

MAINE STATE LEGISLATURE

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STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

for the calendar years

1959 - 1960

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April 5, 1960

To: E. L. Newdick, Commissioner of Agriculture

Re: Statutory Officers — Election when over 70 years of age.

We have your oral request for our opinion on the following question:

“Is the incumbent Commissioner of Agriculture, being over 70 years of age, and a member of the Maine State Retirement System, eligible to run for re-election to that office?”

Answer: Yes.

Under the provisions of section 1, Chapter 32, Revised Statutes of 1954, the Commissioner of Agriculture shall be elected by the Legislature by joint ballot of the senators and representatives in convention, and shall hold his office for the term of four years and until his successor is elected and qualified.

Another statute bearing directly upon your question is Chapter 63 A, section 6, sub-paragraph 1 B.

“Any member specified in paragraph A of this subsection who attains age 70 shall be retired forthwith on a service retirement allowance on the 1st day of the next calendar month; except that any member who is an elected official of the State or an official appointed for a term of years may remain in service until the end of the term of his office for which he was elected or appointed. Notwithstanding the foregoing, on the request of the Governor with the approval of the Council, the Board of Trustees may permit the continuation for periods of 1 year, as the result of each such request, of the service of any member who has attained the age of 70 and who desires to remain in service. Requests for extension of service for employees in participating local districts shall be filed directly with the Board of Trustees by the proper municipal officers and such requests shall not be referred to the Governor and Council.”

With respect to this section and other similar laws, it was said in an opinion dated November 9, 1951, that there “appears to be a distinct trend in legislative policy to refrain from retaining in the public service persons who have arrived at the age of seventy years.”

It appears quite clear that classified employees, who are members of the Maine State Retirement System as a condition of employment, (Chapter 63A, section 3, subsection 1) must retire upon reaching age 70, unless their continued employment is approved in the manner set forth in section 6.

How then does said section 6 affect appointive or elective officers?

Since the enactment of this law (Chapter 328, section 227-E (1) (b) Public Laws of 1941), and without benefit of opinion from this office, a consistent line of administrative decisions of the Board of Trustees of the Maine State Retirement System has held that the prohibitions outlined in section 6 do not prohibit a person over 70 years of age from running for and holding an elective office. We are inclined to believe that this administrative decision is a proper one.

Firstly, may we point out that the necessity for obtaining approval of the Governor and Council for continuing in employment after attainment of age 70 does not apply to appointed or elected officials. The average employee must retire at age 70 unless he is permitted to continue employment for periods of 1 year. An elected or appointed officer, however, under the provision of this section, continues until the end of his term without any such approval being required. Thus, the approval for continuation applies only to those persons not elected or appointed to office.

Secondly, we examine the officials who are elected or appointed.

OFFICERS NOT MEMBERS OF THE SYSTEM

Section 6 applies only to members of the Maine State Retirement System. Under the provisions of section 3, I, membership in the system is optional with elected or appointed officials. Thus, any such officer who chooses not to become a member would be unaffected by section 6.

The result here would mean that any person over 70 years of age, not a member of the system, could not only run for elected office, or be appointed to office, but continue in office if elected or appointed and section 6 could not be applied to him. The result would also amount to discrimination against one belonging to the Retirement System.

CONSTITUTIONAL OFFICERS

(a) Elected by the Legislature

In an opinion dated December 23, 1954, our office said with respect to application of this same law to constitutional officers:

“Further and more compelling reason for holding that the law quoted above does not apply to constitutional officers can be seen in the *Opinion of the Justices*, 137 Maine, pages 352, 353. Therein the Court stated that, with respect to the office of Treasurer of State, whose election, tenure of office, etc., are substantially the same as those of the office in question, the constitutional provision is a complete inhibition against the enactment of legislation filling the office by any method of selection not prescribed by the Constitution.”

We interpret the above case to mean that the election of such officers is within the Legislature, giving due regard to such qualifications as are implicit in the constitution, and unimpeded by further statutory qualifications or disqualifications. Thus, the constitutional right of the legislature to elect such officers cannot be limited by the necessity of subsequent approval of those elected officials by the Governor and Council, whether or not that officer is over 70 years of age, or whether or not such person is a member of the Retirement System.

In this class of officers are the Attorney General, the Secretary of State, and the Treasurer of State.

(b) Elected by the people.

Another class of officers, having a constitutional origin, but who are elected by the people, must also be considered: Registers of Probate, and perhaps Judges of Probate and judges of municipal courts. Any of these persons can be members of the Retirement System by virtue of membership in participating local districts.

As constitutional officers, further legislative qualifications would be subject to the same objection noted in paragraph (a).

STATUTORY OFFICERS

A further class of officers are those statutory officers elected by the Legislature but whose tenure and other qualifications are governed by statute. This class includes the Commissioner of Agriculture and the State Auditor.

While there appears to be no constitutional barrier against the imposition of statutory qualifications for such officers, we again note the possibility of discrimination if a person who is a member of the Retirement System is considered ineligible to run for such offices because of his age, while one who has never been a member is eligible despite his age.

For the above reasons, possible lack of uniformity in administration of the law, possible discrimination without, in our opinion, any reasonable relationship to the effect to be desired, (we presume that membership in the Retirement System neither adds to nor detracts from the basic qualifications or abilities of a person to do a particular job), we conclude that the section in question does no more than spell out a policy with respect to the age of public officers. The legislature may, if it so desires, disregard that policy and elect to office a person over 70 years of age, and such person is eligible to run for office.

JAMES GLYNN FROST
Deputy Attorney General

April 7, 1960

To: Harold I. Goss, Secretary of State

Re: Pardon Petition — Before Sentence

We have your memo of March 28, 1960, in which you ask if a certain pardon petition is in order to go before the Governor and Council for hearing.

It appears from the letter accompanying the petition that the petitioner was charged with the offense of operating a motor vehicle while under the influence of intoxicating liquor; that a bill of exception was filed and allowed to the jury verdict of guilty. The case has been continued from day to day for sentence. Thus, the case is pending before the Law Court, according to the record before us.

In a letter dated March 25, 1960, you advised counsel for petitioner that petitioner's case could not be assigned for hearing before the Governor and Council since there had been "no conviction handed down for operating a motor vehicle while under influence, from the Law Court."

Counsel for petitioner urges that the term "conviction," as used in the constitutional provision relating to pardons, refers to that stage of the trial where a respondent is convicted, either by his plea of guilty or nolo contendere, or is found guilty, and before sentence or punishment is imposed. He believes that the term "conviction" is not such conviction as is the basis of imposing punishment when the guilt of the defendant is