

MAINE STATE LEGISLATURE

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State Employees' Classified or Unclassified Service
5 M.R.S.A. § 671
5 M.R.S.A. § 711
20 M.R.S.A. § 2362

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July 15, 1977

To: Otto W. Siebert, State Budget Officer
From: Kay R. H. Evans, Assistant Attorney General
Subject: Interpretation of 20 M.R.S.A. § 2362

Your memo of June 9, 1977, requests an opinion on the interpretation of that part of 20 M.R.S.A. § 2362 which authorizes directors of vocational technical institutes to appoint policemen. You have asked whether the provision permits establishment of a position in the classified or unclassified service of the State. Reasoning from legislative silence, from general administrative and legislative practice and from assumptions apparent, albeit unstated, in the legislative debates on this particular section, we conclude that § 2362 permits the establishment of an unclassified position.

OPINION:

Section 2362 of Title 20 provides in relevant part:

The directors of the Maine vocational technical institutes may appoint persons to act as policemen. . . .

Obviously the section itself offers no clue to the proper resolution of the question whether the position created is in the classified or unclassified service. Relevant sections of the Personnel Law provide:

The classified service shall consist of all persons holding offices and employments now existing or hereafter created in the State service, except persons who are holding or shall hold offices and employment exempted by section 711. 5 M.R.S.A. § 671.

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and

The unclassified service comprises positions held by officers and employees who are: . . .

After this initial sentence of § 711 there follows a list of specific officers and positions, none of which encompass the position in question.

Taken together, §§ 671 and 711 would appear to indicate, quite straightforwardly, that the § 2362 position, because not within the § 711 list, is a classified position.

It would also appear that the designation of exemptions is a legislative prerogative, presently exercised in § 711 alone. The Legislature could, of course, perform this function in other ways and in fact it appears to have done so, for, according to the Department of Personnel and as becomes obvious on investigation, there exist in State service a large number of unclassified positions which do not appear in the § 711 list.

While no statute explicitly channels to any other person or body the authority to designate a position as classified or unclassified, and while no such authority is implicit in any general power to provide by rule or regulation for the management of State employees and the systems which structure their employment, in actual practice a kind of code system has evolved through which the Legislature is understood, by the Department of Personnel, to have signalled its intent with respect to a particular position. It appears to have become the general practice for the Legislature to include the phrase "subject to the Personnel Law" in a statute creating a new position when it intends that the position created should be within the classified service. The corollary of this is the general administrative practice by which the Department of Personnel treats as unclassified those new positions whose creating statute does not include the phrase^{1/} We do not know, nor is it of any real importance, whether the practice of equating the absence of the phrase with legislative intent to create an unclassified position began with the Legislature itself or with the administrative agency. Whatever its source, the practice has become a procedure on which both rely, and on which the Maine Court has on occasion drawn to support its reasoning, see Ross v. Hanson,

^{1/} Undoubtedly there exist actual instances in which these general practices have not been followed. Nonetheless, these appear to be the rules.

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227 A.2d 606 (Me., 1967) at 608.

It is clear that to interpret § 2362 in the light of §§ 671 and 711 alone, without reference to actual practice, would create a marked anomaly in the State services, though it is also clear that interpretation in the light of actual practice literally reverses the meaning apparent on the face of §§ 671 and 711. We are assisted in this particular case by evidence from the legislative record which indicates a legislative assumption that the position created by § 2362 would be an unclassified one.

The legislative debates on § 2362^{2/} and, in the previous session, on an analogous bill giving identical authority in identical terms to the Trustees of the University of Maine^{3/}, are devoid of reference to the branches of State service. However, the debates plainly show that the Legislature believed that the bills authorized employment of ~~private detective~~ or security agencies to provide the services indicated. This legislative understanding of the provision as permitting employment of private personnel, whose entry requirements, training, conduct and control would be regulated by contract or other agreement between the parties, is incompatible with the idea that the creation of a classified position, subject to State statutory and regulatory controls, was intended. Since we conclude that long standing administrative/legislative practice demonstrates that something more is required than mere creation of a position to evidence legislative intent to place that position in the classified service, and since the debates suggest something considerably less than the necessary intent, we conclude that § 2362 permits creation of an unclassified position.

However, we would caution that, in another case, where clear intent from the legislative history was lacking, it might be more difficult to avoid the specific mandates of sections 671 and 711. The Budget Bureau and/or the Department of Personnel may wish to seek legislative resolution of this conflict between statutory language and actual practice.



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cc: Robert J. Stolt

2/ L.D. 1294; Legislative Record, 1973, Vol. 2, pp. 2005-2009.

3/ L.D. 1547; Legislative Record, 1971, Vol. 3, pp. 1714-1718, 1946, 1951. L.D. 1547 was enacted and subsequently vetoed. The veto was sustained, but the provision was re-enacted, minus a provision not relevant here, as c. 544, § 142, P.L. 1971. The lack of intent to create a classified position by § 2362 may be further indicated by this analogous statute, since persons employed by the University of Maine are not in the state classified service.