

MAINE STATE LEGISLATURE

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STATE OF MAINE

Inter-Departmental Memorandum Date November 25, 1975

To James E. Mitchell, Director Dept. Maine State Housing Authority
Joseph M. Hochadel, Assistant to Executive
Governor
From Martin L. Wilk, Deputy Dept. Attorney General
Subject Maine State Housing Authority - Temporary Deputy Commissioner

This will respond to your joint memorandum dated November 17, 1975, raising several questions with respect to the matter referred to above.

Your primary question is whether the Governor has power to appoint a Temporary Deputy Commissioner to exercise the powers and duties of the Director of the Maine State Housing Authority pursuant to 5 M.R.S.A. § 1, which provides, in pertinent part, as follows:

"In order to provide for the uninterrupted and orderly functioning of an Agency, Board, Commission or Department of the State government during a vacancy in the office of the appointive or elective head thereof and whenever there is no State official, deputy, assistant or other state employee duly authorized by law to exercise the powers and perform the duties of such appointive or elective head during such vacancy, the Governor is empowered to appoint a temporary deputy commissioner to exercise the powers and perform the duties of the appointive or elective head of such office during such vacancy."

For the reasons which follow, it is our opinion that this statute does provide the Governor with authority to temporarily fill a vacancy in the position of Director of the Maine State Housing Authority by appointment of a Temporary Deputy Commissioner.

The express purpose behind 5 M.R.S.A. § 1 is "to provide for the uninterrupted and orderly functioning of an Agency, Board, Commission or Department of State government. . . ." When there is no official authorized by law to exercise the powers of a vacant office, it is necessary that some State official be vested with power to fill such vacancies in a manner which will clothe such temporary appointees with the requisite power and authority to carry out the duties and responsibilities of the office. This power has, quite logically, been placed in the Governor. Since the Governor holds the power to appoint a permanent Director, it would be reasonable to conclude that he also possesses a lesser power to make temporary appointments pursuant to 5 M.R.S.A. § 1 when necessary.

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The Maine State Housing Authority is "a body corporate and politic and an instrumentality of the state." 30 M.R.S.A. § 4601-A. Pursuant to 30 M.R.S.A. § 4782 the Authority has been designated "the state agency responsible for implementing the powers provided by the Constitution in Article IX, section 14-D" relating to the Indian Housing Insurance Program. The Authority consists of 5 Commissioners, all appointed by the Governor. 5 M.R.S.A. § 4601-A. Although it is true that for certain purposes the Authority is to be considered a separate and distinct autonomous body [see Maine State Housing Authority v. Depositors Trust Company, 278 A.2d 669 at 707 (1971)], relating to power to issue bonds beyond constitutional debt limitations, we conclude that the Authority is an "Agency, Board, Commission or Department of State government" within the meaning of 5 M.R.S.A. § 1.

Whether an actual vacancy will exist which would call for the operation of the statute upon the effective date of the resignation of the present Director presents a different question. The Authority's Bylaws, as amended subsequent to the request for this opinion, provide that upon the resignation of the Director, a staff official previously designated by the Director shall exercise the powers of the Director pending appointment of a new Director or an interim appointment under 5 M.R.S.A. § 1. That Bylaw provides:

"Sec. 3.08 Administrative

"In the event that the Director resigns, he shall appoint and designate from among the Staff Officers, a person who shall assume administrative control of the obligations of the Authority, including all powers and duties conferred upon the Director by the laws of Maine.

"In the event of the death, absence or disability of the Director, and in the absence of the Director's written delegation of his powers and duties, the Assistant Director for Finance and Special Programs, or, if the position of Assistant Director for Finance and Special Programs be vacant, the Assistant Director for Housing Development and Management, shall assume administrative control of the Authority, including all powers and duties conferred upon the Director by the laws of Maine.

"All delegations and appointments authorized by this Section shall cease upon the appointment and confirmation of a new Director, or when other steps shall have been taken in accordance with the laws of Maine to provide for the continuing functioning of the Authority."

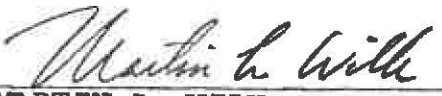
It is not altogether clear that a Director may effectively delegate all his power in anticipation of his own resignation. If § 3.08

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of the Bylaws does effectively establish an "official, deputy, assistant or other state employee duly authorized by law to exercise the powers and perform the duties of such appointive or elective head during such vacancy. . . ", there would be no necessity for the Governor to appoint a Temporary Deputy Commissioner pursuant to 5 M.R.S.A. § 1.

However, Section 3.08 of the Bylaws specifically provides another alternative - a vacancy in the position of Director may be temporarily filled by taking such "other steps. . . in accordance with the laws of Maine to provide for the continuing functioning of the Authority." Since the Bylaws themselves refer to this alternative method of temporary succession, and since 5 M.R.S.A. § 1 provides explicit authority for the Governor to act in such instances, the more prudent course may be for the Governor to exercise his powers under 5 M.R.S.A. § 1.

In view of our answers to the foregoing questions, we trust that there is no occasion at the present juncture to discuss the other questions raised in your memorandum. If, however, you desire advice on any of the other questions raised and can provide us with more specific information with respect to the general questions which you have asked, we would be pleased to consider the matter more closely and provide whatever additional assistance we can.


MARTIN L. WILK
Deputy Attorney General

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