

MAINE STATE LEGISLATURE

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STATE OF MAINE

Inter-Departmental Memorandum Date August 21, 1975

To Joseph Hochadel

Dept. Executive

From S. Kirk Studstrup, Assistant

Dept. Attorney General

Subject Posting of Candidate for Active Retired Justice

Your memorandum of August 15, 1975, concerning the above-stated subject, contained information that Justice James Reid has announced his retirement effective September 1, 1975, and that he will be considered for appointment as an Active Retired Justice. On the basis of these facts, you ask whether the Governor may post Justice Reid's nomination as an Active Retired Justice prior to the actual date of his retirement, so that upon his retirement he may be confirmed by the Executive Council, formally appointed, and assigned to sit on the bench until a successor is confirmed. The answer to your question is affirmative.

The same basic analysis contained in the opinion of July 29, 1975, on "Posting of Candidate for Superior Court Bench," would apply equally in the situation you described. The concept of "prospective appointment," as accepted in Pattangall v. Gilman, 115 Me. 344, 98 A. 936 (1916), would still be applicable. In the case of appointment of an Active Retired Justice, there is no problem of anticipating an actual vacancy. While the number of regular Justices on the Superior Court bench is limited to 14 by statute, there can be any number of Active Retired Justices. 4 M.R.S.A. § 101.

Although there is no problem of having an actual vacancy to fill, the eligibility of a Justice for appointment and the appointment itself are conditioned by the statute upon actual retirement of the Justice.

Title 4 M.R.S.A. § 104 reads, in part:

"Any Justice of the Superior Court having terminated his service on said court under section 103 [retirement] shall be eligible for appointment as an Active Retired Justice of the Superior Court as provided. The Governor with the advice and consent of the Council may, upon being notified of the retirement of any such justice under this section, appoint such justice to be an Active Retired Justice . . ." (emphasis provided)

However, there is no reason why the concept of "prospective appointment" may not still be applied, and the nomination posted in anticipation, provided it is clearly understood that confirmation by

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the Council and formal appointment must await qualification of the nominee by his retirement. One word of caution would be that such anticipatory posting probably should not be made where, unlike the present situation, it appears that the justice may not retire until after the Governor's term of office has expired.

As to your statement concerning assignment of Justice Reid once he is appointed as an Active Retired Justice, such assignment is within the sole discretion of the Chief Justice of the Supreme Judicial Court. 4 M.R.S.A. § 104.

S. KIRK STUDSTRUP
Assistant Attorney General

SKS:mfe

cc: Hon. Armand A. Dufresne, Jr.
Chief Justice