

MAINE STATE LEGISLATURE

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STATE OF MAINE

REPORT
OF THE
ATTORNEY GENERAL

For the Years
1967 through 1972

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 The provisions of 20 M.R.S.A. § 2305, while not specifically repealed by P. & S. 1967, c. 229, are nevertheless affected to the extent that the provisions of section 2305 will no longer be operative relative to the administration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

Administrative Code occurred in 1963 (Public Laws 1963, Chapter 412, section 1).

5 M.R.S.A. sections 2351 and 2352 sets forth the procedure for the adoption, and the filing of rules and regulations under the Administrative Code with the Secretary of State, and the effective date of the rules and regulations thus filed. The sections read as follows;

“ § 2351. Adoption

In addition to other rule-making requirements imposed by law:

“1. Adopt rules. Each agency may adopt, amend and repeal rules of practice before it, together with forms and instructions.

“2. Descriptive statements. To assist interested persons dealing with it, each agency shall so far as practicable supplement its rules with descriptive statements of its procedures.

“3. Notice of action. Prior to the adoption, amendment, or repeal of any rule, the agency shall, so far as practicable, publish or otherwise circulate notice of its intended action and afford interested persons opportunity to submit suggestions orally or in writing.

“4. Form and legality. Prior to the adoption, amendment or repeal of any rule authorized by law, the agency shall submit the proposal to the Attorney General for approval as to form and legality.”

“§ 2352. Filing and taking effect

“Each agency shall file forthwith with the Secretary of State a certified copy of each rule hereafter adopted by it and each rule in effect on September 16, 1961. The Secretary of State shall keep a permanent register of such rules open to public inspection.

“1. Approval. The adoption, amendment or repeal of a rule by an agency shall not hereafter become effective until approved as to form and legality by the Attorney General. Approval shall be presumed if the Attorney General takes no action within a period of 30 days after the proposal is submitted.

“2. Effective date. Except as set forth in subsection 1, the adoption, amendment or repeal of a rule by an agency shall become effective upon filing with the Secretary of State, unless a later date is required by statute or specified in the rule.”

While it is true that 5 M.R.S.A. § 2302 states that, “In any conflict between chapters 301 to 307 and Title 28, the provisions of Title 28 shall prevail.” – an adoption, filing, and making effective rules and regulations pursuant to 5 M.R.S.A. §§ 2351 and 2352 of the Administrative Code would not conflict with any provision of liquor laws under Title 28.

We have examined Title 28 with particular reference to 28 M.R.S.A. § 55 which sets forth the powers and duties of the Liquor Commission. 28 M.R.S.A. § 55, subsection 1, provides, inter alia, that the Commission shall, “. . . make such rules and regulations as they deem necessary for such purpose and to make rules and regulations for the administration, clarification, carrying out, enforcing and preventing violation of all laws pertaining to liquor which rules and regulations shall have the force and effect of law, unless and until set aside by some court of competent jurisdiction or revoked by the commission.”

28 M.R.S.A. § 55, subsection 8, gives the Commission power “To adopt rules, requirements and regulations, not inconsistent with this Title or other laws of the State, the observance of which shall be conditions precedent to the granting of any license to sell liquor, including malt liquor.”

28 M.R.S.A. § 55, subsection 12, requires the Commission, “To publish at least

annually on or before August 31st in a convenient pamphlet form all regulations then in force and to furnish copies of such pamphlets to every licensee authorized by law to sell liquor.”

The aforementioned three subsections of section 55 are the subsections dealing with rules and regulations. These three subsections do not conflict with 5 M.R.S.A. § 2351 or § 2352, as these three subsections do not in any way establish the manner in which the rules shall be adopted and how and when the rules shall become effective.

It is our conclusion, on the basis of the examination of Title 28, that no procedures have been established by that Title for the promulgation of rules and regulations and, therefore, the procedures set forth in 5 M.R.S.A. § § 2351 and 2352 of the Administrative Code are the procedures to be followed by the Liquor Commission for the promulgation of rules and regulations.

In view of the foregoing the rules and regulations filed with the Secretary of State on April 6, 1966 are the effective rules and regulations adopted by the Liquor Commission and all subsequent amendments and additions to, or repeal of, those rules and regulations are not legally effective at this time.

QUESTION NO. 2:

Does the Liquor Commission have direct authority over the Enforcement Division of the Liquor Commission?

ANSWER:

Yes.

OPINION NO. 2:

Although it is true that 28 M.R.S.A. § 55, subsection 14 states in part, “. . . The inspectors shall be under the direct supervision and control of the chief inspector . . .” our legislature did not have to state the obvious fact that the chief inspector shall be under the direct supervision and control of the Liquor Commission. The Liquor Commission appoints the chief inspector and could for cause, under the Personnel Law, discharge the chief inspector. The Liquor Commission, through its direct control of the chief inspector has direct authority over the Enforcement Division. The Liquor Commission is charged with the general supervision and administration of all liquor laws and the Enforcement Division, which is a subordinate branch of the Liquor Commission, assists the Liquor Commission in the manner and to the extent required by the Commission, but in no event exceeding the authority granted the division by 28 M.R.S.A. § 55, subsection 14.

Very truly yours,

JAMES S. ERWIN
Attorney General