

MAINE STATE LEGISLATURE

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September 25, 1973

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Governor Hiring Member of the Executive Council to Implement
Management and Cost Survey

SYLLABUS:

The Chairman of the Executive Council may not be hired and serve as the Governor's Executive Coordinator of the implementation phase of the Maine Management and Cost Survey because he would be pecuniarily interested in a contract made on behalf of the State contrary to 17 M.R.S.A. § 3104.

FACTS:

By Executive Order No. 17, dated September 19, 1973, Governor Curtis directed all state departments and agencies to analyze the recommendations set forth in the Maine Management and Cost Survey, and to submit their evaluations and plans to him.

In the Order the Governor states that he intends to implement those items of the survey that will improve state government, and to include items requiring legislative consideration to the Special Session of the 106th Legislature in January 1974.

The Governor proposes to designate an Executive Coordinator of the implementation phase of the report recommendations. We are informed that the Executive Coordinator shall be compensated for his services which, among other things, will involve being the clearing house of all material and information submitted by the state department and agencies participating in discussions of procedural matters and participating in the resolution of potential implementation problems.

The Governor has inquired whether there is any legal prohibition to the Chairman of the Executive Council being hired and serving as his Executive Coordinator.

QUESTION:

May the Chairman of the Executive Council serve as the Governor's Executive Coordinator of the implementation phase of the Maine Management and Cost Survey?

ANSWER:

No.

REASONS:

Article V, Part 2, § 4 of the Maine Constitution provides that "no Councillor shall be appointed to any office during the time, for which he shall have been elected." In previous opinions of this office we have indicated that this provision precludes a member of the Executive Council from being appointed a member of the Committee on Educational Television, 1961-62 Attorney General's Report 196; a member of the Atlantic States Maine Fisheries Commission, 1955-56 Attorney General's Report 17; or a member of the Board of Commissioners of Pharmacy, 1951-54 Attorney General's Report 199.

In each of these situations it was determined that the appointive position was an "office" within the meaning of the Constitutional prohibition because the positions each had some permanence and continuity, and possessed a delegation of a portion of the sovereign power of the government, to be exercised for the benefit of the public.

In the instant case, it perhaps could be argued that the position of Executive Coordinator is not an "office" within the foregoing meaning of the term, but rather merely an employment. And, while the distinction between an office and an employment is a valid one, Opinion of the Justices, 3 Me. (3 Greenl.) 481, 482 (1822), it is not necessary to a resolution of the present question to determine whether the position of Executive Coordinator is properly one or the other.

17 M.R.S.A. § 3104 entitled "Conflicts of interest; purchases by the State" provides, in pertinent part:

"No trustee, superintendent, treasurer or other person holding a place of trust in any state office or public institution of the State . . . shall be pecuniarily interested directly or indirectly in any contracts made in behalf of the State . . . and any contract made in violation hereof is void."

A member of the Executive Council is "a person holding a place of trust in 3 state office." Attorney General's Opinion dated

May 22, 1968 re: Power of Executive Councillor to Contract with State College; Opinion of the Justices, 108 Me. 545, 549, 82 A. 90, 91 (1911). Since the Executive Coordinator will receive compensation for his services, he will, ipso facto be "pecuniarily interested," and since the compensation will be in consideration of services rendered or to be rendered to the State, he will be pecuniarily interested in a "contract made in behalf of the State."

Accordingly, irrespective of whether the position of Executive Coordinator is an office or merely an employment, a member of the Executive Council may not lawfully serve the Governor in such capacity by virtue of statutory prohibitions set forth in 17 M.R.S.A. § 3104.

We would further observe that the Constitution charges the Executive Council with the responsibility " . . . to advise the Governor in the executive part of government" Maine Constitution, Article V, Part 2, Section 1. Were the Chairman of the Council to simultaneously assume an inferior position, the performance of which is subject to the absolute and unfettered supervision and control of the Governor, the second position may well impede his ability to properly discharge his responsibilities of the superior office. On common law principles, such a conflict may well render the two positions incompatible. Howard v. Harrington, 114 Me. 443 (1916).

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