

# MAINE STATE LEGISLATURE

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

April 15, 1983

Honorable Samuel W. Collins, Jr.  
Maine State Senate  
State House Station #3  
Augusta, Maine 04333

Dear Senator Collins:

This will respond to your request for an opinion in which you make two inquiries concerning Legislative Document 1318, as amended by Senate Amendment "A" (S-42), "AN ACT Pertaining to the Political Activities of State Employees." In particular, you have asked whether the Federal Hatch Act (5 U.S.C. § 1501, et seq.)<sup>1/</sup> applies to certain State of Maine officers and employees and how L.D. 1318 relates to the provisions of that Congressional enactment. Moreover, you have asked whether L.D. 1318, if enacted, would prohibit a state officer or employee from running for the Legislature or the Office of Governor. As more fully explained below, it is the opinion of this Office that the Hatch Act does apply to certain officers and employees of the State and will apply should L.D. 1318 be enacted.<sup>2/</sup> However, because of the ambiguity of L.D. 1318 on the issue, this Office is uncertain as to whether a court would interpret the bill as prohibiting a state employee from running

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<sup>1/</sup> A copy of 5 U.S.C. §§ 1501-1508 (the Hatch Act) is attached to this Opinion.

<sup>2/</sup> For reasons of style, L.D. 1318 will sometimes be referred to as if it were already enacted.

for state elective office, and, therefore, a definitive response to your second question cannot be provided.

In order to place your questions in perspective, it is helpful to examine the current law in Maine regulating the political activities of state employees as well as the Federal Hatch Act and the language of L.D. 1318.

## I. Existing Statutory Law

### A. Maine Law

Maine presently has two statutes which deal with the extent to which classified state officers and employees may participate in political activities. 5 M.R.S.A. § 679-A(1) forbids a classified officer or employee of the State to "use his official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office." Subsection 2 of section 679-A prohibits a classified officer or employee from coercing or advising another state officer or employee "to pay, lend or contribute anything of value to a party, committee, organization, agency or person for political purposes." No classified officer or employee is permitted to be a candidate "for elective office in a partisan public election," although such an individual may be a candidate in a nonpartisan election.<sup>3/</sup> 5 M.R.S.A. § 679-A(3). Finally, 5 M.R.S.A. § 679-A(4) preserves for all classified officers and employees the right to vote as they choose and to express their opinions on political subjects and candidates. As will be seen, section 679-A is virtually identical to the Federal Hatch Act and, in fact, is commonly referred to as the "Little Hatch Act."<sup>4/</sup>

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<sup>3/</sup> As used in this Opinion, a nonpartisan election is any election where "none of the candidates is to be nominated or elected at that election as representing a party any of whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected." 5 M.R.S.A. § 679-A(3).

<sup>4/</sup> It should be pointed out that although 5 M.R.S.A. § 679-A contains various prohibitions, no sanctions for a violation are provided. Moreover, this Office has had only one prior opportunity to interpret the language of 5 M.R.S.A. § 679-A. See Op. Me. Atty. Gen., January 20, 1978 (internal party election not a "public election" within meaning of 5 M.R.S.A. § 679-A(3)).

In many respects, 5 M.R.S.A. § 14 complements 5 M.R.S.A. § 679-A. Section 14 prohibits all state officers and employees from interfering with the participation of any employee in the nonpartisan affairs of a municipality or other political subdivision of the State. It also permits classified officers and employees to make contributions to any political party or candidate, but forbids such individuals to solicit any contribution "from any person for any political purpose in connection with any election for federal, state or county office." Finally, 5 M.R.S.A. § 14 provides that all state employees may donate their own funds, time or services to a political cause subject to the condition that an employee not engage in such conduct during working hours or on property owned or used by the State. Section 14 thus imposes limitations on the political activities of state personnel beyond those required by either the Federal or Maine Hatch Acts.<sup>5/</sup>

#### B. The Hatch Act

The Hatch Act (5 U.S.C. § 1501, et seq.) is a federal statute which imposes various restrictions on the political activities of certain state and local employees. The Act applies to a "State or local officer or employee" of a "State or local agency." 5 U.S.C. § 1501(2) defines a "State or local agency" to mean "the executive branch of a State, municipality, or other political subdivision of a State, or an agency or department thereof." The term "State or local officer or employee" is defined to mean "an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency, . . ."

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<sup>5/</sup> Like Section 679-A, 5 M.R.S.A. § 14 provides no sanctions for a violation of its terms. On two prior occasions this Office has addressed the applicability and meaning of 5 M.R.S.A. § 14. See Op. Me. Atty. Gen., January 20, 1978 (last paragraph of section 14 contemplates that state employee may run in an internal party election); Op. Me. Atty. Gen., April 22, 1976 (section 14 not violated by employee of Bureau of Forestry who served as chairman of a sanitary district).

5 U.S.C. § 1501(4). (emphasis supplied).<sup>6/</sup>

Section 1502 of the Hatch Act contains the specific prohibitions, and exceptions therefrom, which operate against a "State or local officer or employee" as defined. In particular, such an individual may not:

(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office;

(2) directly or indirectly coerce, attempt to coerce, command, or advise a State or local officer or employee to pay, lend, or contribute anything of value, to a party, committee, organization, agency, or person for political purposes; or

(3) be a candidate for elective office.<sup>7/</sup>

5 U.S.C. § 1502(a)(1), (2) and (3).

Section 1502(b) preserves the right of a "State or local officer or employee . . . to vote as he chooses and to express his opinions on political subjects and candidates," and section

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<sup>6/</sup> 5 U.S.C. § 1501(4) specifically provides that the following are not State or local officers and employees:

(A) an individual who exercises no functions in connection with that activity; or

(B) an individual employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by a State or political subdivision thereof, or by a recognized religious, philanthropic, or cultural organization.

<sup>7/</sup> Prior to 1975, an individual falling within the scope of the Hatch Act was forbidden to "take an active part in political management or in political campaigns." By virtue of P.L. 93-443, this language was eliminated and replaced with the prohibition against being a candidate for elective office. 5 U.S.C. § 1502(a)(3).

1502(c) contains a list of state and local officeholders who are exempt from the prohibition against running for elective office.<sup>8/</sup> 5 U.S.C. § 1502(b) and (c). Finally, 5 U.S.C. § 1503 creates another exception to section 1502(a)(3) and permits a "State or local officer or employee" to be a candidate in a nonpartisan election. See note 3 supra.<sup>9/</sup>

Under the Hatch Act the Merit Systems Protection Board, a federal agency, is empowered to investigate possible violations of 5 U.S.C. § 1502, to conduct hearings, to compel the attendance of witnesses and the production of evidence and to order the removal from office of any state or local officer or employee who violates the Act. 5 U.S.C. §§ 1504, 1505, 1507. Moreover, in the event a state agency fails to remove an employee within 30 days after being notified to do so by the Board, or if the employee is removed but, within 18 months, is appointed to another state agency, the Board is empowered to order the withholding of federal loans or grants to that state agency in "an amount equal to 2 years' pay at the rate the officer or employee was receiving at the time of the violation." 5 U.S.C. § 1506. See also Ohio v. United States

<sup>8/</sup> 5 U.S.C. § 1502(c) provides in its entirety:

(c) Subsection (a)(3) of this section does not apply to--

(1) the Governor or Lieutenant Governor of a State or an individual authorized by law to act as Governor;

(2) the mayor of a city;

(3) a duly elected head of an executive department of a State or municipality who is not classified under a State or municipal merit or civil-service system; or

(4) an individual holding elective office.

<sup>9/</sup> As mentioned previously, except as provided in 5 M.R.S.A. § 14, present Maine law appears to prohibit the same conduct as does the Hatch Act. While Maine law applies only to classified officers and employees, the Hatch Act applies to state or local officers and employees, as defined, regardless of whether they are members of a state's classification system.

Civil Service Commission, 65 F. Supp. 77 (S.D. Ohio, 1946).<sup>10/</sup>

## II. Legislative Document 1318

If enacted into law, L.D. 1318 would repeal subsection 3 of 5 M.R.S.A. § 679-A and 5 M.R.S.A. § 14 in its entirety. Section 14 would be replaced with a new list of prohibited and permitted activities. In particular, "officers and employees of this State," a phrase which is not defined in the bill, would be prohibited from using their official authority or influence "for the purpose of interfering with or affecting the result of an election or a nomination for office," and from soliciting any contribution "from any person with whom the officer or employee deals in his official capacity." Moreover, such an individual would be prohibited from coercing or advising another state officer or employee, over whom he has supervisory authority, to make any contribution for political purposes or from soliciting a contribution from any person for political purposes in connection with an election for office, during working hours or on property owned or used by the State.

Under L.D. 1318, certain political activities by state officers and employees would be permitted. Being a candidate in a partisan or nonpartisan election for municipal or county office is expressly permitted under the bill, provided no conflict of interest results. Additionally, subject to the prohibitions in subsection 1 of the bill, state officers and employees are expressly permitted to "participate fully in political campaigns."

The bill would make any violation of 5 M.R.S.A. § 14 a Class E Crime. However, subsections 1, 2 and 4 of 5 M.R.S.A. § 679-A would continue in effect but without any penalties for a violation.

## III. Comparison of Legislative Document 1318 with the Hatch Act

Having briefly outlined the provisions of current Maine law, L.D. 1318 and the Hatch Act, it is now possible to address your specific inquiries. Your question as to whether the Hatch Act applies to certain State of Maine officers and employees is easily answered in the affirmative. By its very terms, the

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<sup>10/</sup> The constitutionality of the Hatch Act has been upheld by the United States Supreme Court. See United Public Workers v. Mitchell, 330 U.S. 75 (1947) (federal officers and employees); Oklahoma v. United States Civil Service Commission, 330 U.S. 127 (1947) (state officers and employees).



Hatch Act applies to "State or local officer[s] or employee[s]" as that phrase is defined in 5 U.S.C. § 1501(4), and nothing in the Act suggests that it is rendered inapplicable simply because a state has enacted similar legislation.<sup>11/</sup> In the event that L.D. 1318 is enacted, the Hatch Act will continue to apply to those state officers and employees falling within its definitional scope unless amended or repealed by Congress.<sup>12/</sup>

You have also requested an analysis as to how L.D. 1318 would relate to the provisions of the Hatch Act. While this Office cannot definitively interpret the Federal Hatch Act, it is possible to make some general observations concerning the potential relationship between the bill and the Act.

As observed earlier (note 9 *supra*) a reading of 5 M.R.S.A. § 679-A, as it currently exists, indicates that that statute prohibits the same type of conduct as the Hatch Act does except that it applies only to classified personnel. Both section 679-A and the Hatch Act prohibit the use of official authority or influence for the purpose of interfering with or affecting the results of an election; both prohibit the direct or indirect coercion of or advice to a state officer or employee to make a political contribution; both prohibit candidacies for elective office in a partisan election and both permit candidacies in nonpartisan elections. L.D. 1318 would leave 5 M.R.S.A. § 679-A in effect, except for the repeal of subsection 3 thereof, i.e., the prohibition against candidacies in partisan elections. Thus, state employees not subject to the Federal Hatch Act would be free of this latter prohibition should L.D. 1318 be enacted. State employees subject to the Federal Hatch Act, however, would of course continue to be banned from candidacy in partisan elections of any kind.

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<sup>11/</sup> In at least two prior opinions, this Office assumed that the Hatch Act applied to certain state and municipal employees. See *Op. Me. Atty. Gen.*, #79-195 (November 9, 1979) (municipal housing rehabilitation counsellor); *Op. Me. Atty. Gen.*, #79-192 (October 30, 1979) (Assistant Director of Finance of the Maine State Housing Authority). As was pointed out in those opinions, any interpretation of the Hatch Act represents a question of federal law and advisory opinions on the meaning and applicability of the Act are rendered by the Office of Special Counsel, 1717 H. Street, N.W., Washington, D.C. 20419.

<sup>12/</sup> The Supremacy Clause of the United States Constitution mandates such a conclusion. U.S. Const., Art. VI, cl. 2.

With regard to 5 M.R.S.A. § 14, L.D. 1318 would repeal and replace that section in its entirety. The bill would instead prohibit an officer or employee of the State from using his official authority or influence for the purpose of interfering with or affecting the result of an election. Both Maine's Hatch Act (5 M.R.S.A. § 679-A(1)) and the Federal Hatch Act (5 U.S.C. § 1502(a)(1)) employ identical language. Maine's Act, however, currently applies only to classified personnel while the Federal Act applies only to a specifically defined class of employees within the executive branch of the State. L.D. 1318, on the other hand, does not define the phrase "officer or employee of this State," and arguably that phrase could be construed to include all officers and employees within the three branches of State Government. Thus, the range of persons covered by this prohibition would be expanded by the bill.<sup>13/</sup>

L.D. 1318 would also prohibit a state officer or employee from soliciting contributions from any person with whom he deals in an "official capacity." Neither the Maine nor Federal Hatch Acts contain such a prohibition, although 5 M.R.S.A. § 14 presently forbids any solicitation by classified officers and employees for political purposes in connection with an election for office. Rather, the Hatch Acts prohibit the direct or indirect coercion of or advice to another state officer or employee to make a political contribution. L.D. 1318 does prohibit such coercion and advice but apparently only where the state officer or employee has a supervisory relationship with another officer or employee. Thus, should L.D. 1318 be enacted in its present form, it is conceivable that an unclassified officer or employee could lawfully solicit or advise another employee to make a political contribution, provided he does not deal with that employee in an official capacity or does not have a supervisory relationship with that employee. Such conduct, however, would continue to be unlawful under 5 M.R.S.A. § 679-A(2) for classified officers and employees and is unlawful under the Federal Hatch Act, if applicable, since

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<sup>13/</sup> Moreover, since L.D. 1318 would only repeal subsection 3 of 5 M.R.S.A. § 679-A, the prohibition in subsection 1 of that Act would continue to apply to classified officers and employees, albeit with no sanctions for any violation. The "Statement of Fact" accompanying L.D. 1318 clearly states that "[t]he new draft goes further to prohibit all state employees, both classified and unclassified, from using their official position to influence an election. . . ." Thus, it would appear that should L.D. 1318 be enacted, the prohibitions contained in 5 M.R.S.A. §§ 14(1)(A) and 679-A(1) would be entirely duplicative as to classified officers and employees.

the relationship between employees is not a factor in determining whether a violation has occurred.

Finally, L.D. 1318 expressly permits a state officer or employee to be a candidate in a partisan municipal or county election. Such conduct would clearly violate the Federal Hatch Act provided, of course, the individual is a state officer or employee as defined by 5 U.S.C. § 1501(4). See, e.g., In Re Higginbotham, 340 F.2d 165 (3rd Cir. 1965); cert denied, 382 U.S. 853 (1966); Smyth v. United States Civil Service Commission, 291 F. Supp. 568 (E.D. Wis. 1968).<sup>14/</sup>

#### IV. Applicability of Legislative Document 1318 to Legislative and Gubernatorial Elections.

Your last question is whether L.D. 1318 prohibits a state officer or employee not subject to the Federal Hatch Act from being a candidate for state elective office. As noted at the outset of this Opinion, L.D. 1318 is somewhat unclear on this issue. While L.D. 1318 describes prohibited conduct, it does not expressly prohibit a state officer or employee from running for state elective office. On the other hand, the bill expressly permits a state officer or employee to be a candidate for municipal or county elective office. The bill itself provides that "[a]ny violations of this section constitute a Class E crime." (emphasis supplied). The "Statement of Fact" accompanying L.D. 1318 recites that

[t]his new draft permits state employees to run for political office in municipalities or counties, provided that a conflict of interest does not result. It would not permit state employees to campaign for the Legislature and retain their state job.

The "Statement of Fact" also recites that "[t]he new draft provides that violation of the prohibitions are Class E crimes." (emphasis supplied). Finally, L.D. 1318 would repeal 5 M.R.S.A. § 679-A(3), which presently imposes a blanket prohibition against candidacies in any partisan public election by classified personnel. Consequently, should L.D. 1318 be enacted, there would no longer be any express prohibition against running for elective office.

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<sup>14/</sup> While this Office has not conducted an in-depth study of those State of Maine officers and employees who are subject to the Federal Hatch Act, it is clear that many employees of the Departments of Transportation, Manpower Affairs and Human Services, to name a few State agencies, would certainly be covered by that Act.

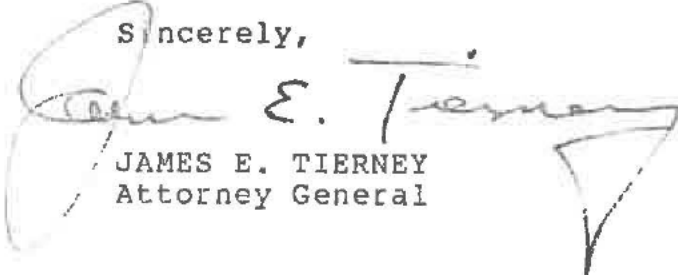
There can be little doubt that the underlying intent of L.D. 1318 is to prohibit state officers and employees from running for state elective office. The difficulty, however, is that the bill does not say so. Since L.D. 1318 would impose criminal penalties, it must be strictly construed. See, e.g., State v. Goyette, 407 A.2d 1104, 1110 (Me. 1979); State v. Porter, 384 A.2d 429, 432 (Me. 1978); State v. Heald, 382 A.2d 290, 294 (Me. 1978). Moreover, it is a fundamental principle of due process "that an enactment is void for vagueness if its prohibitions are not clearly defined." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). See also New England Accessories Trade Ass'n. v. Tierney, 528 F. Supp. 404 (D. Me. 1981), aff'd., 691 F.2d 35 (1st Cir. 1982).

On the other hand, the maxim "expressio unius est exclusio alterius" (expression of one thing is the exclusion of another),<sup>15/</sup> could be invoked to demonstrate that the bill's specific list of permitted activities implicitly prohibits all others. It is questionable, however, whether resort to this rule of statutory construction can overcome the constitutional requirement that a criminal law sufficiently define the conduct which is prohibited.

In short, there appear to be legitimate grounds for concern that a state officer or employee reading L.D. 1318 will not have reasonable notice that being a candidate for state elective office is illegal and carries criminal penalties. Consequently, this Office cannot predict with any degree of confidence how the Maine Law Court would construe L.D. 1318 on this question. It might be advisable, therefore, for the Legislature to clarify its intention on the point by adopting an appropriate amendment to the bill.

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

Sincerely,



JAMES E. TIERNEY  
Attorney General

JET/ec  
Enc.

<sup>15/</sup> See State v. Millett, 392 A.2d 521, 524 (Me. 1978); City of Portland v. New England Tel. & Tel. Co., 103 Me. 240, 249, 68 A. 1040, 1043 (1907).