

# MAINE STATE LEGISLATURE

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W. J. Kelleher J. E. B.

DEPARTMENT OF THE ATTORNEY GENERAL

Memo From

WILLIAM J. KELLEHER  
ASSISTANT ATTORNEY GENERAL  
COUNSEL, MENTAL HEALTH & CORRECTIONS



Date: 4 December 1975

To: Kevin C. Baack, Ph.D., Assistant Director Dept: Bureau of Mental Retardation

Subject: Classified Position, "Director of the Bureau of Mental Retardation"

SYLLABUS:

The legislature has mandated that there be a Director of the Bureau of Mental Retardation and the current vacancy in that position must be filled in accordance with the Personnel Law and Rules. Pending a regular appointment to the position under the Rules, the Commissioner of the Department of Mental Health and Corrections should fill the position through an emergency or provisional appointment or through a combination thereof.

FACTS:

The classified position, "Director, Bureau of Mental Retardation" has been vacant since October 31, 1975, the effective date of the resignation of the last person to hold the position. Effectively, the position has been vacant since March 28, 1975, the date the last Director ceased to perform the duties of that position and assumed other administrative duties within the Department of Mental Health and Corrections. (See September 18, 1975 opinion of this office to Commissioner of Department of Mental Health and Corrections). The Assistant Director of the Bureau of Mental Retardation asks two questions with respect to the vacant position.

QUESTIONS:

1. Is the position of Director of the Bureau of Mental Retardation mandated by law to be filled? Yes.
2. If the answer to the first question is in the affirmative, by what mechanism may the position of the Director of the Bureau of Mental Retardation temporarily be filled pending appointment pursuant to the Personnel Rules and Laws? See Reasons.

REASONS:

1. Section 2062 of Title 34 of the Maine Revised Statutes provides, in part, that "The Commissioner of the Department of Mental Health and Corrections shall appoint, subject to the Personnel Law, a Director of the Bureau of Mental Retardation..." (Emphasis supplied). The Legislature has provided funds for the payment of a salary in connection with this position for the fiscal years of 1975-

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1976 and 1976-1977. See P&S 1975, Chapter 78 and the Allotment Requests for personal services money to fund 56 non-institutional positions within the Department of Mental Health and Corrections. An additional part of the legislative mandate that an appointment be made to the position in question is found in 18 MRSA Chapter 501, Subchapter III-A, which creates the public guardianship function of the Bureau of Mental Retardation. Pertinently, 18 MRSA §3622, provides that, "(t)he authority of the public guardian shall be exercised by the Director of the Bureau of Mental Retardation..." Presently, there are numerous mentally retarded wards under this public guardianship.

The legislative mandate that the position of the Director of the Bureau of Mental Retardation be filled by appointment pursuant to the Personnel Law is clear. We answer your first question in the affirmative.

2. The mandated appointment "shall be made pursuant to the Personnel Law." (34 MRSA §2062). There is no mechanism to effect an appointment of any person to that position except in conformity with the Personnel Law and the Rules promulgated thereunder. However, Personnel Rule 8.6 does provide for an emergency appointment, not to exceed 30 days in duration, whenever a vacancy occurs and conditions exist which necessitate immediate action to provide for carrying on work essential to the public interest. Such an appointment is made pending a regular appointment to the position. Rule 8.6 provides, in part, that, "Prior approval (from the State Personnel Director) 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..." This office understands that the Commissioner of the Department of Mental Health and Corrections has, since the vacancy occurred in the position under discussion, attempted, unsuccessfully, to fill the vacancy through a regular appointment. We, therefore, see no impediment within Rule 8.6 to the Commissioner of the Department of Mental Health and Corrections making an emergency appointment to this position.

Personnel Rule 8.7 provides for a provisional appointment to a vacant position. That rule provides, "When authorized by the (State Personnel) director in the absence of an appropriate eligible register, a provisional appointment of a qualified person may be made to fill a vacant position. Such an appointment shall be terminated upon expiration of 6 months or upon certification and appointment from an eligible list, whichever occurs first...The appointing authority, in nominating a person for provisional appointment, shall transmit to the director a statement of qualifications of the nominee, in such form as the director shall prescribe..."

We advise that the Commissioner of the Department of Mental Health and Corrections, pursuant to the mandate of the legislature, pending a regular appointment to the vacant position to the Director of the Bureau of Mental Retardation, fill that position pursuant to the provisions of either Rule 8.6, Rule 8.7, or a combination thereof. We note the request for this opinion originated from Kevin Baack, Ph.D., Acting Director of the Bureau of Mental Retardation. Dr. Baack occupies the classified position of Assistant Director of the Bureau of Mental Retardation. His functioning in an "acting" capacity so-called, as Director of the Bureau of Mental Retardation is not in conformity with the Personnel Law and Rules as above set forth.

  
William J. Kelleher

Assistant Attorney General

# STATE OF MAINE

Inter-Departmental Memorandum Date 12/2/75

Messieurs Perry and Kelleher

Dept. Mental Health and Corrections

*KCB*  
From Kevin C. Baack, Ph.D., Acting Director

Dept. Bur. of Mental Retardation

Subject Legal opinion

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In the Commissioner's absence, I am referring these questions to you directly.

1. Is the position of Director of the Bureau of Mental Retardation mandated by law to be filled?

2. If the answer to the first question is in the affirmative, by what mechanism may the position of the Director of the Bureau of Mental Retardation temporarily be filled pending appointment pursuant to the Personnel Rules and Laws?

KCB:cc