STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

for the calendar years

1959 - 1960

Davis, on Administrative Law, 6.01, states the following:

"Except in the states whose statutes require hearings for rule making (. . .), and even in some of these states when the hearing requirement does not apply, the usual maximum requirement is what is prescribed by the Model Administrative Procedure Act — notice and opportunity to submit "data or views orally or in writing."

In cases where the statute authorizing the rules are as brief as that contained in the banks and banking law, perhaps the following procedure could be used:

1. Prepare tentative rules, with the advice of the advisory committee.
2. Send such tentative rules to interested parties and ask that comments be submitted.
3. Set a date on which the rules are to become effective, within which time the requested comments are to be studied, or
   Set a date for a hearing at which time comments on the proposed rules may be presented orally, with the rules to become effective at a subsequent date, having in mind the time required to study the views presented.

No particular form for rules is required, but the system of sections, paragraphs, etc. used in the Revised Statutes would be adaptable to rules, and would tend to make their use more convenient.

The final form of the rules should, in your case, indicate that they have been approved and consented to by the advisory committee.

JAMES GLYNN FROST
Deputy Attorney General

September 24, 1959

To: John J. Maloney, Jr., Chairman
Maine State Liquor Commission
Augusta, Maine

Re: Commission Rule and Regulation No. 69

Dear Mr. Maloney:

We have your request for our opinion regarding the authority of the Commission to establish Rule No. 69.

Rule No. 69 read as follows:

"Holders of Certificates of Approval shall notify in writing the Commission and the distributor affected at least 60 days previous to any change made by them either in their distributors or the territories of their distributors in this state.

"Wholesale licensees shall notify in writing the Commission and the Certificate of Approval holder affected at least 60 days previous to any change in either the territory or the distribution of their products.

"However a Holder of a Certificate of Approval or a wholesale licensee within the above provisions may request a hearing before the Commission and for cause the Commission may shorten the waiting period before approving a change in territory or discontinuing of a distributor. By notifying the Commission in writing a Certificate Holder or a wholesale licensee may waive his 60 day rights, and the Commission may immediately approve this change in territory or distributorship.

"Wholesale licensees whose distributorship have been affected under the above provisions, and who have a remaining stock of malt liquor may sell the same to the holder of Certificate of Approval from whom the malt liquor was purchased.

"Nothing in the foregoing provisions shall be held to permit the taking back of a remaining stock of merchandise in the hands of a retail store, restaurant or tavern because of changes in distributorship or territory within the provisions of this rule."

The authority to make rules and regulations must be found in the statute. The powers and duties of the Commission are set out in Section 8 of Chapter 61, Revised Statutes of 1954, which includes the authority to make rules and regulations relating to manufacturing, importing, storing, transporting and sale of all liquors. Section 18, Chapter 61, Revised Statutes of 1954, provides:

"Certificate of approval; reports; fees. — No manufacturer or foreign wholesale of malt liquor shall hold for sale, sell, or offer for sale, in intrastate commerce, any malt liquor or transport or cause the same to be transported into this State for resale unless such manufacturer or foreign wholesaler has obtained from the Commission a certificate of approval. The fee therefor shall be $100 per year, which sum shall accompany the application for such certificate.

"All manufacturers or foreign wholesalers to whom certificates of approval have been granted shall furnish the Commission with a copy of every invoice sent to Maine wholesale licensees, with the licensee's name and purchase number thereon. They shall also furnish a monthly report on or before the 10th day of each calendar month in such form as may be prescribed by the Commission and shall not ship or cause to be transported into this State any malt liquor until the Commission has certified that the excise tax has been paid.

"*The purposes of this section are to regulate the importation, transportation and sale of malt liquor, also in addition thereto, to regulate and control the collection of excise taxes.*

"The certificate of approval shall be subject to the rules and regulations which the Commission has or may make. Any violation of such rules and regulations shall be grounds for suspension or revocation of such certificate at the discretion of the Commission.

"The fees received under the provisions of this section shall be deposited in the general fund of the State." (Emphasis supplied)

Chapter 61, Revised Statutes of 1954, is a statute enacted under the police power for the protection of the general public. *State v. Frederickson*, 101 Me. 37; *Glovsky v. State Liquor Commission*, 146 Me. 38. We have carefully reviewed Chapter 61 to determine if Rule No. 69 could be properly promulgated by the authority therein. It appears that Rule No. 69 is enacted for the sole purpose of controlling the contractual and business relations between certificate of approval holders, wholesale licensees and distributors in addition to the controls set forth in the statutes. The obvious intent of the Rule does not logically involve Section 8 or Section 18, Chapter 61, which provides for rule making powers in regard to malt liquors. It is our opinion that Rule No. 69 does not bear a reasonable relationship between the rule making authority given the Commission and the intent of Rule No. 69.

A state legislature cannot delegate the legislative power vested in them to an administrative officer, but an administrative officer may be vested by the legislature with administrative powers and functions without violation of the delegation of powers principle. 42 Am. Jur. 335, Section 43; *William A. McKenney et als v. Farnsworth et als*, 121 Me. 450; *City of Biddeford v. Frederick Yates*, 104 Me. 506; *Anheuser-Busch, Inc. et al v. Walton et al*, 135 Me. 57.

Legislation is the power to make and repeal laws. Administration is the execution of these laws. As stated in 73 C. J. S. 325, Section 30.

> "An admixture of governmental powers may be conferred on an administrative officer or body, if there is no delegation of actual legislative power or complete surrender of judicial review, and where the legislature sufficiently prescribes a policy, standard, or rule for the guidance of the administrative body, or otherwise confines it within reasonably definite limits, authority may be delegated to the administrative body to carry out the legislative purposes in detail, and to exercise administrative discretion in applying the law."

The legislature may set forth a broad standard provided it can be reasonably applied in relation to the complexity of the subject. The grant of authority to the administrative body to enact rules and regulations having the effect of law must be found in the law declaring a policy or principle with specific standards to guide the administrator. *Darling Apartment Co. v. Springer*, 25 Del. Ch. 98, 15 A. 2d. 670; *Lyons v. Delaware Liquor Commission*, 58 A. 2d. 889, 44 Del. 304; *Anheuser-Busch, Inc. et al v. Walton*, supra.

The legislature has enacted laws relating to specific phases of the liquor traffic, but has never seen fit to legislate regarding this particular contractual or business relationship.

An administrative body must strictly adhere to the standards and guides set forth in the statutes. Accordingly, its rules or regulations must be within the framework of the standards and guides. The limited standards and guides found within Chapter 61 do not in our opinion authorize the promulgation of Rule No. 69.

We are aware of the fact that other State Liquor Boards or Commissions have adopted a rule or regulation similar to Rule No. 69. Of course, we have no authority, nor shall we attempt to pass upon the validity of

those rules or regulations. We must necessarily base our opinion as to the validity of Rule No. 69 on the authority given to your Commission by our own state statutes and the ruling case law. However, for purposes of comparison and as a matter of information, we cite a Delaware statute which seems most nearly to set forth the proper authorization for such a regulation as the one in question.

Delaware Code Annotated, Volume 2, Title 4, Chapter 3, Section 304, Duties and Powers:

"The duties and powers of the Commission shall be to —

. . . .

(2) *Establish* by rules and regulations an *effective control of the business* of manufacture, *sale, dispensation, distribution* and importation of alcoholic liquors within and into the State of Delaware, *including the time, place and manner* in which alcoholic liquors shall be sold and dispensed, not inconsistent with the provisions of this title.

. . . ." (Emphasis supplied)

There is no like authority contained in the Maine law.

We are of the opinion that the adoption of Rule No. 69 is beyond the scope of any authority contained in Chapter 61 and would therefore be invalid.

Very truly yours,

FRANK E. HANCOCK
Attorney General

September 25, 1959

To: Kermit Nickerson, Deputy Commissioner of Education

Re: Payment of Advance Subsidy to School Administrative District #3

I have your request for an opinion concerning whether or not the Commissioner has authority to make an advance payment of the subsidy to School Administrative District #3 in view of the pending litigation.

Referring to Section 242 of Chapter 41, Revised Statutes of 1954, if the Commissioner is satisfied that a financial need exists and with approval of the Treasurer of State, he may pay up to two-thirds of the estimated subsidy provided a sufficient amount is available to meet any obligations to the Maine School Building Authority.

Although there is a petition in the nature of quo warranto pending before the Waldo County Superior Court, questioning the authority of the school directors of School Administrative District #3 to hold their offices and the exercise of the franchise, I am of the opinion that this in itself is not sufficient grounds for withholding subsidies to the district, if the need has been clearly shown and all steps pursuant to Section 242 are in order. At this time no other administrative unit would be entitled to the subsidy payment, nor are any of the towns which make up School Administrative District #3 entitled to any part of the subsidy. In my opinion, payment to the district is proper, provided all the conditions precedent warrant it.

GEORGE A. WATHEN
Assistant Attorney General