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DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

November 21, 1979

Honorable John L. Martin
Speaker of the House
Box 278
Eagle Lake, Maine 04739

Dear Speaker Martin:

I am writing in response to your recent request for an opinion regarding Department of Inland Fisheries and Wildlife employees who trap furbearers. Specifically, you ask: "Whether or not a restriction on the trapping of wild animals by an employee of the Department of Inland Fisheries and Wildlife, when in an off-duty status in the area to which he is assigned or in any other areas, would be prohibited by a provision of the labor agreement between the State and the Maine State Employees Association such as Article XL of the agreement relating to the law enforcement services bargaining units?"

We conclude that the present labor agreement would preclude the Department from unilaterally imposing the suggested restriction. Accordingly, the restriction could be imposed only through one of the following courses of action: (1) a negotiated agreement to change the applicable regulations or to allow the Department to make such a change; or (2) the enactment of legislation prohibiting trapping by Department employees.

An administrative change of the rules or regulations (general orders) of the Department of Inland Fisheries and Wildlife would be subject to the provisions of the current labor agreement and would require prior negotiation. Change made unilaterally by the Department, i.e., without prior agreement of the certified bargaining agent (the Maine State Employees Association) of the law enforcement bargaining unit would violate Article XL and several other provisions of the current labor agreement as well as the obligation of the State to bargain in such areas as hours of work and working conditions.

See generally 26 M.R.S.A. § 979-D(1)(E). The several provisions which relate to changes in an employee's working conditions in the current labor agreement which would be violated by an administratively imposed restriction are: Article XL - outside work; Article XLVIII - rules and regulations; Article XLIX - work rules; and, Article L - maintenance of benefits. I have attached a copy of these Articles for your information.

In short, if the Department of Inland Fisheries and Wildlife wished to amend its general orders or other administrative rules or regulations to include a provision prohibiting game wardens from trapping furbearers in the area to which they are assigned or in any other area, then the Department, in accordance with the labor agreement articles cited and 26 M.R.S.A. § 979-D(1)(E) would have to negotiate the proposed restriction with the Maine State Employees Association and include the restriction or the right to impose the restriction within the scope of the labor agreement. Turning to legislation, neither the cited articles nor the provisions of the State Employees Labor Relations Act limit the Legislature's authority to amend the general laws to impose such a restriction on an employee of the Department of Inland Fisheries and Wildlife. Thus, the only question is whether such legislation would be constitutional.

The Legislature's power is plenary. Ace Tire Company, Inc. v. Municipal Officers of the City of Waterville, 302 A.2d 90 (Me. 1973); Ross v. Hansen, 227 A.2d 606 (Me. 1967). The Legislature may enact legislation prohibiting game wardens from trapping furbearers in the area to which they are assigned or in any other area of the State as long as that legislation does not conflict with either the State or Federal Constitutions. While it might be argued that such legislation would deny game wardens equal protection under the law as guaranteed by both the Maine and United States Constitutions, a review of the prevailing case law indicates that enactment of this legislation would not constitute a denial of equal protection to game wardens. Only recently the Maine Supreme Judicial Court reconfirmed the standard to be applied in measuring the constitutionality of such a restriction. Citing the United States Supreme Court decision in New Orleans v. Dukes, 427 U.S. 297, 303; 96 S.Ct. 2513, 2516; 49 L.Ed.2d 511, 517 (1976) the Law Court said:

> "Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions * * * , our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest." McNicholas v. York Beach Village Corporation, 394 A.2d 264 (Me. 1978).

Because no fundamental personal right is threatened by the proposed legislation,and because the proposed legislation is not directed at any suspect classification, the courts may be expected to apply a reasonable or rational basis standard in measuring its constitutionality. Stated differently, for this legislation to be constitutional in view of the equal protection clauses of the Maine and United States Constitutions, the legislation must have a rational basis and it must be reasonably related to the promotion of a legitimate State legislative purpose. Massey v. Apollonio, 387 F. Supp. 373 (D. Me. S.D. 1974).

That the State has a rational basis and legitimate legislative purpose in enacting legislation prohibiting game wardens from trapping furbearing animals is evident when one examines the conflict between the economic interest of the game warden as a trapper and the enforcement responsibilities of the game warden in enforcing the laws relating to trapping. It is difficult to imagine a clearer conflict of interest than the conflict between the State game warden who in his off-duty hours traps furbearing animals for economic gain and during his on-duty hours enforces the laws relating to the trapping of furbearing animals against other citizens engaged in the same pursuit. In addition to the conflict between the warden's own economic interest and the laws he is sworn to enforce, a possible conflict also arises from the knowledge and information the warden receives in enforcing the trapping laws of the State of Maine against other trappers. Ostensibly, the warden could gain important information with respect to the most lucrative trapping areas and then use that information together with his enforcement authority to preserve those areas for himself, thus giving him an unfair competitive advantage over other trappers. The Legislature could conclude that a conflict exists and that in the interest of preserving the integrity of the warden service; in eliminating even the appearance of impropriety;and, in providing for the equal and objective enforcement of the trapping laws of the State of Maine, that legislation which would prohibit game wardens from trapping furbearing animals is necessary to preventing the possible conflicts of interest discussed above. In enacting such legislation, the Legislature would be acting constitutionally. See, Opinion of the Justices, 402 A.2d 601 (Me. 1979); Gabriel v. Town of Old Orchard Beach, 390 A.2d 1065 (Me. 1978); Union Mutual Life Insurance Company v. Emerson, 345 A.2d 504 (Me. 1975); Ace Tire Company, Inc. v. Municipal Officers of the City of Waterville, 302 A.2d 90 (Me. 1973) and Dandridge v. Williams, 397 U.S. 471 (1970).

If I can be of further service, please let me know.

Very truly yours,

RICHARD S. COHEN
Attorney General

RSC/ec
Enclosures
cc: David Silsby

ARTICLE XL. OUTSIDE EMPLOYMENT

Employees may engage in other employment outside of their State working hours so long as the outside employment does not involve a conflict of interest with their State employment. Whenever it appears that any such outside employment might constitute a conflict of interest, the employee is expected to consult with his or her appointing authority or other appropriate agency representative prior to engaging in such outside employment. In agencies where there are established procedures pertaining to prior approval or prior notice employees shall comply with such procedures. Employees of agencies where there are established procedures concerning outside employment for the purpose of ensuring compliance with specific statutory restrictions on outside employment shall comply with such procedures.

ARTICLE XLI. COMPLAINTS AND INVESTIGATIONS

The department head shall be responsible to ensure that all allegations of misconduct and other violations shall be investigated as follows.

The department head, or other designated officer, shall conduct a preliminary investigation of all such allegations. Where no probable cause is found the investigation shall terminate. If, after preliminary investigation, the department head or his/her designee determines that there is probable cause to believe that misconduct or other violation has been committed by a particular employee, the investigator shall inform (1) the employee under investigation, (2) his/her supervisor, and (3) the MSEA, of the nature of the investigation before proceeding any further with said investigation. If diligent efforts to contact

(e) Settlement of Grievances. The applicable procedures of this Agreement shall be followed for the settlement of all grievances. All grievances shall be considered carefully and processed promptly.

ARTICLE XLVII. WORK STOPPAGE AND SLOWDOWN

Employees within the bargaining unit, MSEA and its officers at all levels, agree that they will not instigate, promote, sponsor, condone or engage in any work stoppage, sympathy work stoppage or slowdown.

"Work stoppage" means a concerted failure by employees to report for duty, a concerted absence of employees from work, a concerted stoppage of work, or a concerted slowdown in the full and faithful performance of duties by a group of employees.

The officers of MSEA, at all levels individually and collectively, agree that it is their continuing obligation and responsibility to maintain compliance with this Article, including the remaining at work during any interruption or slowdown of work which may take place.

ARTICLE XLVIII. RULES AND REGULATIONS

In the event of a conflict between the provisions of this Agreement and the Personnel Rules or departmental rules or regulations as they now exist or may be from time to time amended, the provisions of this Agreement shall apply.

ARTICLE XLIX. WORK RULES

The State may change or adopt work rules during the term of this Agreement but such changed or adopted work rules shall not be inconsistent with the terms and provisions of this Agreement. Whenever such work rules are to be changed or adopted, they shall be posted on bulletin boards in the appropriate organizational units for seven (7) days before they are to become effective. Simultaneously with such posting a copy of same shall be forwarded to MSEA. Upon request by MSEA the State will meet and consult with MSEA on the proposed changed or new rules.

ARTICLE L. MAINTENANCE OF BENEFITS

With respect to negotiable wages, hours and working conditions not covered by this Agreement, the State agrees to make no changes without appropriate prior consultation and negotiations with the Association unless such change is made to comply with law, and existing regulations, Personnel Rules, written Policies and Procedures, General Orders, General Operating Procedure, or Standard Operating Procedure.

ARTICLE LI. MANAGEMENT RIGHTS

The MSEA agrees that the State has and will continue to retain the sole and exclusive right to manage its operations and retains all management rights, whether exercised or not, unless specifically abridged, modified or delegated by the provisions of this Agreement. Such rights include but are not limited to: the right to determine the mission, location