

# MAINE STATE LEGISLATURE

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STATE OF MAINE

REPORT  
OF THE  
**ATTORNEY GENERAL**

For the Years  
1967 through 1972

water supply," local schools maintaining their own sources of water are within the meaning of the phrase, are subject to the statute, and must, therefore, secure the approval of the municipality or municipalities served by the school, before they may lawfully permit the fluoridation of the water used in the school.

MARTIN L. WILK  
Assistant Attorney General

September 7, 1972  
Personnel

Nicholas L. Caraganis, Director

Classified State Employees – Dual Employment – Executive Director, Maine Municipal Bond Bank – Clarification of Rule 5.2 (d) of the Personnel Law and Rules.

*SYLLABUS:*

A full-time classified State employee is not prohibited from assuming the position of, and receiving compensation for acting as, Executive Director, Maine Municipal Bond Bank, while continuing to maintain his or her present full-time classified position, provided that the position of Executive Director is not incompatible with, and does not directly or indirectly interfere with, the proper exercise and performance of the employee's present duties and responsibilities. Rule 5.2 (d) of the Personnel Law and Rules, under certain circumstances limits the amount of compensation a classified employee may receive from the State, but does not apply where the State has by statute otherwise provided for the payment of a State employee's compensation, or where such compensation relates to a position in State service wholly unrelated to the employee's present position.

*FACTS:*

At a Special Session of the State Legislature in 1972, a Bill was enacted entitled "Maine Municipal Bond Bank Act." Section 5164 of the Act (30 M.R.S.A. §§ 5161, *et seq.*) declares that "the bank is constituted as an instrumentality of the State exercising public and essential governmental functions," and that the exercise by the bank of the powers conferred upon it "shall be deemed and held to be an essential governmental function of the State."

The Act further provides that the bank's board of commissioners "shall appoint an executive director who shall also serve as both secretary and treasurer" and that the board of commissioners "shall fix the duties and compensation of the executive director."

We are informed that the compensation of the Executive Director will be \$5,000.00 per annum. We are further informed that the Executive Director's duties will initially entail acquainting municipal officials with the purposes of the Maine Municipal Bond Bank and thereafter involve assisting these officials in the preparation and submission of loan applications. We have been advised that the initial contact work (which should be completed in approximately six months) will be undertaken during the evening after

normal working hours, and possibly on weekends, and that even less time will be required on the part of the Executive Director after the initial contacts have been made. We have not been told when or where the Executive Director will perform these latter duties.

The Director of the State Department of Personnel has inquired whether it is permissible for a full-time classified State employee to assume the position and duties of Executive Director of the Municipal Bond Bank and receive compensation therefor while, at the same time, such employee continues to maintain his present full-time classified position as Deputy State Treasurer.

We have specifically been asked to construe Rule 5.2 (d) of the Personnel Law and Rules relating to compensation for State Classified Employees. The Personnel Board has heretofore taken the position that this rule prohibits a classified employee from receiving dual compensation from the State.

*QUESTION:*

May a full-time classified State employee lawfully assume the position of Executive Director of the Maine Municipal Bond Bank and receive compensation therefor while, at the same time, continuing to maintain his or her present full-time classified position?

*ANSWER:*

Yes, provided that the position is not incompatible with and does not interfere with the proper exercise and a faithful performance of the employee's present duties and responsibilities.

*REASONS:*

There is nothing in the Personnel Law and Rules (effective January 1, 1963) which expressly prohibits a full-time classified employee from undertaking additional employment either within or outside of State Government. The rules provide only that a full-time employee is ". . . normally expected to work at least the standard work week (40 hours) for the class or agency." Rule 1.3 (9) of the Personnel Law and Rules. The employee is not required under the rules to devote his or her entire time to the position. See *State v. Hinshaw*, 198 N.W. 634, 197 Iowa 1265 (Supreme Ct. 1924).

While Rule 5.2 (d) of the Personnel Law and Rules does, under certain circumstances, impose a limitation on the remuneration which an employee may receive from the State, it is our opinion that such limitation does not apply to a full-time classified State employee who otherwise may properly assume the position of Executive Director of the Municipal Bond Bank.\*

Rule 5.2 (d) "Total Remuneration" provides, in pertinent part:

"Any salary paid to an employee in the classified service shall represent the total remuneration for the employee, not including reimbursements for official travel. *Except as otherwise provided* no employee shall receive pay from the state in addition to the salary authorized under the schedules provided in the pay plan for services rendered by him either in the discharge of his ordinary duties or any additional duties which may be imposed upon him or which he may undertake or volunteer to perform." (Emphasis supplied.)

It is our opinion that the State has, by virtue of 20 M.R.S.A. § 5164, "otherwise provided" the extent to which an employee may be compensated by the State. That

\* For purposes of this opinion, we are assuming that the State shall be paying the executive director's salary.

statute specifically provides, without stating any upper or lower limits and without reference to any other statutory limitations, that the bond bank's board of commissioners "shall fix the compensation of the executive director."

In addition, we construe Rule 5.2 (d) as merely limiting the amount of compensation a classified employee may receive for any *one* position in State service and the performance of the duties and responsibilities reasonably related thereto, and not as prohibiting a classified employee from receiving additional compensation from the State in consideration of the proper performance of additional services which are wholly unrelated to, and beyond the scope of, his or her present position. In the absence of any provision in the Personnel Law and Rules or elsewhere expressly prohibiting a classified employee from assuming more than one position in State service, we feel that it would be unreasonable and inequitable to deny such an employee additional compensation from the State for the proper and faithful performance of such additional duties.

Notwithstanding the foregoing, a classified State employee may not properly undertake an additional position beyond the scope of his present duties and responsibilities if the two positions are incompatible, are likely to present conflicts, or may otherwise directly or indirectly interfere with the proper performance of the employee's present duties and responsibilities. *Howard v. Harrington*, 114 Me. 443 (1916); *Report of the Attorney General*, 1953-54, p. 83. See also, *Coleman v. Lee*, 121 P.2d 433, 58 Ariz. 506 (Supreme Ct. 1942).

In *Howard v. Harrington*, *supra*, the Maine Supreme Court recited certain well established tests to be applied in determining whether or not two offices are incompatible. These tests may be summarized as follows:

- (1) Whether the holder may in every instance discharge the duties of each;
- (2) Whether the duties and responsibilities of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both;
- (3) Whether any inconsistency exists in the functions of the two offices.

It is also important to note that in the State of Maine two positions within different branches of the government, are, *ipso jure*, incompatible. Article III of the State Constitution divides the government into three distinct departments, the legislative, executive and judicial, and explicitly prohibits any person belonging to one department from exercising any of the powers properly belonging to either of the other departments.

Applying the foregoing tests to the instant situation, and based upon the information which we have been furnished, it is our opinion that the position of Executive Director of the Maine Municipal Bond Bank is not inherently incompatible with the position of Deputy State Treasurer. There is nothing in the Maine Municipal Bond Bank Act (30 M.R.S.A. §§5161, *et seq.*) or in the statutes pertaining to the office of Deputy State Treasurer (5 M.R.S.A. § 121) which renders the two positions incompatible. The two positions are not within different departments of State. And, since it appears that the Deputy State Treasurer will initially be able to properly exercise the duties of Executive Director of the Bond Bank during evenings after normal working hours and on weekends, and thereafter without expending substantial amounts of time, the second position need not necessarily interfere with or detract from the Deputy State Treasurer's absolute duty to continue to devote full time and proper attention to his present position.

We hasten to point out that our opinion is predicated upon the facts as they have been presented to us and as we have described them above. We note that the Commissioners of the Bond Bank have the power to fix the duties and compensation of the Executive Director, and should the Executive Director be charged with duties and responsibilities more extensive or involving more time than those described above, our opinion may well

be different.

We further wish to make it absolutely clear that we do not, by this opinion, intend to sanction any activities on the part of the Deputy State Treasurer which directly or indirectly detract from the full and proper performance of his present duties. If, for example, the additional burdens of the new position, in terms of time or energy, directly or indirectly were to result in decreased efficiency below acceptable standards, or otherwise materially affect the proper performance of his present duties, we would conclude that the second position interfered with the first, and should not be undertaken or should immediately be discontinued.

MARTIN L. WILK  
Assistant Attorney General

September 15, 1972

Dean Fisher, M.D. Commissioner,

Educational Responsibility of the State for Financing Maintenance and Tutoring of  
Blind Children

*SYLLABUS:*

a) Neither the State nor local government is required to pay maintenance of blind children attending private boarding schools.

b) Whether the administrative unit is required to pay for tutorial services at public schools and/or resource setting depends upon the purpose for which the services are offered.

*FACTS:*

For the past ten years the Division of Eye Care, which obtains federal funds for its vocational rehabilitation program under the authority of the Federal Vocational Rehabilitation Act, has been paying maintenance charges on those children enrolled in grades seven through twelve at Perkins School for the Blind with Federal Vocational Rehabilitation funds (80% federal, 20% state). The tuition charges were paid with 100% state funds. The Division of Eye Care has also been paying private tutoring charges for children in this same age group with vocational rehabilitation funds in a public school and/or resource setting. The rationale behind this practice was that tuition charges were the responsibility of the state and maintenance and tutoring charges were not clearly defined as such under 22 M.R.S.A. 3502 (supp.). The Federal Regional Office has recently questioned this practice.

*QUESTION:*

a. Is the Maine State and/or local government required to pay for maintenance of blind students at private schools?

b. Is the Maine State and/or local government required to pay for tutorial services for its blind students at public schools?