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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333
April 17, 1980

Mr. James S. Henderson
Deputy Secretary of State
State Office Building
Augusta, Maine 04333

Dear Mr. Henderson:

This will respond to your opinion request of March 13, 1980 in which you ask the following questions:

- "1. For what length of term would a district attorney serve if he were appointed to fill a vacancy left by the resignation of the incumbent district attorney?
- 2. If the answer to number one above implies the need for a special election to fill the remainder of an unexpired term, please indicate the procedure by which such an election should be governed?"

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It is our understanding that your opinion request was prompted by the anticipated resignation of Thomas E. Delahanty, II, as district attorney for Prosecutorial District 3. In attempting to respond to your first inquiry, we must look to those statutory provisions which govern the manner in which vacancies in the office of district attorney are to be filled. We should point out that because of the complex and incomplete nature of the statutory provisions involved, our analysis will be somewhat lengthy.

30 M.R.S.A. §451 (1978) provides in relevant part:

"District attorneys shall be elected and notified, their elections determined and vacancies filled in the same manner, ...as is provided respecting county commissioners, but they shall hold office for 4 years."

The language of section 451 quoted above states the general rule that a vacancy in the office of district attorney is to

be filled in the same manner as would a vacancy in the office of county commissioner. Notwithstanding this general rule, paragraph 3 of section 451 also specifically provides that

"[w]hen the office of district attorney becomes vacant, as defined in section 552, before the first day of October in the 2nd year after the election of a district attorney, there shall be a new election held to fill the vacancy in accordance with the other provisions of this section."

In order to determine whether the provisions of 30 M.R.S.A. §451, ¶ 3 apply to a vacancy in the office of district attorney resulting from the incumbent's resignation, it is necessary to examine the language of 30 M.R.S.A. §552 (1978). Section 552 applies only to a vacancy occurring "by reason of the death, permanent incapacity, removal from office under section 455 or removal from the prosecutorial district of the incumbent of the office."¹ In the event of such a vacancy, the Governor is required to appoint a substitute district attorney "to serve... until the first day of January in the year next following an election for Representative."

In view of the fact that an incumbent's resignation is not a "vacancy" within the meaning of section 552, the provisions of 30 M.R.S.A. §451, ¶ 3 do not apply to such a vacancy in the office of district attorney. Consequently, a vacancy in the office of district attorney, created by the incumbent's resignation, is to be "filled in the same manner,...as is provided respecting county commissioners..."² 30 M.R.S.A. §451, ¶ 1 (1978). Accordingly, we now turn to an examination of the statutory procedures governing the filling of vacancies in the office of county commissioner.

1. 30 M.R.S.A. §552 (1978) provides in its entirety:

"Whenever the office of the district attorney becomes vacant by reason of the death, permanent incapacity, removal from office under section 455 or removal from the prosecutorial district of the incumbent of the office, except as provided for in section 452, the Governor shall appoint a competent attorney, a resident of the prosecutorial district affected, to serve as a substitute district attorney until the first day of January in the year next following an election for Representative."

2. Since a district attorney's resignation from office is not a "vacancy" within the meaning of either section 451, paragraph 3 or section 552, it can be argued that the Legislature omitted resignation from those statutes with the intent that such a vacancy would not be filled by election, but rather, that the gubernatorial appointee would hold office for the duration of the incumbent's unexpired term. See also 21 M.R.S.A. §1441(1) (1965) (providing that "[a] vacancy in any office must be filled for an unexpired term....").

We find this argument unpersuasive. Such an argument overlooks the fact that the first paragraph of section 451 explicitly states that vacancies in the office of district attorney "shall

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By virtue of 30 M.R.S.A. §101 (1978), a board of commissioners has been established in each county "consisting of a chairman and 2 other citizens, all resident in the county, who shall be elected every 4 years, or in case of a vacancy, appointed by the Governor." While section 101 clearly provides for gubernatorial appointment of a commissioner in the event of a vacancy in office, it is silent on the length of that appointment. However, section 103 of Title 30 provides in relevant part that

"[w]hen ... a vacancy happens in the office of county commissioner by death, resignation, removal from the county or for any other reason, the Governor shall appoint a person to fill the vacancy, who shall hold office until the first day of January after another has been chosen to fill the place." (emphasis supplied).

Thus, section 103 specifies that a gubernatorial appointee as county commissioner "shall hold office until the first day of January after another has been chosen to fill the place." A question immediately arises as to what is meant by this rather ambiguous statutory language.

One interpretation of section 103 is that the appointee holds office for the remainder of the unexpired term of the commissioner who vacated the office. In other words, the appointee's term of office would terminate at the expiration of the term of office of the commissioner whose place he filled, and the "first day of January" referred to in section 103 means the January first following the election of a new commissioner who would serve a full four year term. Under this interpretation, a person appointed by the Governor to fill a vacancy created by a district attorney's resignation would hold office until midnight on December 31, 1982.³ See 30 M.R.S.A. §7 (1978).

Another possible interpretation of 30 M.R.S.A. §103 (1978) is that the gubernatorial appointee holds office until the first day of January after the next biennial election, i.e., November, 1980. Under this interpretation, a person appointed by the Governor to fill a vacancy created by a district attorney's resignation

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be...filled in the same manner,...as is provided respecting county commissioners..." Since section 451, ¶3 and section 552, by their very terms, do not apply to a vacancy by resignation, the express language of §451, ¶1 mandates that the vacancy be filled in accordance with the laws governing the office of county commissioner. Moreover, according to such an argument, an election to fill a vacancy in the office of district attorney would be held if the vacancy occurred "by reason of death, permanent incapacity, removal from office...or removal from the prosecutorial district..." (30 M.R.S.A. §552), but not if the incumbent resigned from office. For the reasons discussed later in this opinion, we do not believe the Legislature intended such an illogical result. See, e.g., Land Management Inc. v. Department of Environmental Protection, Me., 368 A.2d 602 (1977).

3. All of the district attorneys presently holding office were elected at the general election in November, 1978 and commenced

would hold office until midnight on December 31, 1980.

Finally, a third interpretation of section 103 is that the person appointed by the Governor holds office until the first day of January after a special election. Under this interpretation, a person appointed by the Governor to fill a vacancy created by a district attorney's resignation would hold office until midnight on December 31 in the year of a special election proclaimed by the Governor.⁴

For the reasons discussed in greater detail below, it is our conclusion that the second interpretation referred to above is the correct construction of 30 M.R.S.A. §103 (1978).

In determining which interpretation of section 103 is correct, we must be guided by the familiar principle of statutory construction that the Legislature's intent is controlling. See e.g., Concord General Mutual Ins. Co. v. Patrons-Oxford Mutual Ins. Co., Me., ___ A.2d ___, slip op. at 5 (Opinion filed February 25, 1980); Paradis v. Webber Hospital, Me., ___ A.2d ___, slip op. at 4 (Opinion filed December 31, 1979). As a general rule, statutes are to be construed in accordance with the plain meaning of the language which the Legislature used. Vance v. Speakman, Me., ___ A.2d ___, slip op. at 5 (Opinion filed December 31, 1979); State v. Flemming, Me., 377 A.2d 448 (1977). See also 1 M.R.S.A. §72(3) (1979). However, the "plain meaning" rule is of limited usefulness where the language of the statute, in this case 30 M.R.S.A. §103, is ambiguous. To determine the legislative intent underlying the enactment of a particular statute, and thereby resolve any statutory ambiguities, it is often helpful to examine the history of the law in question. See, e.g., State v. Bellino, Me., 390 A.2d 1014, 1021 (1978); Finks v. Maine State Highway Commission, Me., 328 A.2d 791, 797 (1974). In view of the ambiguous nature of 30 M.R.S.A. §103, we must look to the history of that statute and related laws in search of any evidence of legislative intent.

The language of 30 M.R.S.A. §103 (1978) first appeared, in virtually identical form, in Chapter 78, §3 of the Revised Statutes of 1857, which provided in relevant part:

"When...a vacancy happens by death, resignation, or removal from the county, the governor, with advice of council, shall appoint a person to fill the vacancy, who shall hold office until the first day of January after another has been chosen to fill the place." (emphasis supplied).

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their four year terms of office on January 1, 1979. See P.L. 1973, c.567, §§21, 23.

4. The second and third interpretations of section 103 raise a question as to the length of the term of office of the person chosen at the general or special election, namely, whether he serves for the remainder of the unexpired term of the incumbent who vacated the office or whether he commences a new four year

As is apparent from an examination of the statute quoted above, the provisions of 30 M.R.S.A. §103, establishing the gubernatorial appointee's term of office, have remained substantially unchanged from 1857 until the present day. See page 3, supra. In order to understand how this statutory procedure for the filling of vacancies in the office of county commissioner developed, it is necessary to examine the history of section 103 prior to 1857.

The laws pertaining to the office of county commissioner can be traced at least as far back as 1831. By virtue of Chapter 500, §1 of the Public Laws of 1831, county commissioners held their offices for four year terms and were appointed by the Governor with the advice of the Council. In the event of a vacancy in the office of county commissioner the law provided that "the governor, with advice of the council, shall appoint suitable persons to fill the same...who shall also hold their offices for the said term of four years." R.S. 1841, c.99, §2. Thus, as originally created, the office of county commissioner was totally non-elective.

In 1842, however, the Legislature passed "An Act for the election of certain county officers." Chapter 3, §1 of the Public Laws of 1842 provided for the election of three commissioners for each county. Pursuant to the procedure established by the 1842 act, the term of office of each commissioner was determined by the number of votes each received at his election. The commissioner with the highest number of votes served for three years, the commissioner with the next highest vote total served for two years and the commissioner who received the third highest number of votes served for a one year term of office. Chapter 3 thus created a system whereby one commissioner's term of office expired each year, and at the annual election, one commissioner would be chosen to serve for a three year term of office. With respect to vacancies occurring in the office of county commissioner, section 3 of Chapter 3, P.L. 1842 provided that

"...in such case the governor with advice of council, shall appoint some suitable person to fill the vacancy, until another shall be chosen in his place, which election shall take place on the second Monday of September next after such vacancy shall have happened."

It is apparent from a reading of section 3 of Chapter 3, P.L. 1842 that the Legislature intended that a vacancy in the office of county commissioner would be filled temporarily by a gubernatorial appointee. It is equally apparent that the Legislature contemplated that the appointee's term of office would be of short duration and that at the next regularly scheduled election for a commissioner "another shall be chosen in his place." Under the staggered procedure established by P.L. 1842, c.3, §1, one commissioner was elected each year and the election to fill a vacancy coincided with the annual election for a commissioner. Thus, under Chapter 3, the gubernatorial appointee would not necessarily serve for the remainder of the incumbent's unexpired term, but rather, until the next commissioner election.

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term. This question is discussed in greater detail in a later section of this opinion.

Two years later, Chapter 87 of the Public Laws of 1844 was enacted as additional legislation to P.L. 1842, c.3.⁵ Section 1 of Chapter 87, P.L. 1844 provided in relevant part:

"In all cases of elections under the act to which this is additional, when...a vacancy shall happen by death, resignation or otherwise, such vacancy shall be filled by the governor and council, as provided in section three of said act to which this is additional, for one year from the first day of January next succeeding the election for the choice of county officers, and so from year to year until an election shall have been effected."

While Chapter 3, §3, P.L. 1842 established when an election to fill a vacancy would be held, Chapter 87, §1, P.L. 1844 fixed the length of the gubernatorial appointee's term of office. Under section 1 of Chapter 87, P.L. 1844, the person appointed by the Governor to fill a vacancy pursuant to P.L. 1842, c.3, §3 would hold office until the first day of January following the election of someone "in his place, which election shall take place on the second Monday of September next after such vacancy shall have happened." P.L. 1842, c.3, §3.

Chapter 3, §3 of the Public Laws of 1842 and Chapter 87, §1 of the Public Laws of 1844 were subsequently reenacted as Chapter 78, §3 of the Revised Statutes of 1857. As mentioned earlier, the language of R.S. 1857, c.78, §3 has survived, virtually unchanged, to become what is now 30 M.R.S.A. §103 (1978). The legislative history of section 103 strongly indicates that the person appointed by the Governor to fill a vacancy in the office of county commissioner does not automatically hold office for the remainder of the unexpired term,⁶ but only until the first day of January after the next regularly scheduled election for commissioners. Pursuant to the law as it existed until 1880, one commissioner's term of office expired each year and, consequently, an election.

5. Chapter 87 of the Public Laws of 1844 was entitled "An Act in addition to an act entitled 'an act for the election of certain county officers,' approved February twenty second, eighteen hundred and forty two." Chapter 3 of the Public Laws of 1842 was approved on February 22, 1842.

6. Strong support for the conclusion that the gubernatorial appointee does not automatically complete the remainder of the unexpired term of the commissioner who vacated office, is found in 30 M.R.S.A. §102 (1978). Section 102 provides in relevant part that "[t]he terms of office of a county commissioner shall be 4 years, except when one is elected to fill out an unexpired term when it shall be for the remainder of the unexpired term." The foregoing language of 30 M.R.S.A. §102 (1978) indicates that the Legislature contemplated that circumstances would arise which would necessitate the election of a county commissioner for an unexpired term of office. Had the Legislature intended that the person appointed to fill a vacancy pursuant to section 103 always held office for the duration of the unexpired term, there would have been no need to provide in section 102 for the election of commissioners "to fill out an unexpired term."

to choose a commissioner was held each year.⁷

Under present law, county commissioners hold office for four years. 30 M.R.S.A. §102 (1978). Moreover, because of the staggered system of electing county commissioners, the term of office of at least one commissioner expires, and has to be filled, every other year. See 30 M.R.S.A. §§105-A -105-U. Section 105 of Title 30 mandates that "[c]ounty commissioners shall be elected on the Tuesday following the first Monday of November in each even-numbered year...." Thus, the regularly scheduled election for a commissioner is the general election in November. See 21 M.R.S.A. §1(14) (1965). Accordingly, the language of section 103 that the gubernatorial appointee holds office "until the first day of January after another has been chosen to fill the place" means the first day of January after the next general election.

Our interpretation of 30 M.R.S.A. §103 (1978) that the gubernatorial appointee holds office until the first day of January after the next regularly scheduled election for county commissioner appears to be consistent with past practice. In Opinion of the Justices, 50 Me. 607 (1863), the Supreme Judicial Court had occasion to interpret the precursor of 30 M.R.S.A. §103, namely, Chapter 78, § 3, R.S. 1857. The facts of this case merit consideration in some detail. At the annual election for county officers in 1860, one John Hemingway was chosen as commissioner for York County. After assuming office in January 1861, Hemingway served one year and then resigned. The Governor appointed one Alfred Hall to fill the vacancy and he served until the first of January, 1863. At the annual election in September, 1862 (which was the next regularly scheduled election after Hemingway's resignation) the voters chose Samuel Hasty as commissioner, and he assumed the duties of office on the first of January, 1863. At the next annual election in September, 1863, Alfred Hall was chosen commissioner for a three year term of office.

7. By Chapter 239, §32 of the Public Laws of 1880, the initial term of office for a county commissioner was six, four or two years, depending upon the number of votes each commissioner received. Under this staggered scheme, one commissioner's term expired every other year and a commissioner was then elected to a full six year term of office. The election for a commissioner, rather than taking place at an annual election, was held at the biennial election in September. P.L. 1880, c.239, §34. In 1943 the Legislature established the initial term of office for each commissioner at six years, regardless of the number of votes he received. See P.L. 1943, c. 307. The present four year term of office for county commissioners was set by Chapter 332, §2 of the Public Laws of 1975

8. 20 M.R.S.A. §1(14) (1965) defines the "general election" as "the regular election of state and county officials occurring biennially in November." A "regular election" is one "held at a regular time prescribed by statute." 21 M.R.S.A. §1(34) (1965).

The question presented to the Justices was whether Samuel Hasty had been elected to fill out Hemingway's unexpired term or whether he served for a full three year term of office. The Justices held:

"John Hemingway was elected for the full term of three years. He held office one year and resigned. It then became the duty of the Governor and Council to make a temporary appointment to continue 'until the first day of January after another has been chosen to fill the place.' That place to be filled was the one made vacant by the resignation of Hemingway, whose original term of office had not then expired, but which will expire on the first day of January 1864. That place has been filled by the election of Samuel Hasty for that specific purpose and no other." (emphasis original).

As the facts in the Justices' Opinion illustrate, the election to fill the vacancy was held at the next regularly scheduled commissioner election. See also Opinion of the Justices, Me., 260 A.2d 142, 145 (1969). Moreover, the Opinion makes it clear that the person elected to fill the vacancy holds office for the remainder of the incumbent's unexpired term. See note 4, supra. See also Opinion of the Justices, 61 Me. 601, 603-04 (1872) See generally 30 M.R.S.A. §102 (1978) (note 6 supra); 21 M.R.S.A. §1441(1) (1965).

Having concluded that, pursuant to 30 M.R.S.A. §103 (1978), the gubernatorial appointee holds office until the first day of January after the next regularly scheduled commissioner election, it is now necessary to apply that conclusion to your specific question regarding a district attorney's resignation from office. It is our understanding that Mr. Delahanty is expected to resign from office in the very near future. Under our analysis of 30 M.R.S.A. §103(1978), upon Mr. Delahanty's resignation the Governor is required to appoint a person to fill the vacancy who will serve until midnight on December 31, 1980. At the biennial election to be held in November of this year, someone will be chosen district attorney to serve for the remainder of Mr. Delahanty's unexpired term, i.e., until midnight on December 31, 1982.

Of course, we have assumed that Mr. Delahanty will resign shortly and that there will be sufficient time to prepare for the election to fill his vacancy in November. In the event that it is not possible, because of the timing of Mr. Delahanty's resignation, to elect someone at the November election, then the gubernatorial appointee would hold office until the first day of January after the next biennial election, i.e., until midnight on December 31, 1982. The Legislature has not indicated, in the context of a district attorney's resignation from office, at what

9. 21 M.R.S.A. §1441(1)(1965) provides that "[a] vacancy in any office must be filled for an unexpired term, except where it is specifically provided to the contrary."

point in time it becomes impossible or impracticable to hold the "vacancy" election in November. Nevertheless, in making this determination we would advise you to follow the timetable provided for in 30 M.R.S.A. §451, ¶3.¹⁰

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In view of our conclusion that the person appointed to fill a vacancy created by a district attorney's resignation from office serves until the first day of January after the next biennial election, it is necessary to consider your second inquiry regarding "the procedure by which such an election should be governed." In the event that the election to fill the vacancy takes place at the general election in November, 1980, as to the office of district attorney it will be a special election.¹¹ As stated by the Law Court in Duquette v. Merrill, 141 Me. 232, 236, 42 A.2d 254 (1945), a case involving an election to fill a vacancy in the office of county treasurer:

"Although it was a general election that was held September 11, 1944, yet, assuming a vacancy in the office of County Treasurer, and the right and duty of the electorate to fill that vacancy at the time of the general election, yet as to such office it was a special election, as there would be no one to be elected except for the vacancy and by the provisions of the statute the election would not be for the regular term of four years but for the unexpired term of two years. That such election is held at the same time and place with the general election, does not change its character."

Thus, with respect to the election to fill the expected vacancy in the office of district attorney, that election should be treated as a special election and you should be guided by the

10. Paragraph 3 of 30 M.R.S.A. §451 (1978) is quoted in its entirety at page 2 supra.

11. Paragraph 2 of 30 M.R.S.A. §451 provides that "[t]he district attorneys shall be elected on the Tuesday following the first Monday in November in every 4th year..." A special election is defined by 21 M.R.S.A. §1 (36) (1965) as "an election other than a regular election." Of course, if it is not possible to hold the vacancy election in November, 1980, then the next biennial election in November, 1982 would be the regular election for district attorney.

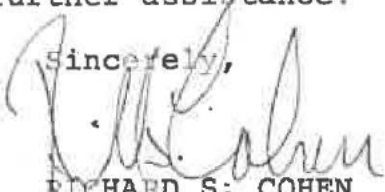
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provisions of 21 M.R.S.A. §1444 (1965).

SUMMARY

The following will summarize our conclusions with respect to your opinion request. First, a vacancy in the office of district attorney, occurring by reason of the incumbent's resignation, must be filled in accordance with 30 M.R.S.A. §103, governing the filling of vacancies in the office of county commissioner. Second, in the event of a vacancy in office under 30 M.R.S.A. §103, the Governor must appoint a person who will hold office until January first after the next general election, which will be conducted either in November, 1980 or in November, 1982, depending upon when the vacancy occurs. Third, if the vacancy election is held in November, 1980, then the gubernatorial appointee holds office until midnight on December 31, 1980 and the person elected to fill the vacancy completes the remainder of the incumbent's unexpired term. On the other hand, if a vacancy election cannot be held in November, 1980, the gubernatorial appointee holds office until midnight on December 31, 1982 and the person elected in November, 1982 commences a new four year term of office as district attorney. Finally, if a vacancy election is held in November, 1980, it should be treated as a special election in accordance with the provisions of 21 M.R.S.A. §1444 (1965).

I hope this information is helpful to you. Please feel free to call upon me if I can be of further assistance.

Sincerely,


RICHARD S. COHEN
Attorney General

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12. 21 M.R.S.A. §1444 (1965) provides:

"A special election must be notified and conducted as nearly as practicable like its regular counterpart.

1. The proclamation of a special election must specify the time and place it must be held as well as any necessary filing, posting, publishing and reporting dates."