

MAINE STATE LEGISLATURE

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STATE OF MAINE

Inter-Departmental Memorandum Date June 28, 1974

To Otto W. Siebert, State Budget Officer Dept. Bureau of the Budget
From Charles R. Larouche, Assistant Dept. Attorney General
Subject Commerce and Industry; status and funding of certain assistants

This replies to your memorandum request of June 10, 1974.

It appears that 10 M.R.S.A. § 402 provides:

"The commissioner may employ division directors, deputies, assistants, specialists and such other employees as may be necessary, subject to the Personnel Law; appoint assistants who shall serve at his pleasure; employ or engage with the approval of the Governor and Council such outside technical or professional consultants as may be necessary or appropriate to assist the department in carrying out its functions; and may enter into contracts with other boards, commissions, departments and divisions of the State or with the University of Maine to assist him or any division of the department in carrying out this chapter."
(Emphasis supplied.)

I understand your first question to be whether or not the "assistants" who are appointed to "serve at his pleasure" by the Commissioner, pursuant to the above-quoted statute, are in the classified or unclassified service of the State? The answer to that question is that they are in the unclassified service.

5 M.R.S.A. § 671 provides that:

"The classified service shall consist of all persons holding offices and employments now existing or hereafter created in the state service, except persons who are holding or shall hold offices and employments exempted by section 711."

5 M.R.S.A. § 711 states that "The unclassified service comprises positions held by officers and employees who are. . . " and it enumerates the "excepted" positions in 11 subsections, none of which includes assistants appointed by the Commissioner of Commerce and Industry who are appointed to serve at his pleasure. Therefore, it would seem that since these positions are not included in the "exceptions" enumerated by § 711, such positions would come within the "all other positions" category

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of § 671, namely "classified service." However, that does not appear to be the intent of 10 M.R.S.A. § 402, above-quoted, for it initially authorizes the Commissioner to employ certain persons, including "assistants" who are to be "subject to the Personnel Law." This reference to "the Personnel Law" appears to be to the statutes governing the classified service. Chapter 53, Title 5, provides a "State Personnel Board" and Chapter 55 provides a "Director of Personnel" whose authority is over the "classified service." Furthermore, 5 M.R.S.A. § 671 provides:

"Appointments to and promotions in the classified service shall be made according to merit and fitness, from eligible lists prepared upon the basis of examinations, which so far as practicable shall be competitive. . . ."

Such provisions are plainly inconsistent with the concept of an appointment of an assistant "who shall serve at the pleasure" of appointing authority.

Accordingly, it is concluded that the provision in 10 M.R.S.A. § 402 for the appointment of "assistants" to "serve at his pleasure" constitutes an additional exception to 5 M.R.S.A. § 671, which is not specified in 5 M.R.S.A. § 711.

Your second question appears to concern the manner of funding for the assistants appointed to serve at the pleasure of the Commissioner under 10 M.R.S.A. § 402. You state that P. & S. L. 1973, c. 202 provides for the funding of 31 permanent positions in the Department of Commerce and Industry; you refer to sections 5 and 20 of Chapter 202. It appears that the "assistants" who are "appointed to serve at his pleasure" are being paid from the funds appropriated for the 31 permanent positions. You have concluded that such payment appears to be improper "if these special assistants are unclassified employees." I understand your second question to be whether or not this office concurs with your conclusion. The answer to that question is negative.

Positions in the unclassified service are treated as "permanent" by the Legislature, within the meaning of that word as used in Section 5 C. 202, P. & S.L. 1973. Because the position of assistant(s) is a permanent position, and is of a recurring nature, it may not be funded from salary savings, nor may such assistant(s) be employed in excess of the 31 permanent positions.

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I trust that the foregoing fully answers the questions you had in mind in transmitting your June 10, 1974, memo on this subject to this office. However, if I can be of any further aid to you in this matter, please advise me.


CHARLES R. VAROUCHE
Assistant Attorney General

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