

# MAINE STATE LEGISLATURE

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STATE OF MAINE

REPORT  
OF THE  
**ATTORNEY GENERAL**

For the Years  
1967 through 1972

obtain the 25 years of creditable service necessary . . . .”

It is apparent that the subject individual occupies dual roles: (1) A “law enforcement officer in the Department of Inland Fisheries and Game.” (5 M.R.S.A. § 1121, subsection 1, paragraph D); and (2) “an airplane pilot employed by the State of Maine.” (5 M.R.S.A. § 1121, subsection 4, paragraph A, subparagraph (2).) It is equally clear that prior to the above-described amendments of 5 M.R.S.A. § 1121, a person occupying either of these roles was subject to compulsory retirement at age 60. After the foregoing amendments, the pilot is subject to compulsory retirement at age 60, but the game warden may be permitted to continue “until age 63 in order to obtain the 25 years of creditable service necessary.”

Since both functions are vested in the one individual, a conflict in statutory provisions arises. A cardinal rule of statutory construction states:

“A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error.” Sutherland, *Statutory Construction*, 3rd Edition, Section 4705.

The dual functions, of game warden and pilot, occupied by subject individual, appear to be severable. Therefore, when the above-quoted rule of construction is applied to the problem presented, it is apparent that subject individual may be permitted to continue as a game warden until age 63 in order to attain 25 years of State service; however, he may not be permitted to continue in the function of a pilot employed by the State beyond age 60. This construction gives full, operative effect to both sections of the above-quoted statute. It also conforms to the fairly implicit legislative purpose to liberalize the age limitation upon game wardens but to maintain the prior limitation upon pilot age. This legislative distinction appears to be reasonable.

Accordingly, it is concluded that in the absence of a “request of the Governor with the approval of the Council,” pursuant to 5 M.R.S.A. § 1121, subsection 4, paragraph B, the subject individual may not be permitted to continue in State employment as an airplane pilot beyond age 60. However, it is also concluded that the subject individual may be permitted to continue in State employment as a game warden until he reaches age 63 in order to attain 25 years of State service.

It should be noted that 5 M.R.S.A. § 1121, subsection 4, paragraph B, provides the following alternative with regard to pilots:

“Retirement shall be compulsory at the attainment of age 60 except that on the request of the Governor with the approval of the Council, the board of trustees may permit the continuation for periods of one year, as the result of each such request, of the service of such member.”

Accordingly, if the Department of Inland Fisheries and Game especially desired to continue subject individual in the dual roles of game warden pilot, from year to year, it could submit a request to the Governor to seek the above-quoted exceptional action.

CHARLES R. LAROUCHE  
Assistant Attorney General

December 3, 1970  
Indian Affairs

James H. Murphy, Commissioner

Vacancy in Seat of Representative of Penobscot Indian Tribe

*SYLLABUS:*

A vacancy in the seat of the Representative of Penobscot Indian Tribe due to death of that Representative is filled by an appointment of Tribal Governor with the advice and consent of the Tribal Council.

*FACTS:*

In September, 1970, the Penobscot Tribe elected John Nelson as their Representative to the Legislature pursuant to Title 22 M.R.S.A. § 4792, paragraph 1. Subsequent to his election Mr. Nelson deceased.

*QUESTION:*

Is the vacancy of the seat occupied by John Nelson to be filled by the Tribal Governor and Council pursuant to Title 22 M.R.S.A. § 4792 or as provided in 22 Me. Const. Art. IV, pt. 1, § 6?

*ANSWER:*

By the Tribal Governor and Council.

*REASONING:*

The Maine Constitution in Article IV, part 1, §6 refers to vacancies in the seats of Representatives to the Legislature. The Representatives referred to are constitutional representatives as defined in Article IV; that is, those apportioned among the people of the State and elected in general election. In this case that Representative would be the one apportioned to Indian Island Voting District by P. & S.L. 1963, Ch. 233, § 1, Mr. Starbird. A vacancy in such a seat would be filled as provided in Article IV, part 1, § 6.

The Representative of the Penobscot Tribe, however, does not come within this definition of a constitutional Representative. He is a creature of the Legislature having only those powers granted by the Legislature. See for example: Title 3, M.R.S.A. §2, which distinguishes between Representatives and Indian Representatives for compensation purposes. The Indian Representative has no vote. He is elected only by the tribe and vacancies are filled as prescribed by the enabling legislation. See again 22 M.R.S.A. § 4792, paragraphs 3 and 4.

“Only certified members of the tribe who are 20 years of age or older shall be eligible to vote. The commissioner shall give notice of the time and place, 7 days before said day of election, by posting notices thereof, one at his office and one in some conspicuous place on Old Town Island. Said commissioner shall receive, sort and count the votes given in at said election, in presence of the members of the tribe, and shall give to those elected certificates thereof. The governor, lieutenant governor and representative at the Legislature so elected shall hold office for 2 years commencing on the first day of October on the even-numbered years beginning October 1, 1968, or until their successors are elected. At such time, all correspondence, records, files and other materials pertaining to Penobscot tribal government and tribal activities shall be turned over to the newly elected tribal governor by the former tribal officials.

“Whenever any vacancy occurs the commissioner shall call a meeting of the tribe to fill such vacancy. Vacancies shall be filled through appointment by the

tribal governor, with the advice and consent of the tribal council, with preference first given to unsuccessful candidates in the previous election, in descending order of the number of votes cast for such candidates. Vacancies so filled shall be for the unexpired terms. Tribal members who have been convicted of a felony shall not be permitted to hold any tribal office, either elective or appointive.”

Although the law states that a Representative shall hold office until his successor is elected, it does not appear to mean that vacancies shall be filled by general election of the tribe. Rather paragraph 4 governs filling of any vacancies. Thus the procedure would appear to be as follows: (1) The Commissioner calls a tribal meeting, (2) the tribal governor nominates a replacement giving preference to prior candidates as prescribed, (3) the Council accepts or rejects nominations until a successor is selected.

JOHN M. R. PATERSON  
Assistant Attorney General

December 10, 1970  
Division of Probation and Parole

G. Raymond Nichols, Director

Commutation of Sentence Prior to Commencement

*SYLLABUS:*

The Governor with the advice and consent of the Council may, pursuant to Maine Constitution, Article V, Part 1, §11, commute a sentence of which an inmate at the Maine State Prison is not yet in execution.

*FACTS:*

An inmate at the Maine State Prison currently in execution of a sentence, and subject to serve a consecutive sentence upon completion of that currently being served, has applied to the Governor for commutation relative to both sentences.

*QUESTION:*

Has the Governor with the advice and consent of the Council authority to grant a commutation in connection with a sentence of which an inmate at the Maine State Prison is not yet in execution?

*ANSWER:*

Yes.

*REASON:*

The power of the Governor with the advice and consent of the Council to grant commutation is found in Maine Constitution, Article V, Part 1, § 11, which 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,