

MAINE STATE LEGISLATURE

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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04330

September 9, 1974

Mr. Edward I. Bernstein, Clerk
Cumberland County Superior Court
142 Federal Street
Portland, Maine 04112

Dear Mr. Bernstein:

Your letter of August 1, 1974 addressed to Deputy Attorney General John Benoit has been referred to me for an answer. You have posed the following question:

"Is the office of a Bail Commissioner incompatible or in any conflict with the office of a City Councilor, Town Selectman or Municipal Officer?"

I find no incompatibility exists where any of the municipal officials designated in your question hold the office of bail commissioner. This answer is based upon the strict definition of municipal officers as set forth in 30 M.R.S.A. § 1701(7) which reads as follows:

"'Municipal officers' means the mayor and alderman of a city, and the selectmen of a town.'"

As you are probably well aware, two offices are considered legally incompatible when the holder thereof cannot, in every instance, discharge the duties of either. The leading case in Maine representative of this principle is Howard v. Harrington, 114 Me. 443, 96 Atl. 769 (1916).

There is no statutory prohibition which precludes a bail commissioner from serving a municipality as a mayor, alderman (councilman) or selectman, and therefore one must analyze the functions of the respective offices to ascertain if any conflict exists.

Bail Commissioners are appointed by the Superior Court and must first be justices of the peace. (14 M.R.S.A. § 5541) Within their statutory powers, they may admit to bail, persons charged with the commission of a crime. (14 M.R.S.A. § 5542). I can see no conflict in performing this function, while a person simultaneously serves a town or city in the capacity of selectman, alderman (councilman) or mayor. A person who is an elected public official, whether a mayor, alderman or selectman, is not acting in derogation of his executive or legislative duties, when he admits a person to bail. He is simply acting independently in a judicial capacity, solely as a court appointed officer.

Our law court, in a case primarily significant for determining the status of a person under our Workmen's Compensation Act, has ruled, inter alia that:

"A deputy sheriff while acting as a court officer during a session of the court, is not and cannot be held to be exercising an executive function while acting as such court officer, under the direction and control of the executive department,"

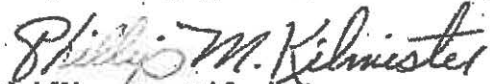
"It is a rule generally prevailing and adhered to in this State, that the executive and judicial departments are absolutely independent of each other within the sphere of their respective powers. This rule does not preclude just what happened in the instant case. A deputy sheriff, an executive as well as an administrative officer, was for the time being acting as an officer of the judicial department as an officer of a court, within the sphere of the power of that court. This overlapping and interlacing of the duties of officers of the two departments is not unusual. On the contrary, it is a very necessary result of our governmental system!" Bowden's Case, 123 Me. 359 (1924)

Giving the term municipal officers a broader view than the statutory definition (30 M.R.S.A. § 1901(7) quoted above, it would seem that certain municipal officers and employees could not serve in the capacity of bail commissioner. Law enforcement officials, absent statutory authority to the contrary, could not serve as bail commissioners, and this would undoubtedly include city solicitors, providing their office is endowed with prosecutorial duties.

It closing, it should not be overlooked that municipal charters might specifically prohibit service by any particular official in the capacity of a bail commissioner.

I trust that the above-information will be of some assistance to you.

Very truly yours,


Phillip M. Kilmister
Assistant Attorney General

PMK/mf