

# MAINE STATE LEGISLATURE

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STATE OF MAINE

REPORT  
OF THE  
**ATTORNEY GENERAL**

For the Years  
1967 through 1972

U. S. 362, 370 (1941). It was likewise early settled that the protection of the contract clause extends to contracts in which the State is a party as well as to contracts between private individuals. *See Fletcher v. Peck*, 6 Cr. 87 (1810).

Accordingly, it is our opinion that the provisions of Me. Public Laws 1967, ch. 481, § 4, which modified existing law so as to increase the principal obligation of recreational project loans and decrease the percentage of net project costs which such loans may comprise, cannot operate to invalidate a conditional mortgage insurance agreement executed by the Maine Recreation Authority in compliance with the law existing at the date of execution.

ROBERT G. FULLER, JR.  
Assistant Attorney General

February 15, 1968  
Executive

Honorable Kenneth M. Curtis, Governor

Appointment of Employee of State College to the State Board of Education.

*FACTS:*

The Maine Revised Statutes relating to Education provide, inter alia, that the State Colleges specified in 20 M.R.S.A. § 2301 are under the direction of the State Board of Education; and that the Board has charge of the general interests of those State Colleges, including the employment of teachers and lecturers for the State Colleges.

“The state colleges shall be under the direction of the state board. Said board shall have charge of the general interests of said colleges; shall see that the affairs thereof are conducted as required by law and by such by-laws as the board adopts; employ teachers and lecturers for the same; and shall have authority, by and with the consent of the Governor and Council, to dispose of and acquire property for the improvement of the plants and grounds; and biennially render to the Governor and Council an accurate account of the receipts and expenditures for the biennium preceding, including same as a part of the commissioner’s report. The clerical and staff services for this board shall be performed by the employees of the department under the direction of the commissioner. The head of a state college shall be designated as a president.” 20 M.R.S.A. § 2305.

*QUESTION:*

Does the law prohibit the Governor from appointing an employee of a State College to the State Board of Education?

*ANSWER:*

Yes.

*REASON:*

The provisions of 20 M.R.S.A. § 2305 specify that the State Colleges (designated in

2301) are under the direction of the State Board of Education; that the reference Board has charge of the general interests of those colleges to the extent that the affairs of the State Colleges are conducted as is required by law; and that the employees and lecturers for the State Colleges are employed by the State Board of Education. If the instant appointment materialized, and the employee of the State Board of Education became a Board member, he would be both "employee" and "employer".

Respectfully, fulfillment of the appointment would create a situation which would violate the common law doctrine of incompatibility of offices; as that doctrine is expressed in *Howard v. Harrington*, 114 Me. 443, 96 A. 769. (In citing *Howard v. Harrington*, supra, we do not borrow the facts of that case; but, do borrow the doctrine and the reasoning expressed in the case.) We mention the doctrine of incompatibility of offices because even though specific constitutional and statutory provisions furnish no bar to a person's holding of particular offices or positions simultaneously, the common law must be considered in determining whether a contemplated appointment will create incompatibility; unless the Legislature has, by clear and unambiguous language, evidenced its intention to abrogate the common law principle to the extent of permitting a person to hold incompatible offices. *Childs v. Moses*, 178 Misc. 828, 36 N.Y.S. 2d 574, aff'd. 264 App. Div. 353, 38 N.Y.S. 2d 704, aff'd. 290 N.Y. 828, 50 N.E. 2d 235, motion granted, 290 N.Y. 925, 50 N.E. 2d 307. Also see *Rainey v. Stovall*, — Ky. —, 361 S.W. 2d 518.

The question of incompatibility of offices necessarily depends on the circumstances of the individual case. *Kobylarz v. Mercier*, 130 N.J. Law 44, 31 A.2d 208; *Mosher v. Board of County Commissioners of Howard County*, 235 Md. 279, 201 A.2d 365.

It has been generally decided that the inconsistency, which at common law renders offices incompatible, does not accrue by reason of the physical impossibility to discharge the duties of both offices; but lies, instead, in a conflict of interest, such as when one office is subordinate to the other, and is subject in some degree to the supervisory power of the other. *Russell v. Worcester County*, 232 Mass. 717, 84 N.E. 2d 123; *In Re Opinion of the Justices*, 61 R.I. 197, 21 A.2d 267; *State ex rel Doherty v. Finnegan*, 25 Conn. Supp. 390, 206 A.2d 477; and *Hetrich v. County Commissioners of Anne Arundel County*, 222 Md. 304, 159 A.2d 642. Here, the position of teacher or lecturer who is employed at one of those state colleges specified in 20 M.R.S.A. § 2301, et seq., is subordinate to and subject to the supervisory power of the State Board of Education.

**QUESTION:**

If the answer to the above question is in the affirmative, is the Governor legally authorized to appoint an employee of a State College to the State Board of Education, if such appointment is made subsequent to the effective date of P. & S. 1967, c. 229 (L.D. 1849)?

**ANSWER:**

Yes, provided that such appointee does not, by reason of serving on the State Board of Education, become a member of the Board of Trustees as is provided in P. & S. 1967, c. 229, § 2.

**REASON:**

Thirty days after the effective date of P. & S. 1967, c. 229, the Board of Trustees, the Chancellor, the Administrative Council, and the heads of the various campuses shall

become vested with duties relative to the operation of the University of Maine. For example, the Board of Trustees shall constitute the governing and planning body of the University. Too, the head of each campus shall be responsible for academic programs under his direction. The provisions of 20 M.R.S.A. § 2305, while not specifically repealed by P. & S. 1967, c. 229, are nevertheless affected to the extent that the provisions of section 2305 will no longer be operative relative to the administration of the University of Maine. That being so, your appointment of an employee of one of the campuses of the University of Maine to the State Board of Education would not involve the principle of incompatibility of offices. However, it should be noted that such appointee cannot, in turn, be appointed as a trustee of the University (as is specified in section 2 of the instant Act) without involving the doctrine of incompatibility mentioned herein for the reasons set out in our answer to the initial question.

JOHN W. BENOIT  
Assistant Attorney General

February 29, 1968

Honorable William Dennett  
Kittery  
Maine

Dear Mr. Dennett: Re: Liquor Commission – Administrative Code

*FACTS:*

You have asked this office for opinions re the following two matters.

*QUESTION NO. 1:*

Do the procedures for the adoption, filing and taking effect of rules and regulations of 'agency' under the Administrative Code apply to the Liquor Commission?

*ANSWER:*

Yes.

*OPINION NO. 1:*

There can be no doubt that the State Liquor Commission is an 'agency' subject to provisions of Chapters 301 through 307 of Title 5. 5 M.R.S.A. § 2301, subsection 1, lists those agencies subject to the Administrative Code. The section reads in pertinent part:

“ § 2301. Definitions

For the purpose of chapters 301 to 307:

“1. Agency. 'Agency' means the following State boards, commissions, departments or officers authorized by law to make rules or to adjudicate contested cases:

....

“State Liquor Commission

....”

The addition of the State Liquor Commission to the State agencies subject to the