

MAINE STATE LEGISLATURE

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STATE OF MAINE

REPORT
OF THE
ATTORNEY GENERAL

For the Years
1967 through 1972

statutory criteria for approval, will also be a function of constitutional protections of vested interests.

E. STEPHEN MURRAY
Assistant Attorney General

August 1, 1972
Environmental Protection

Henry E. Warren

Effect of Failure to Comply with Time Limits.

SYLLABUS:

Failure of the Board of Environmental Protection to comply with time limits for decision making does not divest the Board of its jurisdiction to make such decisions.

FACTS:

Various statutes defining the authority of the Department of Environmental Protection require the Board to render decisions within specified periods of time. Those statutes include Title 38 § 483, 484, 590, 593 and Title 12 § 4802.

The burden of work and delay in preparation of transcripts by the official reporters apparently causes great difficulty in meeting such deadlines.

QUESTION:

Does the failure of the Department of Environmental Protection to issue an order or make a decision within the time limit as specified divest the Board of jurisdiction or render its decision unenforceable?

ANSWER:

No.

REASONING:

Statutes which require the performance of an act in a certain fashion or by a certain time and which attach no penalties for failure to so act are termed "directory." On the other hand, statutes which impose conditions for failure to act within a specified time period are termed "mandatory." The distinction rests on the consequences which result from the action or non-action. 82 *C.J.S.*, Statutes, § 379. In general, a statute with a mandatory time provision will provide that if the official fails to act within the time specified then that failure to act will have the same effect as if the official had made a particular decision. See for example 30 M.R.S.A. § 1953(5) which provides that failure of the Attorney General to approve an interlocal cooperation agreement "within 30 days of its submission shall constitute approval thereof."

None of the statutes defining the authority of the Department of Environmental

Protection attach consequences should the Board fail to act within the time specified. Nor do such statutes indicate which, if any, result would be deemed to occur from a delay. One could just as easily assume that a delay constituted an approval as a disapproval of an application. We must conclude therefore that the time provisions in question are directory and not mandatory. Failure of the Board to issue an order or render a decision within the required statutory time period does not mean that the Board has either approved or disapproved of the application pending before it. The Board retains its authority to render a decision even though it did not act within the time period specified. It cannot be prevented from rendering or enforcing such decision. See e.g., *Liberty Mutual Ins. Co. v. Industrial Accident Commission*, 42 Cal. Rptr. 58 (1964); *Koehn v. State Board of Equalization*, 333 P.2d 125 (Cal. 1959); *Superior Oil Co. v. Foote*, 214 Miss. 857, 59 So.2d 85 (1952).

Having decided that a failure to act as promptly as directed is not fatal to the Board's jurisdiction, we must add a caveat. Failure to act as promptly as required could result in a party applying for and obtaining a mandatory injunction requiring the Board to act. Also such decision could be voidable for being based on a stale record. 2 *Am. Jur.2d*, Administrative Law, § 687. Absent particular facts, it is impossible to predict how long a delay would render a record stale and the evidence insufficient to support a determination. The Board would be well advised to avoid, to the maximum extent possible, any delay in meeting its statutory deadlines.

JOHN M. R. PATERSON
Assistant Attorney General

August 10, 1972
Banks & Banking

Robert A. Brown, Acting Bank Commissioner

Authority of Bank Commissioner to declare moratorium on formation of new banking institutions.

SYLLABUS:

The Maine Bank Commissioner does not have the authority to declare a general moratorium on the formation of new banking institutions in the State.

FACTS:

None.

QUESTIONS:

- (1) Does the Bank Commissioner have the authority to declare a general moratorium with regard to the formation of new banking institutions within the State of Maine?
- (2) Would such a moratorium prevent the formation of a financial institution by Federal charter?
- (3) Would such a moratorium be considered a "restraint of trade"?