

MAINE STATE LEGISLATURE

The following document is provided by the
LAW AND LEGISLATIVE DIGITAL LIBRARY
at the Maine State Law and Legislative Reference Library
<http://legislature.maine.gov/lawlib>



Reproduced from scanned originals with text recognition applied
(searchable text may contain some errors and/or omissions)

79-195

RICHARD S. COHEN
ATTORNEY GENERAL



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

November 9, 1979

Honorable Patrick E. Paradis
18 Laurel Street
Augusta, Maine 04330

Re: Incompatibility of Position as Housing Rehabilitation
Counselor with Position of Legislator.

Dear Representative Paradis:

You have requested an opinion from this office regarding the compatibility of the position of housing rehabilitation counselor for the City of Augusta and the office of State Representative. Based upon our understanding of the nature of the housing rehabilitation position, we cannot find any incompatibility between it and the office of State Representative.

We have looked at the position of housing rehabilitation counselor from two different perspectives: first, assuming that it would constitute federal employment, and second, as a municipal position. Under neither of these analyses can we find any incompatibility between the position and the office of State Representative.

Assuming that the position constitutes federal employment, the issue would be whether it was an "office under the United States" pursuant to art. IV, part 3, § 11 of the Maine Constitution. Prior opinions of this office have addressed this question and have determined that both federal and state law require something more than simply employment by the government to constitute an office. This distinction was upheld by the Maine Supreme Judicial Court in Opinion of the Justices, 3 Me. 481 (1822). In order to constitute an "office," it is

necessary that the job entail exercise of a part of the sovereign powers. Id. at 482. The same is true under federal law. See Miller v. United States, 317 U.S. 192 (1942). It is our opinion, assuming that this is federal employment, that there is no incompatibility.

In an alternative line of analysis, assuming that this position constitutes employment by a municipality, there is also no incompatibility with the office of State Representative. If the position of housing rehabilitation counselor with the City of Augusta constitutes municipal employment, art. IV, part 3, § 10 of the Constitution of Maine, prohibiting members of the State Legislature from holding an "office of profit under the State" does not apply because such employment is not an "office of profit." See Opinion of the Attorney General, April 22, 1977 (a copy of which is enclosed herewith). Nor would such municipal employment constitute employment by the executive or judicial departments of the State in violation of the separation of powers doctrine stated in art. III, §§ 1 and 2 of the Maine Constitution.

One final issue, that of common law incompatibility, ought to be considered. The common law test for incompatibility is essentially one of inconsistency or repugnance. Howard v. Harrington, 114 Me. 443 (1916). Based on the information available to us, we can see no inconsistency or repugnancy between the position of housing rehabilitation counselor and that of State Representative.

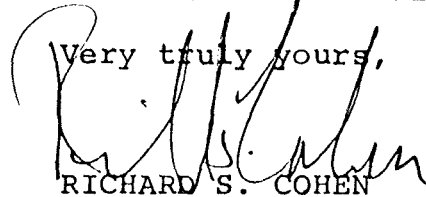
It is therefore our opinion that under any of these lines of analysis, there is no incompatibility between the job of housing rehabilitation counselor and the office of State Representative.^{1/}

On a related subject, the position in question is governed by the provisions of the Hatch Act, 5 U.S.C. § 1501, et seq., which limits the political activities of persons employed in federally funded positions. If you should obtain the position and should decide to run for reelection as a State Representative, problems may arise under this statute. Since this is essentially a federal question, we believe it would be safer for you to seek an official ruling from the appropriate federal agency. Official opinions are rendered by the Office of Special Counsel, whose address is: Office of Special Counsel, 1717 H. Street, N.W., Washington, D.C. 20419. We suggest you contact them with regard to any problems concerning the effect of the statute upon your running for reelection.

^{1/} The question of conflict of interest is a separate issue controlled by statute, 1 M.R.S.A. §§ 1001-1021. This statute does not, by its terms, preclude the acceptance of any specific job. Instead, the remedy for a legislative conflict of interest is for the Legislator to abstain from voting on the question both in the Legislature and in committee and not to attempt to influence the outcome in any way, 1 M.R.S.A. § 1015(1).

I hope you find this information useful. If you have any further questions, please feel free to contact this office.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Richard S. Cohen', written over the typed name.

RICHARD S. COHEN
Attorney General

RSC/ec

JOSEPH E. BRENNAN
ATTORNEY GENERAL



RICHARD S. COHEN
JOHN M. R. PATERSON
DONALD G. ALEXANDER
DEPUTY ATTORNEYS GENERAL

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

April 22, 1977

Honorable Armand A. LeBlanc
House of Representatives
State House
Augusta, Maine 04333

Dear Representative LeBlanc:

This letter responds to your request for an opinion from this office on a question concerning compatibility of offices. It is our understanding that you intend to apply for a position as Executive Director of the Van Buren Housing Authority, but before proceeding further you wish to know whether there would be any incompatibility or conflict of interest between this position and your office as State Representative. The answer to your question is that there would be no incompatibility or conflict of interest inherent in the positions themselves.

Local housing authorities are established by statute and are designated as public corporation exercising public and governmental functions. 30 M.R.S.A. §§ 4551, et seq. The authorities are established in each municipality and their functions and powers are exercised solely on a municipal basis. Appointment of an Executive Secretary is made by the five commissioners of the authority and it is the commissioners that establish the duties of the Executive Director. 30 M.R.S.A. § 4602, sub-§ 1, ¶ B. Therefore, an Executive Secretary has no duties or powers which would extend beyond the municipal duties and powers of the authority itself.

This office has previously expressed its opinion that a State Legislator may also be the manager of a local water district, which is also a quasi-municipal corporation (Opinion of the Attorney General, January 23, 1976), or a town manager, who is a municipal appointee (Opinion of the Attorney General, September 24, 1973).

Honorable Armand A. LeBlanc
Page 2
April 22, 1977

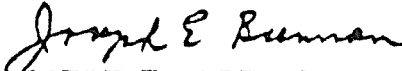
The basis for these opinions is that a municipal appointee holding office in a quasi-municipal corporation is not holding ". . . any civil office of profit under this State. . . ." which might fall within the prohibition of Article IV, Part Third, Section 10 of the Constitution of Maine. Nor would such municipal office constitute employment in the Executive or Judicial Departments of the State, so that there would be no question of "separation of powers" under Article III, Sections 1 and 2 of the Constitution of Maine. Therefore, service as a State Legislator and as Executive Director of a local housing authority would not be constitutionally incompatible.

In addition, it is our opinion that these two positions would not be incompatible as a matter of common law under the several tests set forth in Howard v. Harrington, 114 Me. 443 (1916). The nature and duties of the two offices are such that there is no inherent inconsistency or repugnancy involved and the duties of each office may be simultaneously performed without conflict.

Finally, it should be noted that there is a separate conflict of interest provision for housing authorities which is set forth in 30 M.R.S.A. § 4603. However, this section is designed to cover pecuniary interests of the Executive Director, Commissioners and employees of the authority and would not prohibit an Executive Director from simultaneously serving as a State Legislator.

We hope the foregoing information will be helpful to you. Please call upon us whenever you feel we may be of assistance.

Sincerely,


JOSEPH E. BRENNAN
Attorney General

JEB:mfe