

MAINE STATE LEGISLATURE

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STATE OF MAINE

Inter-Departmental Memorandum Date July 11, 1975

To Nicholas L. Caraganis, Director

Dept. Personnel

From Courtland D. Perry, Asst. Att'y General

Dept. Mental Health & Corrections

Subject Educational Leave Advisory Board

SYLLABUS:

The Educational Leave Advisory Board established by 5 M.R.S.A. § 723 is required to review all requests for educational leave for durations of more than one week made by unclassified and classified state employees. The authority of such board is the final authority in connection with the approval or disapproval of educational leave, and it may approve educational leave notwithstanding disapproval by the employing state agency. The regulatory authority of the Educational Leave Advisory Board is exclusive in connection with matters of educational leave, and such authority supplants the previously existing authority of the State Personnel Board in connection with such matters and, to that extent, P.L. 1973, Chapter 500, has impliedly repealed 5 M.R.S.A. § 592, sub-§ 2, L.

FACTS, QUESTIONS AND ANSWERS:

Your request for this opinion is stated as follows:

"In order to clarify certain provisions of Title 5, M.R.S.A., Chapter 60, the Act Establishing a Uniform Program for Educational Leave for State Employees, I am requesting a written formal opinion addressing the following issues:

"1. Must the Educational Leave Advisory Board review all requests for educational leave from state employees, classified and unclassified, regardless of approval or disapproval of educational leave on the part of the state agency by which the employee is employed?"

ANSWER: Yes.

"2. Does the Educational Leave Advisory Board have ultimate authority with respect to approval or disapproval of educational leave requests of state employees in the event of disapproval of educational leave by the agency by which the employee is employed?"

ANSWER: Yes.

"3. Are the regulations of the Educational Leave Advisory Board sufficient to reflect the functions of the Educational Leave Advisory Board as contemplated by the Educational Leave Act and, if not, what further regulatory provisions should be adopted in order to assure handling of educational leave requests in accordance with law?"

ANSWER: See reason.

REASON:

The 106th Legislature enacted P.L. 1973, Chapter 500, appearing as 5 M.R.S.A. §§ 721-727, cited as the "Maine Educational Leave Act." 5 M.R.S.A. § 723 establishes the Educational Leave Advisory Board and states its functions to be "to advise and consult with the Department of Personnel to review and authorize all educational leave requests from classified and unclassified state employees for durations of more than one week."

We view this language as establishing two functions of the Board: (1) to advise and consult with the Department of Personnel and (2) to review and authorize all educational leave requests from classified and unclassified state employees for durations of more than one week. It is the second function with which we are here concerned; and the language employed by the legislature as to that function requires no interpretation and is clear on its face, requiring that the Board review all applications for educational leave made by state employees, classified or unclassified, for durations of more than one week. This language is without limitation, requiring such review regardless of the approval or disapproval of educational leave by the state agency by which the state employee is employed when such educational leave is to exceed one week.

It is equally clear that the Educational Leave Advisory Board is vested with final authority in connection with the approval or disapproval of all educational leave requests of state employees for durations of more than one week. We view that the word, "authorize," imparts to the Board the final decision-making power as to whether educational leave will or will not be granted in each case and that the position of the employing agency as to an educational leave request by a state employee is not binding upon the Educational Leave Advisory Board. We find support for this view in the legislative design of the "Maine Educational Leave Act." A distinct body has been established by the legislature to pass judgment on educational leave requests of state employees, the board is given regulatory authority in this connection as set forth in 5 M.R.S.A. § 724; and § 724 provides that the "board shall seek the advice of the department head concerned in reviewing the educational leave application of each employee." This latter language indicates clearly that the board is not bound by the position of the employing state agency vis-a-vis the request for educational leave, the intent of such language obviously being that the board, in the exercise of its review and authorization function, have a statement of the position of the department head to assist the board in weighing the merits of the educational leave request in order to insure informed judgment in each case.

We come now to your third question in which you inquire into the sufficiency of the regulations of the Educational Leave Advisory Board entitled, "Guidelines for Educational Leave," which we append hereto for convenient reference. In order to determine the sufficiency of the regulations, we must first discuss the nature of the regulatory authority the nature of the regulatory authority vested in the Educational Leave Advisory Board by 5 M.R.S.A. § 724, which reads:

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"The board shall by rule and regulation establish procedures for applying, processing and granting of educational leave to classified and unclassified employees of the State . . . and may adopt such other regulations as it finds necessary to administer this chapter."

Such scope can only be defined through a determination of the present operative effect of 5 M.R.S.A. § 592, sub-§ 2, L., referring to the State Personnel Board:

"The board shall have the following powers and duties: . . .

"2. Rules and regulations. Upon recommendation of the director and after a public hearing, and subject to the requirements of chapters 51 to 61, to prescribe or amend rules and regulations relative to: . . .

"L. Leave of absence, resignation, hours of service, vacations and sick leave, . . ." (Emphasis supplied)

Acting pursuant to the last cited authority, the State Personnel Board has established rules dealing with educational leave with pay, Personnel Rule 11.11, and educational leave without pay, Personnel Rule 11.14. We append the text of these rules for convenient reference.

We must resolve the issue as to whether by enactment of P.L. 1973, Chapter 500, (5 M.R.S.A. Chapter 60, Sections 721-727) the legislature has impliedly repealed 5 M.R.S.A. § 592, sub-§ 2, L., to the limited extent only that the regulatory authority of the State Personnel Board as to "leave of absence" no longer includes the authority to regulate educational leave of state employees, such authority now being vested in the Educational Leave Advisory Board.

The Maine Supreme Judicial Court has set forth the general rules applicable to consideration of the issues of implied repeal as follows:

"It is well settled that a repeal by implication is not favored and will not be upheld in doubtful cases. . . . It is, however, equally well established that repeals by implication exist when a later statute covers the whole subject matter of an earlier statute. This principle has been expressed in appropriate language in many cases in this state . . .

"'Repeal by implication exists in two classes of cases, first, when the later statute covers the whole subject matter of the earlier, especially when additional remedies are imposed, and second, when the later is repugnant to or inconsistent with the earlier.'

" . . . to effect a repeal by implication the later statute must be so broad in its scope and so clear and explicit in its terms as to show that it was intended to cover the whole subject matter and to displace the prior statute or the two must be so plainly repugnant and inconsistent that they cannot stand together.' . . .

" . . . the precedents are numerous in support of a general rule which is applicable when it is claimed that one statute effects the repeal of another by necessary implication.

"The test is whether a subsequent legislative act is so directly and positively repugnant to the former act, that the two cannot consistently stand together. Is the repugnancy so great that the legislative intent to amend or repeal is evident? Can the new law and the old law be each efficacious in its own sphere?'. . .

"The court will if possible give effect to both statutes and will not presume that a repeal was intended. . . .

"Where a later statute does not cover the entire field of the earlier statute but is inconsistent or repugnant to some of its provisions, a repeal by implication takes place to the extent of the conflict." (Emphasis supplied)

State vs. London, 156 Me. 123, 126 - 128 (1960).

It is the opinion of this office that the legislature's enactment of the "Maine Educational Leave Act", P.L. 1973, Chapter 500, presents an appropriate instance of implied repeal and that such act repeals 5 M.R.S.A. § 592, sub-§2, L, to the extent that it has vested regulatory authority in connection with educational leave of state employees in the Educational Leave Advisory Board, taking from the State Personnel Board the previously existing authority to regulate educational leave as encompassed within the board's authority to regulate "leave of absence." We support this view by the following: The legislature enacted an entirely new Chapter 60 within Title 5 of the Revised Statutes, designating the same, "Maine Educational Leave Act." Such Chapter 60 falls within the compass of Chapters 51 to 61 of Title 5 to which the regulatory authority of the State Personnel Board is made subject by the language, "subject to the requirements of Chapters 51 to 61" (5 M.R.S.A. § 592, sub-§2). The legislature in P.L. 1973, Chapter 500, has expanded the scope of educational leave to include unclassified state employees in addition to classified state employees. It has established the broad purpose of educational leave in 5 M.R.S.A. § 722, thus providing the guidelines under which the Educational Leave Advisory Board is to act, and it has mandated in 5 M.R.S.A. § 724 the establishment of procedural rules and regulations relating to "applying, processing and granting educational leave," and has empowered the Educational Leave Advisory Board to establish such other regulations as it finds necessary to administer the "Maine Educational Leave Act."

Clearly, two administrative boards can not effectively regulate educational leave. The latter enactment must control and must be said to have vested in the Educational Leave Advisory Board exclusive regulatory authority in connection

with educational leaves, including both procedural and substantive regulatory authority.

An example of the conflict which could arise if the State Personnel Board and Educational Leave Advisory Board were to possess co-extensive regulatory authority is seen in the present provisions of Personnel Rule 11.11 inasmuch as such rule, in its provision for departmental plans for educational leave, would be in direct conflict with 5 M.R.S.A. Chapter 60 which provides for review and authorization by the Educational Leave Advisory Board in each individual instance of a state employee's request for educational leave. Further, the requirements of Personnel Rules 11.11 and 11.14 as to approval by the department head and approval by the personnel director of educational leave would also be in conflict with the powers vested in the Educational Leave Advisory Board.

Just as the educational leave regulatory authority encompassed within 5 M.R.S.A. § 592, sub-§ 2 L, to the limited extent that it has heretofore included educational leave, is no longer operative, Personnel Rules 11.11 and 11.14, as they relate to educational leave, must also be considered presently inoperative and without force.

In view of the fact that implied repeal is not favored and is not construed to exist in doubtful cases, we have also looked at the legislative record of May 31, 1973, in which amendments to L.D. 672, An Act to Establish a Uniform Program for Educational Leave for State Employees, which resulted in the enactment of P.L. 1973, Chapter 500, were debated on the floor of the House of Representatives. It is seen from such debate that the board which would be created by the act would possess full regulatory authority as to educational leave. This being the case, the Legislature can not have intended that the State Personnel Board possess further any regulatory authority as to educational leave.

In order to further assure the propriety of applying the rule of implied repeal as here discussed, we have inquired into the legislative history pertinent to P.L. 1973, Chapter 500, and find that in 1971 the legislature by joint order (S.P. 628) directed the Legislative Research Committee to study the problem of educational leave for state employees and further directed the Committee "to determine the feasibility of promulgating and enforcing rules and regulations by means of the State Personnel Board which will carry into practice a uniform policy for educational leave for all state employees." (Emphasis supplied) The Legislative Research Committee in its report to the 106th Legislature dated January, 1973, reported in pertinent part as follows:

"At the close of its hearings and the executive deliberations which followed, the Committee felt it would be in the best interests of the State if the various policies, practices and procedures currently employed by the State were subject to uniform regulation. It is the Committee's feeling that a permanent board should be established by statute to oversee and rule upon all such activity involving more than one week's duration and that this should be accomplished without the use of State funds,"

and the Legislative Research Committee in its report set forth its proposal, which appeared as L.D. 672, which, with amendments, was passed as P.L. 1973,

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Chapter 500. Although the joint order above cited directed the Legislative Research Committee to determine the feasibility of regulation of educational leave by the Personnel Board, it is seen by the committee's report and by the legislation ultimately enacted that the legislature established an entirely new board, the "Educational Leave Advisory Board," to regulate and oversee in every respect educational leave of state employees.

The present regulations of the Educational Leave Advisory Board, "Guidelines for Educational Leave," appear to be sufficient insofar as they set forth the procedures to be followed by the state employees requesting educational leave. However, they are unclear as to the means by which the employing state agency and the department head are to have input into the Educational Leave Advisory Board for its assistance in making its educational leave decisions. The regulations should omit reference to Personnel Rules since such rules, as to educational leave, are without operative effect as above discussed, and the regulations should omit reference to the establishment of state policy since that is a legislative function and the same has been accomplished by the legislature in Section 722. The regulations should not merely refer to "permanent status employees," since the Maine Educational Leave Act is applicable to unclassified as well as to classified state employees. Referring to pages 5 and 6 of the regulations and the language, "the Educational Leave Advisory Board will base their approval or disapproval of applications for educational leave on the information supplied by the agency head justifying the need and benefits to be derived in each case," this appears to assume as singularly controlling the position taken by the employing state agency. Under the legislative design of the Maine Educational Leave Act, the board is to take into consideration the merits of the educational leave request as presented both by the state employee and by the agency by which he is employed. The quoted language should be amended to reflect the totality of the information upon which the Educational Leave Advisory Board's decisions are made.



Courtland D. Perry
Assistant Attorney General

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attach.