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Jobs  
STATE OF MAINE

Inter-Departmental Memorandum Date 18 September 1975

To John Rosser, Commissioner

Dept. Mental Health and Corrections

From Joseph E. Brennan, Attorney General

Dept. Attorney General

Subject Hiring, Grant and Contract Practices of the Department of Mental Health and Corrections

This memorandum is in response to your request to this office that we advise you relative to hiring, contract and grant practices of the Department of Mental Health and Corrections. Of particular importance, is the legal status of certain persons presently working in the Central Office in the Department of Mental Health and Corrections. We undertake in this memorandum to deal with the legal status of each such person and the legal propriety of certain fiscal practices of the Department of Mental Health and Corrections and to advise respecting corrective measures in those instances where the present practices are, in our view, inconsistent with law.

The legal status of the individuals in question must be tested against certain common law principles and statutes of the State of Maine. For your assistance, the common law test in determining the existence of an employer/employee relationship is set forth below. Statutes will be cited or quoted as they are considered pertinent to individual cases or practices.

The common law test is as follows:

"We reiterate (the holding of In re Dudley, 256 A. 2d 592, 595, Me. 1969) that the vital test to prove the existence of the employer-employee relationship is whether or not the employer has retained the right to control. The right to control on the other hand is best established by the right in the employer... to discharge the employee at will...It is the right to control and the right to fire, not the exercise of these rights, which we deem to be important criteria in establishing an employment status." Owen v. Royal Industries, Inc., 314 A. 2d 60 at p. 62. (Me. 1974). See also Harlow v. Agway, Inc., Me. 327 A. 2d 856 (1974).

"At common law there are four elements which are considered on the question of whether the employer-employee or master and servant relationship exists, namely, the selection and engagement of servant, payment of wages, power of dismissal, and power of control of the servant's conduct." Attorney General Report 1951 - 1954, p. 141.

"A master and servant relationship may exist between two persons even though the servant's compensation is paid by a third person." 56 CJS §2(e), p. 39.

"If there is no express contract or if the contract is ambiguous or doubtful, the conduct of the parties and all of the surrounding circumstances may be looked to in determining the relationship of the parties." 56 CJS §3(2), pp. 48-49.

I. Clyde Leib

In his capacity as special assistant to the Commissioner of Mental Health and Corrections and legislative liaison officer for the Department of Mental Health and Corrections, Mr. Leib is clearly in an employer-employee relationship with the Department of Mental Health and Corrections as above described.

The authority of the Commissioner of Mental Health and Corrections to employ persons in the state service is circumscribed by 34 M.R.S.A. § 1. Under this section, the Commissioner of Mental Health and Corrections "shall have the power to appoint institutional heads as shall be necessary for the proper performance of the duties of said department; such appointment shall be subject to the Personnel Law, except as otherwise provided in this Title. He may appoint such other employees as may be necessary; such other appointment shall be subject to the Personnel Law, except as otherwise provided in this Title . . . ."

We find no authority in Title 34 for the appointment by the Commissioner of any person with the responsibilities of Mr. Leib except in conformity with the Personnel Law. We are of the opinion that the only mechanism which may be legally employed in order to effect the hiring of a person to perform the duties presently performed by Mr. Leib is pursuant to 5 MRSA § 671 through the creation of a new classified position in the Department of Mental Health and Corrections in accordance with applicable rules of the Personnel Department.

The payment mechanism for Mr. Leib is as follows: The Department of Mental Health and Corrections receives certain federal monies known as 314D funds which are intended for expenditure by the Department of Mental Health and Corrections for the provision of community mental health services. Such monies were used by the Department to fund a grant to the Aroostook Mental Health Center. The granting authority of the Department of Mental Health and Corrections for the provision of community mental health services is found in 34 MRSA Chapter 183. Mr. Leib receives his paycheck directly from the Aroostook Mental Health Center. There are no conditions, written or verbal, for the direct provision of services by Mr. Leib to the Aroostook Mental Health Center. Mr. Leib's services to the Department of Mental Health and Corrections are broadly based, touching the totality of the departmental program and are not limited to the mental health field. We are of the opinion that the funds granted by the Department purportedly pursuant to 34 MRSA § 2052 to the Aroostook Mental Health Center are in violation of that statutory authority of the Department to grant monies to mental health agencies in the community. Furthermore, the condition precedent to the grant of funds under section 2052; i.e, the receipt of an application prepared in conformity with the statute, was not met in this case, there being no application from the Aroostook Mental Health Center. The grant in this instance was not made to the Aroostook Mental Health Center in order to assist it in the conduct of its mental health services.

In view of the nature of the relationship of the position in question to the office of the Commissioner, this does not appear to be an appropriate instance for a contract with an independent contractor to provide services to the Department of Mental Health and Corrections.

The remaining money in the hands of the Aroostook Mental Health Center should be recalled by the Department of Mental Health and Corrections and the grant terminated. We do not perceive any legal difficulty in undertaking such recall, in view of the fact that the grant is a nullity, the condition precedent to the making of such grant not having been fulfilled.

II. George Viles

The position occupied by Mr. Viles appears on the departmental organizational chart as the Chief of the Planning and Review Division within which is a three-person planning staff, the data processing section, containing four classified state employees, and the statistician, a classified state employee, as well as a secretarial position. Mr. Viles reports directly to the Acting Director of the Bureau of Administrative Services, Albert Anderson, his major task being to develop a coordinated mental health plan; secondary duties being the development of an accountability system for the provision of mental health services throughout the state, and licensing regulations in accordance with Chapter 183 of Title 34 of the Maine Revised Statutes. Employing the common law test, set out above, we are of the opinion that Mr. Viles is in an employer-employee relationship with the Department of Mental Health and Corrections. The functions which he carries out do not appear to be the appropriate subject matter of a contract with an independent contractor, his functions being such an integral part of departmental operations, particularly when viewed in terms of his supervision of state classified employees and the goals and objectives of the Department.

Monies used for this position originated from the Mental Health Program Improvement Fund as created by P.L. 1965, Chapter 503, §3, a council order having been obtained on April 9, 1975, (C.O. #230), the Statement of Fact of which states: "Supplementary grants for operational expenditures are made periodically to the mental health centers. This grant will permit expanded resources of the (Aroostook Mental Health Center) which will assist the service functions in the Department of Mental Health and Corrections." A grant was subsequently made to the Aroostook Mental Health Center in the amount of \$45,000, the purpose for which is illustrated in a letter from Dr. Schumacher to Robert Vickers, Executive Director of Aroostook Mental Health Center, dated April 17, 1975, from which we quote in part:

"I would like to clarify the arrangements in relation to our payment to you of the \$45,000 grant which is being processed... In receiving this grant, the Aroostook Mental Health Center agrees to hire a single administrative staff employee who will be assigned to the Department of Mental Health and Corrections, who will work within the Bureau of Mental Health or in programs of the Department involving the Bureau of Mental Health. By agreement, we have determined that the salary for this position will be equivalent to the State pay range 27, Step C which is \$17,383.60 annually, or a weekly rate of \$334.30. This position will be a full-time position with exclusive responsibilities in the Department of Mental Health and Corrections, and the incumbent will have his fringe benefits paid for by the Aroostook Mental Health Center on the same basis that other employees of your center enjoy... In the event of unsatisfactory work performance by this employee, it is understood that this employment with the Aroostook Mental Health Center will be terminated on the request of the Department of Mental Health and Corrections, with notice as defined in your Personnel Rules.

"Work assignment and job responsibilities will be determined by the Bureau of Mental Health and/or Department of Mental Health and Corrections and this employee will be based in Augusta, Maine..."

The subject grant was made for a two year period.

It is pertinent at this point to discuss the granting mechanisms available to the Department of Mental Health and Corrections. The Mental Health Program Improvement Fund as created by P.L. 1965, Chapter 503, §3, reads:

"All sums received by the Department of Mental Health and Corrections under section I shall be credited to a special revenue account in the Department of Mental Health and Corrections to be known as the Mental Health Program Improvement Fund. At least 50% of the sums in the fund shall be transferred, with the approval of the Governor and Council, to the Department of Health and Welfare to finance insofar as possible a liberalized definition of disability by including mental disease or disorder as a basis for eligibility for assistance. Sums remaining in the Mental Health Program Improvement Fund shall be utilized by the Department of Mental Health and Corrections, with the approval of the Governor and Council, for improvement of mental health programs."

The legislature has not set forth in such public law any enabling language relative to the granting authority of the Department of Mental Health and Corrections. Under the quoted law, the Department may define an intended use for Mental Health Program Improvement Fund monies. Such intent is then submitted to the Governor and Council and upon their approval, the Department may utilize the approved funds for the intended purpose. We are then left with the question as to how such funds may be channeled from the Department into a community mental health center other than through contracts for services with independent contractors. If the movement of such funds is to be undertaken through a grant, such undertaking can only be pursuant to 34 MRSA Chapter 183, for this is the only granting authority which the Department of Mental Health and Corrections has in connection with mental health programs, which authority predated the establishment of the Mental Health Program Improvement Fund. See P.L. 1961, Chapter 391. In order to make such grants, the Department is required to have an application from the mental health center and the grant would be made on the basis thereof. The provisions of this chapter circumscribe the agencies to which grants may be made and the purposes for which grant monies may be used.

"The department may make grants of funds to any entity described in this section applying therefor to be used in the conduct of its mental health services." 34 MRSA §2052.

The entities to which this language refers are "state agencies, municipalities, persons, unincorporated associations and non-stock corporations...(a)ny state department, municipality, other governmental unit or any branch thereof, or any composite thereof, through its authorized representative or governing body..." Section 2052 does not define "mental health services," however, it is our opinion that the following language contained within section 2052-A is applicable:

"The term 'agency for the provision of mental health services' as used in this section shall mean any agency maintained and operated...for the purpose of providing out-patient counseling and other psychological and psychiatric, diagnostic or therapeutic services and other allied services..."

The Aroostook Mental Health Center has made no application to the Department for the grant of monies used to employ Mr. Viles nor has it used the monies granted it for any of the purposes above set forth.

The creation of the position now occupied by Mr. Viles and the employment of a person in that position should be undertaken in conformity with the State Personnel Law and Rules and the employment authority of the Department of Mental Health and Corrections (34 MRSA §1). As to the grant to the Aroostook Mental Health Center of the monies which funded the Viles position, we believe that this is a nullity because it was not managed appropriately through the community mental health services statutory framework and because the monies are not being employed for the permitted purposes under 34 MRSA, C.183. We believe that the remaining monies should be recalled by the Department. We do not rule out the possibility that a person appropriately hired who deals exclusively with the mental health programs of the Department of Mental Health and Corrections might be funded from the Mental Health Program Improvement Fund.

### III. Steven Tselikis

Mr. Tselikis is employed within the team of planners under the direction of George Viles, Chief of the Planning and Review Division. His primary responsibility is as the Bureau of Mental Retardation Planner in the development of a departmental plan in conjunction with the other members of the planning team. Pertinently, the third member of the planning team is a state employee occupying the classified position of "Correctional Planner."

The monies used in the employment of Mr. Tselikis originated from the Mental Health Program Improvement Fund, a council order having been obtained on April 30, 1975 (C.O. # 276) which authorized "the payment of a grant to the Health Planning Council of Kennebec Valley, Waterville, Maine" in the amount of \$27,214. For the same reasons discussed in connection with George Viles, supra, with respect to the utilization of Mental Health Program Improvement Fund monies through a grant mechanism, the use of the establishment of the instant position is inappropriate. In addition to these infirmities, it should be noted that the Health Planning Council of Kennebec Valley is not an agency engaged in the provision of mental health services as previously defined and required by 34 MRSA Chapter 183. We rely for this conclusion upon the language in the corporate charter on file in the office of the Secretary of State

Again, for the same reasons discussed in connection with George Viles, Mr. Tselikis' position should have been secured through the State Personnel System, the employer-employee relationship clearly obtaining here. For the same reason as stated with respect to George Viles, the funds should be recalled by the Department of Mental Health and Corrections.

### IV. Frederick Slutsky

Although it is our understanding that Mr. Slutsky is not presently employed in the manner discussed below, we understand that the Department of Mental Health and Corrections is planning to contract with Mr. Slutsky for his services. We, therefore, consider it pertinent to advise the Department as to our findings and conclusions for the guidance of the Department in entering into a contract with Mr. Slutsky.

Mr. Slutsky was hired by the Commissioner to review the thirty-two existing departmental administrative policies and to review the statutes pertaining to the Department of Mental Health and Corrections and to recommend policy and statutory changes. Our observation of this individual indicates that he was assigned additional duties from time to time by the Commissioner which indicate an additional important function of his employment was as a "troubleshooter" operating out of the Commissioner's office. Technically, Mr. Slutsky

reported to the Acting Director of the Bureau of Administrative Services, however, his daily communications with the Commissioner indicated a direct responsibility to that officer. There is no comparable position in the state classified service and no attempt was made to create such a position. The funding mechanism for the position was the use of Mental Health Program Improvement Fund monies as authorized by Council Order No. 276, the same council order discussed with reference to Mr. Tselikis, supra.

For all of the reasons stated in connection with Mr. Tselikis, the funding mechanism employed with respect to Mr. Slutsky was inappropriate and, in addition, an examination of the Statement of Fact of Council Order No. 276 reveals that the functions carried out by Mr. Slutsky were not within the contemplation of Council Order No. 276. It is arguable in connection with the past employment of Mr. Slutsky that the services of an independent contractor could have been obtained by contract for the purposes of review and recommendation in connection with departmental policies and statutes of the Department provided that the means by which such review and recommendation were undertaken were outside of the control of the Commissioner of Mental Health and Corrections or his delegate. However, Mr. Slutsky's additional functions as a "troubleshooter" for the Commissioner clearly are not within the contemplation of the functions of an independent contractor. Again, the funds utilized in connection with this position should be recalled by the Department of Mental Health and Corrections.

V. Ned Vitalis

Mr. Vitalis was initially hired by Albert Anderson, Director of the Bureau of Mental Retardation to inventory community resources for the mentally retarded and to establish a career ladder for employees of the Pineland Center. His employment during the period from July 1, 1974, to June 30, 1975, was accomplished through the mechanism of a contract between the department and the Pine Tree Society for Crippled Children and Adults, Inc., and the authorization for his continued employment is unknown. The department has prepared a proposed contract between itself and the aforementioned agency for the period of July 1, 1975, through June 30, 1976. The proposed contract, which is being held by this office, would be the mechanism for the payment of Mr. Vitalis. Throughout this employment, Mr. Vitalis has reported to the Director of the Bureau of Mental Retardation and we are informed that at the present time, his work is assigned to him by the Bureau Director, Mr. Vitalis acting in the nature of the Assistant Bureau Director. The organizational chart of the Department of Mental Health and Corrections identifies Mr. Vitalis as the "planning coordinator" of the Bureau and lists the position of Deputy Director as being vacant. It is, therefore, somewhat unclear as to the exact responsibilities of Mr. Vitalis in his current employment. The monies used to fund the contract in effect until June 30, 1975, originated from Account No. 4360-2001, identified by the department as the Mental Retardation Improvement Fund. The proposed contract monies would originate from Account No. 4360-2001-4099, identified by the department as the Mental Retardation Improvement Fund.

Applying the test to determine the existence of an employer-employee relationship, it appears that such relationship exists in connection with Mr. Vitalis and the Department of Mental Health and Corrections. The position presently occupied by Mr. Vitalis should have been filled in accordance with Personnel Law and Rules and 34 MRSA §1.

We face a new problem in connection with a determination of the propriety of the funding mechanism. As cited above, the funds used came from an account designated by the Department of Mental Health and Corrections as the



Mental Retardation Improvement Fund. We are advised that this fund is comprised solely of monies received from the Pineland Center as Medicare and Medicaid payments. The allocation of such funds and use thereof is solely controlled by P.L. 1965, Chapter 503, §3. The fund created by such section as has been heretofore referenced, is the Mental Health Program Improvement Fund. There is no legal authority for the establishment of a Mental Retardation Improvement Fund and no legal authority for the utilization of what should be a part of the Mental Health Program Improvement Fund for the purposes of mental retardation. The Legislature has clearly separated the two functions of the Department of Mental Health and Corrections, the separate Bureaus of Mental Health and Mental Retardation being established respectively in 34 MRSA §2001 and 34 MRSA §2061. Further, the Legislature has clearly separated the grant functions of these bureaus. (See 34 MRSA §2051 et seq. and 34 MRSA §2095 et seq.) Although the legislative separation of mental retardation and mental health matters has expanded in recent years, the Legislature had clearly manifested its intent to treat separately mental health and mental retardation prior to the enactment of P.L. 1965, Chapter 503, §3. This intent is evident in 34 MRSA §2251 sub-§5 wherein the definition of mentally ill individuals specifically excludes the mentally retarded, and in 34 MRSA §2151 wherein the resident population of the then Pineland Hospital and Training Center was divided into two categories, the mentally ill and the mentally retarded. See also 34 MRSA §2003 which established the committee on mental health and P. & S.L. 1965, Chapter 197 which reactivated the Maine Committee on Problems of the Mentally Retarded. Therefore, the legislative design that mental health and mental retardation matters be separate is clear. The funds in this instance are from an improper source and are utilized for an improper purpose. We advise abolition of the Mental Retardation Improvement Fund and the transfer of any monies presently in that fund to the Mental Health Program Improvement Fund.

VI. Jules Goudreau

Mr. Goudreau functions as an industrial engineer within the Central Office of the Department of Mental Health and Corrections. His employment began on July 1, 1975, and will terminate on June 30, 1976, unless otherwise extended. Mr. Goudreau's functions are to effect a complete review of management practices in the Central Office, the various state institutions and the mental health centers. He reports to the Acting Director of Administrative Services. The source of the funds to employ Mr. Goudreau are identified within a memorandum from Albert Anderson, Jr., Acting Director of the Bureau of Administrative Services to Lowell Hawes of that bureau, dated June 11, 1975:

"In order to employ Mr. Goudreau from July 1, 1975, to June 30, 1976, the following steps must be taken. 1) \$7,500 from the Mental Health Program Improvement Fund, 2) \$7,500 from the Mental Retardation Improvement Fund, 3) \$7,500 from Indirect Costs, accumulated through Mental Retardation grants.

These monies are to be made available to the Kennebec Valley Mental Health Center. Develop a letter of agreement which provides a salary of \$18,000, 15% fringe benefits, 7% Indirect Costs, and \$1,000 in travel.

The purpose for reducing the Indirect Cost monies accumulated through Mental Retardation is that this is the only fund that

we have that would allow us to immediately purchase necessary equipment. As is well known, there is no money in Central Office as such."

Investigation reveals to date no "agreement" or contract exists between the Department of Mental Health and Corrections and the Kennebec Valley Mental Health Center for the stated purpose. Mr. Goudreau is being paid, however, by the Kennebec Mental Health Association (a/k/a Kennebec Valley Mental Health Center). An investigation indicates that a verbal agreement exists between the Association and the Department to this end.

The Anderson memorandum indicates that \$7,500 of the monies to fund this position were to come from the Mental Health Program Improvement Fund. We find no council order to support the use by the department of such amount from the Mental Health Program Improvement Fund as required by P.L. 1965, Chapter 503, §3. In addition, it is clear from the responsibilities assumed by Mr. Goudreau that his functions diverge significantly from functions which could be classified as "the improvement of mental health programs" as required by said law.

The Anderson memorandum also indicates that \$7,500 of the monies used with respect to this position would come from the Mental Retardation Improvement Fund, the illegality of which was addressed under V, supra, the same reasoning applying here. With respect to the remaining \$7,500 referred to in the Anderson memorandum as coming from "Indirect Costs" the funds in this account are earned by the Department of Mental Health and Corrections through the administration of programs funded from federal sources. The "Indirect Costs" monies being funds earned by the department are in the nature of revenue, the receipt and disposition of which are controlled by statute and the Maine Constitution as quoted below.

"Every department and agency of the State, whether located at the Capitol or not, collecting or receiving public money, or money from any source whatsoever, belonging to or for the use of the State, or for the use of any state department or agency, shall pay the same immediately into the State Treasury, without any deductions on account of salaries, fees, costs, charges, expenses, refunds, claims or demands of any description whatsoever..." 5 MRSA §131.

"No money shall be drawn from the Treasury, except in consequence of appropriations or allocations authorized by law." Constitution of Maine, Article V, part 4, section 4.

We find no special revenue account created by law and designated "Indirect Costs" or designated in a manner so as to contemplate the treatment of the monies received into the "Indirect Costs" account in the manner undertaken by the Department of Mental Health and Corrections. Absent a special revenue account created by law, we are of the opinion that the funds earned by the Department of Mental Health and Corrections incident to the management of federal grant funds are revenue to the State of Maine and should be deposited in the General Fund pursuant to the last mentioned statutory authority. Any disposition of which following deposit would be required to be in accordance with law as mandated by the last mentioned constitutional provision. We find no pertinent law dealing with the dispositions of such revenues. We distinguish the nature of the funds earned on federal grants as above discussed from federal grants the funds of which may be deposited in the grant accounts set up for the

purpose of the administration of the two grant programs of the Department of Mental Health and Corrections; (Mental Health - 34 MRSA, Chapter 183; Mental Retardation - 34 MRSA, Chapter 184-C).

It appears that the responsibilities vested in Jules Goudreau are those which may well be undertaken by an independent contractor. There is no contract respecting Mr. Goudreau. We suggest that once on appropriate funding source is found, the department might enter directly into a contract with Mr. Goudreau for the provision of the services which we understand he is presently rendering.

The funds which underwrite the Goudreau employment should be recalled by the department. We advise that the "Indirect Costs" account be dissolved and all monies contained therein be deposited in the General Fund to which we have previously referred. Any funds in the so-called Mental Retardation Improvement Fund should be removed therefrom, the fund dissolved and the monies paid into the Mental Health Program Improvement Fund. We were unable to discover whether the Mental Health Program Improvement Fund monies directed to be allocated for Mr. Goudreau's project have been allocated therefor, the absence of a council order being evidence that they have not. If they have, those monies should be recalled.

#### VII. Harold Siefken

Mr. Siefken is in a staff position in the Aftercare Services Division of the Bureau of Mental Retardation as indicated on the organizational chart of the department. Mr. Siefken was hired by the Acting Director of the Bureau of Mental Retardation to whom he is directly responsible. His duties include re-writing Title VI contracts for the bureau; writing Title XX plans with George Viles and Steven Tselikis. Mr. Siefken identifies his job to be Assistant Director of Social Services. The position of Director of Social Services being vacant, Mr. Siefken is acting in that capacity in addition to the following duties: Coordinator of the Traveling Trainor program of the Bureau (includes consulting with and providing direction although not supervision of 12 paraprofessional staff in the communities of the state); assisting the Director of Social Services for the Bureau in coordinating and consulting with the approximately 42 staff persons of the aftercare system in the various communities of the State (he informs us that these people are hired by and could be fired by the Bureau Director, although they nominally work for the mental health centers in which they are physically located). There is no comparable position in state service and no attempt was made to create such a position through Personnel. From the period dating July 1, 1974, until June 30, 1975, a contract existed between the department and Health Planning Council of Kennebec Valley to "evaluate, coordinate, plan and develop projects whose objectives would be the provision of needed health and social services that will have a significant impact on upgrading rehabilitative programs available to the mentally retarded and the disabled statewide..." (Rider A). The contract was in the amount of \$58,481 the source of the funds being the Mental Retardation Improvement Fund. The department informs us that in addition to Mr. Siefken, Mr. Eldridge Dumont was employed with these monies. Investigation reveals that Mr. Siefken started work on May 1, 1975, and the Acting Director of the Bureau of Administrative Services has informed us that the mechanism by which he is employed is the above-mentioned contract. The department has prepared a contract in the amount of \$17,654.12 with the Health Planning Council of Kennebec Valley which is currently

being held in this office, having been forwarded to us for approval as to form. The monies proposed to be used to fund this contract will also be used to employ Eldridge Dumont, discussed infra. They include monies from the so-called Mental Retardation Improvement Fund, previously discussed.

It seems clear that Mr. Siefken is in an employer-employee relationship with the Department of Mental Health and Corrections, basic elements of the common law test obtaining here. In view of Mr. Siefken's duties as he related them, it does not appear that he could be employed as an independent contractor. We recommend that the department seek the creation of his position through the Personnel System. No monies have yet been expended by the department for the employment of Mr. Siefken since July 1, 1975, and we advise that no monies be expended for such purpose. Returned herewith is the proposed contract.

#### VIII. Eldridge Dumont

Mr. Dumont was originally hired in the fall of 1974, his principal duty being to assess the dental needs of and develop a plan to provide dental services to the residents of the Pineland Center and the mentally retarded in the boarding and nursing homes throughout the state. He was originally hired by Dr. Anderson, Director of the Bureau of Mental Retardation and he currently works for Dr. Kevin Baack, Acting Director of the Bureau of Mental Retardation. The source of the funds used to employ Mr. Dumont appear to be Mental Retardation Improvement Fund monies which as discussed, supra, are in reality funds belonging to the Mental Health Program Improvement Fund. The underlying contract which provided the mechanism for the employment of Mr. Dumont from the fall of 1974, until June 30, 1975, appears to have been the contract discussed in VII, supra. In addition, on October 10, 1974, the department sought and received Council Order #2038, which authorized the department to expend \$15,000 from the Mental Health Program Improvement Fund in order to provide "funds for the payment of a grant to Health Planning Council of Kennebec Valley for a dental needs survey..." The department appears to have earmarked \$10,500 of the \$15,000 authorized by the Governor and Council to the dental needs survey grant. It is unclear at this time whether the mechanism used for the employment of Mr. Dumont was the aforementioned contract or a grant to the Health Planning Council of Kennebec Valley. If the latter, support for which is the aforementioned council order, there exists no application on file from the Health Planning Council of Kennebec Valley. We have been informed by the Acting Director of the Bureau of Administrative Services that a contract is being prepared between the department and the Health Planning Council for the employment of Mr. Dumont from July 1, 1975, through the end of this calendar year. The principal duties of Mr. Dumont are to evaluate the dental needs of clients served by the Mental Health and Corrections system and to supervise the implementation of the Pineland Center's dental needs plan. There is no comparable position within the State Personnel System and no attempt was made to create such a position. It appears, however, that in view of the stated functions to be carried out by Mr. Dumont, the elements which give rise to the employer-employee relationship might be removed and Mr. Dumont hired as an independent contractor to perform the services above described.

The proposed contract to fund the employment of Mr. Dumont, as well as Mr. Siefken, has been discussed in VII, supra. Inasmuch as the principal monies to fund this contract are from the illegal Mental Retardation Improvement Fund, the department will have to ascertain whether monies exist which may legally be used to employ Mr. Dumont as an independent contractor, as recommended.

IX. Dr. Albert Anderson

On September 2, 1974, the classified position, Director, Administrative Services (Department of Mental Health and Corrections) became vacant. This is a competitive position and, in accordance with the Personnel Rules, appropriate steps were taken to establish an eligible register for this position which was done in the Department of Personnel on or about December 4, 1974. Appointment to the vacant position is controlled by 5 MRSA §672 and Personnel Rules 8.1 et seq. Records of the State Department of Personnel show that the position in question remains vacant and that the eligible register created following examination relative to this position, has not been certified.

In March, 1975, Dr. Albert Anderson was designated by the Commissioner of Mental Health and Corrections as the Acting Director of Administrative Services and presently functions in that capacity. According to records of the State Department of Personnel, Dr. Albert Anderson holds the classified position, Director of the Bureau of Mental Retardation (Department of Mental Health and Corrections).

Although it is our understanding that since the appointment of the present Commissioner of Mental Health and Corrections, plans have been in process to reorganize the Department of Mental Health and Corrections, we are of the opinion that such fact does not obviate the necessity to comply with the requirements of the Personnel Law and Rules and, ultimately, to effect such reorganization in accordance with such law and rules.

As previously stated in this opinion, the appointing authority of the Commissioner of Mental Health and Corrections (34 MRSA §1) must be exercised in accordance with the Personnel Law with limited exceptions not pertinent here which relate to certain appointments to unclassified positions. The Personnel Law and Rules previously cited and pertinent here are:

"Positions in the classified service shall be filled by original appointment, promotion, transfer, reinstatement or demotion in pursuance of rules and regulations established by the Board and administered by the Director." 5 MRSA §672. (See also Personnel Rule 8.1)

"Upon receipt of request for an employee the Director" (of Personnel) "shall certify the proper number of names from the appropriate eligible register or authorize some other kind of appointment as provided in these rules. No appointment except an emergency appointment shall be made without such certification or prior authorization..." (Emphasis supplied) Personnel Rule 8.2.

- "An emergency appointment is an appointment for a period of not exceeding 30 days made under conditions necessitating immediate action to provide for carrying on work that must be continued in the public interest. The Director shall not approve successive emergency appointments nor shall he approve more than three emergency appointments for one person within one calendar year. Prior approval shall not be required in the case of emergency appointments, but each such appointment shall be reported to the Director the day it is made..." Personnel Rule 8.6

We find no provision in the Personnel Law or Rules which provides for "acting" appointments in the classified service and conclude that the appointment by the Commissioner of Albert Anderson as the "Acting Director of Administrative Services" was illegal and that this position should be filled in conformity with the Personnel Law and Rules.

Dr. Anderson performs no services for the State within his job classification, Director of the Bureau of Mental Retardation (Mental Health and Corrections) and paying him for services not performed constitutes violations of State Statutes and Personnel rules; viz., 5 MRSA §§ 11 and 741, possibly 17 MRSA § 1603-A and Personnel Rule 14.5 (a).

The investigation undertaken by this office at your request was facilitated by the full cooperation of the staff of your department. The salient feature of our findings in our judgment is the repeated clear violation of the State Personnel Law and Rules; and we advise the Department to take immediate steps to bring its practices into conformity with the Personnel Law and Rules.

Joseph E. Brennan  
Joseph E. Brennan  
Attorney General