

MAINE STATE LEGISLATURE

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January 19, 1976

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Environmental Protection

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Attorney General

By memorandum of August 11, you ask a number of questions concerning the interpretation of Chapter 539 of the Public Laws of 1975. Some of these questions appear to arise out of the activities of people who left the Department of Environmental Protection prior to the effective date of Chapter 539. An opinion of this office for the Public Utilities Commission concluded that Chapter 539 does not apply to persons who left State service before its effective date. Since this opinion disposes of the specific cases you raise, we will not attempt to determine whether those activities would have been covered by Chapter 539 had the employees involved left State service after its effective date. We will attempt to answer your other questions to the extent the facts available permit.

1. "Are members of the Board of Environmental Protection considered State employees within the meaning of this statute?"

Yes. The only individuals covered by the statute are members of the "classified or unclassified service" who are "employed" by an executive agency. 5 M.R.S.A. §15-1. Members of the Board of Environmental Protection are members of the unclassified service as defined in 5 M.R.S.A. §711-3. Further the Board members are for the purposes of this statute to be considered "employed" because they are clearly in the unclassified service and they provide services for compensation to a state agency that is not semi-independent such as the Maine Guarantee Authority. This opinion should not, however, be construed to hold B.E.P. members state employees for any matter not addressed herein. The key factor here is their status in "unclassified service."

2. You have asked three questions with respect to Assistant Attorneys General assigned to represent the Department of Environmental Protection while serving as such. Because of the variety of conditions under which representation may occur, we cannot provide precise answers to your questions outside the context of a particular case. The following general observations may, however, be helpful. The questions, matters or cases with respect to which Assistant Attorneys General counsel or represent the Department of Environmental Protection are subject matter directly within their official responsibilities. It does not necessarily follow, however, that all of the activities of a department are subject matter within the official responsibilities of every Assistant Attorney General who represents or advises that department. Because the language of Chapter 539 is somewhat indefinite, such questions will have to be resolved on the basis of the facts and circumstances of each case.

Comparison with the analagous federal statute, 18 U.S.C. § 207(a), may help to illustrate the intended breadth of the term "subject matter." The structure of the two statutes is sufficiently similar to suggest that the federal statute was, in part, a model for Chapter 539. The federal act, however, restricts former employees only with respect to a "particular matter involving a specific party" and a matter in which the employee "participated personally and substantially." It seems that the Maine Legislature intended a broader prohibition. Thus, the federal ban becomes operative only if the former employee's work involves the same parties as were involved in matters he worked on while employed by the government. The Maine statute may ban participation by a former employee even when the same parties are not involved.

4. You also ask whether a particular federal program, which is directly carried out by a technical staff member and is within the general responsibility of a division leader, is "subject matter at issue . . . directly within" the official responsibilities of both. We believe it is, but cannot determine whether Chapter 539 would apply to the activities of any such former division leader or technical staff person outside the context of a specific case.

5. You have also asked whether Chapter 539 prohibits former employees from acting for parties other than the State outside the context of a "proceeding". Communication and liaison between a regional planning commission and the Department of Environmental Protection may not always involve a "proceeding." "Proceeding" is not, however, necessarily restricted to public hearings or meetings with the Board. It may extend to any process by which the Department or the Board reaches a decision on particular issues of law, fact, or policy within its jurisdiction. Thus, approval of a specific regional plan may involve a "proceeding", while continuing liaison for the coordination of various activities designed to carry out the plan might not. The evident purpose of the statute was to prevent the misuse of confidential information and the application of undue influence to decision making processes in State government. The word "proceeding" will undoubtedly be given content in particular cases by reference to the statutory purpose.

6. Finally, you ask whether there is any statutory responsibility of a department that is not a matter in which "the State is a party or has direct and substantial interest", and whether the State's interest extends to the Department's responsibility under federal laws such as P.L. 92-500.

State agencies may be presumed to have direct and substantial interest in all areas where they exercise statutory responsibilities. The only questions under this paragraph would come regarding proceedings where the State was participating as a discretionary matter such as a court challenge to a federal law. As the Department of Environmental Protection has state statutory authority parallel to that of Public Law 92-500 and as the Department works closely with the federal government implementing the federal law, it would appear that the Department of Environmental Protection has a clear, direct and substantial interest in all of the activities which it undertakes in furtherance of the Federal Water Pollution Control Act, the Clean Air Act, and other federal laws which the Department aids in implementation.

JEB:jg