# STATE OF MAINE

# REPORT

## OF THE

# ATTORNEY GENERAL

for the calendar years

1959 - 1960

General oversight of chambers and rooms means overall superintendence; general supervision; and management of such chambers and rooms.

The term "Legislature" as used in the section of law under consideration means the legislative body — the House and the Senate, with the result that the general oversight of chambers and rooms refers to chambers and rooms occupied by either or both branches of the Legislature.

The aforementioned duties of the Clerk of the House may be limited by a joint order of the Legislature.

Answer to Question No. 2 —

"Yes".

Very truly yours,

FRANK E. HANCOCK
Attorney General

August 24, 1959

To: Perry D. Hayden, Commissioner of Institutional Services

Re: Leasing of State-Owned Property

I have your request for an opinion regarding the authority of a state officer to lease a state-owned rock crusher to a construction company.

It is my opinion that you cannot lease public property to a private person.

Section 5, Chapter 27, Revised Statutes of Maine of 1954, charges you with the care, management, custody and preservation of the property of all state institutions but I do not believe this would authorize you to lease public property to a private individual. Public property is held by the State in trust for the people.

Subparagraph VI, Section 34, Chapter 15-A, Revised Statutes of 1954, provides that the Bureau of Purchases shall have authority to

> ". . . transfer to or between state departments and agencies, or sell supplies, materials and equipment which are surplus, obsolete or unused. . ."

I am unable to find any authority for you to execute such a lease.

GEORGE A. WATHEN
Assistant Attorney General

August 31, 1959

To: Marion E. Martin, Commissioner of Labor & Industry

Re: Minimum Wage Law

We have your memo of July 16, 1959, in which you ask 11 questions concerning Chapter 30, sections 132-A to 132-J, as enacted by Chapter 362, Public Laws 1959, an Act establishing a minimum wage.

The Act, with certain classes of employees being exempted, prohibits an employer from paying an employee less than $1.00 per hour, excepting employers employing three or less employees.

Question No. 1. "(Sec. 132-B, III C) Does the "major portion" mean more than half? In other words, if a waitress receives $3 a week in wages plus three meals a day, which would be counted as $7.20 a week for a 6-day week, for a total of $10.20 a week, and she received $15 in tips for the week, is she exempt? Under this formula, she would make $25.20 total for the week, whereas, if covered, and working 48 hours, she would make $48.00."

*Answer:* Yes. A major portion means more than half.

Question No. 2. "(Sec. 132-B, III C) Upon whom lies the burden of proof as to the amount of remuneration received by a service employee in the form of gratuities? Under the authority of the Commissioner to "make and promulgate . . . rules and regulations. . ." (Sec. 132-H II), would it be proper to require a signed statement from the employee before granting an exemption?"

*Answer:* The tenor of this entire question is such that we feel compelled to discuss the problems involved at some length.

The Act itself does not change the present law of this State relating to criminal prosecutions. The "burden of proof" required to convict an employer of the violation of the Act will rest upon the prosecution — the State will have to prove beyond a reasonable doubt that the employer is in violation.

The last sentence of this question appears to assume that after some administrative action the Commissioner of Labor and Industry will grant an exemption. The exemptions in the law are granted by statute. Once the provisions of 132 G or H are invoked, then the Commissioner will have to determine whether the evidence gathered is such as will compel the Commissioner to mail the notice provided for in section 132-G and perhaps request prosecution by the County Attorney. Since the County Attorney has the burden of instituting criminal actions against employers, it might be well to consult with him when questionable cases arise in his jurisdiction. In the meantime, and until such time as a complaint is filed against a particular employer, it will no doubt be presumed that employers are obeying the law. For the time being, we are excepting from this discussion handicapped workers and apprentices under sections 132-D and 132-E.

Proceeding to that part of your question relating to rules and regulations, it is our opinion that you do not have the authority to promulgate a rule and regulation requiring a signed statement from the employee. Rules and regulations are proper when such rules and regulations are designed to help achieve a statutory direction. A rule and regulation which goes outside the law, or in effect amounts to legislation, or is inconsistent with law, is void and ineffective. *McDonald v. Sheriff*, 148 Me. 365. The Legislature itself cannot by statute authorize a rule and regulation to take precedence over any then existing statute inconsistent therewith. *McKenny v. Farnsworth*, 121 Me. 450.

The duties of the Commissioner of Labor & Industry are directly limited by sections 132-G and H, Chapter 362. The provisions of 132-H permitting the Commissioner to examine, inspect, and

copy the records of the employer in relation to violation or compliance with this Act only upon receipt of a written complaint, clearly negates, in our opinion, any authority on the part of the Commissioner to promulgate a rule and regulation such as is suggested both in this question and in questions 4, 8 and 10.

A rule and regulation properly promulgated has the effect of law. Chapter 362 denies to the Commissioner the right of access to records pertinent to the problem of minimum wages except as outlined in section 132-H. A rule and regulation providing that the Commissioner could require further papers to be supplied would be inconsistent with the intent of the law and, therefore, improper.

Question No. 3. "(Sec. 132-B, III D) Several rehabilitation agencies have made inquiry concerning their patients who are given employment in local business establishments as part of the rehabilitation program. Wages paid in these cases are low, being consistent with the ability of the patient. Would this exemption for nonprofit organizations or programs controlled by educational nonprofit organizations properly cover these persons, or should they be considered under the handicapped workers provisions of Sec. 132-D?"

*Answer:* Patients placed by rehabilitation agencies in local business establishments cannot be considered as being employed by a "public supported nonprofit organization" or "educational nonprofit organization", but should be considered under the handicapped workers provisions.

Question No. 4. "(Sec. 132-B, III E) Upon whom lies the burden of proof as to whether or not employees are "regularly enrolled in an educational institution, or are on vacation therefrom"? Under the authority of the Commissioner to make rules and regulations (Sec. 132-H II), would it be proper to require a signed statement from the employee before granting an exemption, or would it be better to require a statement from the school itself?

*Answer:* See answer to No. 2 above.

Question No. 5. "(Sec. 132-B, III I) In view of the fact that students are not covered employees (III E), should they be excluded from the count of employees for the "3 or less employees at any one location" exemption?"

*Answer:* Students are not considered as "employees" under the provisions of the Act. They should, therefore, be excluded from the count of employees for the "3 or less employees at any one location" exemption.

Question No. 6. "(Sec. 132-B, III I) If persons working under a rehabilitation program are exempt (Question 3), should they be excluded from the count of employees for the "3 or less employees at any one location" exemption?"

*Answer:* Handicapped persons employed under the provisions of section 132-D are not exempt personnel but should be included in the count of employees.

Question No. 7. "(Sec. 132-B, III I) In a business where several members of a family are employed, should all persons related to and residing with or dependent upon the proprietor of the establishment be excluded from the count of employees for the "3 or less employees" exemp-

tion, whether or not they are on the payroll? Should all other relatives be included?"

*Answer:* For the purpose of determining whether a business or service establishment has three or less employees, all persons except such as are exempted by statute who are suffered or permitted to work in that particular establishment should be considered. The minimum wage law does not exempt relatives of the proprietor.

Question No. 8. "(Sec. 132-B, III I) Is an employer required to pay the minimum wage whenever and at such times as he employs four persons and permitted to pay less whenever and at such times as he employs three or less? Alternately, would it be proper for the Commissioner, under the authority to make rules and regulations (Sec. 132-H, II), to set the number of weeks an employer might employ four or more persons before payment of the minimum wage would be required?"

*Answer:* We believe that the safest course to follow is suggested in your question; the statute be considered as establishing an hourly basis for determining the number of employees and the employer be considered as being required to pay the minimum wage if and when he employs four or more persons and permitted to pay less whenever, and at such times, as he employs three or less.

As indicated above, we are of the opinion that rules and regulations as suggested in this question would be improper.

Question No. 9. "(Sec. 132-B, III I) Are all part-time employees counted as employees when determining the number of employees for the "3 or less employees" exemption? For example, if a store employed two clerks on a full-time basis, and two clerks on Friday and Saturday only, would the store be required to pay the minimum wage to all four for all hours worked; or could they pay less than the minimum Monday through Thursday to the two regular clerks and the minimum to all four on Friday and Saturday; or would they not be considered to have four employees at all? (See Question 8)"

*Answer:* Part-time employees should be counted as employees when determining whether there are three or less employees in a particular business. The remainder of this question is answered in the preceding answer.

Question No. 10. "(Sec. 132-B, V) For the purpose of computing tips and gratuities under this section, would it be proper to require a signed statement from the employee as to the amount received? (See Question 2)"

*Answer:* See the answer to question No. 2.

Question No. 11. "(Sec. 132-H, I) Under sec. 2, Chap. 30, R. S. 1954, the Commissioner has a duty to "collect . . . statistical details relative to . . . the daily and average wages paid each employee" and to "cause to be enforced . . . all laws regulating the payment of wages. . ." On January 22, Mr. Frost gave us an oral opinion that the Commissioner had authority to inspect payroll records under Sec. 2 whether or not specific authority to do so was included in a minimum wage statute. Do the words later written into the Act, "upon written complaint setting forth the violation of Section 132-C", take away this authority to enter an establishment to

inspect payroll records, or is this an additional authority to do so when a complaint is made?"

*Answer:* The purpose of the gathering of statistical material provided for by section 2 of Chapter 30, R. S. 1954, is not related to the minimum wage law, and the method of gathering such material and its use are limited by sections 3 and 4 of Chapter 30. For instance, section 4 permits entrance for the purpose of gathering such statistics only upon the property of certain type establishments: "any factory or mill, construction activity, workshop, private works or state institutions which have shops or factories,". Section 3 limits the use of such material, "such information being confidential and not for the purpose of disclosing personal affairs."

It thus appears that the words "upon written complaint setting forth the violation of section 132-C" (not present in the original bill but inserted by House Amendment "G" to S. P. 472, L. D. 1337) clearly limit the authority of the Commissioner to inspect books, payrolls and other records of the employer for the purpose of ascertaining information relating to the minimum wage law, such inspection being authorized only upon receipt of written complaint setting forth the violation of section 132-C.

JAMES GLYNN FROST
Deputy Attorney General

September 8, 1959

To: E. W. Campbell, Dr. P. H., Executive Officer of Plumbers' Examining Board

Re: Installation of Water Pipes to Heating Plant by Licensed Oil Burnerman

This is in response to your memo of August 18, 1959, in which you point out a present situation relating to the action of a licensed oil burnerman for connecting water pipes to an oil-burning boiler installed by the oil burnerman in his course of business.

It appears that a Plumbing Inspector of the Town of Sanford plans to take legal action against the licensed oil burnerman for such action. As a result of the contemplated action you have prepared a memo to the Director of the Oil Burnermen's Licensing Board in which you state, in essence, that such business has been for years a licensed business of a plumber, and that action will be taken against anyone not possessing a plumber's license who performs such work.

You ask the guidance of our office in the matter.

For our information you attached a memo dated March 2, 1944, written by the then Attorney General to the effect that a hot-water storage tank comes within the intent of the definition of fixtures as contained in section 175, Chapter 1, Laws of 1933. You also enclose a departmental notation of an oral opinion of the Attorney General issued in 1939, that the Plumbers' Examining Board could legally grant limited plumbers' licenses per-