

MAINE STATE LEGISLATURE

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

July 16, 1980

Honorable Richard H. Pierce
42 Roosevelt Avenue
Waterville, Maine 04901

Dear Senator Pierce:

You have asked several questions regarding the powers of the Commissioner of Inland Fisheries & Wildlife to regulate the time and manner of the hunting of bear. For the reasons set forth below, it is our opinion that the Commissioner may not vary by regulation the number of dogs that may be used to hunt bear, but that he may by regulation close the State or any part thereof to the hunting of bear generally for any period of time between May 1 and the first Monday following Thanksgiving. You have also asked whether the Commissioner may hold a public hearing with regard to a proposed regulation which he does not, in our opinion, have the legal authority to adopt, to which our response is that we cannot find any rule of law that would prevent such activity.

I. Regulation of Hunting Bear with Dogs.

You have asked whether the Commissioner may by regulation prohibit the hunting of bear with dogs. This manner of hunting is governed by 12 M.R.S.A. § 7452(1) which provides that a person hunting bear with dogs may not use more than four dogs at any one time. This provision derives from a statute enacted in 1973 which limited the number of dogs which could be used to hunt bear to ten. P.L. 1973, c. 181 (1973). An examination of the legislative history of this act reveals that it was one of several proposals before the Legislature at the 1973 Regular Session relating to the use of dogs for hunting bear. One of these proposals, Legislative Document 536, would have prohibited the use of dogs entirely, but this bill was unanimously reported by

the Fisheries & Wildlife Committee of the Legislature "ought not to pass." 1973 Legislative Record, at 470, 504. The bill which eventually became law, Legislative Document 230, proposed to limit the number of dogs to six. That number was later raised to ten and the bill finally emerged from the Committee as Legislative Document 1790 and was passed by the Legislature without debate. It would thus appear that the Legislature had clearly considered all possible resolutions to the question of how many dogs should be permitted in hunting bear and had resolved the issue by determining that ten was the appropriate number.

In 1975, a bill was introduced to reduce the number of dogs allowable to four, and, notwithstanding a recommendation of the Fisheries & Wildlife Committee that it ought not to pass, was enacted by both Houses after substantial debate. P.L. 1975, c. 266; 1975 Legislative Record at B763-64, B809-10. Later, in 1979, this provision was moved to a new place in the Revised Statutes, as part of a recodification of the entire Fisheries & Wildlife laws. P.L. 1979, c. 420. As indicated above, the provision may now be found at 12 M.R.S.A. § 7452(1).

The powers of the Commissioner to pass rules regulating the conduct of hunting are governed by 12 M.R.S.A. § 7035(1). That section provides in relevant part:

"The commissioner may, with the advice and consent of the advisory council in conformity with the Maine Administrative Procedure Act, Title 5, Part 18, and except as otherwise provided, adopt, amend and repeal reasonable rules, including emergency rules, necessary for the proper administration, implementation, enforcement and interpretation of any provision of law that he is charged with the duty of administering."

Thus, the issue presented is whether Section 7452(1), with its attendant legislative history outlined above, constitutes a limitation on the power of the Commissioner to regulate the number of dogs which may be used to hunt bear within the meaning of the "except as otherwise provided" language of Section 7035(1). Since it is quite clear that the Legislature thoroughly addressed the question of the number of dogs which may be used to hunt bear and resolved it by permitting a maximum of four, it is our opinion that Section 7452(1) would constitute such an exception to Section 7035(1) and that the Commissioner may not change the number by regulation.

II. Regulation of Bear Hunting Season.

You have asked three questions regarding the power of the Commissioner to limit the hunting of bear generally, both as to time and place. As indicated in the answer to the preceding question, under Section 7035(1) the Commissioner's powers in this regard are plenary, unless there can be found a specific statutory provision which limits them. The only provision addressing the general question of the hunting season for bear is 12 M.R.S.A. § 7451(1)(A) which provides:

"There shall be a closed season on hunting bear from the first Monday following Thanksgiving to April 30 of the next calendar year."

This provision dates from 1965, P.L. 1965, c. 274. The purpose of the bill was to close the State to the hunting of bear during the hibernation season, 1965 Legislative Record at 1208-10, and it therefore constitutes an express legislative directive that there be a closed season for the hunting of bear during the period specified. This would appear to prevent the Commissioner from opening the State to the hunting of bear at any time during that period. The question remains, however, as to whether Section 7451(1)(A) impliedly prohibits him from closing the State, or any part thereof, to the hunting of bear at any time from May 1 to the first Monday following Thanksgiving. We believe that the section should not be read in this way.

Prior to 1978, the predecessor of § 7451(1)(A) coexisted in the code with another section which accorded the Commissioner full power to regulate the time and manner of hunting of bear. That section, formerly codified at 12 M.R.S.A. § 1960-A, provided:

"The Commissioner, with the advice and approval of the Advisory Council shall, by regulation, establish open seasons for the hunting . . . of . . . fur-bearing animals, and may make such other regulations, including adequate limits with regard to the same, as may be deemed advisable. He may, from time to time, with the advice and approval of the Advisory Council, change or close such open seasons with respect to any species of . . . fur-bearing animals, and may change such existing regulations or issue such new regulations as may be deemed advisable."

The term "fur-bearing animals" was further defined expressly to include bear. 12 M.R.S.A. § 1960-A(2). It is thus clear that, before 1978, the Commissioner had full power to establish open seasons for bear hunting during the period that had not been explicitly closed by the Legislature.

In 1978, § 1960-A was repealed, as part of an omnibus bill designed to conform the statutes of the State to the newly enacted Maine Administrative Procedure Act: P.L. 1977, c. 694. In conforming the Inland Fisheries & Wildlife laws to the Administrative Procedure Act, the Legislature repealed all explicit grants of rule-making authority which had theretofore been granted to the Commissioner and replaced them with a new general rule-making authority, now codified as Section 7053(1). *Id.* at §§ 244 to 273. As indicated above, this section gives the Commissioner the authority to promulgate any rule "necessary for the proper administration, implementation, enforcement and interpretation of any provision of law that he is charged with the duty of administering," except as otherwise provided. Thus, the repeal of § 1960-A was not intended by the Legislature to alter the Commissioner's rule-making powers as they existed in 1978, but merely to cast them in a new form. Consequently, the Commissioner must be judged to have retained the power to regulate the time and place of hunting of bear between May 1 and the first Monday after Thanksgiving.

That being the case, the answer to your second question is that the Commissioner may limit by regulation bear hunting during the month of November although, in answer to your third question, he may not extend the open season beyond the first Monday after Thanksgiving, even if that happens to still fall in November. Finally, in answer to your fourth question, the Commissioner would also be able to limit bear hunting to the same period of time as that which has been legislatively set for the hunting of deer, since the deer hunting season begins in October and ends on the Saturday following Thanksgiving and is therefore entirely within the period in which the hunting of bear is not legislatively prohibited.

III. Authority to Hold Public Hearing.

Your final question is whether the Commissioner may hold a public hearing with regard to the adoption of a proposed rule which he may not, in the opinion of this office, have the legal authority to promulgate. Our answer is that we can find no statutory prohibition against his holding such a hearing, which

might be viewed as analogous to the holding of a hearing by the Legislature on a piece of proposed legislation which, in the view of the Attorney General's Office, would be clearly unconstitutional. Thus, even if our office were of the view that a proposed rule would be beyond the scope of an agency's authority (as we feel would be the case with a proposed rule regulating the number of dogs which may be used to hunt bear), we would not undertake to attempt to prohibit the holding of a public hearing with regard to such proposed rule, but would simply refuse to approve it as to form and legality, under the powers granted to us by the Administrative Procedure Act, 5 M.R.S.A. § 8056(1)(A).

I hope that this letter answers your questions. Please feel free to reinquire if you need further assistance.

Sincerely,



RICHARD S. COHEN
Attorney General

RSC:mfe

cc: Glenn H. Manuel, Commissioner