

MAINE STATE LEGISLATURE

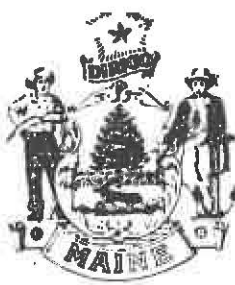
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DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

October 30, 1979

Genevieve K. Gelder, Director
Maine State Housing Authority
320 Water Street
Augusta, Maine

Dear Ms. Gelder:

You have requested our advice as to whether it is proper for Mr. Laurent L'Heureux to continue in his position as Assistant Director of Finance for the Maine State Housing Authority. Your question stems from the fact that Mr. L'Heureux is presently running for re-election for the Waterville City Council, and his candidacy has been questioned on the ground that it may be in violation of the Federal Hatch Act, 5 U.S.C. § 1501, et seq. Since the facts underlying this problem are complicated and involve prior action by this office, it is necessary that they be set out in some detail.

On March 21, 1979, we issued an opinion at the request of Senator Richard H. Pierce in which we indicated that there would be no incompatibility or conflict of interest for an individual to hold the position of Assistant Director of Finance for the Maine State Housing Authority while serving on a municipality's city council. That opinion also stated that we saw no prohibition against the person seeking re-election for his municipal position without terminating his employment with the Authority. While our conclusion on the re-election issue was technically limited to State law, it was understandably interpreted by the individual involved--namely, Mr. L'Heureux--to encompass federal law as well. To the best of our knowledge, then, Mr. L'Heureux' decisions in this matter--that is, his decision to remain with the Housing Authority and his decision to seek re-election for the City Council--were guided by his good faith reading of our opinion.

As we understand the most recent developments, it is only within the last day or two that the possibility became known that Mr. L'Heureux' re-election bid might be in violation of the Hatch Act. In light of the imminence of the election, he has apparently concluded that it would be unduly disruptive of the electoral process for him to withdraw his candidacy at this time. It is that decision which has given rise to your question as to whether the Authority should take any action with respect to Mr. L'Heureux' employment as Assistant Director of Finance.

Since we had only a short period of time in which to consider your question, our research has been limited to an analysis of the Act supplemented by discussions with the Federal Office of Special Counsel which is charged with its enforcement. Based upon that research, it is our view that Mr. L'Heureux would appear to have a valid defense against any charge that his candidacy violates the Hatch Act so as to require his removal from his position with the Authority. Accordingly, we would advise that the Authority not take any action predicated on such an alleged violation.

To fully understand our conclusion, it is necessary to appreciate the rather unusual nature of the Hatch Act. After defining the conduct to be prohibited, Congress has further provided that engaging in that conduct does not warrant enforcement action in all cases. Even when it has been determined that there has been a violation, the Act requires a subsequent determination as to "whether the violation warrants the removal of the officer or employee from his office or employment. . . ." 5 U.S.C. § 1505(2). With respect to that determination, the individual is entitled to a hearing at which both he and his counsel may be heard. Put succinctly, the Hatch Act thus provides a defense even where there may have been a violation of the literal language of its provisions.

In an effort to ascertain the parameters of the defense referred to above, we contacted the Office of Special Counsel which administers the Act. That office has advised us that the primary consideration in determining whether enforcement is warranted is a finding that the violation was intentional. In other words, as the Act is interpreted by those charged with its enforcement, the lack of knowledge that one's conduct contravenes the provisions of the statute essentially constitutes a defense.

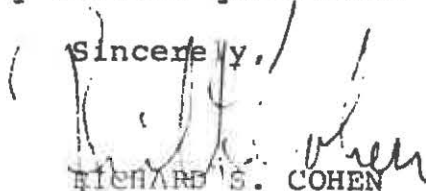
In the situation at hand, we shall assume for purposes of convenience that Mr. L'Heureux' conduct could be said to violate the literal language of the Hatch Act. It seems incontrovertible, however, that any such violation would not only have been inadvertent but also would have been the result of his good faith reliance on his understanding of the advice previously rendered by this office. Furthermore, his decision to continue with his

candidacy seems eminently reasonable in light of the point in time at which the problem was discovered. In conclusion, if there were ever a case in which the defense of lack of knowledge would be applicable, it would appear to be that of Mr. L'Heureux.

Given our conclusion that Mr. L'Heureux has a valid defense to any allegation that he has violated the Hatch Act, we are satisfied that it is not inappropriate for him to continue as a candidate for the City Council while remaining in his position with the State Housing Authority. For the same reason, we do not believe that the Authority should take any action with respect to Mr. L'Heureux' employment based upon charges arising under the Hatch Act. Only if the appropriate federal officials were to reach a contrary conclusion, which we do not anticipate will happen, would the Authority be justified in seeking either to terminate Mr. L'Heureux' employment or to impose any other sanctions.

I hope this information is helpful. Please feel free to contact me if you have any further questions.

Sincerely,


RICHARD S. COHEN
Attorney General

RSC:mfe