

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)

JAMES E. TIERNEY
ATTORNEY GENERAL



82-25

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

April 28, 1982

Reuben Phillips, Acting Chairman
Tribal-State Commission
5 Grove Street
Dover-Foxcroft, Maine 04426

Paul Frinsko, Commissioner
Tribal-State Commission
Bernstein, Shur, Sawyer and Nelson
One Monument Square
Portland, Maine 04101

Dear Messrs. Phillips and Frinsko:

This will respond to your inquiry as to whether an individual may serve simultaneously as either an Active Retired Justice of the Supreme Judicial Court or the Superior Court and Chairman of the Maine Indian Tribal-State Commission. It is our opinion that the holding of these two positions would violate certain provisions of the Maine Constitution.

There are two provisions of the Maine Constitution that severely curtail the right of judicial officers to hold other state offices. Article III, a separation of powers measure, provides:

Section 1. The powers of this government shall be divided into three distinct departments, the legislative, executive and judicial.

Section 2. No person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted.

A second constitutional provision, focusing exclusively on the Judicial Branch, provides:

No Justice of the Supreme Judicial Court or any other court shall hold office under the United States or any other state, nor under this State, except as justice of the peace or as a member of the Judicial Council.

Maine Constitution, Article VI, Section 5.

By its terms, Article III, Section 2 forbids a member of one branch of government from exercising any of the powers of another branch. This office has interpreted Article III as prohibiting an individual from exercising simultaneously duties of an important character for two separate branches of government. See, for example, Opinion of the Attorney General dated February 2, 1981 (and opinions cited therein) concluding that a legislator could not serve as a member of the Tribal-State Commission.

Applying this principle to your inquiry, we are constrained to conclude that an Active Retired Justice may not serve simultaneously as Commission Chairman.

Active Retired Justices are clothed with the same essential judicial powers and status as their fully active non-retired colleagues. Dufresne v. Board of Trustees, 482 A.2d 412, 417 (Me. 1981). They are appointed by the Governor, confirmed by the Legislature, and serve a seven year term like all other judicial officers.^{1/} They possess the same jurisdiction and are subject to the same restrictions as their fully active counterparts^{2/} except that they may exercise their judicial powers only at the direction of the Chief Justice.^{3/} That they are judicial officers can hardly be doubted since, by statute, the Supreme Judicial and the Superior Courts are expressly described as consisting of "active" Justices and "such Active Retired Justices as may be appointed and serving on said court" and, further, they are declared to "constitute a part of the court" from which they retired.^{4/} The statutory language cited above reveals quite clearly that Active Retired Justices are judicial officers.

1/ 4 M.R.S.A. §6 (Supreme Judicial Court); 4 M.R.S.A. §104 (Superior Court); Article VI, Section 4, Maine Constitution.

2/ 4 M.R.S.A. §6 (Supreme Judicial Court); 4 M.R.S.A. §104 (Superior Court).

3/ Id.

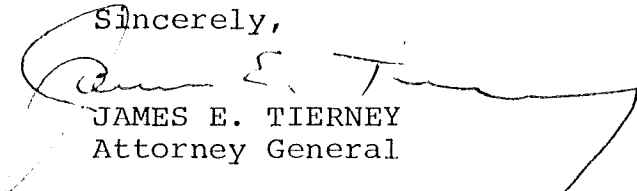
4/ 4 M.R.S.A. §1 (Supreme Judicial Court); 4 M.R.S.A. §101 (Superior Court).

The Chairman of the Tribal-State Commission is, by contrast, an executive officer. The Commission has the authority to enact fishing regulations on waters within and bordering Indian Territory. 30 M.R.S.A. §6207(3). State law provides that any violation of the fishing regulations of the Commission is an unlawful act, 12 M.R.S.A. §7655, which is subject to the jurisdiction of the State's courts. 30 M.R.S.A. §§6204, 6210(2). Since the Commission exercises this regulatory authority, its status is no different from that of any other statutorily created executive agency. The Chairman, who is a voting member of the Commission, plays an important role in these and other policy-making functions conferred on the Commission since no decision or action of the 9-persons Commission is valid unless 5 members vote in favor of such action or decision. 30 M.R.S.A. §6212(3). For these reasons, we must conclude that the Chairman is an executive officer of the State.

In light of the foregoing analysis we are of the opinion that the language of Article III, forbidding a person in one department of government from exercising the powers of another department, prohibits an Active Retired Justice from also serving as Chairman of the Tribal-State Commission. For similar reasons we are of the opinion that holding of these two offices is barred by Article VI, Section 5, a provision prohibiting any Justice from holding any other state office except justice of the peace or member of the Judicial Council. While it is true that the express language of Article VI, Section 5 refers to Justices, not Active Retired Justices, we nonetheless believe its prohibition applies to Active Retired Justices since they are, by statute, members of the Court from which they retired⁵ and it is the apparent intent of Article VI, Section 5 to prohibit such court members from holding other state offices.

In closing, we are aware that the conclusions we have reached may hinder the attempts of the Commission to select a Chairman from the class of Retired Judges described in 30 M.R.S.A. §6212(2). In the event that the Commission's task becomes impossible, it should consider the possibility of securing amendatory legislation to address this matter.

Sincerely,



JAMES E. TIERNEY
Attorney General

JET/ec