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37-A M.R.S.A. 65

Loyalty Oath

STATE OF MAINE

Inter-Departmental Memorandum Date October 17, 1978

To Scott B. Johnson, Admin. Officer

Dept. Civil Emergency Preparedness

From Sarah Redfield, Assistant

Dept. Attorney General

Subject Proposed Loyalty Oath for the Bureau of Civil Emergency Preparedness

This is in response to your request for an opinion as to the legality of a loyalty oath for the Bureau of Civil Emergency Preparedness. The loyalty oath, as proposed, is not authorized by law.

The Bureau of Civil Emergency Preparedness has proposed the use of a loyalty oath for its department. This loyalty oath is proposed pursuant to Title 37-A M.R.S.A. § 65, which provides as follows:

"No person shall be employed or associated in any capacity in any civil emergency preparedness organization established under this chapter who advocates or has advocated a change in the constitutional form of the government of the United States or in this State or the overthrow of any government of the United States by force or violence, or who has been convicted or who is under indictment or information charging any subversive act against the United States. Each person who is appointed to serve in an organization for civil emergency preparedness shall, before entering upon his duties, take an oath in writing, before a person authorized to administer oaths in this State which oath shall be substantially as follows:

"I _____ do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of Maine, against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely without any mental reservation or purpose of evasion; that I will well and faithfully discharge the duties of the office which I am about to enter."

The first paragraph of the proposed oath tracks the statute verbatim and appears to be consistent with both the statute and constitutional law. However, the second paragraph of the proposed oath is not in compliance with the limited language of the statute

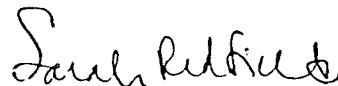
or with the case law which has developed concerning such loyalty oaths. The second paragraph provides:

"And I do further swear (or affirm) that I do not advocate, nor am I a member of any political party or organization that advocates the overthrow of the government of the United States by force or violence; and that during such time as I am a member of the Civil Defense and Public Safety Agency I will not advocate nor become a member of any political party or organization that advocates the overthrow of the government of the United States by force or violence, so help me God."

As a general matter, both the federal and state statutes may require, in certain situations, that a person take a so-called "loyalty oath" indicating that they are not engaged in or do not advocate subversive or other treasonable activity. See, generally, 70 Am. Jur.2d, Sedition, § 8. However, in determining the constitutionality of such loyalty oaths, the courts have viewed, as necessary to due process, the requirement of knowledge on the part of the affiant as to the subversive nature of the organization to which he may belong. The oath as proposed does not provide for this.

In a case analogous to the present proposal, a state had required a loyalty oath indicating that the affiant was not engaged in "one way or another in the attempt to overthrow the government." The United States Supreme Court, while upholding a state's authority to have a narrow loyalty oath, found the oath as indicated in the above quotation to be unconstitutional. See Whitehill v. Elkins, 389 U.S. 54 at 57 (1957). Similarly, the Supreme Court of New Jersey has found a loyalty oath unconstitutional where the oath required a person to swear that he did not believe in the use of force or unconstitutional means to overthrow the government and to disavow membership in any organization believing in such overthrow. See, generally, Imbrie v. Marsh, 71 A.2d 352 (1950).

More specifically, the statutory language of Title 37-A M.R.S.A. § 65 itself is much more limiting than the second paragraph of the proposed oath suggests. With this precedent in mind and considering the language of Title 37-A M.R.S.A. § 65, it would appear more appropriate that the oath in question be limited to the first paragraph as proposed.



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