

# MAINE STATE LEGISLATURE

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RICHARD S. COHEN  
ATTORNEY GENERAL



79-123  
STEPHEN L. DIAMOND  
JOHN S. GLEASON  
JOHN M. R. PATERSON  
ROBERT J. STOLT  
DEPUTY ATTORNEYS GENERAL

STATE OF MAINE  
DEPARTMENT OF THE ATTORNEY GENERAL  
AUGUSTA, MAINE 04333

June 14, 1979

Honorable James A. McBreairty  
Senate Chambers  
State House  
Augusta, Maine 04333

Dear Senator McBreairty:

Subsequent to our opinion to you on March 26, you have asked two additional questions.

First, you have asked whether a selectman in the Town of Allagash who is an officer in the Army Corps of Engineers, the agency responsible for construction of the proposed Dickey-Lincoln Dam, has a conflict of interest by virtue of holding those positions. The mere fact that the selectman holds a position in the Army is not per se a conflict of interest. The existence of a conflict would arise only in the context of particular issues or contemplated acts and cannot be answered except in the context of a specific fact situation. The mere holding of these positions does not in itself create a conflict. Should a conflict arise, however, it could be avoided by the individual disqualifying himself from performing one of his duties.

Second, you have asked whether a selectman may also serve as part-time deputy sheriff. We have reviewed our files and find that previous opinions of the Attorney General have expressed conflicting view on this question. By an opinion dated March 5, 1937, this office stated that it was an incompatibility for an assessor to be a deputy sheriff. On February 9, 1955, the office stated that it was not incompatible for a selectman to be a deputy sheriff unless the selectman was also a local assessor. On March 11, 1966, the Attorney General issued an opinion stating that the positions of selectman and deputy sheriff were not incompatible. Unfortunately, none of these earlier opinions provides any reasoning, each of them being conclusory in nature.

The earlier opinions of the Attorney General were based on an interpretation of the common-law concept of incompatibility as set forth in Howard v. Harrington, 114 Me. 446 (1916). Subsequently, new statutory provisions have been enacted which relate in part to this question. Title 30 M.R.S.A. § 951 prohibits a full-time deputy from holding a position as a municipal officer. No similar prohibition exists, however, regarding part-time deputies. While Title 30 M.R.S.A. § 959(2) authorizes participation by all deputies in "elections" and permits them to run for local office, it is silent on the question of whether a part-time deputy may serve simultaneously as a municipal official.

Given the absence of a statutory provision on the subject, we must apply the principles of common law incompatibility as stated in Howard v. Harrington, *supra*. That case holds generally that no person can occupy two offices with inconsistent functions which preclude the person from being able to discharge the duties of each office. Although Howard gives no precise formula for determining inconsistency, we do not believe it is incompatible for a part-time deputy to be a selectman.

The function of a deputy is to enforce the law. The function of a selectman is to conduct local municipal business and, where authorized, enact local ordinances. Ordinarily a selectman has little, if any, authority to adopt a municipal ordinance, that function being reserved to the entire town meeting. Assuming that the deputy may be called on to enforce an ordinance, that does not create any inconsistency. In Bamford v. Melvin, 7 Me. 5 (1830) and Stubbs v. Lee, 64 Me. 195 (1874), the Law Court held that it would be incompatible for a deputy to be a justice of the peace or trial justice, since in each case the individual as a judicial officer would be exercising a power clearly in conflict with his law enforcement duties. However, we do not perceive the same problem arising out of the possibility that, on limited occasions, a deputy sheriff might be called upon to enforce an ordinance which he voted to adopt in his capacity as a selectman. For that reason, we do not deem the offices to be incompatible.

Having answered the common-law incompatibility issue, the question arises as to whether the positions of deputy sheriff and selectman are constitutionally compatible. Article III, § 2 of the Maine Constitution provides that "no person or persons belonging to either of these departments [legislative, executive or judicial] shall exercise any of the powers belonging to either of the others, except in cases herein expressly directed or permitted." It has long been the rule in Maine that a sheriff or deputy is a member of the executive branch. Bamford v. Melvin and Stubbs v. Lee, *supra*. Although the sheriff is a constitutionally created officer, Me. Const. Art. IX, § 10, the inclusion of the sheriff in the executive branch stems from the office's principal function of law enforcement.

Given this fact, the question then narrows to a determination of whether a selectman is an officer in a different branch of government, i.e., the legislative branch. In an analogous case the Maine Law Court intimated that a mayor may be a member of the executive branch of state government, despite the fact that he was elected locally, since the mayor's functions involve duties affecting the general public which are created by and delegated to him under state law. Howard v. Harrington, supra. It may logically follow, therefore, that a selectman, insofar as he is delegated certain legislative functions by municipal charter, may likewise be a member of the legislative branch. However, we think there are persuasive grounds to conclude that a municipal selectman or city councillor is not in fact a member of the state legislative branch.

Apart from the now rather dated dicta in Howard v. Harrington, we know of no Maine case stating or implying that a locally elected official is part of the state legislative branch of government in the sense that it is referred to in Art. III, §§ 1 or 2 of the Maine Constitution. While the case law recognizes a distinction between state and local offices, the line between them is not clearly defined. See generally the discussion in McQuillen, Municipal Corporations, § 4.115 (3d ed. 1973) and Dillon, Municipal Corporations, § 97 (5th ed., 1911). Generally, however, the distinction appears to rest on whether the official is charged with duties affecting the state at large or responsibilities essentially local in character. Viewed from this perspective, we would characterize a town selectman as a local official.

In addition, we think it unlikely that the reference to the legislative branch in the Constitution was intended to encompass local officials like a selectman. While it is possible that a selectman is a state official in the sense that the position is created and the powers prescribed by statute, it nevertheless seems unlikely that the reference to the legislative branch in Art. III, § 1, of the Maine Constitution was intended to encompass local elected officials. Rather, it is far more probable that for constitutional purposes the reference to the legislative branch in Art. III, § 1 was intended to refer back to the Legislature, as defined and created in Art. IV of the Maine Constitution.

For that reason, we conclude that there is no constitutional incompatibility with a part-time deputy sheriff serving as a local municipal official since the selectman is not in a separate constitutional branch of government.

I trust this answers your questions. If I can be of further assistance, please let me know.

Sincerely,



JOHN M. R. PATERSON  
Deputy Attorney General