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Authority of State Personnel Board to Establish Position of Deputy Commissioner, Department of Finance and Administration

SYLLABUS:

The State Personnel Board does not have the power or the authority to establish the position of Deputy Commissioner of the Department of Finance and Administration referred to in the first paragraph of 5 M.R.S.A. § 282 as a separate and distinct position because the position referred to in the first paragraph is unclassified, and the statute explicitly provides that the duties of such Deputy Commissioner and the duties of one of the department bureau chiefs shall be performed by one and the same person. However, the Board does have the authority to establish the position of a second deputy commissioner of the Department of Finance and Administration referred to in the second paragraph of 5 M.R.S.A. § 282 as a separate and distinct position because the statute specifically provides for the employment of such "other deputies . . . as may be necessary, subject to the Personnel Law."

FACTS:

In December 1967, upon the request of the Commissioner of the Department of Finance and Administration, the position of Deputy Commissioner, Department of Finance and Administration, was established as a separate and distinct classified position by the State Personnel Board. At that time, 5 M.R.S.A. § 282 provided, in pertinent part, as follows:

"The commissioner may employ such bureau chiefs as may be necessary, with the approval of the Governor. The bureau chiefs shall be under the immediate supervision, direction and control of the commissioner and shall perform such duties as he may prescribe, except as otherwise provided by law."

"The salaries of the bureau chiefs shall be fixed by the Commissioner, with the approval of the Governor"

"The Commissioner may employ such deputies, assistants and employees as may be necessary, subject to the Personnel Law." (Emphasis supplied).

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The position of Deputy Commissioner authorized by the foregoing language was filled for a few years. However, in December of 1971, after the position had been vacant for some time, the State Personnel Board discontinued the classification.

At a Special Session of the Legislature in 1972, and as part of governmental reorganization, the Legislature amended 5 M.R.S.A § 282 to read as follows:

"The commissioner may, with the approval of the Governor and Council, appoint a deputy commissioner, who shall be the chief of one of the department bureaus and shall perform the duties of the commissioner during his absence, in addition to his duties. The compensation and expense of the deputy commissioner shall be paid from any available funds appropriated for the use of the bureau of which he is chief. The commissioner may employ such bureau chiefs, except the Director of the Bureau of Alcoholic Beverages, as may be necessary, with the approval of the Governor and Council. The bureau chiefs shall be under the immediate supervision, direction and control of the commissioner and shall serve at his pleasure and perform such duties as he may prescribe, except as otherwise provided by law.

"The commissioner may employ such other deputies, division heads, assistants and employees as may be necessary, subject to the Personnel Law. (Emphasis supplied).

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The position of bureau chief referred to in both the amendment and in the 1967 version of Section 282 has at all times been viewed and treated as an unclassified position by the State Personnel Board.

Subsequent to the amendment to Section 282, the Commissioner of the Department of Finance and Administration requested that the State Personnel Board re-establish the classified position of Deputy Commissioner, Department of Finance and Administration. At a meeting of the Board held on May 2, 1973, the Board did re-establish the classification as a separate and distinct position.

QUESTIONS:

1. Does 5 M.R.S.A. § 282 as amended impose any limitations on the authority of the State Personnel Board to establish a separate and distinct position of Deputy Commissioner, Department of Finance and Administration, i.e., a position to be assumed by a person whose sole and exclusive duties would be that of a Deputy Commissioner?

2. Is Governor and Council approval required for the classification of Deputy Commissioner referred to in the second paragraph of Section 282 which the State Personnel Board is authorized to establish as a separate and distinct position?

ANSWERS:

1. Yes. The State Personnel Board has no authority to establish the position of Deputy Commissioner referred to in the first paragraph of Section 282 as a separate and distinct position. However, the amendment leaves unchanged the Board's authority to classify such "other deputies . . . as may be necessary."

2. No.

REASONS:

1. The State Personnel Board has the power to prescribe rules and regulations relative to the classification of positions in the classified service only, not in the unclassified service. 5 M.R.S.A. § 592 (2) (B). The Director of Personnel has the duties "to ascertain and record the duties and responsibilities of all positions in the classified service, and to establish classifications for such positions, in conformity with regulations adopted therefor by the Board as provided in Section 592." (5 M.R.S.A. § 633).

5 M.R.S.A. § 671 provides that the classified service shall consist of all persons holding offices and employments in State service "except persons who are holding or shall hold offices in employment exempted by Section 711." Section 711 in turn provides in pertinent part as follows:

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

* * * *

"3. Appointed by Governor; certain official clerks. Heads of departments and members of boards and commissions required by law to be appointed by the Governor with the advice and consent of the Council, bureau directors, and the official clerk of the State Liquor Commission, and the secretary of the Public Utilities Commission.

* * * * "

As noted above, at the time the position of Deputy Commissioner, Department of Finance and Administration, was established by the State Personnel Board in 1967, the only reference to Deputy Commissioner in 5 M.R.S.A. § 282 was as follows:

"The commissioner may employ such deputies, assistants and employees as may be necessary, subject to the Personnel Law." (Emphasis supplied).

However, amended version of the statute refers to the position of Deputy Commissioner in two places as follows:

"The Commissioner may, with the approval of the Governor and Council, appoint a Deputy Commissioner, who shall be the chief of one of the department bureaus and shall perform the duties of the Commissioner during his absence in addition to his duties "

"The Commissioner may employ such other deputies, division heads, assistants and employees as may be necessary, subject to the Personnel Law." (Emphasis supplied).

There can be no question that the earlier version of the statute authorized the State Personnel Board to establish the position of Deputy Commissioner as a separate and distinct classification, and there is no question that the position was to be a classified one, since the statute specifically recited that such persons were "subject to the Personnel Law."

By amending the statute to provide for the appointment of a deputy commissioner who shall also serve as a bureau chief, it appears that the legislature was seeking to conserve manpower and encourage greater efficiency by requiring that at least one deputy commissioner shall serve in a dual capacity. In other words, the object of the amendment was to insure that in the first

instance the duties of Deputy Commissioner would be assumed by, and, unless other deputies were necessary, be carried out exclusively by one of the existing officials. The statute specifically requires that the compensation for such additional duties is to be paid out of the appropriation for the bureau of which such deputy is chief.

Since the bureau chiefs are not classified employees, it follows that the position of deputy commissioner referred to in the first paragraph of Section 282, who must, ipso jure, be a bureau chief, is not a classified employee. Being an unclassified position, the State Personnel Board has no power or authority with respect to such position.

2. Notwithstanding the foregoing, the statute does provide in clear and unequivocal language that "other deputies . . . subject to the Personnel Law" may be employed if necessary. Thus, if the services of a second or even a third deputy commissioner are required, such "other" deputyships would be subject to the Personnel Law, and, therefore, classified.

There is no requirement in the statute that such "other deputies" serve in dual capacities or provide dual functions. Accordingly, there would appear to be no limitation on the power of the Personnel Board to reinstate the position of deputy commissioner referred to in the second paragraph of Section 282 as a separate and distinct position. Whether a need for such position actually exists presents a different question which we have not been asked to, and which for purposes of the present opinion, it is unnecessary for us to consider. It should be emphasized, however, that it would not be proper for the Department of Finance and Administration to request the services of a deputy referred to in the second paragraph of Section 282 in the absence of or in lieu of the prior appointment of the deputy referred to in the first paragraph of Section 282.

There is nothing in the statutes pertaining to the classified service which requires the State Personnel Board to secure Governor and Council approval of the classifications which it makes pursuant to 5 M.R.S.A. § 592. In our opinion, the Board's powers with respect to the classification of employees referred to in the second paragraph of Section 282 are no greater and no less than its general powers with respect to other State employees and officials whose positions are "subject to the Personnel Law."

MLW:H

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