

MAINE STATE LEGISLATURE

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AUGUSTA, MAINE 04333

March 6, 1980

The Honorable Dana C. Devoe
Maine Senate
State House
Augusta, Maine 04333

Dear Senator Devoe:

This is in response to your inquiry concerning testimony by a Public Utilities Commissioner ("Commissioner") before a legislative committee on the qualifications of certain Commission personnel. Specifically, you have asked two questions: (1) whether the Personnel Law would prohibit a Commissioner from discussing the qualifications or capabilities of individual staff members before a public hearing of a legislative committee; and (2) whether the legislator presiding at the hearing has the right to demand such testimony from the Commissioner.

With regard to your first question, it is our opinion that the Personnel Law would not prohibit, but might restrict, testimony about the qualifications or capabilities of specific members of the Commission staff. The applicable section of the Personnel Law is 5 M.R.S.A. § 554 which provides in relevant part:

The following records shall be confidential and not open to public inspection, and shall not be "public records" as defined in Title 1, section 402, subsection 3:

1. Papers relating to examinations or evaluations of applicants. Working papers, research material, records and the examinations prepared for and used specifically in the examination or evaluation of applicants for positions within the classified service of State Government:

2. Personal information. Records containing the following, except they may be examined

by the employee to whom they relate when that examination is permitted or required by statute:

- A. Medical information of any kind, including information pertaining to diagnosis or treatment of mental or emotional disorders;
- B. Performance evaluations and personal references submitted in confidence;
- C. Information pertaining to the credit worthiness of a named employee;
- D. Information pertaining to the personal history, general character or conduct of members of an employee's immediate family; and
- E. Complaints, charges or accusations of misconduct, replies to those complaints, charges or accusations and any other information or materials that may result in disciplinary action. If disciplinary action is taken, the final written decision relating to that action shall no longer be confidential after it is completed.

3. Other information. Other information to which access by the general public is prohibited by statute.

While section 554 contains an express declaration of confidentiality with respect to the listed records, the ramifications of that declaration are not entirely clear.

Complicating the interpretation of section 554 is the absence of any meaningful legislative history. The confidentiality provision was added to the Personnel Law, without debate, as part of a 1977 "Errors and Inconsistencies" bill. See P.L. 1977, c. 564, § 14, enacting L.D. 1896. In 1979, the Legislature amended the language of the section and, in the same bill, established identical confidentiality requirements for county and municipal governments. See P.L. 1979, c. 403. The Statement of Fact to that bill, L.D. 826, provides the only insight into the legislative intent:

The purpose of this bill is to give to county and municipal employees the same right to privacy concerning their personal history information as is presently given to State employees by Title 5, section 554.

In short, the Legislature viewed these confidentiality provisions as conferring upon governmental employees some measure of privacy with respect to their personal history information.

Against this backdrop, it is our view that section 554 would prohibit a Commissioner from revealing at a public hearing of a legislative committee information contained in personnel records declared confidential by the statute. To conclude otherwise would allow members of the public access to information contained in records which they are expressly prohibited from examining and would thus render the protection afforded by the statute a nullity. Thus, information learned from confidential personnel records should not be disclosed at a public hearing.

Although unrelated to the Personnel Law, the Code of Judicial Conduct might also inhibit testimony about the matters raised in your questions. The Maine Law Court has long held that the powers of the Public Utilities Commission are quasi-judicial in nature. See In re Guilford Water Company, 118 Me. 367, 376 (1919). While the Code of Judicial Conduct has not been expressly made applicable to the Commission, it would be difficult to fault a Commissioner for following its dictates. Canon 3(A) (6) of the Code requires that a "judge should abstain from public comment about a pending or impending proceeding. . . ." Although perhaps not absolutely required to do so, a Commissioner might understandably feel compelled to abide by this standard.^{1/} Thus, to the extent that testimony about a staff member would involve comment on a pending or impending matter, there might well be valid ethical reasons for avoiding such testimony.

^{1/} Another reason for avoiding comment on a pending or impending matter would be to avoid a charge of bias under 5 M.R.S.A. § 9063(1). That section provides in relevant part:

Hearings shall be conducted in an impartial manner. Upon the filing in good faith by a party of a timely charge of bias. . . of a presiding officer or agency member in the proceeding requesting that the person disqualify himself, that person shall determine the matter as a part of the record.

Thus, a Commissioner might reasonably wish to refrain from all public comment on a pending or impending matter which could be construed to reflect his views on that matter.

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Turning to your second question, we know of no authority for a legislative committee to compel testimony except when it has been granted that power by the Legislature pursuant to 3 M.R.S.A. § 165(7). See also 3 M.R.S.A. §§ 401-474.^{2/} Since we interpret your question to refer to a committee which is not operating under a grant of such authority, it would not have the legal power to require a Commissioner to testify about the qualifications or capabilities of Commission staff members. This conclusion applies with equal force to individual legislators serving on the committee.

In light of the above conclusion, we should add that there is nothing which would legally preclude a witness from deciding that a particular line of testimony was inappropriate for a public hearing and from declining to testify on that ground.

I hope this information is helpful. Please feel free to contact me if my office can be of any further service.

Sincerely,


RICHARD S. COHEN
Attorney General

RSC:ks

^{2/} For a detailed discussion of this subject, see Op. Atty. Gen.
79-38.