

# MAINE STATE LEGISLATURE

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# STATE OF MAINE

Inter-Departmental Memorandum Date 12 August 1971

To William F. Kearns, Jr., Commissioner

Dept. Mental Health and Corrections

From Courtland D. Perry, Assistant Atty. Gen'l.

Dept. Mental Health and Corrections

Subject Applicability of Personnel Law Grievance Procedure in Instance of Proposed Non-Appointment of Pineland Hospital and Training Center Superintendent

SYLLABUS:

The decision of the Commissioner of Mental Health and Corrections not to appoint the incumbent Superintendent of the Pineland Hospital and Training Center to the unclassified position of Superintendent of the Pineland Hospital and Training Center established by P.L. 1971, Chapter 350, §§1, 2 and 4, is not appealable under the State Personnel Law. The Legislature without being subject to any constitutional restraint has effectively abolished the Civil Service position of the Superintendent of the Pineland Hospital and Training Center, effective September 23, 1971, and as of that date its incumbent superintendent has no vested right thereto nor interest therein, the abolishment of such position being by operation of law.

FACTS:

On July 16, 1971, the Commissioner of Mental Health and Corrections advised the incumbent Superintendent of the Pineland Hospital and Training Center that on September 23, 1971, the effective date of P.L. 1971, Chapter 350 -- AN ACT to Provide Hospital Administrators under the Department of Mental Health and Corrections, the Commissioner would not appoint said superintendent to the post of Superintendent of the Pineland Hospital and Training Center as established by P.L. 1971, Chapter 350, §§ 1, 2 and 4.

On July 20, 1971, the Commissioner was advised by said superintendent, in writing, "Today, I am satisfying the State Personnel Law by filing an appeal."

It is not clear to the Commissioner as to exactly what is being appealed. It

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appears that such appeal would be from the decision of the Commissioner not to appoint the incumbent superintendent, such decision being regarded by the superintendent as tantamount to dismissal or removal from office.

QUESTION:

Does an appeal lie from the decision of the Commissioner of Mental Health and Corrections not to appoint the incumbent Superintendent of the Pineland Hospital and Training Center to the post of Superintendent of the Pineland Hospital and Training Center, established by P.L. 1971, Chapter 350, such appeal being proposed to be taken pursuant to the State Personnel Law?

ANSWER:

No.

REASON:

5 M.R.S.A. 1964, §678 as repealed and replaced by P.L. 1968, Chapter 539, §2 and amended by P.L. 1970, Chapter 512 is in language as follows:

"An appointing authority may dismiss, suspend or otherwise discipline an employee for cause. This right is subject to the right of appeal and arbitration of grievances set forth in sections 751 to 753; and said sections 751 to 753 shall apply only to any employee who has attained permanent status in such employment."

Had the Commissioner of Mental Health and Corrections dismissed the incumbent Superintendent of the Pineland Hospital and Training Center an appeal would lie from

such dismissal as provided in the above quoted statute.

5 M.R.S.A. 1964, §711, as amended by P.L. 1971, Chapter 350, §1 provides in pertinent part as follows:

"§711. Composition of.

The unclassified service comprises positions held by officers and employees who are:

- 11. Superintendents of institutions. The Superintendent of the Augusta State Hospital, the Superintendent of the Bangor State Hospital and the Superintendent of the Pineland Hospital and Training Center."

P.L. 1971, Chapter 350, §§2, 4 are in language as follows:

"Sec. 2. Said commissioner shall have the power to appoint institutional heads as shall be necessary for the proper performance of the duties of said department; such appointments shall be subject to the Personnel Law, except as otherwise provided in this Title. He may appoint such other employees as may be necessary; such other appointments shall be subject to the Personnel Law, except as otherwise provided in this Title."

"Sec. 4.

§2151. Purposes

"Pineland Hospital and Training Center, heretofore established at New Gloucester in the County of Cumberland, shall be maintained for the training, education, treatment and care of persons who are mentally retarded and of persons who are between the ages of 6 and 16, except as provided in section 2155, who are mentally ill.

"The head of the Pineland Hospital and Training Center shall be called the superintendent. The commissioner shall, with the advice and consent of the Advisory Committee on Mental Health, appoint, and set the salary for the Superintendent of the Pineland Hospital and Training Center. The appointment shall be for a term of 4 years and until his successor is

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appointed and qualified, or during the pleasure of the commissioner and the Advisory Committee on Mental Health. The superintendent shall be a qualified psychiatrist, a qualified pediatrician, a qualified hospital administrator, a licensed psychologist, or a person with a master's degree in social work, public administration or public health. In making the appointment, the commissioner and the advisory committee shall give due consideration to the appointee's qualifications and experience in health matters. The superintendent shall be responsible for the training, education, treatment and care of all persons received into the Pineland Hospital and Training Center. He shall be responsible for the release of all such persons, except those placed in the Pineland Hospital and Training Center under Title 15, sections 101 or 103. He shall have direct supervision, management and control of the grounds, buildings and property and officers and employees of the Pineland Hospital and Training Center, subject to the approval of the department."

The 105th Legislature by P.L. 1971, Chapter 350, §§1, 2 and 4 have abolished the position of Superintendent of the Pineland Hospital and Training Center as a position within the Civil Service of the State, controlled by the State Personnel Law, and have established in its place the unclassified position of Superintendent of the Pineland Hospital and Training Center with new provisions relative to manner of appointment, qualifications for office, tenure of office and salary. The Legislature have by P.L. 1971, Chapter 350, §4, mandated that the Commissioner of Mental Health and Corrections shall appoint a Superintendent of the Pineland Hospital and Training Center. The Commissioner in contemplation of this mandate has advised the incumbent superintendent, in advance, of the effective date of the Act, September 23, 1971, of his decision not to appoint said superintendent to the position established by the Act.

No removal from office or dismissal from office has occurred or will occur on September 23, 1971, but on that date, by Act of the Legislature, the Civil Service position of Superintendent of the Pineland Hospital and Training Center, together

with all benefits and protections accorded to it, under the State Personnel Law, is abolished, all without any appealable action taken by the appointing authority, the Commissioner of Mental Health and Corrections.

In order to assure the validity of our view that the action, to date, of the Commissioner is not appealable under the State Personnel Law and that the classified position of Superintendent of the Pineland Hospital and Training Center is legally terminated, by operation of law, on September 23, 1971, we look to pertinent Maine case law and quote from the cases as set forth below:

"...Public offices established by the legislature are mere agencies for the benefit of the people, not contracts on their part with the office-holder for his benefit. They may be accepted or refused. If accepted, they may be resigned at any moment, and no action is maintainable for such resignation. As offices are created for the public good, the cause for their creation may, in process of time, become a sufficient one for their abolition. The term of official existence may be made longer or shorter, or the office itself may be abolished, as the public necessities may demand....."

Farwell v. Rockland 62 Me. 296 at 299 (1866)

"...All offices, except when legislative authority is limited or restricted by constitutional provisions, are subject to the will of the legislature. There is, with the above exception, no vested right in an office or its salary. The office may be abolished. The mode of appointment may be changed. The length of time of official existence may be shortened. The compensation for official services may be diminished...."

Prince v. Skillin 71 Me. 361 at 365 (1880)

"...There is no vested right in an office, which the legislature may create or destroy, as it judges most consonant to the public interest....."

Rounds, Petitioner vs. Smart 71 Me. 380 at 383 (1880)

".....Only the legislature can establish a public office (other than a constitutional office) as an instrumentality of government. Whether the creation of the office is necessary or expedient, its duties, its powers, its beginning, its duration, its tenure, are all questions for the legislature to determine and be responsible to the people for their correct determination....."

State of Maine, By Information vs. Amos K. Butler  
105 Me. 91 at 96, 97 (1909)

".....The Legislature may create offices and provide for the manner of appointment, tenure, and the like, subject only to the restraint of the Constitution...."  
Ross vs. Hanson, Jr. 227 A. 2d 606 at 611 (Maine 1967)

"'.....The office of county attorney is the creature of the legislature. It exists (exists) only by virtue of the statute, which fixes its tenure, prescribes its duties and determines its compensation...'" The will of the legislature "may change its duties, diminish its compensation or repeal the statute by force of which alone it exists, and no vested rights will thereby be impaired."

Paine, County Attorney v. State of Maine 258 A.2d 266 at 268 (Maine 1969) [citing Rounds, Petitioner vs. Smart supra

We are satisfied that there is no constitutional restraint upon the action taken by the Legislature in the enactment of P.L. 1971, Chapter 350, and that the classified position of Superintendent of the Pineland Hospital and Training Center is effectively abolished as of September 23, 1971, with its incumbent superintendent having no vested right thereto and no further interest therein, and that no action appealable under the Personnel Law has been taken by the Commissioner of Mental Health and Corrections.

Courtland D. Perry  
Assistant Attorney General

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