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5 M.R.S.A. § 593
State Employment Appeal Boards
Personnel Appeal Board

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December 8, 1977

To: Robert Stolt, Commissioner of Personnel

From: Kay R. H. Evans, Assistant Attorney General

Subject: Conflict between 5 M.R.S.A. §593 and Chapter 427, P.L. 1977

Your memo of October 4, 1977 asks for an interpretation of 5 M.R.S.A. §593 in the light of the recent enactment of Chapter 427, P.L. 1977, which amended §593 by the addition of a new paragraph. With this addition, §593 now provides two time frames for certain appeals to the State Personnel Board. The question has arisen whether the time provision added by the amendment repeals that already provided in the statute.^{1/} Since there is no express repealing language, the issue is whether the amendment impliedly repeals the earlier provision. In my opinion, criteria laid down by the Maine Court for determination whether a statutory change effects an implied repeal of prior law indicates that the enactment of Chapter 427 does not have this result.

Opinion

Prior to its amendment in 1977, §593 of Title 5 provided:

Any employee or appointing authority aggrieved by the determination of the Director of Personnel concerning the classification of positions, the allocation of new positions or the reallocation of existing positions in the classified service may appeal from such determination to the State Personnel Board. Such appeal must be made within 30 days after receipt of written notice of such determination from the director. Such employee or

^{1/} Section 593 was enacted as Chapter 686, §3, P.L. 1975. It was amended once in the same year, in a manner not of consequence here. See Fn. 2, infra.

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appointing authority, or his representative, shall be afforded a public hearing before the board with an opportunity to present facts and arguments in support of or in relation to such appeal at a time and place and in such manner as may be prescribed by the board. The board shall examine and review such appeal and, upon the vote of at least 3 of its members, make such changes in classification, allocation or reallocation as may be just and equitable. Determinations of the board shall be transmitted to the State Budget Officer, the Director of Personnel and the employees and department heads affected thereby.

Any classification of a position and any allocation or reallocation of a position made by the director or the State Personnel Board pursuant to this section shall become effective on the first day of the fiscal year following approval by the State Budget Officer and the appropriation of funds therefor, except that the State Budget Officer may, if he determines that sufficient funds exist, authorize an effective date prior to the first day of the ensuing fiscal year.

Chapter 427, P.L. 1977, amended the section by adding a new paragraph:

Any request for classification of positions, the allocation of new positions or the reallocation of existing positions in the classified service or the unclassified service, shall be processed by the Director of Personnel and the director's determination made within 45 days from the date of filing the request with the Department of Personnel. Any employee or appointing authority that is a party to the request may appeal to the State Personnel Board within 10 days after the expiration of the 45 days allotted for the process of such requests for hearing and review. The board shall examine and review such appeal and make such changes as provided in this section. The board's decision in the appeal shall be given within 30 days after the hearing on the appeal, has been concluded.

The question has arisen whether the language of Chapter 427 which provides that "(a)ny employee or appointing authority that is a party

to the request may appeal to the State Personnel Board within 10 days after the expiration of the 45 days allotted for the process of such requests for hearing and review" impliedly repeals that part of the prior law which provides that "(a)ny employee or appointing authority aggrieved by the determination of the Director of Personnel^{2/} . . . may appeal from such determination to the State Personnel Board. . . (s)uch appeal must be made within 30 days after receipt of written notice of such determination from the director."

Repeal by implication occurs when a later statute covers the whole subject matter of an earlier statute so that it appears that displacement of the earlier was intended, Inhabitants of Eden vs. Inhabitants of Southwest Harbor, 108 Me. 489 81A, 10013 (1911), or when the two are so inconsistent and mutually repugnant that they cannot consistently stand together, Starbird v. Brown, 84 Maine 238, 24 A. 824 (1892), cited approvingly in State v. London, 162 A.2d 150 (Me. 1960), Blaney v. Rittall, 312 A.2d 522 (Me. 1973), Small v. Gartley, 363 A.2d 724 (Me. 1976). Where only some portions of prior and later enactments are inconsistent or repugnant, there may be repeal by implication to the extent of the conflict, State v. London, supra; State v. Bryce, 243 A.2d 726 (Me. 1968). Repeal by implication is not favored by the Maine Court, as clearly appears from all of the above cited cases. Nor for that matter is it favored by the majority of Court's and commentators.^{3/} Where possible, effect will be given to both the earlier and later provisions. State vs. London, supra, at 153, citing other cases.

In my opinion, the newly added provision does not cover the entire matter of the time in which appeals are to be taken in matters covered

2/ Chapter 766, § 4, P.L. 1975, substituted the Commissioner of Personnel where Director of Personnel appeared in the statutes.

3/ One commentator, however, observes that

The presumption against implied repeal runs directly counter to the real probability . . . that the purpose of new legislation is to change prior law, and in so doing to displace or repeal some part of it (emphasis in original). Sutherland Statutory Construction, v.1A, § 23.10 (1972).

by §593. It should be noted that the first sentence of the new paragraph establishes the time within which the Commissioner of Personnel must act on §593 requests. The effect of the second sentence is, in my opinion, to attach a consequence to any failure of the Commissioner to act within that time. Thus, the expiration of 45 days triggers the right of any "party to the request" to appeal to the State Personnel Board, which right must be exercised within 10 days. In contrast, the 30-day appeal period provided in the first paragraph commences with issuance of the Commissioner's notice of his determination of the request. The right of appeal where a written notice of determination has been issued is given only to an "employee or appointing authority aggrieved by the determination of the (Commissioner)." Thus, though both appeal time periods apply to the same kinds of requests for administrative determinations, each takes effect in a different factual context and gives rights of appeal to different individuals. Further, each requires different action of the State Personnel Board. Where there is a written notice of the Commissioner's determination, the Board's task is to review that determination. Where there is no written determination, the Board must essentially act de novo on the request itself.

The above analysis also leads me to conclude that the two time provisions are not inconsistent or mutually repugnant. Each clearly can remain operative despite the existence of the other; under the relevant rules of construction, effect must be given to both. In my opinion, the effect must be that described above: the Commissioner has 45 days to act on a request for "classification of positions, the allocation of new positions or the reallocation of existing positions." Where within that 45 days he issues a written notice of his determination, any employee or appointing authority aggrieved thereby has 30 days from the date of issuance to appeal the determination to the State Personnel Board. Where the Commissioner does not issue written notice of his determination within 45 days, after the 45 days expires any party to the request has 10 days in which to take the matter to the State Personnel Board.^{4/}

Kay R. H. Evans

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^{4/} I would add that even if it appeared that the addition of a new appeal time period were intended to repeal or had the effect of repealing the earlier time provision, in my opinion the result would not be to establish a requirement that appeals be filed within 10 days of the Commissioner's written decision, whenever issued, as provided by paragraph 2 of the State Personnel Board's Procedure for Appeals, a copy of which you have supplied. Rather, the effect would be to require that an appeal be filed within 10 days of the expiration of the 45 day period, regardless of whether or when the Commissioner issued his written determination. Because it is my opinion that no repeal has occurred in this instance, I do not adopt this interpretation.