

MAINE STATE LEGISLATURE

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STATE OF MAINE

REPORT
OF THE
ATTORNEY GENERAL

for the calender years

1961 - 1962

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.

You mention in your memo that if such persons were on a regular payroll there would be no problem. You state that being paid on a voucher basis seems to preclude them from retirement status. There is no reference in the retirement law to the necessity of an employee being on a payroll in order to have the benefit of the state retirement system.

The actual answer to your query is in the hands of the board of trustees. Revised Statutes, Chapter 63-A, section 3-IV, provides:

"The board of trustees may, in its discretion, deny the right to become a member to any class of employees. . . . or who are serving on a temporary or other than *per annum basis*." (Emphasis supplied.)

A similar idea is also expressed in Section 4-IV.

"The board of trustees shall fix and determine by appropriate rules and regulations how much service in any year is equivalent to 1 year of service,"

So the board may deny retirement rights to any *class* of employees who are serving on other than a *per annum basis*. *Per diem* employees could be considered such a *class* of employee.

The board must also determine what constitutes a year of service. Therefore, the board has the full responsibility of determining if persons receiving *per diem* pay are eligible for membership in the retirement system.

GEORGE C. WEST

Deputy Attorney General

February 28, 1962

To: Ober Vaughan, Director of Personnel

Re: Return from Leave Rights — Marie F. Hunter

You ask in your memo of February 20, 1962, if the above should return to state service does she have return from leave rights under section 28, chapter 63.

The above section provides in substance that an employee who has been employed at least 6 months and has attained permanent status and who enters military service, under certain conditions, shall be considered on leave of absence without pay. He shall be considered as in the service of the agency by which employed at time of entry into the military service during such service for pension and seniority rights.

An amendment enacted as Public Law 1957, Chapter 25, added the following sentence to the above section:

"No credits toward retirement under the State Retirement System, nor vacation or sick leave accumulation shall be allowed beyond the period of first enlistment or induction in said armed forces of the United States unless the individual involved is required to remain in or return to military service beyond the first period of service under some mandatory provision."

This amendment became effective August 28, 1957. Therefore, up to August 28, 1957, the above-named individual had retirement, sick leave and vacation rights. The two latter rights would accumulate according to the regulations of the Personnel Department in effect on August 28, 1957. No rights to retirement,