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DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

December 23, 1982

Honorable Joseph E. Brennan
Governor of Maine
State House
Augusta, Maine 04333

Dear Governor Brennan:

You have inquired whether, having been reelected to a second four year term last month, you must follow the process set forth in 20 M.R.S.A. § 1-A, should you wish to have Mr. Harold Raynolds, Jr. continue as Commissioner of Educational and Cultural Services into your next term. That section provides, in pertinent part:

> "The department shall consist of a Commissioner of Educational and Cultural Services . . . who shall be appointed by the Governor from a list of 3 candidates prepared by the State Board of Education as established and subject to review by the Joint Standing Committee on Education and to confirmation by the Legislature to serve at the pleasure of the Governor."

This section clearly sets forth how a Commissioner of Educational and Cultural Services is to be initially appointed, and in addition states quite clearly that he may be removed at any time by the Governor, but it is silent on its face as to

whether an incoming Governor, whether succeeding himself or another, may elect to hold over his predecessor's Commissioner without submitting that person to the confirmation process. Significantly, this situation is identical to that which exists for the other members of the Governor's cabinet.1/

For the reasons which follow, it is the opinion of this department that, although a literal reading of the existing general provisions of law governing holdovers might lead to the conclusion that these officers may not continue in office past the expiration of their terms, a thorough examination of the history of these provisions, as well as those governing the appointment of these officers, makes it clear that the Legislature must be found to have intended that none of the members of the Cabinet are required to be reconfirmed should an incoming Governor choose to retain them from his or another's expiring term. This opinion will begin, therefore, with an explication of the general statutory provisions, will continue

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1/ See 5 M.R.S.A. § 287 (Commissioner of Finance and Administration); 7 M.R.S.A. § 1 (Commissioner of Agriculture, Food and Rural Resources); 10 M.R.S.A. § 8002 (Commissioner of Business Regulation); 12 M.R.S.A. sec. 5011 (Commissioner of Conservation); 12 M.R.S.A. § 7031 (Commissioner of Inland Fisheries and Wildlife); 22 M.R.S.A. § 1 (Commissioner of Human Services); 23 M.R.S.A. § 4205 (Commissioner of Transportation); 25 M.R.S.A. § 2901 (Commissioner of Public Safety); 26 M.R.S.A. § 1401 (Commissioner of Labor); 34 M.R.S.A. § 1 (Commissioner of Mental Health and Mental Retardation); 34 M.R.S.A. § 32 (Commissioner of Corrections); 38 M.R.S.A. § 341 (Commissioner of Environmental Protection). The statute governing the Commissioner of Personnel, 5 M.R.S.A. § 631, enacted by P.L. 1979, c. 127, § 31 and amended by P.L. 1981, c. 289, § 6, adds the phrase "or until his successor has been appointed and qualified" following the provision that the Commissioner "shall serve at the pleasure of the Governor." The statute governing the Commissioner of Marine Resources, 12 M.R.S.A. § 6022(1), enacted by P.L. 1977, c. 661 , § 5, provides that "his term shall be coterminous with the Governor, but shall continue until his successor is appointed and qualified" instead of that he "shall serve at the pleasure of the Governor." There is no indication in the legislative history of either provision, however, that the Legislature intended any different treatment of holdovers in these two offices than in those of the rest of the cabinet.

with a brief summary of the history of their enactment, and will conclude with a history of the specific statutory provisions relating to the members of the cabinet.[2/]

I. General Constitutional and Statutory Structure

As just indicated, the statutes governing the appointment of the various members of the Governor's cabinet are silent as to whether they may be held over by a succeeding Governor without reconfirmation. One current provision of the Maine Constitution and three current statutes of general applicability, however, have a possible bearing on the problem.

Article IX, Section 6 of the Maine Constitution provides:

> "The tenure of all offices, which are not or shall not be otherwise provided for, shall be during the pleasure of the Governor."

Title 5, Section 3 of the Maine Revised Statutes states, in pertinent part:

> "All civil officers . . . appointed in accordance with law and whose terms of office are fixed by law, shall hold office during the term for which they were appointed and until their successors in office have been appointed and qualified, unless sooner removed in accordance with law." (emphasis added)

An apparent companion provision, Title 5, Section 2, provides:

> "All civil officers, appointed in accordance with law, whose tenure of office is not fixed by law or limited by the Constitution of Maine, otherwise than during the pleasure of the Governor . . . shall hold their respective offices for 4 years and no longer, unless reappointed, and shall be subject to removal at any time within that term by the Governor for cause." (emphasis added)

2/ This opinion is limited in its scope to the question of the confirmation of these officers listed in note 1, supra. If any question should arise as to the ability of any other officer to hold over beyond his term, we would be happy to respond at that time.

Finally, Title 5, Section 1 addresses the problem of vacancies in office as follows:

> "In order to provide for the uninterrupted and orderly functioning of any agency, board, commission or department of the State Government during a vacancy in the office of the appointive or elective head thereof and whenever there is no state official, deputy, assistant or other state employee duly authorized by law to exercise the powers and perform the duties of such appointive or elective head during such vacancy, the Governor is empowered to appoint a temporary deputy commissioner to exercise the powers and perform the duties of the appointive or elective head of such office during such vacancy. The term of office of such temporary deputy commissioner so appointed shall be at the pleasure of the Governor and shall not extend beyond the date of qualification of a successor to the office of appointive or elective head of such agency, board, commission or department or 60 days from the date of his appointment, whichever shall first occur. The term of office of such a temporary deputy commissioner so appointed to an office to which appointments are by law subject to confirmation by the Legislature shall be at the pleasure of the Governor and shall not extend beyond the date of qualification of a successor appointed to such office or 6 months from the date of appointment, whichever shall first occur. Such temporary deputy commissioner shall not be eligible for reappointment. Such temporary deputy commissioner shall be appointed from the personnel of the agency, board, commission or department in which such vacancy occurs.

On its face, this scheme appears to provide a clear answer to the holdover problem. If the office in question is one whose "term," is "fixed by law," then an incumbent may continue to serve beyond such term until his successor is "appointed and qualified." 5 M.R.S.A. § 3. If the "tenure of office is not

fixed by law," otherwise than "during the pleasure of the Governor," the term is then fixed at "four years and no longer," and an incumbent may not serve beyond that time. 5 M.R.S.A. § 2. If a vacancy should occur in an office, perhaps by the operation of Section 2, the Governor may appoint a temporary deputy commissioner "from the personnel of the agency" for a single six month period while the position was being filled for another four years through the appropriate confirmation process. 5 M.R.S.A. § 1.

Applying these provisions to the problem at hand, the first question to resolve is whether the position of Commissioner of Educational and Cultural Services (as well as the other department heads enumerated in footnote 1, supra) is one whose "term" or "tenure" is "fixed by law." The statute governing that position, quoted at the outset of this opinion, is silent as to the term for which any Commissioner serves. Thus, it would appear that the Commissioner's term is not "fixed by law," and that Section 2 would apply. This would mean that the Commissioner's term would expire four years after it began, and the present incumbent would be ineligible to remain in office (unless he qualifies as a member of the "personnel of the agency" and could be appointed a temporary deputy commissioner for six months) without being reappointed, confirmed and qualified within that time.3/

We are unable, however, to accept this conclusion. A careful review of the history of the enactment of the three sections of Title 5, as well as an examination of the

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3/ This was the conclusion reached in an opinion of a Deputy Attorney General of this office on December 11, 1978, with regard to the position of Commissioner of Educational and Cultural Services, a copy of which is attached. That opinion found Section 2 to be applicable to the position and, after assuming that the four year provision contained therein rendered the Commissioner's position coterminous with that of the Governor, determined that the incumbent's term would expire with that of the outgoing Governor Longley, unless he was reappointed a temporary deputy commissioner pursuant to Section 1. As will be made clear below, we believe this opinion to be in error. A similar conclusion was also reached in an Opinion of the Attorney General of May 25, 1978 (Commissioner of Manpower Affairs), copy attached, an opinion which acknowledged that it was based on "relatively limited research."

legislative history of the provision creating the position of Commissioner of Educational and Cultural Services (as well as those relating to the other department heads), convinces us that the Legislature did not intend the cumbersome procedure just outlined to apply at the beginning of each Governor's term. We therefore here summarize that history to show that the Legislature intended that Section 3 apply in these circumstances, and not Section 2.

II. History of Title 5, Sections 1, 2 and 3.

Article IX, Section 6 of the Maine Constitution provides that, unless limited by law, all officers in the state government shall serve at the pleasure of the Governor. This provision appeared in identical form[4/] in the original Maine Constitution which went into force shortly before the entry of the State into the Union in 1820. As suggested above, however, a provision of law which sets forth only that a civil officer serves "at the pleasure" of another determines only the manner by which such officer may be removed and is silent as to the term for which he may serve without being reappointed. Nonetheless, it was the practice in the early Maine Legislatures to create civil offices, to be filled by gubernatorial appointment with the advice and consent of the Executive Council, whose appointees were to serve for an unlimited period of time, at the pleasure of one or both.[5/] At the time, of course, the Governor of Maine served only a one year term. Maine Constitution, Article V, § 2 (1819). Consequently, perhaps acting out of a desire to limit the ability of a particular Governor to appoint officials with indefinite tenure to positions of significant regulatory responsibility whose removal, if the consent of the Executive

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4/ Except that the "pleasure" was, at the time, of the Governor and the now-abolished Executive Council.

5/ See, e.g., P.L. 1821, c. 148, § 1 (Inspector General of Beef and Pork); P.L. 1821, c. 149, § 1 (Inspector of Butter and Lard); P.L. 1821, c. 150, § 1 (Fish Inspectors); P.L. 1821, c. 175, § 1 (Indian Agents) and, two provisions which later became the subject of litigation, P.L. 1821, c. 54, § 9 (Reporter of the Supreme Judicial Court) and P.L. 1821, c. 156, § 4 (Inspector of Stone Lime and Lime Casks).

Council were required, might be difficult, the Legislature, in 1824, enacted a Tenure of Office Act.[6] P.L. 1824, c. 257. This law, which survives in substantially the same form[7] today as 5 M.R.S.A. § 2, made it clear that unless otherwise provided,[8] the tenure of office of any civil officers appointed by the Governor and Executive Council shall be four years and no longer. Holdovers were thus clearly not permitted, for to do so would be to divest the provision of its basic purpose: the limitation of the tenure of officers holding

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6/ The enactment of Tenure of Office Acts was evidently quite common during this period of American history, perhaps owing to the development of political parties and the so-called "spoils system" for the filling of governmental offices. See the history of the federal Tenure of Office Acts, the first of which contained a four-year limitation and was enacted in 1820, set forth in the dissent of Justice Brandeis in Myers v. United States, 272 U.S. 52, 250-275 (1926).

7/ The only significant difference is that the current statute contemplates removal of persons holding offices covered by the section for cause only, whereas the original act specified that they should serve at the pleasure of the Governor and Executive Council.

8/ In the first codification of the Maine statutes in 1841, the phrase "otherwise than during the pleasure of the Governor and Council" was added to the Tenure of Office Act of 1824. Since we do not believe this phase affects a term of office in the first place, and since it was added to the law as part of a recodification, which is generally thought not to effect a change of substance, we do not think its addition of any legal consequence. The Supreme Judicial Court apparently agrees. In the Opinion of the Justices, 72 Me. 542 (1881), Justices Appleton, Peters and Barrows indicated that the Act was the subject of "slight alterations by way of condensation and not intended to effect any change"; id. at 558, and Justice Libbey observed that "the provisions of the Act have been brought down through the revisions of 1840 and 1857 . . . with no change of language indicating an intention of the Legislature to change of meaning. . . . .. " Id. at 564.

positions of otherwise unlimited duration.9/

It was not until 1947 that the holdover problem was finally addressed by the Legislature. In that year, the Legislature enacted what now survives as 5 M.R.S.A. § 3, providing that if a person is serving in an office for which a term is fixed, he may hold over after the expiration of his term until his successors have been "appointed and qualified." P.L. 1947, c. 4. Regrettably, no legislative history survives as to how this provision was intended to mesh with the old Tenure of Office Act. However, it is worthy of note that, by the time of the 1947 enactment, the government of the State had seen the development of a substantial permanent bureaucracy, organized

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9/ In the century following its enactment, the Supreme Judicial Court had occasion to apply the Tenure of Office Act of 1824 twice, although in neither case was the issue whether an office holder could hold over after the expiration of four years after his assumption of office. In 1881, the attempted removal of the Reporter of the Law Court by the Governor before the expiration of four years prompted the Executive Council to ask the Justices of the Court for an advisory opinion as to whether their consent was not also required. The Justices responded that the Tenure of Office Act did apply, since, as indicated at note 5 supra, the statute authorizing the appointment of the Reporter did not fix his term, and that, inasmuch as the Act contemplated removal by the Governor only with consent of the Executive Council, the Governor could not act alone. Opinion of the Justices, 72 Me. 542 (1881).

Later, in 1913, the Court also invoked the Act in sanctioning the removal of an inspector of lime casks before the expiration of his four year term by the Governor and Executive Council. Lothrop v. Rockland & Rockport Lime Company, 110 Me. 296 (1913). The use of the Tenure of Office Act in this case seems inappropriate and unnecessary since the statute governing lime inspectors had been amended since its original enactment in 1821, see note 5 supra, and by the time of the Lothrop case fixed the terms of the inspectors at four years "unless sooner removed." P.L. 1903, c. 196, § 1. Thus, the same result should have been reached without recourse to the Tenure of Office Act. This office has had occasion to criticize Lothrop on this point before. Opinion of Attorney General 81-63 at note 1 (July 2, 1981), copy attached.

into departments headed by commissioners, all of whom served for fixed terms independent of that of the Governor.10/ The statutes establishing these commissionerships typically provided that they should be appointed by the Governor with the consent of the Executive Council and should serve at their joint pleasure for terms of three or four years.11/ If a vacancy occurred, the successor commissioner was to serve for a full term of the same duration.12/ No provision, however,

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10/ Since 1881, the Governor had served a two year term. The first four year Governor was John H. Reed, following his reelection in 1962. Maine Constitution, Article V, § 2.

11/ The Revised Statutes of Maine of 1944 contained provisions of this kind regarding the following predecessors of the commissioners listed in note 1, supra: Commissioner of Finance (c. 14, § 1, three years); Commissioner of Health and Welfare (c. 22, § 1, three years); Commissioner of Institutional Services (c. 23, § 1, three years); Commissioner of Labor and Industry (c. 25, § 1, three years); Commissioner of Forestry (c. 32, § 1, four years); Commissioner of Inland Fisheries and Game (c. 33, incorporating by reference c. 38, § 1 of the Revised Statutes of 1930, three years); Commissioner of Sea and Shore Fisheries (c. 34, § 1, four years); Commissioner of Education (c. 37, § 1, three years); Commissioner of Banking (c. 55, § 1, four years, removable only for cause); Commissioner of Insurance (c. 56, § 2, four years). There is no provision in several of these statutes that incumbents serve at the pleasure of the Governor and Executive Council; that gap, however, would presumably have been filled by the operation of Article IX, Section 6 of the Maine Constitution quoted supra. The Commissioner of Agriculture was chosen by the Legislature for a four year term, c. 27, § 1. There was no predecessor commissioner for the Departments of Transportation and Personnel, which were run by Boards with their own special appointment statutes, c. 20, § 3 and c. 59, § 3. And there were no predecessors to the Commissioners of Public Safety and Environmental Protection at all.

12/ This succession provision was absent from the statutes of the Forestry Commissioner, Fish and Game Commissioner and Sea and Shore Fisheries Commissioner.

was made for persons holding over past the expiration of their terms.13/ Thus, it might be fair to conclude that the purpose of the 1947 enactment was to make it clear that members of the Governor's cabinet (and any other officials who served for fixed terms and whose statutes were silent as to their holding over), could continue to serve after their terms had expired until their successors assumed office. In any event, it was clear that the Tenure of Office Act no longer applied to the members of the cabinet, since the statutes under which they held office (unlike those of executive officers in 1824), provided that they should do so for fixed terms.

In 1957, the Legislature added the final piece to the current statutory structure, enacting what appears today as 5 M.R.S.A. § 1. P.L. 1957, c. 256. This enactment, for which no pertinent legislative history exists, provided that whenever a vacancy existed at the head of any agency (and no other official was authorized by law to act), the Governor may appoint a "temporary deputy commissioner" for no more than sixty days from among the personnel of the agency.14/ The Legislature was thus, apparently, attempting to close any gaps in the statutes where, through resignation or death, a vacancy occurred and no provision for an immediate substitute officer existed. The new provision was clearly not, however, intended to address the problem of holdover members of the cabinet; that problem had been remedied in 1947 with the enactment of the current Section 3 of Title 5, and there was no additional danger at the time that the Tenure of Office Act could operate to create a vacancy in the cabinet, since all of its members served for fixed terms. See note 11, supra. See also Maine Beauty Schools v. State Board of Hairdressers, 225 A.2d 424, 426-27 (Me. 1967), in which the Law Court, applying Section 3, held that a member of the Board of Hairdressers could serve beyond his fixed term, even though the Board's statute did not provide that he might do so until "his successor is appointed and qualified," as had formerly been the case.

13/ Except the Agriculture, Banking and Insurance Comissioners, who served until their "successors were appointed and qualified."

14/ The statute appears today as it was enacted in 1957, except for the inclusion of a sentence expanding to six months the period for which a temporary deputy commissioner for positions for which legislative confirmation is required may be appointed.

III. History of Recent Amendments to Statutes Governing Cabinet Appointments.

The statutory structure regarding the appointment, removal, replacement and ability to hold over of cabinet level officers in Maine was thus unambiguous following the enactment of Section 1 of Title 5 in 1957. Pursuant to their respective statutes, cabinet officers held office for fixed terms not coterminous with that of the Governor, and were removable at pleasure by the joint act of the Governor and the Executive Council. If a vacancy occurred, Section 1 allowed the Governor to appoint a temporary commissioner until he and the Council could agree on a successor. But if a commissioner's term expired, the commissioner could continue to serve, by virtue of Section 3, until his successor was appointed and qualified for a full term.

In 1971, however, a major constitutional change occurred in Maine government. In that year, the Legislature decided to alter the system by which a member of the Governor's cabinet served a term independent of the Governor and, if he enjoyed the confidence of a majority of the Executive Council, might well continue in office against the Governor's will. Following the reelection of Governor Kenneth A. Curtis to a second four-year term in 1970, the Legislature passed a series of acts, removing the fixed three or four year term provisions from the statutes governing the terms of most of the members of the cabinet, and replacing them with a provision that each commissioner shall continue to be appointed by the Governor with the consent of the Executive Council, and shall serve simply at the pleasure of both.[15/] In 1972 and 1973 the

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15/ P.L. 1971, c. 481, § 1 (Commissioner of Commerce and Industry); P.L. 1971, c. 488, § 1 (Commissioner of Consumer Protection); P.L. 1971, c. 489, § 1 (Commissioner of Environmental Protection); P.L. 1971, c. 490, § 1 (Commissioner of Agriculture); P.L. 1971, c. 491, § 1 (Commissioner of Natural Resources); P.L. 1971, c. 492, § 1 (Commissioner of Education); P.L. 1971, c. 493 § 1 (Commissioner of Human Services); P.L. 1971, c. 496, § 1 (Commissioner of Public Safety); P.L. 1971, c. 497, § 1 (Commissioner of Finance and Administration); P.L. 1971, c. 498, § 1 (Commissioner of Transportation); P.L. 1971, c. 499, § 1 (Commissioner of Manpower Affairs). No changes to the statutes governing the Commissioners of Inland Fisheries and Game, Mental Health and Corrections and Sea and Shore Fisheries were made in 1971.

Legislature altered this approach somewhat, and re-amended each of the respective statutes to provide that each commissioner should serve "a term coterminous with the Governor" and be subject "to removal for cause by the Governor and Council." (emphasis added).16/ The great majority of the amendments made no provision for holdovers.17/ Thus, the Legislature may be presumed to have intended to continue the existing rule with regard to holdovers, whereby, pursuant to Section 3 of Title 5, commissioners were permitted to serve beyond their terms until their successors were appointed and qualified. The only pertinent change effected by the legislative activity of

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16/ P.L. 1971, c. 584, § 2 (Commissioner of Commerce and Industry); P.L. 1971, c. 592, § 14 (Commissioner of Public Safety); P.L. 1971, c. 593, § 16 (Commissioner of Transportation); P.L. 1971, c. 594, § 1 (Commissioner of Agriculture); P.L. 1971, c. 610, § 2 (Commissioner of Education); P.L. 1971, c. 615, § 4 (Commissioner of Finance and Administration); P.L. 1971, c. 618, § 8 (Commissioner of Environmental Protection); P.L. 1971, c. 620, § 12 (Commissioner of Manpower Affairs); P.L. 1973, c. 460, § 16 Commissioner of Conservation); P.L. 1973, c. 513, § 3 (Commissioner of Marine Resources); P.L. 1973, c. 553, § § 2, 3 (Commissioners of Health and Welfare, and Mental Health and Corrections); P.L. 1973, c. 585, § 4 (Commissioner of Business Regulation). The provisions for the Commissioners of Education and Manpower Affairs did not specify that their removal for cause should be "by the Governor and Council." The provisions for the Commissioners of Environmental Protection and Marine Resources contained no removal provision whatever. There is no indication in the legislative history of any of the provisions that there is any legal significance to these variations. The Commissioner of Inland Fisheries and Game continued to serve a term of three years, and thus became the only commissioner enjoying that status following the 1971-73 amendments.

17/ The exceptions were the provisions relating to the Commissioners of Transportation, Environmental Protection, Conservation and Marine Resources, each of whom was to serve "until his successor is appointed and qualified." See the appropriate citations in note 16, supra. There is no indication in the legislative history of any of the provisions set forth in note 16 as to why this phrase appears only with regard to these four commissioners.

1971-73 was to convert the commissioners' terms from a fixed number of years to ones coterminous with the Governor.

In 1976, however, the statutes governing the appointment of the Governor's cabinet underwent one final revision. In that year, following the removal of the Executive Council from the Constitution by referendum in November, 1975 (effective January 4, 1977), the Legislature was faced with the problem of redistributing the confirmation powers of that body over hundreds of positions in the executive branch. The result was Chapter 771 of the Laws of Maine of 1975 (the "Redistribution Act") which substantially reduced the number of positions requiring confirmation, and required that those remaining be confirmed, through a complex process, by the Legislature. Since confirmation by the Legislature of the Governor's cabinet was required under the Redistribution Act, it amended once more the commissioners' appointment statutes.

The major issue concerning those amendments, heavily debated both in committee[18/] and on the floors of both houses of the Legislature, was whether the Governor should continue to be limited in his power to remove members of his cabinet for cause, now that the other obstacle to removal, the Executive Council, had been abolished. The Committee and, ultimately, the Legislature determined that he should not be so limited[19/] and the statute of each commissioner was amended to read that he should be:

> "appointed by the Governor, subject to review by the [appropriate committee of the Legislature] and to confirmation by the

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18/ See "Replacing the Executive Council," Final Report of the Joint Standing Committee on State Government, 107th Maine Legislature at 9-10 (February 6, 1976).

19/ Except for the power of the current Governor, James B. Longley, to remove member of his cabinet for the duration of his current term. P.L. 1975, c. 771, § 429-A.

> Legislature to serve at the pleasure of the Governor."20/

The specifications that each commissioner serve a term "coterminous with the Governor" were removed, and no further language, such as that he shall serve "until his successor is appointed and qualified," was added. The various statutes, as indicated at the outset of this opinion, were simply silent as to whether incumbent commissioners would be allowed to hold over beyond the term of the Governor who appointed them.

The problem thus presented is whether, in deleting the references to terms "coterminous with the Governor" from each commissioner's statute, the Legislature intended to render these positions no longer coterminous and thereby reverse the practice with regard to holdovers which had prevailed since the enactment, in 1947, of Section 3 of Title 5. By removing the "coterminous" provision, did it intend to revive, sub silentio, the applicability of the Tenure of Office Act of 1824 by rendering the terms of the commissioners of indefinite duration, and intend further, without explanation, that the mechanism by which any awkwardness during changes in

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20/ See the following sections of the Redistribution Act, amending the statutes of the respective commissioners into the form in which they appear today: § 52-A (Commissioner of Finance and Administration); § 96 (Commissioner of Agriculture); § 122 (Commissioner of Business Regulation); § 142 (Commissioner of Inland Fisheries and Wildlife); § 146 (Commissioner of Marine Resources) (as indicated in note 1, this provison was relocated in the code in 1977, and amended to say that the Commissioner shall serve "a term coterminous with the Governor, but shall continue until his successor has been appointed and qualified"); § 156 (Commissioner of Conservation); § 166 (Commissioner of Educational and Cultural Services); § 207 (Commissioner of Human Services); § 257 (Commissioner of Transportation); § 268 (Commissioner of Public Safety); § 289 (Commissioner of Manpower Affairs (now Commissioner of Labor)); § 376 (Commissioner of Mental Health and Corrections) (the statute creating the Commissioner of Corrections, P.L. 1981, c. 493, § 1, contains the same language quoted in the text of this opinion); § 418 (Commissioner of Environmental Protection). The Commissioner of Personnel was not created until 1979 and reads as indicated in note 1.

administration was to be ameliorated was the appointment of temporary commissioners, pursuant to the 1957 statute? Or did it simply assume that the rule already existing with regard to holdover commissioners was satisfactory, and required no further legislative action? An examination of the legislative history on the point indicates that the Legislature did not intend, in passing Redistribution Act, to reverse the long standing state of the law regarding holdovers.

The most significant element of this history is the amendment which the Act made to the Tenure of Office Act.21/ In amending 5 M.R.S.A. § 2 to remove all reference to the Executive Council, the Redistribution Act added that the removal (now by the Governor alone) of officers whose positions are covered by Section 2 shall be "for cause." P.L. 1971, c. 771, § 24. Clearly, then, the Legislature did not intend the amended Tenure of Office Act to apply to the Governor's cabinet since, as just explained, after extensive debate, it had eliminated the "for cause" limitation from the statutes of those officers and expressly made them removable at the Governor's pleasure. The Legislature cannot have intended to undo indirectly what it had done directly in the same piece of legislation.

In addition, two indirect references to the holdover problem were made in the floor of the Legislature during the passage of the Redistribution Act which support the conclusion that holdovers were to be permitted. First, in describing the

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21/ The Redistribution Act also added, as indicated at note 14 supra, a provision of 5 M.R.S.A. § 1, extending to six months the time for which a temporary commissioner may be appointed to positions requiring legislative confirmation. While no legislative history exists as to the purpose of this provision, its obvious intent was to allow more time than the sixty days already provided in which the newly created legislative procedure could operate. Sixty days was ample time for the seven member Executive Council to convene and act; it was clearly inadequate for a legislative committee to hold hearings, vote and pass a nomination on to the Senate which would usually have to be called into special session to act on it. It is more difficult to discern any intent to ease the transition from one gubernatorial administration to the next by allowing an incoming governor to hold his predecessor's cabinet members over while he was deciding on his own.

intention of the Joint Standing Committee on State Government with regard to the terms of the Governor's cabinet, Representative Cooney, the House Chairman of that Committee, said:

> "So what the committee has provided for is that the commissioner serve at the pleasure of the governor, just as the cabinet officers serve at the pleasure of the president. We have provided that the system would work the same in the State of Maine." 1976 Maine Legislative Record at 841.

While this remark might be viewed strictly as directed only at the removal provisions of the Redistribution Act, it does evince a legislative intention to model Maine practice on federal law. From the beginning of the republic, the tradition at that level was that Presidents need not submit for confirmation cabinet officers whom they chose to hold over into another term, even if those officers were appointed by a prior President.22/ Second, in speaking in favor of the Redistribution Act, Representative McKernan offered the following explanation on the basic purpose of the confirmation process:

> "The whole purpose of. . .a confirming body is to guarantee qualified people running our departments. . . .That is the only role these confirming bodies should have. . . . So there is no need [to have the Governor's removal power limited] because we will be assured by the confirmation process alone that we will have qualified people that will

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22/ The federal practice was thoroughly summarized by Attorney General Mitchell in an Opinion to President Hoover in 1929, on the occasion of Mr. Hoover's intention to hold Secretary of the Treasury Mellon over from the cabinet of President Coolidge. 36 Op.Att'y.Gen. 12, 13-16 (1929). Mr. Mitchell relied heavily upon the earlier opinion of Attorney General Berrien in 1831, which pointed out that such noted cabinet members as Albert Gallatin and James Madison held office through several administrations under one commission. 2 Op.Att'y.Gen. 410 (1831).

be appointed." 1976 Maine Legislative Record at 843.

In the view of Representative McKernan, therefore, if the function of confirmation is to insure competence, there should be no need for reconfirmation, should a new Governor decide to hold over a previously confirmed commissioner. It thus appears that, should it have been faced directly with the question, the Legislature would have sanctioned holdover commissioners.23/

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In conclusion, therefore, it is the opinion of this department that, in amending the statutes governing the appointment of the Governor's cabinet into the form in which they appear today, including the provision governing the Commissioner of Educational and Cultural Services,24/ the Legislature did not intend to revive the practice applicable to holdovers which existed prior to 1947. That being the case, should you desire to retain any of the current

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23/ This conclusion is not inconsistent with the only decisions of the Supreme Judicial Court to have been handed down since 1976 interpreting the statutes at issue in this opinion. In Longley v. State Employees Appeals Board, 392 A.2d 529 (Me. 1978), the Court sustained the power of the Governor not to reappoint a prior Governor's appointee who served entirely at his pleasure. The case therefore did not deal with power of a Governor to hold a prior Governor's appointee over, even if the position in question required Legislative confirmation, which Mr. Sperry's did not.

24/ The statute relating to the Commissioner was further amended in 1978 to include the provision, set forth at the outset of this opinion, that the Governor, in making an appointment, must choose from three names provided to him by the State Board of Education. P.L. 1977, c. 674, § 15-A. There is no indication, however, in the legislative history of this provision, which relates solely to the appointment of the Commissioner, that it was intended in any way to affect whether he might hold over into another administration.

incumbents in the positions enumerated in note 1 supra, you may do so without submitting them to the Legislature for reconfirmation.

Sincerely,

JAMES E. TIERNEY
ATTORNEY GENERAL

JET/dab

cc: Honorable Gerard P. Conley
Honorable John L. Martin

81-63

JAMES E. TIERNEY
ATTORNEY GENERAL

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

July 2, 1981

William G. Blodgett
Executive Director
Maine State Retirement System
State House #46
Augusta, Maine 04333

Dear Bill:

You have requested an opinion from this office on the question of whether the Assistant to the Commissioner of Educational and Cultural Services has the option of joining the Maine State Retirement System. This request requires us to formulate a general rule to determine which state employees are not required to join the Maine State Retirement System as a condition of their employment. The relevant language appears in 5 M.R.S.A. § 1091(1), which describes membership in the System and which reads as follows:

> Any person who shall become an employee shall become a member of the retirement system as a condition of employment and shall not be entitled to receive any retirement allowance under any other retirement provisions supported wholly or in part by the State, anything to the contrary notwithstanding. Membership shall be optional in the case of any class of elected officials or any class of officials appointed for fixed terms.
>
> [Emphasis added.]

In order to formulate a rule, we must determine the meaning of the words "fixed term." As a starting point, we think that the

Legislature intended to encompass at least those officials for whom a specific term is established by constitution or statute.1/ We do not think, however, that these are the only state employees who are to be viewed as serving fixed terms.

We also think that the words "fixed term" were meant to include employees who are appointed by and serve at the pleasure of officials with fixed terms. It is well established that, in the absence of statute, an appointing authority cannot confer on his appointees tenure beyond his own term. See Longley v. State Employees Appeals Board, 392 A.2d 530, 531 (Me. 1978); Ross v. Hanson, 227 A.2d 606 (Me. 1967). It follows that "at pleasure" appointees of officials appointed or elected to offices with established tenures serve a "fixed term" because their tenure is, at most, coterminous with their appointer. In our view, the Legislature intended to include within the "class of officials appointed for fixed terms" not only those officials whose terms are specifically limited by statute or constitution, but also appointees who serve at the pleasure of such officials.

In the context of the Personnel Law, the interpretation suggested in this opinion draws a distinction between state employees who are appointed either to a set term or serve at the pleasure of appointing officials and those state employees who may only be dismissed "for cause." 5 M.R.S.A. § 678. When viewed in this way, our conclusion is supported by the history of the enactment of the original Retirement System statute. The language of § 1091(1) which is interpreted

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1/ This conclusion runs contrary to Lothrop v. Rockland & Rockport Lime Co., 110 Me. 296 (1913), in which the Law Court held that a state official was not appointed for a fixed term if a procedure for his removal prior to the expiration of that term existed. For a number of reasons, however, we do not think the Legislature intended to incorporate that holding into its definition of "fixed term" in the Retirement System statute. First, the Court was interpreting a different statute whose purpose is in no way related to the Retirement System. Second, since statutory or constitutional removal procedures exist for every civil official, see, e.g., Me. Const., art. IX, § 5, the ultimate extension of Lothrop's reasoning is that there are no officers whose terms are "fixed." Finally, and most significantly, the reasoning in Lothrop is flawed and therefore unpersuasive, and we do not think that the Legislature would have incorporated its conclusion in a statute.

herein is identical to the language found in the original retirement statute. P.L. 1941, c. 328, § 227-C. Since the Personnel Law in effect at the time of that enactment set up the same distinction between "for cause" and "at pleasure" employees, see R.S. 1944, c. 59, § 16, it is reasonable to infer that the Legislature had this distinction in mind when it employed the words "fixed term" in the 1941 retirement statute.2/

The distinction suggested in this opinion is also supported by a policy inherent in the operation of the Retirement System. The critical difference between "at pleasure" and "for cause" employees is that the latter have some protection against dismissal, and can therefore reasonably expect to serve a long period or an entire career in state government, while the tenure of the former is likely to be more limited. Under both the current and original retirement statutes, it is necessary to serve a substantial period as a state employee in order to qualify for meaningful retirement benefits. In both cases, the amount of benefit is based on the number of years of service. 5 M.R.S.A. § 1121(2)(A)(1); R.S. 1944, c. 60, § 5(II). Additionally, under the original statute, it was necessary to be

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2/ There is one category of state employees which does not appear to fall within the "for cause"/"at pleasure" distinction developed in this opinion. State officers who are subject to the provisions of 5 M.R.S.A. § 2 appear to have the characteristics of both categories. That section reads as follows:

> All civil officers, appointed in accordance with law, whose tenure of office is not fixed by law or limited by the Constitution, otherwise than during the pleasure of the Governor, shall hold their respective offices for 4 years and no longer, unless reappointed, and shall be subject to removal at any time within said term by the Governor for cause.

The effect of this provision is to limit the term of an officer whose tenure is "not fixed by law or limited by the Constitution, otherwise than during the pleasure of the Governor" to four years, subject to removal for cause during that four-year period. Officers subject to this section thus have "for cause" protection, but only for the limited period of their terms. We conclude that these officers serve a "fixed term" for purposes of § 1091 because their tenure is set by statute and they therefore fall within the original class intended to be excepted from mandatory membership in the Retirement System. Their "for cause" protection does not change this result because it applies only within the period of their set term.

"in service" at the age of 65 in order to qualify for benefits, R.S. 1944, c. 60, § 5(I), and currently, a member must have at least 10 years of service to qualify for a minimum benefit. 5 M.R.S.A. § 1121 (2)(A)(4). It is probable that the Legislature had these provisions in mind when it determined whether membership in the System was to be optional or mandatory. It is therefore reasonable to conclude that the Legislature decided to distinguish between the class of employees whose tenure with the State was likely to be so limited that they might never qualify for benefits and those who could expect to qualify. Membership of the former in the System could be optional; for the latter, it was to be mandatory.

We must now apply the rule formulated herein to your specific inquiry as to whether the Assistant to the Commissioner of Educational and Cultural Services is an official appointed for a "fixed term" under § 1091(1). The Assistant to the Commissioner is described in 20 M.R.S.A. § 1-B(5), as serving at the pleasure of the Commissioner and as not being subject to the Personnel Law. We therefore conclude that the Assistant to the Commissioner of Educational and Cultural Services serves for a "fixed term" under § 1091(1) and therefore may join or not join the System at her option.

We hope this information is useful. If you have any further questions, please feel free to contact this office.

Very truly yours,

JAMES E. TIERNEY
Attorney General

JET/jwp

cc: Vendean Vafiades
Assistant to Comm. of Educational and Cultural Services

William C. Nugent, Assistant Atorney General
Linda McGill, Employee Relations
Norman Best
George Viles, Personnel

Education Bill
Summary 2
Summary 1
Commission 1-A 2

JOSEPH E. BRENNAN
ATTORNEY GENERAL

RICHARD S. COHEN
JOHN M. R. PATERSON
DONALD G. ALEXANDER
DEPUTY ATTORNEYS GENERAL

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

December 11, 1978

Inge L. Foster, Chairman
State Board of Education
Dresden, Maine 04342

Re: Commissioner of Educational & Cultural Services

Dear Mrs. Foster:

You have inquired as to whether a vacancy will exist in the position of the Commissioner of Educational and Cultural Services at the end of the present Governor's term of office. It is our opinion that the Commissioner of Educational and Cultural Services' term of office is coterminous with that of the Governor's and that upon the expiration of the Governor's term of office the Commissioner's term of office also expires.

Pursuant to 20 M.R.S.A. § 1-A the Commissioner of Educational and Cultural Services "shall be appointed by the Governor from a list of three candidates prepared by the State Board of Education as established and subject to review by the Joint Standing Committee in Education and to confirmation by the Legislature to serve at the pleasure of the Governor." Civil officers, other than judicial officers, who are appointed in accordance with law and whose terms of office are fixed by law, normally hold their office during the term for which they are appointed and until their successors in office have been appointed and qualified. 5 M.R.S.A. § 3. However, pursuant to 5 M.R.S.A. § 2 those civil officers whose tenure of office is not fixed by law or limited by the Constitution other than to serve during the pleasure of the Governor "shall hold their respective offices for four years and no longer, unless reappointed." Since the Commissioner of Educational and Cultural Services serves at the pleasure of the Governor and not for a fixed term of office, it is our opinion that 5 M.R.S.A. § 2 is the controlling statute rather than 5 M.R.S.A. § 3. Therefore, the Commissioner's term will end with the Governor's and it would terminate at the expiration of the Governor's term of office.

Although the Commissioner's term is coterminous with the Governor's and would terminate at the expiration of the Governor's term of office, the new Governor could appoint the Commissioner as a temporary Deputy Commissioner to exercise the powers and perform the duties of the Commissioner until a Commissioner is duly appointed. 5 M.R.S.A. § 1. Such an appointment has been limited to a maximum period of six months by Public Laws of 1975, Chapter 771, Section 23.

Chapter 771 was "An Act Redistributing the Powers of the Executive Council." There was considerable legislative debate surrounding the enactment of Chapter 771, in particular dealing with the expanded power of the Governor to appoint and to remove department heads. Amendments which would require the Governor to appoint his Commissioners within a set period of time were considered but were defeated. During debate, Reprsentative Kelleher expressed his concern about the need for job security and the fact that former Commissioners could be kept in a state of limbo by the new Governor while he delayed the appointment process. Representative Cooney responded by pointing out the need for harmony between the Governor and his Commissioners and the need for him to be able to dismiss them at his own discretion.* He added that,

> "the (State Government) Committee has provided that all appointees serve coterminous, but a Governor may appoint, for a six-month provisional period someone, to act as Acting Commissioner. This would mean that if he was unable to find someone to serve in a position quickly, he could appoint a deputy commissioner or some person from the classified service to act as acting commissioner for a period not to exceed six months. So there is a provision in the Committee bill for interim appointments." (L.R. 841, House, March 31, 1976)

The State Government Committee bill was L.D. 2197. Section 23 of Chapter 771 is exactly the same wording as originally appeared in § 23 of L.D. 2197. Therefore, the Legislature has provided for the orderly transfer of governmental functions from one administration to the next by allowing the Governor to appoint a temporary Deputy Commissioner for a period of up to six months while the search for a permanent Commissioner proceeds.

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* On April 5, 1976, Senator Curtis stated that "It was the determination of the (State Government) Committee in its final report that there should be no restrictions upon the Governor" should he decide to dismiss one of his department heads. (L.R. 968).

In conclusion, it is our opinion that 5 M.R.S.A. § 2 applies to the Commissioner's position rather than § 3 and that the new Governor has the authority under 5 M.R.S.A. § 1 to appoint a temporary Deputy Commissioner to be the Acting Commissioner until such time as a Commissioner has been duly nominated and confirmed. At this point, we decline to answer the second question raised in your request of October 31, 1978.

Sincerely,

DONALD G. ALEXANDER
Deputy Attorney General

DGA/ec

JOSEPH E. BRENNAN
ATTORNEY GENERAL

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DEPUTY ATTORNEYS GENERAL

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

May 25, 1978

Emilien A. Levesque, Commissioner
Manpower Affairs
20 Union Street
Augusta, Maine 04333

Dear Emilien:

This letter responds to your oral request for an opinion of this office concerning the term of office for the Commissioner of Manpower Affairs. It is our understanding that the Governor has posted his nomination for a new Commissioner and that this nomination is presently going through the legislative confirmation process. This nomination has caused you to request an opinion on the term of office for the new appointee, if and when he is confirmed.

We realize that time is of the essence with regard to this question in light of the imminent confirmation proceedings, and we have attempted to respond as quickly as possible. On the basis of the relatively limited research we have been able to perform, it is our opinion that the term of office for the new Commissioner of Manpower Affairs would be governed by 5 M.R.S.A. § 2, and would be for a period of four years. That section reads, in pertinent part:

> "All civil officers, appointed in accordance with law, whose tenure of office is not fixed by law or limited by the Constitution, otherwise than during the pleasure of the Governor, . . . shall hold their respective offices for 4 years and no longer, unless reappointed, and shall be subject to removal at any time within said term by the Governor for cause."

Our analysis of the question begins with examination of 26 M.R.S.A. § 1401. This section previously provided that the Commissioner would be appointed ". . . by the Governor with the advise and consent of the Council for a term coterminous with that of the Governor subject to removal for cause. . . ."

However, with the elimination of the Executive Council, this section was amended to provide only that the Commissioner if ". . . appointed by the Governor subject to review by the Joint Standing Committee on Labor and to confirmation by the Legislature . . . ." P.L. 1975, Chapter 771, section 289. Therefore, at the present time there is no specifically provided term of office for the Commissioner.*

Article IX, section 6 of the Constitution of Maine provides "The tenure of all offices, which are not or shall not be otherwise provided for, shall be during the pleasure of the Governor." The term "otherwise provided for" was interpreted, prior to the 1975 amendment to the section, as meaning those cases where the Governor alone is vested with the appointing power, rather than with the advice and consent of the Council. Opinion of the Justices, 72 Me. 542, 547 (1881). However, within the same Opinion of the Justices which contained that construction, there is an indication that the phrase may also include statutory limitations upon terms of office. 72 Me. 558. The Justices found such limitation in P.L. 1824, Chapter 257, which is the forerunner of the present 5 M.R.S.A. § 2. The Justices noted with regard to the 1824 enactment that "The original enactment was passed for the purpose of establishing uniformity in the duration of official life." It is our opinion that 5 M.R.S.A. § 2 provides the same function today and, consequently, since the term of office for the Commissioner of Manpower Affairs is not stated in 26 M.R.S.A. § 1401, the term of that office is for 4 years.

Sincerely,

Joseph E. Brennan

JOSEPH E. BRENNAN
Attorney General

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* This treatment of the Commissioner of Manpower Affairs is unique among "cabinet level" positions, i.e., department heads. Virtually every other position at this level specifically serves "at the pleasure of the Governor." The lack of such provision with regard to the Commissioner of Manpower Affairs may have been an oversight in legislative drafting of P.L. 1975, c. 771.