

# MAINE STATE LEGISLATURE

The following document is provided by the  
**LAW AND LEGISLATIVE DIGITAL LIBRARY**  
at the Maine State Law and Legislative Reference Library  
<http://legislature.maine.gov/lawlib>



Reproduced from scanned originals with text recognition applied  
(searchable text may contain some errors and/or omissions)

# STATE OF MAINE

Inter-Departmental Memorandum Date April 8, 1975

To Peter M. Damborg

Dept. Executive

From Charles R. Larouche, Assistant

Dept. Attorney General

Subject Compatibility of Legislator as Member of Board of Trustees of the University of Maine or of Maine Maritime Academy or of Similar Boards.

## SYLLABUS:

A Legislator cannot be legally appointed a member of the Board of Trustees of the University of Maine, nor of the Maine Maritime Academy, nor as a member of the Board of Directors, Maine Law Enforcement Planning and Assistance Agency. He may be appointed to any board or commission which is not empowered to exercise an Executive Department or Judicial Department function.

## FACTS:

Stated in question.

## QUESTIONS AND ANSWERS:

(1) Can a Legislator be legally appointed a member of the Board of Trustees of the University of Maine? No.

(2) Can a Legislator be legally appointed a member of the Board of Trustees of the Maine Maritime Academy? No.

(3) Can a Legislator be legally appointed a member of the Board of Trustees, Maine Law Enforcement Planning & Assistance Agency? No.

(4) To what boards and commissions may a Legislator legally be appointed? To any board or commission which is not empowered to exercise an executive or judicial function. For further explanation, see Reasons for answer to Question 4.

## REASONS:

Re Question #1. (University of Maine)

Article III, Constitution of Maine, provides:

"Section 1. The powers of this government shall be divided into three distinct departments, the legislative, executive and judicial."

"Section 2. No person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted."

Peter M. Damborg  
Page 2  
April 8, 1975

The critical question to be decided is: What is the status of a Trustee of the University of Maine? That University was created as a "body politic and corporate" by Chapter 532, Private and Special Laws of 1865. By section 3 of the Act, the Governor and Council were given the power to examine into the affairs of the University and to direct the Attorney General to take action against the Trustees either individually or collectively if they were guilty of any acts of misfeasance or nonfeasance which might prove injurious to the University.

Under Section 4 of the Charter, as amended by Chapter 229, Private and Special Laws, 1968, the Board of Trustees consists of 15 persons, 14 of whom are appointed by the Governor with the advice and consent of the Council. The fifteenth member is the Commissioner of the Department of Educational and Cultural Services.

From its beginning, the University has been the constant care and ward of the State. It is true that in 1909 Justice Cornish, writing for the Supreme Judicial Court of Maine, declared:

"The University of Maine, while chartered by the State and fostered by it especially in recent years, is not a branch of the State's educational system nor an agency nor an instrumentality of the State, but a corporation, a legal entity wholly separate and apart from the State. The defendant seeks to class it as a State institution in the same sense as are the public schools or the normal schools, but such is not its legal status." Orono v. Sigma Alpha Epsilon Society, 105 Me. 215.

In an opinion dated March 25, 1943, Attorney General Cowan commented on that statement as follows:

"The things that the Judge says about the College are very largely dicta and, as such, not binding as precedents of our courts but, nevertheless, are entitled to great weight." Report of the Attorney General, 1941-1942, p. 180, 182.

On July 7, 1943, Attorney General Cowan issued a more extensive opinion on the status of the Trustees in Report of the Attorney General, 1943-44, pages 60-65, stating:

Peter M. Damborg

Page 3

April 8, 1975

"The State, in its attitude toward the University of Maine, must recognize two things. First--the spirit of the College is free--and must function in that pure atmosphere where thought and study are unhampered by material considerations. Second--the physical assets of the College are the property of the State, and as such are to be regarded and treated as public properties.

"The faculty, expressive as they are of the spirit of the College, are not public employees. They make such rules, not contrary to law, as they wish for their own guidance or convenience, subject, of course, to the supervision of the Trustees.

"The Trustees are liaison officers between the spirit of the College and its body. They perform material functions, but are not themselves charged with the duty of teaching. They have custody of the lands, buildings and equipment set aside by the State for the use of the College in performing its functions of study and teaching.

"To the extent necessary to make it the beneficiary of Congressional and State grants of money, the University of Maine may be classed as a State institution. The lands, buildings and other physical assets, title to which is in the State, are instrumentalities of the State." (At page 63)

"The question as to whether or not the fact that the Governor appoints all the Trustees of the University in itself is the determining factor in making of the University a State instrumentality or agency must be answered in the negative. The Trustees have a dual function, and the method of their selection is simply one of convenience. It is their duty to ensure that the State property entrusted to their care shall be used for the purposes determined by the people of the State speaking through their Legislature,

Peter M. Damborg  
Page 4  
April 8, 1975

and to that extent they are acting in a departmental capacity. They are then guiding and directing the institution in that part of its functions in which it is making use of State property and is acting by delegation as an agency or instrumentality of the State.

"Their second function has to do with protection of the College as a guiding lamp for those who seek knowledge. That function I have discussed above in sufficient detail. Any failure on their part to recognize their dual capacity and that, once they have been appointed as trustees and have qualified as such, they must exercise that latter function in a manner that will keep it absolutely clear of any political interference would be a definite refusal to recognize in full the responsibilities of their position. My answer must, therefore, be that insofar as proper handling of the physical functions of the University is concerned, the State does possess the right of direction and control, and the Trustees should at all times take that into consideration in making their decisions." (Id., at page 64)

This dual trustee function concept was expressly incorporated into statutory provisions by Chapter 98, P.L. 1945, stating:

"The University of Maine is declared to be an instrumentality and agency of the State for the purpose for which it was established and for which it has been managed and maintained under chapter 532 of the private and special laws of 1865 and supplementary legislation relating thereto." 20 M.R.S.A. § 2252.

On May 25, 1971, this Office issued a letter opinion to Representative John F. Clemente, which concluded:

"It is clear then that a trustee exercises powers of the executive branch of the State government. If he were at the same time a member of the Legislature, he would be holding incompatible offices under the Constitutional limitation above cited."

Peter M. Damborg  
Page 5  
April 8, 1975

We think it is clear from the foregoing authorities that one of the functions of the Board of Trustees of the University of Maine is to exercise a part of the sovereign power of this State, and that the exercise of that function is executive in nature, and, hence, within the executive department of government. Accordingly, a legislator cannot be a trustee of the University.

Re Question #2. (Maine Maritime Academy)

The reasoning and authorities cited in regard to the answer to question 1 are applicable to this question. In addition, it should be noted that Deputy Attorney General West issued a letter opinion to Executive Councillor Richard W. Logan on December 22, 1971, advising him that a trustee of the Maine Maritime Academy could not at the same time be a legislator.

Re Question #3. (Maine Law Enforcement Planning and Assistance Agency)

5 M.R.S.A. § 3350 expressly states that the Maine Law Enforcement Planning and Assistance Agency is "in the Executive Department to carry out programs of planning for more effective law enforcement and for assisting local and state agencies in improving law enforcement in the State." Section 3350 confers upon them the broad powers of a State Planning Agency within the meaning of several Federal Acts. Section 3354 confers upon them the power to make grants for planning and for improvement of law enforcement, and under Section 3355 they are empowered to accept funds from various sources for purposes consistent with Title 5, Chapter 315 M.R.S.A. On January 3, 1975, this Office issued a memorandum opinion to the Executive Director of the Maine Law Enforcement Planning and Assistance Agency, advising him that a legislator could not be a member of the board of directors of that Agency. We fully appreciate that 5 M.R.S.A. § 3351 expressly provides that the Chairman of the Joint Legislative Judiciary Committee shall be a member ex officio of the reference Agency. However, that provision is in violation of Article III, Constitution of Maine, and is void.

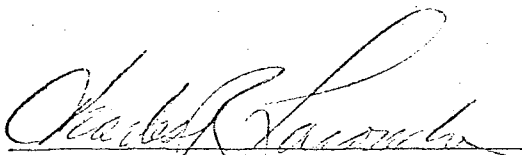
Re Question #4.

A legislator is barred by Article III, Constitution of Maine, from exercising any of the powers of either of the other two great branches of our government, i.e., the judicial and executive departments. With regard to the executive branch, a legislator cannot occupy any position enabling him to exercise any of the sovereign, executive powers of the State. Any position which requires him to execute, carry out, implement, enforce, apply or administer, on behalf of this State, a law of the State, is one which involves the exercise of a

Peter M. Damborg  
Page 6  
April 8, 1975

function of the executive department. For example, this includes sheriffs and their deputies, all tax assessors, district attorneys and their assistants, and county commissioners. It also includes positions in any State body, regardless of its name, which is empowered to make State decisions as contrasted with mere recommendations. Examples of a State body on which a Legislator can lawfully serve without violating Article III, Constitution of Maine, are the many commissions to study and report recommended changes in our laws.

However, it is difficult to generalize with assurance of accuracy in this particular area. Caution should be exercised in making any appointments of legislators to positions that may involve some exercise of the executive function, especially in view of the serious consequences that flow from the acceptance of an incompatible office, i.e., acceptance of the second office vacates the first office. Howard v. Harrington, 114 Me. 443. This Office will be pleased to advise you upon the constitutionality of any appointment of a legislator to a specific position concerning which you may entertain any doubt.

  
CHARLES R. LAROUCHE  
Assistant Attorney General

CRL:mfe