STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

For the Years
1967 through 1972

concluded that "the goods are 'in bond' or under control of the U.S. Customs until the moment of export. They never become part of the common mass of goods in the State." *Id. p. 555.*

It should be noted in passing that there is no prohibition from regulation, licensing, taxing, prohibiting the delivery or use of liquor within a state since the 21st Amendment grants this power to the state. The primary question however, is *whether the goods have come to rest within the State of Maine so that they can become subject to the taxing authority of the town or the state.*

Although in most cases it would be considered that export did not begin until there had been an actual sale and a delivery to a carrier for the purpose of removal of the product, here we have a situation controlled by federal statute, which control is initiated outside of the State of Maine and continues until the product is removed from the state and the country. Although the facts of the decided cases are not necessarily similar to the Maine situation, we assume that there is compliance with the statutes and regulations of the federal government.

The reasonable conclusion to be reached is that the property never comes to rest for tax purposes within the State of Maine because it is treated by federal law as exported merchandise throughout the warehousing and transportation process.

JAMES M. COHEN
Assistant Attorney General

April 4, 1969
Executive

Governor Kenneth M. Curtis

Retirement benefits and mileage allowances; are they emoluments.

SYLLABUS:

The term "emoluments" appearing in Article IV, Part Third, Section 10 of the Maine Constitution does not include retirement benefits or mileage allowances.

FACTS:

The Constitution of Maine contains the following proviso regarding the appointment of legislators to civil offices of profit in this State:

> "No Senator or Representative shall, during the term for which he shall have been elected, be appointed to any civil office of profit under this State, which shall have been created, or the emoluments of which increased during such term, except such offices as may be filled by elections by the people." *Constitution of Maine,* Article IV, Part Third, Section 10.

During the present legislative session, both the retirement benefits and the automobile mileage allowance may be increased: L. D. 480 (mileage allowance); L. D.'s 565; 576; 871; 992; 993; and 994 (retirement benefits). One of the members of this present Legislature proposes to resign and to accept an appointment to a civil office of profit in Maine. Although the salary of the reference office is not to be increased by this Legislature, the office to which the person is to be appointed participates in the State retirement program and mileage allowance provision.

QUESTION:

Would an increase in retirement benefits or mileage allowances constitute an increase in "emoluments" within the meaning of Article IV, Part Third, Section 10 or the Maine Constitution?

ANSWER:

No.

REASON:

The Federal Constitution (Article 1, § 6, par. 2) and many state constitutions contain a provision substantially to the effect that a member of Congress or a legislature shall not, during the term for which he was elected, be appointed or elected to any civil or public office which shall have been created or the emoluments of which shall have been increased during the term for which he was elected a member of Congress or of the legislature. *118 A.L.R. 182.* The purpose of such provisions is to prevent the members of the legislative body from creating public offices or increasing the emoluments of those already in existence, with a view towards occupying such offices themselves. State v. Gooding (1912), 22 Idaho 128, 124 P. 791; Westernport v. Green (1923), 144 Md. 85, 124 A. 403.

In *State ex rel. Todd v. Reeves* (1938) 196 Wash. 145, 82 P.2d 173, 118 A.L.R. 177, the Court considered the nature and character of emoluments in the state constitutional provision similar to the Maine constitutional mandate herein considered. There, the court held that a statute providing for retirement of judges enacted during the term of the legislator in question, did not disqualify such member of the legislature from seeking the office of judge because such Act did not increase the emoluments of the office of judge. The court took the view that emoluments, as used in the state constitution, contemplated actual pecuniary gain, rather than some imponderable and contingent benefit such as the retirement benefits. The court also noted that although the retirement benefits statute made the office of judge more desirable for a candidate, this was not tantamount to an increase in emoluments. I should call attention to the fact that the reference Washington State case was not a unanimous opinion. Two of the eight members of the court dissented.

State ex rel. Todd v. Reeves, supra, is valid authority today; it has been followed as recently as 1967 in *Bulgo v. Enomoto* (Hawaii), 420 P.2d 327. In that case, the Supreme Court held that the enactment of a statute which applied generally to public employees entitling them to receive the difference between regular salary and temporary disability compensation; under a workmen's compensation law did not increase emoluments of the office of county commissioner so as to disqualify a member of the legislature which enacted that statute from holding the office of county commissioner under a constitutional provision similar to that under study here. The court thought that the temporary disability compensation contemplated in the statute was too remote and contingent in order to disqualify the person in question.

In *State ex rel. Todd v. Reeves,* an "emolument" is defined thus:

> "The word 'emolument' is defined in Webster's dictionary as 'profit from office, employment, or labor; compensation; fees or salary'. This definition is substantially the same as that found in the decisions of the courts. That the word was employed in the constitution in its ordinary sense, as implying actual

pecuniary gain, rather than some imponderable and contingent benefit, can hardly be questioned." *Id.*, 175.

We now take up the matter of mileage allowances, otherwise known as travel expenses, and advise that such allowances are not emoluments within the meaning of that term as used in the subject constitutional sense. Our position is grounded upon authorities such as *Spearman v. Williams* (1966), Okla., 415 P.2d 597, where it was decided that expenses incurred by members of a legislative council for office rent and travel were not salary or emolument within the meaning of constitutional provisions prohibiting members of the legislature from receiving compensation other than salary or emoluments.

Courts generally hold that travel expenses incurred by public employees "are expenses of the performance of official duties and are not compensation, salary or emoluments * * * ." *Ibid.* After all, the only object of an allowance of expenses is to preserve the officer's salary to him free of encroachments thereon, through expenses imposed by his official position. *McCoy v. Handlin,* 35 S.D. 487, 153 N.W. 361.

JOHN W. BENOIT, JR.
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April 9, 1969
Legislative Finance

William H. Garside, Legis. Fin. Officer

SYLLABUS:

Language in the Appropriation Act stating that job reclassifications must not result in an increased request for funds from legislature can prevent upward reclassifications unless accompanied by comparable amount of downward reclassification.

FACTS:

In the fourth paragraph of the 1967 General Fund Appropriation Act, P. & S. L. 1967, Chapter 154, and the third paragraph of the General Fund Appropriation Act, P. & S. L. 1967, Chapter 225, is the following language:

"To provide some degree of flexibility, each department, institution or agency may apply to the Personnel Board for an exchange between job classifications, and such action may be approved if by so doing the total amount determined to be available for Personal Services, in such account, for any one year is not exceeded, and also providing that certification is made, in writing, that such action will not result in an increased request for Personal Service moneys from the Legislature."

QUESTION:

Does the quoted language prevent reclassification and range changes?

ANSWER:

See REASONS.