

MAINE STATE LEGISLATURE

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STATE OF MAINE

REPORT
OF THE
ATTORNEY GENERAL

for the calender years

1961 - 1962

be entitled to receive any retirement allowance under any other retirement provisions supported wholly or in part by the state, anything to the contrary notwithstanding:" (Emphasis supplied)

The word "employee" is defined in section 1 as follows:

"'Employee' shall mean any regular classified or unclassified officer or employee in a department, including teachers in the state teachers' colleges and normal schools, and for the purposes of this chapter, teachers in the public schools, *but shall not include . . . nor shall it include* any member of the state police who is now *entitled* to retirement benefits under the provisions of sections 22 and 23 of chapter 15." (Emphasis supplied)

The clear meaning of the definition of "employee" as used in Chapter 63-A, section 1, is that it does not include a state police officer *entitled* to retirement benefits under Chapter 15, sections 22 and 23. Therefore, if such a person should accept employment in another state department or as a teacher, he would not be an "employee" so far as the retirement law is concerned.

In other words, even though he may become employed by the state or as a teacher, he could not join the Maine State Retirement System. As far as the trustees of the State Retirement System is concerned, such a person is not an "employee" and the trustees cannot exercise any control whatever over the retirement benefits of such person.

GEORGE C. WEST

Deputy Attorney General

February 26, 1962

To: Paul A. MacDonald, Secretary of State

Re: Pardon Petition re Conviction twice of Driving Under the Influence

I have your letter of February 19, 1962, transmitting a request for an opinion from the Governor and Executive Council.

The facts are as follows:

A man has been convicted twice of driving under the influence of intoxicating liquor; the first conviction became final on January 26, 1954, and his second on August 11, 1959.

Under the provisions of Section 150 of Chapter 22 of the Revised Statutes he is not eligible for a hearing on the question of restoration by the Secretary of State until August 11, 1962. He sought a pardon of his 1959 offense so as to make him eligible for an operator's license at this time. The Governor and Council were willing to remit the penalty only as to loss of license in connection with the August 1959 conviction on condition that the petitioner be granted a license to operate motor vehicles in conjunction with his employment during working days only. This restriction to continue for a period to be determined by the Secretary of State.

Question: The question, based on these facts, is:

May the Governor, with the advice and consent of the Council, remit a loss of license only, without a pardon as to the conviction upon which the loss of license was based?

Answer: No.

The power to pardon is contained in our Constitution, Article V, Part First, section 11, and reads as follows:

“He shall have power, with the advice and consent of the Council, to remit, after conviction, all forfeitures and penalties, and to grant reprieves, commutations and pardons, except in cases of impeachment, upon such conditions, and with such restrictions and limitations as may be deemed proper, subject to such regulations as may be provided by law, relative to the manner of applying for pardons. Such power to grant reprieves, commutations and pardons shall include offenses of juvenile delinquency. And he shall communicate to the legislature, at each session thereof, each case of reprieve, remission of penalty, commutation or pardon granted, stating the name of the convict, the crime of which he was convicted, the sentence and its date, the date of the reprieve, remission, commutation, or pardon, and the conditions, if any, upon which the same was granted.”

The words in this section of the Constitution which might be interpreted to allow an affirmative answer to the question are “to remit, after conviction, all forfeitures and penalties” and “reprieves, commutations and pardons.”

Our court in *Lord v. State*, 37 Me. 179, has said:

“The terms ‘fine’ and ‘penalty’ signify a mulct for an omission to comply with some requirement of law; or for a positive infraction of law; . . .”

“A ‘forfeiture’ is a penalty by which one loses his *rights and interest in his property*, ‘forfeit’ being defined as to lose, or lose the right to, by some error, fault, offense, or crime, or to subject, *as property* to forfeiture or confiscation.” *State v. Cowen*, 3 N. W. 2d 176 (Iowa). (Emphasis supplied)

“A ‘penalty’ is punishment inflicted by law for its violation by act or omission, and although penalty and forfeiture are generally used as synonyms ‘*forfeiture*’ is usually taking of money or goods, thereby making forfeiture, as general rule, a penalty, even though penalty is not necessarily forfeiture.” *In re Thrift Packing Co.*, 100 F. Supp. 907.

In *Steves v. Robie*, 139 Me. 359, at 363, the court said:

“ . . . Registration (Motor Vehicle) is for the purpose of exercising such control and the certificate of registration constitutes a license to operate in accordance with such conditions as are imposed. *Such license is a privilege and in no sense a contract or property.*” (Emphasis supplied.)

It follows from these definitions that the words “forfeitures and penalties” used in the particular section of the Constitution does not reach the suspension or revocation of an operator’s license. They refer solely to the judgment or sentence imposed upon a conviction of a crime.

The word “reprieves” is defined as follows:

“A reprieve, from the French word ‘*reprendre*,’ to take back, is the withdrawing of a *sentence* for an interval of time, whereby the execution is suspended. It is merely the postponement of the execution of a *sentence* for a definite time, or to a day certain. It does not and cannot defeat the ultimate execution of the *judgment of the court*, but merely delays it temporarily.” 39 Am. Jur. 524. (Emphasis supplied.)

The word "commutation" is defined as follows:

"A commutation of sentence is the change of punishment to which a person is *sentenced* to less severe punishment, — substitution of a less for a greater punishment, — by authority of law, and may be imposed upon the convict without his acceptance, and against his consent." 39 Am. Jur. 524. (Emphasis supplied.)

The word "pardon" is defined as follows:

"A pardon is a *remission of guilt* and a declaration of record by the authorized authority that a particular individual is to be relieved from the legal consequences of a particular crime." *Territory v. Richardson*, 60 P. 244 (Okla.). (Emphasis supplied.)

It can be readily seen that the words "reprieves, commutations and pardons" apply directly to the sentence imposed by the court or to the conviction of a crime. The suspension or revocation of an operator's license is not a sentence imposed by a court and hence is not subject to "reprieves, commutations and pardons."

There is another compelling reason why the Governor with the advice and consent of the Council may not, under the guise of his general pardon power, change the length of a suspension or revocation of an operator's license.

As was said in *Steves v. Robie*, supra.

". . . the right to use the highways for business is not inherent or vested but in the nature of a special privilege which *the State, through the Legislature*, may condition, restrain, extend or prohibit." (Emphasis supplied.)

The legislature, by its enactments, has prescribed conditions under which individuals may legally operate motor vehicles upon the highways of the state. The court has recognized this as a proper function of the legislature. It being a function of the legislative branch the executive branch may not substitute its judgment for that of the Legislature. To allow the executive to do so would be violative of Article III, section 2, of our Constitution.

"No person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted."

No cases being expressly directed or permitted by the Constitution, as shown before, we must advise that the Governor with the advice and consent of the Council may not remit the loss of license only, without a pardon as to the conviction upon which the loss of license was based.

GEORGE C. WEST

Deputy Attorney General

February 27, 1962

To: Earle R. Hayes, Executive Secretary of Maine State Retirement System

Re: Status of Per Diem Employees under Retirement System

Reference is made to your memo of February 20, 1962, in which you inquire about the retirement status of persons appointed to state offices and reimbursed on a per diem basis.