

MAINE STATE LEGISLATURE

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STATE OF MAINE

Inter-Departmental Memorandum Date May 10, 1976

To Lee M. Schepps, Director

Dept. Bureau of Public Lands

From David T. Flanagan, Assistant

Dept. Attorney General

Subject Scalers

The Bureau of Public Lands has asked for an opinion of this Department as to whether scalers may be appointed by the Director without adherence to the Personnel Laws.

Bureau of Public Lands requires the services of scalers from time to time for the purpose of measuring the quantity of wood cut under permits on public reserved land. Since permits are issued irregularly and the reserved lands are widely dispersed over the counties, the need for such service is sporadic.

QUESTION: May the Director of the Bureau of Public Lands appoint scalers under 12 M.R.S.A. §553(3) (H) without following the provisions of 5 M.R.S.A. §551, et seq.?

ANSWER: Yes.

REASONING: Three considerations govern this construction. The rules of statutory construction, legislative intent and administrative interpretation all result in the same conclusion when they are applied to the statute in question.

First, application of the rules of statutory construction underlines the distinction between civil service appointments in BPL and those of scalers. In Martin v. Piscataquis Savings Bank, 325 A.2d. 49, 51 (Me., 1974), the Supreme Judicial Court said

"Where two subsections of a statute are specifically embraced in a certain statutory procedure and a third subsection is omitted, we think it is a fair inference that the third section is excluded from the statutory procedure, unless there is an expressed legislative policy strong enough to encompass the excluded section."

An analagous inference arises from the arrangements of the statutes in this case.

12 M.R.S.A. §553(3)(H) authorizes the Director to "appoint, swear and reimburse surveyors or scalers." This subsection also describes the duties of such scalers, but it is silent as to the application of the Personnel Law, 5 M.R.S.A. §551, et seq. In contrast, the general authority of the director to hire personnel for the management of public lands is explicitly made subject to the Personnel Law. 12 M.R.S.A. §553(3)(B) provides he may "Appoint and remove the staff of the bureau, subject to the Personnel Law, and prescribe their duties as may be necessary to implement the purposes of this Chapter."

This distinction was deliberately created so as to make it clear that the director would have the flexibility to hire, with moneys deposited in the management funds, scalers when and where they were needed to effectively supervise cutting operations.

This segregation of general appointing authority and authority to hire scalers parallels the equivalent Forestry laws. 12 M.R.S.A. §701, relating to Bureau of Forestry scalers is likewise silent as to the application of the Personnel Law, but 12 M.R.S.A. §521 makes appointments of other Forestry personnel explicitly subject to the Personnel Law.

Second, with respect to Legislative intent, this provision was originally introduced at the 107th Legislature as a part of L.D. 930, which later became P.L. 1975, ch. 339.

In explanatory notes accompanying L.D. 930 distributed under the auspices of the Bureau of Public Lands to both the sponsors and all the members of the Joint Select Committee on Public Lands, note 46 stated, "12 M.R.S.A. §553(3)(H) permits the Director to appoint private scalers to supervise cutting permits when regular Bureau of Public Lands personnel are unavailable or the site is too remote for regular and economical access from Augusta.

The position taken by the authors was consistent with the legislative history of the provision, the development of which is entitled to "decisive weight" and the reversal of principles established thereby is to be done only when a clear intention to do so appears. Opinion of the Justices, 142 Me. 409, 60 A. 903 (1947); General Motors Acceptance Corp. v. Colwell Diesel Service and Garage Co., 320 A.2d 595 (Me., 1973).

The language of 12 M.R.S.A. §553(3)(H) closely parallels that of 12 M.R.S.A. §701 relating to the authority of the Director of the Bureau of Forestry to appoint scalers to measure wood in its custody.

12 M.R.S.A. §701 has come down virtually unchanged from P.L. 1860, ch. 183, §7, an act creating a statutory framework for the sale of timber on public lands. For at least 116 years* scalers have been appointed by the Land Agent, the Forestry Commissioner, and the Director of Public Lands as the need arose from among people available in the vicinity of the operation.

It is with this legislative history and the construction thereof given to the Legislature when the statute in question was enacted that construction must now be made.

This result is obtained notwithstanding the fact that scalers are not one of the classes of employees exempted from the classified service, 5 M.R.S.A. §671, by the provisions of 5 M.R.S.A. §711. As noted above, the position of scaler long antedated the establishment of the classified personnel system, P.L. 1937, c. 221 and the juxtaposition of the general employment laws of Forestry and Public Lands, with their otherwise unnecessary reference to the inclusion of some employees under the Personnel Laws, to their particular laws on scalers demonstrates a consistent pattern of retention of their special status.

Finally, with respect to administrative interpretation, the same history applies as well. In State v. Mottram 232 A.2d 809 (Me. 1967) the Supreme Judicial Court recognized that the construction which has been placed on the statutes by officers responsible for carrying out the law is to be accorded due consideration by courts construing the statute.

In this case both the Bureau of Public Lands and its predecessors, Forestry and the Land Agent, have consistently construed their authority to appoint scalers for public land timber to have been unencumbered by civil service rules.

In conclusion, both the recent and distant history of legislative and administrative construction of this provision and its predecessors, coupled with the application of the rules of statutory construction, justify a construction of 12 M.R.S.A. §553(3)(H) as empowering the Director of the Bureau of Public Lands to appoint scalers when and where they may be needed from time to time on his own authority and without review under 5 M.R.S.A. §551, et seq.

* See Report of the Land Agent 1861, p. 7, suggesting that the new Act had allowed him to permit timber cutting on severally, possibly dispersed, townships.