

MAINE STATE LEGISLATURE

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*Legislation State Officers Running for Office
State Officers Running for Legislature
see Const Art III*

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DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

February 6, 1978

Mrs. Sylvia Lund
65 Stone Street
Augusta, Maine 04330

Dear Mrs. Lund:

You have asked our opinion whether a member of the Board of Environmental Protection may run for the office of State Representative and simultaneously remain a member of the Board. You have stated that if elected you would resign from the Board; your question is limited to the time between an announcement of candidacy and election. Our answer is that you may seek election to the Maine House of Representatives and remain a member of the Board.

Existing constitutional and common law prohibitions relate to exercising the powers of incompatible offices, not with holding one office and seeking election to an incompatible office. Existing statutory prohibitions affect only members of the classified service, not members of the unclassified service.

The Constitution of Maine, Article III, Section 1 provides:

The powers of this government shall be divided into three distinct departments, the legislative, executive and judicial.

As a member of the Board of Environmental Protection you exercise powers belonging to the executive branch of our government. Members of the House of Representatives exercise powers belonging to the legislative branch.

The Constitution of Maine, Article III, Section 2 provides:

No person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directly or permitted.

The Constitution of Maine, Article IV, Part 3, Section 11 provides:

No member of Congress, nor person holding any office under the United States (post officers excepted) nor office of profit under this State, justices of the peace, notaries public, coroners and officers of the militia excepted, shall have a seat in either House during his being such member of Congress, or his continuing in such office.

The thrust of all three of the above quoted sections of the Maine Constitution is that the doctrine of separation of powers, as well as sound public policy, requires that no person may exercise the powers belonging to more than one department of government.

Maine cases which have interpreted the constitutional and common-law prohibitions regarding incompatible offices deal with the question of holding two or more incompatible offices and not with the question of seeking election to an office which would be incompatible upon election. See e.g. Opinion of the Justices, 3 Me. 484 (1825) (offices of sheriff and justice of the peace are incompatible); Howard v. Harrington, 114 Me. 443 (1916) (offices of mayor and judge of police court are incompatible); Stubbs v. Lee, 64 Me. 195 (1874) (offices of deputy-sheriff and trial justice are incompatible). However, dictum in Howard helps to answer your question: "An office holder is not at common law ineligible to appointment or election to another an incompatible office, but the acceptance of the latter vacates the former." 114 Me. 443, 447.

The rationale for prohibiting an official from holding two incompatible offices is stated in Stubbs v. Lee, 64 Me. 195 (1874), where the Court held that the offices of deputy-sheriff and trial justice are incompatible:

Where one has two incompatible offices, both cannot be retained. The public has a right to know which is held and which is surrendered. It should not be left to chance, or to the uncertain and fluctuating whim of the officeholder to determine. The general rule, therefore, that the acceptance of and qualification for an office incompatible with one then held is a resignation of the former, is one certain and reliable as well as one indispensable for the protection of the public. Stubbs v. Lee, 64 Me. 195, 198.

Implicit in the Court's ruling in Stubbs, however, is the proposition that person may seek election or appointment to an office incompatible with one currently held: it is the "acceptance of and qualification for" an incompatible office which constitutes the prohibited act.

Classified state employees are prohibited by statute from candidacy for elective office pursuant to 5 M.R.S.A. Section 679-A(3): "No officer or employee in the classified service of this state shall be a candidate for elective office in a partisan public election...." However, no such prohibition exists for members of the unclassified service. Members of the Board of Environmental Protection are members of the unclassified service. 5 M.R.S.A. Section 711 (3).

That a member of the Board of Environmental Protection should not be prohibited from seeking elective office is also supported by an understanding of the composition of the Board. The Board consists of 10 members who are "chosen to represent the broadest possible interest and experience which can be brought to bear in the implementation of this Title and all other laws which the Board is charged with the duty of administering." 38 M.R.S.A. Section 361.

Mrs. Sylvia Lund

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Although your request is limited to our opinion whether you may seek elective office and remain a member of the Board, it is clear that, whether or not you should decide to run, the law regarding conflict of interest remains applicable. As long as you remain a member of the Board,

the law requires...(public officers) perfect fidelity in the exercise of...(the powers and duties of their office)... whatever has a tendency to prevent their exercise of such fidelity is contrary to the policy of the law, and should not be recognized as lawful... (emphasis supplied). Opinion of the Justices, 330 A.2d 912, 916 (1975).

It is therefore our opinion that you may seek election to the Maine Legislature and, until you take office, you may remain a member of the Board of Environmental Protection.

Sincerely,

Philip Ahrens
Assistant Attorney General

PA:ldp