

MAINE STATE LEGISLATURE

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August 2, 1973

Governor Kenneth M. Curtis

Executive

Jon A. Lund, Attorney General

Attorney General

Incompatibility of Offices of Commissioner of Department of Conservation and Members of the Board of Environmental Protection

SYLLABUS:

The offices of commissioner of the newly created Department of Conservation and member of the Board of Environmental Protection are incompatible because the Board of Environmental Protection is required to rule upon applications for permits and approvals submitted by or with the advice of the Department of Conservation through its Bureaus.

FACTS:

In 1973, the 106th Legislature, meeting in Regular Session, enacted a Bill creating a Department of Conservation, Chapter 460, P.L. 1973 (S.P. 465 - L.D. 1521), and which incorporated into one department the following state agencies:

1. Forestry Department
2. Parks and Recreation Department
3. Maine Forest Authority
4. Maine Mining Bureau
5. Keep Maine Scenic Committee
6. Allagash Wilderness Waterway
7. Land Use Regulation Commission

The purposes of the newly created department are enumerated in § 5011 of the Act as follows:

- (a) to preserve, protect and enhance the land resources of the State of Maine,
- (b) to encourage the wise use of scenic, mineral and forest resources of the State and to insure that

coordinated planning for the future allocation of lands for recreational, forest production, mining and other public and private uses is effectively accomplished, and

- (c) to provide for the effective management of public lands in the State of Maine.

The Act provides that the chief executive officer of the department shall consist of a Commissioner of Conservation appointed by the Governor with the advice and consent of the Council. §§ 5011, 5012. Among his powers and duties, the Commissioner shall (§ 5012):

- (a) coordinate and supervise the activities and programs of the bureaus and agencies which are part of the department;

- (b) undertake comprehensive planning and analysis with respect to the functions and responsibilities of the department;

- (c) organize and maintain within the department an administrative services division to which he may assign personnel from the agencies and bureaus of the department.

In addition, the Commissioner has the power to appoint (and to remove for cause) the following officials, with the approval of the Governor:

- (1) The Director of the Bureau of Forestry
- (2) The Director of the Bureau of Parks and Recreation, and
- (3) The Director of the Bureau of Public Lands

Section 21 (2) of the Act provides that the Governor shall appoint the Commissioner "on the effective date of this Act" and that "nothing in this Act shall be construed to prevent a person from serving as both a bureau director and commissioner."

By memorandum dated July 17, 1973, Governor Curtis inquired whether it would be legally permissible for a member of the Board of Environmental Protection to simultaneously also serve as Commissioner of the Department of Conservation.

QUESTION:

Is it legally permissible for a member of the Board of Environmental Protection to simultaneously also serve as Commissioner of the Department of Conservation?

ANSWER:

No.

REASONS:

The law is well settled in this State that two offices are incompatible when the holder cannot in every instance discharge the duties of each. Howard v. Harrington, 114 Me. 443, 96 A. 769 (1916). As expressed by the Supreme Court, 114 Me. at 446, 447:

"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 acceptances 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.

When the powers and duties of the Board of Environmental Protection are considered in relation to the powers and duties of the Commissioner of the newly created Department of Conservation, it becomes quite clear that the two offices are incompatible.

The Board of Environmental Protection ("BEP") is the State agency charged with the responsibility for issuing waste discharge licenses (38 M.R.S.A. § 413), Great Pond dredging permits (38 M.R.S.A. § 422), wetlands dredging permits (12 M.R.S.A. § 4701)* and site location approvals (38 M.R.S.A. § 483). This responsibility extends not only to applications by members of the private sector, but to applications submitted on behalf of state agencies as well. See 38 M.R.S.A. §§ 413, 422, 483. Moreover, these laws require State agencies such as the Forestry Department (Bureau of Forestry of the Department of Conservation) or the Parks and Recreation Department (Parks and Recreation Bureau within the Department of Conservation), to secure permits and approvals from BEP.

* Chapter 618, § 11, P.L. 1972 provides that BEP shall issue or reject such permits.

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The Parks and Recreation Department informs us that it has to date applied to BEP for 1 site location approval, 3 waste discharge permits, 9 Great Pond alteration permits and 10 wetlands alteration permits, and the Department estimates that in the next year it shall be submitting to BEP 10-12 Great Pond applications, 4-6 wetlands applications, 2 waste discharge applications and 4-6 site location applications.

In view of the fact that the Commissioner of the Department of Conservation will have supervisory and appointive powers over the Bureau of Parks and Recreation, and will otherwise be involved with activities of that Bureau, it would be incompatible for the Commissioner of the Department seeking a BEP permit or approval to sit on the Board vested with the authority and obligation to issue or deny such permit or approval.

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