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Saco River Corridor Commission As to Agency

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Hugh Calkins
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Dear Mr. Calkins:

You have inquired into the legal status of the Saco River Corridor Commission with regard to the State's Workmen's Compensation Act, 39 M.R.S.A. §§1 et seq.; Employment Security Law, 26 M.R.S.A. §§1041 et seq.; Retirement Law, 5 M.R.S.A. §§1001 et seq.; Personnel Law 5 M.R.S.A. §§551 et seq.; Purchasing Law 5 M.R.S.A. §§1811 et seq.; and Administrative Procedure Act, 5 M.R.S.A. §§8001 et seq. Our general answer is that the Commission should not be considered an agency of State government, but rather a unique kind of local entity. The consequences of this under each statute are explained below.

First, however, a general description of the origin and financing of the Saco River Corridor Commission is required. The Commission was created in 1973, Laws of Maine of 1973, Priv. and Spec. Laws, ch. 150 (1973), amended by Laws of Maine of 1975, Priv. and Spec. Laws, ch. 208 (1974) and Laws of Maine of 1977, ch. 276 (1977). With one exception */ this enabling legislation is silent as to whether the Commission is to be considered an agency of State government. The 1973 Act designates a geographical area to be called the "Saco River Corridor" and establishes the "Saco River Corridor Commission," to be composed of representatives of each municipality which has territory in the Corridor. Id. §1 (§§3,4). It then goes on to empower the Commission to carry out

*/ The exception occurs in the 1974 amendments, which add a provision that "The commission shall be deemed a state commission within the meaning of [5 M.R.S.A. §191]," which allows it to receive "legal services" from the Attorney General, Laws of Maine of 1977, Priv. and Spec. Laws, ch. 208, §7 (§32).

detailed regulatory responsibilities within the Corridor. In addition, the Commission is granted the authority to "sue and be sued in its own name." Laws of Maine 1975, Priv. and Spec. Laws, ch. 208, §6 (1974).

The Commission has historically been funded from several sources. In its original enabling legislation, the sum of \$47,500 was appropriated directly from the General Fund by the Legislature for its use. Laws of Maine 1973, Priv. and Spec. Laws, ch. 150, §3 (1973). In 1975, the Legislature appropriated an additional \$25,000 for its operating funds. Laws of Maine 1975, Priv. and Spec. Laws, ch. 103, §1 (1975). In 1976, an additional \$12,500 was appropriated for the same purpose. Laws of Maine of 1975, Priv. and Spec. Laws, ch. 147, §21 (1976). In addition, however, the Commission began to receive financial support from the counties of Cumberland and York, in the amounts of \$3,000 and \$6,000 respectively. In 1977, the Legislature expressly adopted this approach, including an appropriation for the Commission in those of the counties of Cumberland and York (\$4,000 and \$10,000 respectively), Laws of Maine of 1977, Legislative Resolves, ch. 31, §2 and 34, §3 (1977), as well as appropriating another \$12,500 directly. Laws of Maine of 1977, ch. 380, §19 (1977). In addition, the Commission has received additional funds from the federal government through the State Planning Office and occasionally receives small contributions from its constituent municipalities.

With these funds the Commission has employed a full-time Executive Director and hired part-time summer employees without recourse to the State Personnel System; has rented office facilities in Cornish, Maine and purchased office supplies without the assistance of the Maine Bureau of Purchases; has made no provision for workmen's compensation, unemployment compensation, or retirement benefits for its employees; and has taken no action to comply with the Administrative Procedure Act.

I. Workmen's Compensation (39 M.R.S.A. §§1 et seq.)

Two questions present themselves in determining the Commission's status under this Act: first, must the employees of the Commission be considered "employees" within the meaning of the Act so as to be subject to its provisions; second, if so, should the State be considered their employer so as to bring them within the State's self-insurance plan for its employees?

It would appear that the Commission's employees should be considered "employees" within the meaning of the Act. The Act's definition of this term specifies that it shall include "officials of the State, counties, cities, towns, water districts and all other quasi-public corporations of a similar character." 39 M.R.S.A. §2(5)(A). In addition, the definition of "employer" specifies that the term shall include "the State, counties, water districts and all other quasi-municipal corporations of a similar nature, cities and towns." 39 M.R.S.A. §2(6). As indicated above, the Commission was created and given substantial regulatory responsibilities by the State Legislature, in the manner of an administrative agency of the State. Its membership is chosen by certain towns of the State. It has historically been funded in substantial part from the General Fund of the State, entirely until 1976 and now along with the annual appropriation for the two counties involved. It would thus appear that the employees of the Commission are exclusively the employees of some governmental entity, and as such, are among the group of people intended to be given coverage by the Act. */

This leaves only the question as to whether the employees of the Commission may be deemed to be employees of the "State." If so, they would automatically be covered by the State's self-insurance plan. If not, the Commission would be required, under the terms of the Act, to purchase insurance for them. In resolving this question, we would place particular reliance on the recent shift in the manner in which the Legislature makes appropriations for the Commission. Up until 1976, it had made appropriations for it directly from the General Fund, as it does for all the agencies of State government. Now, however, the Legislature appears to have adopted the practice of treating the Commission, at least for purposes of funding, as a kind of sub-unit of the two counties in which the Corridor lies. It would appear that, in the future, the Commission will make its requests for funds in part through the two counties, who will then include them in their budget requests to the Legislature. This does not suggest that the Legislature continues to regard the Commission as of identical stature with the agencies of State government. We would conclude, therefore, that for purposes of the workmen's compensation laws, the Commission, while an "employer," is not "the State," and must make its own arrangements for insuring its employees, in the same manner as counties and other political subdivisions of the State.

*/ It is worth adding on this point, that the term "employee" covers part-time and temporary employees. Thus, workmen's compensation insurance should be provided for all persons employed by the Commission for however brief a time.

II. Unemployment Compensation (26 M.R.S.A. §§1041 et seq.)

Until the 1977 session of the Legislature, neither the agencies of the State nor of its political subdivisions were considered "employing units" within the meaning of the Employment Security Act, and thus, were not required to make provisions for unemployment compensation for their employees. This situation was reversed through the enactment of substantial amendments to the Act that year. Laws of Maine of 1977, ch. 570 (1977). This statute includes a new definition of "employing unit" which states:

"On or after January 1, 1978, 'employing unit' shall also mean the State or any of its instrumentalities or any political subdivision thereof or any of its instrumentalities or any instrumentality of more than one of the foregoing or any instrumentality of any of the foregoing and one or more other states or political subdivisions."
26 M.R.S.A. §1043(10).

The purpose of this amendment was to include all governmental entities in the State within the purview of the Act. Since the Commission clearly exercises governmental powers, it should, therefore, now be considered covered by the Act, regardless of whether it is to be considered the "State" or a "political subdivision" of the State. The consequences of this for the Commission is that it will have to decide, with the assistance of the Employment Security Commission, on a plan for the coverage of its employees, both full and part-time, for unemployment compensation benefits. In this regard, it should be noted that the Commission, as a governmental entity, may elect to pay direct reimbursements to any employee who should become eligible for unemployment compensation, rather than make quarterly contributions to the Employment Security Commission from its payroll. 26 M.R.S.A. §1221(10).

III. Retirement Benefits (5 M.R.S.A. §§1001 et seq.)

The general question presented here is whether the employees of the Commission must be members of the State Retirement System, whether they may be members of the system, or whether they are not and cannot be eligible to join the system at all.

Section 1091(1) of the Retirement Law provides that "any person who shall become an employee shall become a member of the retirement system as a condition of employment" 5 M.R.S.A. §1091(1) (emphasis added). "Employee" is defined to mean "any regular classified or unclassified officer or employee in a department." 5 M.R.S.A. §1001(10) (emphasis added). "Department" is defined to mean "any department, commission, institution or agency of State Government." 5 M.R.S.A. §1001(8). As indicated in Part I above, it now appears that the Legislature does not regard the Commission as being a part of State government. Thus, it would not seem that its employees must automatically be made members of the retirement system.

One difficulty, however, presents itself to this analysis. The Executive Director of the Commission is expressly made a member of the Unclassified Service of the State. P. & S. L., 1973, ch. 150, §2 (1973), which adds a new subsection (12) to the list of positions in 5 M.R.S.A. §711 which comprise the unclassified service. The term "unclassified service" is defined to mean all "offices . . . in the State service, except those placed in the unclassified service . . ." 5 M.R.S.A. §552(3). All this would seem to suggest that the Executive Director is a member of the "State Service," and, therefore, might be an "employee" within the meaning of the Retirement Act, even if the Commission is not deemed to be a "commission . . . of State Government." Such an approach, however, even if tenable during the first few years of the Commission's existence, would appear incompatible with the Legislature's evident present attitude toward the Commission. The Legislature seems no longer to regard the Commission as a "commission . . . of State Government." Thus, the Executive Director, even if a member of the unclassified service, is not an "officer . . . in a department." Thus, he is not an "employee" and may not be made a member of the Retirement System involuntarily.

It appears, however, that the Commission may elect to include its employees in or give them access to the system. Section 1092 of the Retirement Law allows for a "participating local district" to elect such participation on whatever terms, within certain limits, it chooses. 5 M.R.S.A. §1092(1). "Local district" is defined to mean "any county, municipality, quasi-municipal corporation, incorporated instrumentality of the State of one or more of its political subdivisions." 5 M.R.S.A. §1001 (11-A). As in the case of the definition of "employing unit" in the Employment Security Law, the clear intent of this definition was to include all governmental entities of the State. Since the Commission

clearly exercises governmental functions, receives its funding through two counties, and has its members chosen by its constituent municipalities, it is certainly a governmental entity of some kind. Thus, it could qualify to participate as a "local district" within the meaning of the Retirement Law. As a participating local district, the Commission could, within certain statutory limits, structure membership, contribution amounts and benefit programs to meet the needs of its personnel within the strictures of its budget.

IV. Personnel Law (5 M.R.S.A. §§551 et seq.)

In order for the Commission to be subject to the State Personnel Law, which governs the hiring, promotion, and discharging of State employees, it must be deemed to be an "appointing authority" within the meaning of 5 M.R.S.A. §552(1). That definition includes an "officer, board, commission, person or group of persons having the power by virtue of . . . a statute . . . to make appointments." This definition must be read, however, to mean, "appointments to a position in a State agency;" and we have already seen that the Legislature appears to no longer treat the Commission as a State agency. We must conclude, therefore, that the Legislature did not intend that the Commission be subject to the Personnel Law, if indeed it ever did. */ The only exception to this would be the case of the Executive Director, who, as indicated above, has been made part of the unclassified service by statute. But, this provision (which would appear to have no effect on the Executive Director position itself since the effect of placing a position in the unclassified service is to exempt it from the rest of the Personnel Law) should not be interpreted to mean that any other employees of the Commission should be made members of the classified service by implication. The Legislature could, of course, make them subject if it so chose, but in view of its general attitude toward the Commission, we cannot say that it has done so.

*/ The original enabling act provided "the executive director, with the approval of the commission, may hire whatever competent professional personnel and other staff as may be necessary." Laws of Maine of 1973, Priv. and Spec. Laws, ch. 150, §1 (§6) (1973). This kind of explicit hiring authority is generally not provided to state agencies, it being assumed that they will obtain personnel through the State Personnel System. It thus might be argued that the Legislature always intended to treat the Commission differently for personnel purposes.

V. Purchasing Law (5 M.R.S.A. §§1911 et seq.)

The Bureau of Purchases of the Department of Finance and Administration is authorized by the Purchasing Law to "purchase all services, supplies, materials and equipment required by the State Government or by any department or agency thereof." 5 M.R.S.A. §1811(1). The Executive Director of the Commission, however, is expressly authorized to "obtain office space, goods and services as required." Laws of Maine of 1973, Priv. and Spec. Laws, ch. 150, §1 (§6) (1973). This special provision, which appeared in the Commission's original enabling act, would appear to override the general language of the Purchasing Law. And even if it somehow were not so determined, the recent shift in legislative attitude toward the Commission would appear to remove it from the purview of the Law.

VI. Administrative Procedure Act(5 M.R.S.A. §§8001 et seq.)

The newly enacted Maine Administrative Procedure Act requires generally that all "agencies" of State government bring their administrative procedures into conformity with the standard procedures established by the Act. The sole question here, then, is whether the Commission is an "agency," within the meaning of the Act. The Act defines the term to include "any body of State Government authorized by law to adopt rules, to issue licenses, or to take final action in adjudicatory proceedings," but exclude "special purpose districts or municipalities, counties, or other political subdivisions of the State." 5 M.R.S.A. §8002(2). As indicated above, it is clear that the Legislature does not view the Commission as an agency of State government at present. Moreover, the manner in which it is constituted (each constituent municipality nominating one member) suggests an entity more like a special purpose district than anything else. It would appear, therefore, that, absent any express legislative expression to the contrary, the Commission should not be considered an "agency" for purposes of this Act.

* * *

I hope this answers your questions. Please feel free to reinquire if any clarification is required.

Sincerely,



CABANNE HOWARD
Assistant Attorney General