

# MAINE STATE LEGISLATURE

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Comp  
April 24, 1973

Mr. H. F. Friedman  
Right of Way Division  
Department of Transportation  
State Office Building  
Augusta, Maine 04330

Dear Mr. Friedman:

This is in response to your note of April 6, 1973. As you may know, this office does not give any formal opinions other than to the Governor, Executive Council, State Departments and the Legislature. As a matter of custom, however, we have responded to requests for informal advice respecting the possible incompatibility of offices.

You inquired whether or not the position of Right-of-Way Agent with the Department of Transportation is incompatible with membership on the State Soil and Water Conservation Committee (the "Committee"). It is our understanding that your position with the Department of Transportation is that of a classified employee and that your duties are limited to contacting property owners abutting proposed road construction or reconstruction to determine their property lines, checking their sources of title and dates of acquisition of and determining the existence of any physical improvements within such proposed rights of way, including septic tanks, orchards, etc. We assume that the position you refer to on the Committee is one of the "2 soil conservation representatives to be appointed by the 4 district supervisors." The duties and powers of the Committee are set forth at Title 12 M.R.S.A. § 54.

Your position with the Department of Transportation and proposed position as a member of the Committee are both within the Executive branch of the Government and there is, accordingly, no constitutional prohibition against your holding both offices. In addition to the constitutional requirements, there are certain common law rules respecting the incompatibility of public offices. For your information, we have attached to this letter an Appendix briefly discussing the common law rule. We find no incompatibility under the applicable common law rules between your holding both of the above described offices.

Mr. H. F. Friedman

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Furthermore, we perceive no readily apparent conflict between your mere occupation of both of the above described public offices and the Personnel Law and Rules, including the provisions of Title 5 M.R.S.A. § 679, which prohibits classified employees from engaging in certain political activities. Finally, we have reviewed Administrative Bulletins 193 and 321 issued by the Maine State Highway Commission pertaining to certain political activities by employees of the State Highway Commission and, again, see no readily apparent conflict between your mere occupation of both of the above-described public offices and those administrative rules.

Very truly yours,

LEE M. SCHEPPS  
Assistant Attorney General

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"The answer to the question before us does not necessarily depend upon constitutional or statutory provisions. The doctrine of the incompatibility of offices is bedded in the common law, and is of great antiquity. At common law two offices whose functions are inconsistent are regarded as incompatible. The debatable question is, what constitutes incompatibility? This question has been answered by the courts with varying language, but generally with the same sense. We cite a few examples. "Two offices are incompatible when the holder cannot in every instance discharge the duties of each. The acceptance of the second office, therefore, vacates the first." The King v. Tizzard, 9 B. & C., 418. This language is cited with approval by this court in Stubbs v. Lee, supra. "Incompatibility must be such as arises from the nature of the duties, in view of the relation of the two offices to each other." Bryan v. Cattell, 15 Iowa, 535. "Incompatibility arises where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both." Abry v. Gray, 58 Kan., 148. "Incompatibility between two offices exists when there is an inconsistency in the functions of the two." People, ex rel. Ryan v. Greene, 58 N.Y., 295. "The functions of the two must be inconsistent, as where an antagonism would result in the attempt by one person to discharge the duties of both offices." Kenney v. Georgen, 36 Minn., 190. "The test of incompatibility is the character and relation of the offices, as where the function of the two offices are inherently inconsistent and repugnant." State v. Goff, 15 R.I., 505. "The true test is whether the two offices are incompatible in their natures, in the rights, duties or obligations connected with or flowing out of them." State ex. rel. Clauson v. Thompson, 20 N.J. Law, 689. The foregoing cases may also be cited in support of the doctrine that acceptance of the later of two incompatible offices vacates the former. See also Cotton v. Phillips, 56 N.H., 220; People v. Carrigan, 2 Hill, 93; Van Orsdale v. Hazard, 3 Hill, 243; Magie v. Stoddard, 25 Conn., 565; 3 Com. Dig. Tit. Officer (K. 5.) Mechem on Public Officers, sect. 420. An office holder is not at common law ineligible to appointment or election to another and incompatible office, but the acceptance of the latter vacates the former."

Howard v. Harrington, 114 Me. 443, at 446, 447.

MAINE STATE HIGHWAY COMMISSION

Administrative Bulletin #193

February 21, 1962.

TO: All State Highway Commission Employees.

FROM: David H. Stevens, Chairman

SUBJECT: Hatch Act (Political Activities) and Related Policy of the State Highway Commission.

On March 3, 1954, the State Highway Commission voted "that all employees of the State Highway Commission shall be considered subject to the provisions of the so-called Hatch Act, and further, that employees of the State Highway Commission shall not take part in local, partisan, political activities, or accept local appointments or election to municipal offices which are incompatible with the work of the State Highway Department." Under date of March 8, 1954, the above was transmitted to Division chiefs and Division Engineers with a request that a review of all employees be made and any conflicts with the above ruling discussed with the employee involved.

On March 18, 1955, Administrative Bulletin No. 24 addressed to Division Heads, Division Engineers and District Supervisors, repeated the above quoted excerpt from the Record of March 3, 1954 and described supplemental action taken by the State Highway Commission on March 24, 1954, as follows: "Incompatibility will not be established with respect to Selectmen, Road Commissioners, or local officials, when employed as project employees on State or State Aid work, provided they are not elected or appointed on the basis of partisan, political action." Administrative Bulletin No. 24 further requested the addressees to check employees to make sure that there were none who were affected.

The purpose of this Bulletin is to reaffirm the policy of the State Highway Commission in this matter and to assure a wider distribution of this information.

If there are any questions they may be addressed to the State Highway Commission.

MAINE STATE HIGHWAY COMMISSION

Administrative Bulletin #321

June 12, 1967

TO: Division Heads, Division Engineers,  
Assistant Division Engineers, Division  
Supervisors, and District Maintenance  
and Construction Supervisors.

FROM: David H. Stevens, Chairman.

SUBJECT: Hatch Act (Political Activities) and  
Related Policy of the State Highway Commission

Reference is made to Administrative Bulletin #193 dated February 21, 1962 under the above subject.

The Commission's policy has now been amended to provide that incompatibility will not be established with respect to Selectmen, Road Commissioners, or other local officials when employed as permanent seasonal employees on State or State Aid projects. This decision was made because these projects are of short duration and the opportunity for incompatibility in the matter of such employees' duties as Selectmen or other local officials and the procedures and policies of the State Highway Commission would be extremely limited because of the short duration of the project.