

# MAINE STATE LEGISLATURE

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Inter-Departmental Memorandum Date October 26, 1973

To G. Raymond Nichols, Director Dept. Probation and Parole  
From Courtland D. Perry, Asst. Att'y General Dept. Mental Health & Corrections  
Subject Person Serving in Dual Roles of Probation & Parole Officer II and Member of State Parole Board

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I first wrote to you at your request regarding the matter of a person serving as a job developer under the Division of Probation and Parole while at the same time serving as a member of the State Parole Board by memorandum dated September 13, 1973. Because of information which has recently come to my attention through another question raised by the Bureau of Administrative Services of the Department of Mental Health and Corrections relative to the legality of payments to one person on connection with the two functions and the appropriate allocation of such payments, I feel compelled to write you again by way of necessary clarification.

It had been my understanding that the job developer was to be hired for one year under an LEAA grant and was to carry out the functions heretofore carried out by the same person under the "Project Exit" program which had also been funded by LEAA, such person now to do such work for the Division of Probation and Parole. I had not realized, but now do, that this person has been hired as a classified state employee carrying the classification Probation and Parole Officer II. I must add the following to the previously submitted admonitions relative to the two positions held by this person. It is my opinion that the job developer/Probation & Parole Officer II, being an employee in the classified service, is subject to the provisions of Personnel rule 5.2 (d), which reads as follows:

"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",

and that his acceptance of payment from the State as a member of the State Parole Board would be in violation of such rule. It is my further opinion that, although this person may work as a "job developer," so-called, his classification as a Probation and Parole Officer II, which brings him into a statutory relationship with the Division of Probation and Parole, relating specifically to parole matters, makes legally questionable his simultaneous service as a member of the State Parole Board. Morrisey v. Brewer, 92 S.Ct. 2593, requires that members of the State Parole Board be "neutral and detached." Query: How "neutral and detached"

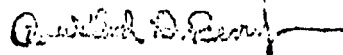
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is a State Parole Board member who is at the same time a classified state employee; viz., a Probation and Parole Officer II, who by definition of his office, as described in Title 34, Chapter 121, has statutorily described duties under the supervision of the Director of Probation and Parole, including the power to arrest parole violators, his factually stated function as "job developer" notwithstanding? I suggest that such relationship may be ripe for the testing by post-conviction habeas corpus petition brought by an aggrieved parolee whose parole is revoked by the State Parole Board upon which sits said job developer/Probation and Parole Officer II.

I now advance my appraisal of September 18, 1973, respecting the relationship of job developer-State Parole Board Member from highly tenuous to legally untenable for the reasons herein stated.

In connection with the issue raised here it is pertinent in closing to note some aspects of the common law rest of incompatibility as it relates to one person holding two offices; incompatibility exists here.

"Two offices are incompatible when the holder cannot in every instance discharge the duties of each. ... Incompatibility must be such as arises from the nature of the duties, in view of the relation of the two offices to each other. ... 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. ... Incompatibility between two offices exists when there is an inconsistency in the functions of the two. ... 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. ... 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. ... 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." Howard v. Harrington, (Me. 1916) 114 Me. 443.



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Courtland D. Perry  
Assistant Attorney General