty of the Commission to study, investigate, and from time to time recommend to the persons responsible for the conditions, ways and means, so far as practicable and consistent with the public interest, of controlling the pollution of the rivers, waters and coastal flats of the state by the deposit therein or thereon of municipal sewage, industrial waste and other substances and materials insofar as the same are detrimental to the public health or to animal, fish or aquatic life, or to the practicable and beneficial use of said rivers, waters and coastal flats. The Commission shall make recommendations to each subsequent legislature with respect to the classification of the rivers, waters and coastal flats and sections thereof within the state, based upon reasonable standards of quality and use.

“The Commission shall make recommendations to each legislature with respect to abatement of pollution of the rivers, waters and coastal flats and sections thereof within the State for the purpose of raising the classifications thereof to the highest possible classification so far as economically feasible; such recommendations to relate to methods, costs and the setting of time limits for compliance.

“The Commission shall consult with and advise the authorities of municipalities, persons and businesses having, or about to have, systems of drainage or sewerage except purely storm water systems, as to the best methods of disposing of the drainage or sewage with reference to the existing and future needs of the municipality, other municipalities, persons or businesses which may be affected thereby. It may also consult with and advise with persons or corporations engaged or intending to engage in any manufacturing or other business whose drainage or sewage may tend to pollute any waters under the jurisdiction of the Commission, as to the best methods of preventing such pollution, and it may conduct experiments to determine the best methods of the purification or disposal of drainage or sewage. Municipalities and sewer districts shall submit to said Commission for its advice the plans and specifications for any proposed new system of drainage, sewage disposal or sewage treatment, except purely storm water systems and any alterations in existing facilities. The Commission shall establish standards for the operation of municipal treatment facilities.”

Section 2.

“Standards of classification. 1953, c. 403, § 2. 1955, c. 425, § 5. The Commission shall have 4 standards for the classification of surface waters and tidal flats.

“Class A shall be the highest classification and shall be of such quality that it can be used for bathing and for public water supplies after disinfection, and the dissolved oxygen content of such waters shall not be less than 75% saturation and contain not more than 100 coliform bacteria per 100 milliliters.

“There shall be no discharge of sewage or other wastes into water of this classification and no deposits of such material on the banks of such waters in such a manner that transfer of the material into the waters is likely. Such waters may be used for log driving or other commercial purposes which will not lower its classification.

“Class B, the second highest classification, shall be divided into two designated groups as B-1 and B-2.

“B-1. Waters of this class shall be considered the higher quality of the Class B group and shall be acceptable for recreational purposes and after adequate treatment for use as a potable water supply. The dissolved oxygen of such waters shall be not less than 75% of saturation and contain no more than 300 coliform bacteria per 100 milliliters.

“There shall be no disposal of sewage or industrial wastes in such waters except those which have received adequate treatment to prevent lowering of the standards for this classification, nor shall such disposal of

sewage or waste be injurious to aquatic life or render such dangerous for human consumption.

"B-2. Waters of this class shall be acceptable for recreational boating, fishing, industrial and potable water supplies after adequate treatment. The dissolved oxygen of such waters shall not be less than 60% of saturation and contain no more than 1,000 coliform bacteria per 100 milliliters.

"There shall be no disposal of sewage or industrial waste in such waters to lower its classification nor shall such disposal of sewage or waste be injurious to aquatic life or dangerous for human consumption.

"Class C, the third highest classification, shall be of such a quality as to be satisfactory for recreational boating, fishing and other uses except potable water supplies and swimming, unless adequately treated to meet standards.

"Waters of this classification shall be free from scums, slicks, odors and objectionable floating solids, and shall be free from chemicals and other conditions inimical to aquatic life. The dissolved oxygen content of such waters shall not be less than 5 parts per million for trout and salmon waters and not less than 4 parts per million for non-trout and non-salmon waters.

"The Commission may take such action as may be appropriate for the best interests of the public when it finds that a "C" classification is temporarily lowered due to abnormal conditions of temperature and stream flow for that season involved.

"Class D waters, the lowest classification, shall be considered as primarily devoted to the transportation of sewage and industrial wastes without the creation of a nuisance condition and such waters shall contain dissolved oxygen at all times. During a period of temporary reduction in the dissolved oxygen content in this class water, due to abnormal conditions of temperature or stream flow for the particular season involved, the Commission, provided a nuisance condition has not then been created in such water and in the opinion of the Commission is not likely to be created during such season, shall take no action to reduce the amount of pollution from any source which is allowed in such class water under normal conditions."

Section 4.

"Enforcement. 1953, c. 403, § 2. *After adoption of any classification, by the legislature, for surface waters or tidal flats, or sections thereof, it shall be unlawful for any person, corporation, municipality or other legal entity to dispose of any sewage, industrial or other waste, either alone or in conjunction with another or others, in such manner as will lower the quality of the said waters, tidal flats, or section thereof, below the minimum requirements of such classification, and notwithstanding any licenses which may have been granted or issued under sections 8, 9, and 10 hereof.*

"The Commission shall enforce the provisions of this section by appropriate orders, and in the event such orders are not complied with within such time as the Commission shall stipulate, appropriate legal

action shall be instituted by the Commission to enforce compliance or to punish violators. . . .”

Section 6 sets forth a penalty for violation of sections 2, 3, 4 and 5 or of an order of the Commission.

Section 6.

“Penalties. 1953, c. 403, § 2. Any person, corporation or other legal entity who shall violate any of the provisions of the four preceding sections or who shall fail, neglect or refuse to obey any order of the Commission lawfully issued pursuant hereto, shall be punished by a fine of not less than \$25, nor more than \$200, for each day of such violation, failure, neglect or refusal after the expiration of any time limit set by the Commission.”

Sections 8, 9 and 10 relate to licenses—those persons who must obtain a license, the manner of obtaining the license, and appeals from decision of the Commission relating to licenses. We herewith quote Section 8:

“Pollution restricted. 1945, c. 345, § 2. 1951, c. 383, § 2. 1953, c. 403, § 3. No person, firm, corporation or municipality or agency thereof shall hereafter discharge into any stream, river, pond, lake or other body of water, or watercourse, or any tidal waters any waste, refuse or effluent from any manufacturing, processing or industrial plant or establishment or any sewage so as to constitute a new source of pollution to said waters without first obtaining a license therefor from the Water Improvement Commission; provided, however, that no application for a license shall be required hereunder for any manufacturing, processing or industrial plant or establishment, now or heretofore operated, for any such discharge at its present general location, such license being hereby granted.”

Section 12 permits the Attorney General to institute injunction proceedings to enjoin violation of these statutes or orders of the Commission.

Section 15 contains the many Legislative classifications of waters of the state, which waters are to be administered by the Commission in accordance with the Standards set down in Section 2.

Only classified waters are within the jurisdiction of the Water Improvement Commission.

Examination of the above-quoted statutes reveal the following facts with respect to the Commission and its powers and duties:

The only waters within the jurisdiction of the Commission are those waters classified by the Legislature in Section 15, Chapter 48, standards for which, to guide the Commission, have been established in Section 2 of Chapter 49.

This conclusion is based upon the following reasons:

Section 2, establishing the standards of classification of waters is prefaced by these words:

“The Commission shall have 4 standards for the classification of surface waters and tidal flats.”

Section 4, an enforcement section, provides that the Commission can enforce by appropriate orders, the disposal of wastes in those waters

which have been classified. And such enforcement runs only to waste that lowers the quality of such classified waters. See italics in quoted section.

The only other powers of the Commission which relate to the question at hand, appear in Section 1, and confer upon the Commission the duty in one case, and the power in another, to consult with, advise, and make recommendations to those disposing or intending to dispose of drainage or sewage which tend to pollute any waters under the jurisdiction of the Commission.

In summary the only "teeth" in the law available for enforcement purposes relate to those waters which the Legislature has classified.

The license issued by the Commission is issued subject to the conditions imposed by the Legislature.

As stated above, a licensee takes his license subject to such conditions as are imposed by the Legislature.

The primary conditions imposed by the Legislature upon licensees disposing of waste in Maine waters are seen in Section 2, Standards for Classification, and Section 15, the Classification Section.

Examples of other conditions can be seen in Section 4—no disposal of waste as to lower the quality of said (classified) waters; Section 6—the imposition of a penalty upon those who violate certain provisions of the Water Improvement Commission law or an order of the Commission.

The Legislature has not vested in the Commission the power to impose conditions upon licensees—the Legislature itself has imposed conditions, some of which we have mentioned above.

With respect to licenses to dispose of wastes in classified waters, the Legislature itself has classified the waters (Section 15), established the standard for classification of such waters (Section 2), and has vested in the Commission the power to determine those facts which, if conformed with, would permit the disposal of waste in such manner as not to lower the quality of classified waters.

The determination by the Commission of such facts as procedures of disposal, are ministerial acts performed in fulfillment of their duty to see that the classification of waters remain unchanged.

Thus, if a licensee were to be charged criminally, or enjoined, for violating the Act with respect to classification, such charge would not be for violating a condition imposed by the Commission but because it would be a violation of a Legislative condition, to wit: lowering the quality of water below the standard authorized by the Legislature.

So, if the Commission demands that a licensee do certain acts before he can dispose of waste material, those acts are required because, in the Commission's best judgment, such a procedure is demanded in order that the legislative standard not be violated. If the licensee fails to perform the required acts, punishment, if any, would be due, not for his failure to perform the act, but because such failure resulted in violation of a legislative standard.

Summary—The Commission may demand that certain procedures or methods of disposal be used before one can dispose of waste into classified waters.

Such requirements are not legislative conditions, but merely ministerial conclusions of fact, required of the Commission under the Water Improvement Com-

mission Act. It seems to us that such requirements may be demanded before or after a license issues. The effect is the same.

Disposal of wastes by Saco Tannery not within jurisdiction of Water Improvement Commission.

It is our understanding that these questions have been sent to this office in connection with the Saco Tannery matter.

It is also our understanding, through conversation with representatives of the Commission, that any wastes to be disposed of by the Saco Tannery will be discharged into that part of the Saco River which lies in tide-water, and which area is unclassified.

The above discussion reveals, we believe, that the Water Improvement Commission has no jurisdiction over unclassified waters.

While Section 8 appears in general terms to require all persons, with an exception not here pertinent, to possess a license in order to discharge waste into Maine waters, the Act considered in its entirety will not permit such interpretation. It would be a vain act to require the Saco Tannery to procure a license to discharge waste into waters which do not come within the enforcement powers of the Water Improvement Commission.

We are, therefore, of the opinion that the Water Improvement Commission is without authority to license the Saco Tannery to discharge waste into that portion of the Saco River which is in tide-water.

The answers above given make it unnecessary to answer Question No. 1.

JAMES GLYNN FROST
Deputy Attorney General