

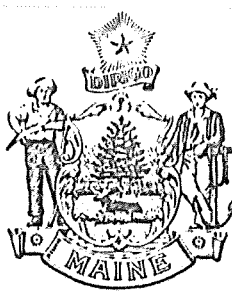
MAINE STATE LEGISLATURE

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DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

August 3, 1979

Leslie B. Higgins
Deputy Director
Bureau of Civil Emergency Preparedness
State House
Augusta, Maine 04333

Dear Mr. Higgins:

We wanted to take this opportunity to respond to your written request for a formal legal opinion from this Office regarding the meaning of 37-A M.R.S.A. § 59(2). In pertinent part, the provision reads as follows

A director of any civil emergency preparedness agency shall not be simultaneously an executive officer or member of the executive body of a political subdivision of the State.

Your request seeks an interpretation of this section, and, as we understand it, an opinion on the question of whether this section is in conflict with any statutes providing that, where municipal officers fail to make a given appointment, they are to serve in the vacant position.

The meaning of this provision seems clear on its face; an appointed director of a civil emergency preparedness agency is not to serve simultaneously as an executive officer or member of the executive body of any county, city, town, village, township, district or any other political subdivision of the State, as defined by 37-A M.R.S.A. § 53(4). The problem presented is the definition of "executive officer" or "member of the executive body." The term "officer" generally means holders of offices which are specified by statute or constitution, elected or appointed, and whose duties, responsibilities, pay and powers are regulated by statute or constitution. See generally, 3 E. McQuillan, Law of Municipal Corporations, § 12.27 (3rd ed. 1973). Thus, the characteristics of an "office" are

statutorily or constitutionally specified tenure or duration, fees or salaries, and powers and duties. 3 E. McQuillan, supra, § 12.29; see also Goud v. City of Portland, 96 Me. 125 (1902).

The test of whether a person is an officer is often stated in terms of whether that person is authorized to exercise the power of the sovereign. 3 E. McQuillan, supra, § 12.30 and cases cited therein.

The statute at issue herein evidences an intent on the part of the Legislature to preclude those persons involved in the day-to-day administration of a political subdivision of the State from serving as local directors of civil emergency preparedness. Given this intent and the principles related above defining what an officer is, it can be concluded that at least the following persons are precluded by this section from serving as local directors of civil emergency preparedness: town manager, selectman, county commissioner, city councillor or alderman. Some of these positions are specifically designated as "municipal officers" by 30 M.R.S.A. § 1901(7). Further, each of these officers is, by statute, charter or other authority, generally charged with executive and/or administrative duties with regard to a municipality or other governmental body. E.g., 30 M.R.S.A. § 2317(1)(A) (town manager is chief executive and administrative official of a municipality). This list is not meant to be exhaustive but merely representative of those persons who can be considered "officers" under the definition discussed above.

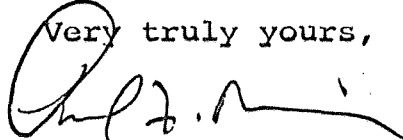
In response to the second part of your inquiry, our research of the Maine statutes has failed to locate any single or general provision which requires municipal officers to serve in a position to which they have failed to make an appointment or which the town meeting has failed to elect. 30 M.R.S.A. § 2055, prior to its amendment in 1969, provided that town officials other than town meeting moderator, clerk, selectmen, assessors, overseers of the poor, treasurer and members of the school committee could be elected by ballot, but, where they were not, they were to be appointed by the selectmen. The repeal of this section throws the problem of vacancy of a municipal office back onto the general vacancy sections, 30 M.R.S.A. §§ 2253 and 2060. It is § 2060 which contains the only provision which we have found whereby the selectmen of a town succeed to an unfilled position. Under § 2060(4)(B), where overseers of the poor have not been elected, the selectmen are to serve in that position; under subsection (7)(B) of that section, the selectmen may, but are not required to, act as road commissioners; under subsection (5)(B) of § 2060, where a full board of assessors is not elected, the selectmen are to appoint the board, and a selectman can serve as an assessor.

The position of director of a municipal civil preparedness agency is nowhere specifically mentioned in these vacancy statutes. Further, as discussed above, there is no general provision providing that municipal officers are to serve in any or all vacant town

positions. It is thus the opinion of this office that, where the selectmen fail to appoint a municipal civil emergency preparedness director, or, where appropriate, the town meeting fails to elect one, the provisions of 30 M.R.S.A. § 2253(1) come into play, and the office should be filled by appointment by the selectmen.

We hope this information addresses the concerns you have expressed. If you have any further questions, please feel free to contact this office.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Paul F. Macri".

PAUL F. MACRI
Assistant Attorney General

PFM/ec