

MAINE STATE LEGISLATURE

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ATTORNEY GENERAL



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

August 18, 1983

Honorable Joseph E. Brennan
Governor of Maine
State House Station #1
Augusta, Maine 04333

Dear Governor Brennan:

This will respond to your recent opinion request in which you ask a series of questions concerning Chapter 519 of the Public Laws of 1983 (AN ACT to Create the Finance Authority of Maine), which becomes effective on September 23, 1983. Your questions are:

1. Is prospective appointment^{1/} and legislative confirmation of the members of the Finance Authority, other related Boards and the Chief Executive Officer prior to September 23, 1983 permissible?
2. Does the Authority exist as a public entity as of September 23, 1983 even if its members and Chief Executive Officer have not been confirmed?

^{1/} The stages of the appointment process are established by Me. Const. art. V, pt. 1, § 8: nomination, confirmation and appointment ("[The Governor] shall nominate, and, subject to confirmation as provided herein, appoint. . ."). The first stage of the process is, therefore, not "appointment," as your letter suggests, but "nomination." "Appointment" is an act of the Governor occurring subsequent to confirmation, by which the Governor vests the appointee with official authority. It is followed by a final stage of "qualification," in which the appointee takes the oath of office. 5 M.R.S.A. §§ 5, 6 (1979 & Supp. 1982).

3. If the members of the Authority have not been appointed and confirmed by September 23, 1983, what is the status of the Maine Guarantee Authority, the Maine Veterans Small Business Loan Authority and the Maine Small Business Loan Authority and their respective governing boards? If these authorities continue until the Finance Authority is constituted, does that occur when its members are confirmed or when it convenes and elects officers?

For the reasons explained below, it is the Opinion of this Office that the members of the Finance Authority and its related boards and the Chief Executive Officer of the Authority may be prospectively nominated and confirmed prior to the effective date of Chapter 519. Moreover, it is this Department's conclusion that the Finance Authority exists as a public entity as of September 23, 1983, notwithstanding the fact that its members and Chief Executive Officer may not have been confirmed, and that on that date the agencies which the Finance Authority replaces no longer exist as public entities.

In order to place your questions and these answers in perspective, it is necessary to examine the pertinent provisions of Chapter 519.

Chapter 519 of the Public Laws of 1983

On June 29, 1983, you approved Chapter 519 as non-emergency legislation. Accordingly, that Act becomes effective on September 23, 1983, ninety days after the adjournment of the Legislature. See Me. Const., Art. IV, pt. 3, § 16.

The Act creates the Finance Authority of Maine which is charged with the responsibility of administering the Mortgage Insurance Program, the Revenue Obligation Securities Program, the Municipal Securities Approval Program, the Maine Small Business Loan Program, the Maine Veterans' Small Business Loan Program, and the Natural Resources Financing and Marketing Programs. (10 M.R.S.A. § 964(1)). The authority is declared to be "the successor to the Maine Guarantee Authority, the Maine Veterans' Small Business Loan Authority, and the Maine Small Business Loan Authority," (10 M.R.S.A. § 977), and the funds formerly administered by those agencies are to be administered by the Finance Authority or its related boards.^{2/} (10 M.R.S.A. § 1023(1-A)) (Mortgage Insurance

^{2/} There is one exception to this general rule. See 5 M.R.S.A. § 7011(4) (State Development Office successor to Community Industrial Buildings Program formerly administered by Maine Guarantee Authority).

Fund successor to fund formerly administered by Maine Guarantee Authority); (10 M.R.S.A. § 1073) (Municipal Obligations Approval Program successor to program formerly administered by Maine Guarantee Authority); (10 M.R.S.A. § 1092(3)) (Maine Small Business Loan Insurance Fund successor to fund formerly administered by Maine Small Business Loan Authority); (10 M.R.S.A. § 1100-D) (Veterans' Small Business Loan Insurance Fund successor to fund formerly administered by Maine Veterans' Small Business Loan Authority). The Act replaces all references to these authorities with references to the Finance Authority and also creates a new Maine Veterans' Small Business Loan Board. (10 M.R.S.A. § 1100-A).

The Act provides that the Finance Authority shall consist of a total of thirteen members, six of whom are to be appointed by the Governor, subject to review by the Joint Standing Committee on State Government and confirmation by the Legislature.^{3/} (10 M.R.S.A. § 965(2) and (3)). The Act also creates the position of Chief Executive Officer of the Finance Authority which is to be filled in the same manner, except that "[a]t least 10 days before the Governor seeks review by the joint standing committee, he shall consult with the Maine Finance Authority Board regarding his proposed appointee." (10 M.R.S.A. § 972).

The Natural Resources Financing and Marketing Board, a subdivision of the Finance Authority, is to consist of seven members, four of whom are to be appointed by the Governor, subject to approval by the Joint Standing Committee on State Government and confirmation by the Senate.^{4/} (10 M.R.S.A. § 985).

Finally, the Act creates the Maine Veterans' Small Business Loan Board, consisting of nine members, eight of whom are to be appointed by the Governor.^{5/} (10 M.R.S.A. § 1100-A).

^{3/} Of the remaining seven members of the Finance Authority, three are to be officials of existing state agencies and two each must be selected by the Governor from the Maine Veterans' Small Business Loan Board and the Natural Resources Financing and Marketing Board. (10 M.R.S.A. §§ 965, 985, 1100-A).

^{4/} The remaining three members are to be the Commissioners of Conservation, Marine Resources, and Agriculture, Food and Rural Resources; or their designees. (10 M.R.S.A. § 985).

^{5/} The ninth member is to be the Director of Veterans' Services. (10 M.R.S.A. § 1100-A).

1. Is Prospective Nomination and Confirmation Permissible?

A thorough reading of Chapter 519 leads unavoidably to the conclusion that the Legislature intended the Finance Authority to assume the responsibilities of the authorities it replaces immediately upon the termination of those authorities. The Legislature clearly recognized that the Maine Guarantee Authority, the Maine Veterans' Small Business Loan Authority and the Maine Small Business Loan Authority implement important governmental programs which should be preserved and administered by the newly created Finance Authority. Indeed, the Legislature explicitly stated that the exercise of the Finance Authority's "powers and duties is deemed the performance of an essential governmental function" (10 M.R.S.A. § 978), and that the provisions of law creating the Authority "shall be liberally construed." (10 M.R.S.A. § 976).

Given the importance which the Legislature attached to the responsibilities it imposed upon the Finance Authority, and in view of the clear mandate that the Authority act as the "successor" to those authorities it replaces, it is the Opinion of this Office that the Legislature did not intend to preclude prospective nomination and confirmation of the members of the Authority and its related boards. To conclude otherwise would frustrate the very purpose which the Legislature sought to effectuate when it specifically designated the Finance Authority as the successor to existing governmental programs and could effectively prevent the Authority from fulfilling its duties for several months. In short, Chapter 519 must be read to manifest a legislative intention that steps would be taken prior to September 23, 1983 to minimize the transition period necessary for the Finance Authority to become fully functional.

This conclusion finds support in the concept of "prospective appointment," which was recognized and applied in this State in Pattangall v. Gilman, 115 Me. 344 (1916). In that case, the Court upheld the appointment of a member of the Board of Dental Examiners made on December 9, 1914, notwithstanding the fact that the vacancy which the appointment filled did not arise until the first of January, 1915. In so ruling, the Court adopted the following proposition of law:

. . . if the term of the appointing power extends beyond the point of time when the vacancy arises, a prospective appointment may be made; and, conversely, that if the term of the appointing power does not extend until

the vacancy arises in the appointive office, no appointment, prospective or otherwise, may be made by that appointing power.

115 Me. at 346.^{6/}

This Office, relying upon Pattangall, has applied the doctrine of "prospective appointment" on several occasions. See Op. Me. Att'y. Gen. (Aug. 29, 1977) (prospective appointment to fill expected vacancy on Public Utilities Commission); Op. Me. Att'y. Gen. (Sept. 7, 1977) (prospective appointment to Land Use Regulation Commission); Op. Me. Att'y. Gen. (June 9, 1976) (prospective appointment of Associate Justice of Supreme Judicial Court); Op. Me. Att'y. Gen. (July 19, 1975) (prospective nomination of Superior Court Justice); Op. Me. Att'y. Gen. (Aug. 21, 1975) (prospective nomination of Active Retired Justice). In the most recent discussion of this subject by this Office, it was stated:

. . . because the ability to make prospective appointments contributes to continuity and stability of governmental operations and functions, we conclude that nomination, confirmation and appointment may take place in advance of an actual vacancy, where no explicit or reasonably implied prohibition exists and where the authority to appoint does not expire before the effective date of the appointment.

Op. Me. Att'y. Gen. (Aug. 29, 1977.)^{7/}

^{6/} The Court in Pattangall also upheld the Executive Council's authority to give its advice and consent to a prospective appointment (115 Me. at 349) and this Office has recognized the propriety of prospective confirmation by the Legislature. Op. Me. Att'y. Gen. (Aug. 29, 1977).

^{7/} In that Opinion, it was also noted that a prospective appointment may only be made within a reasonable amount of time prior to the existence of a vacancy. In this regard, it should further be noted that 5 M.R.S.A. § 6 (Supp. 1982) requires that "[all] public officers appointed in accordance with law shall, within 30 days after being commissioned, qualify [by taking the oath of office] to perform the duties of their office [or] . . . shall be deemed to have forfeited [the] appointment."

While the concept of "prospective appointment" is not entirely on point with the situation you have presented, it is closely analogous to it, particularly in view of the clear legislative intention that the Finance Authority assume the duties, powers and responsibilities of existing state programs immediately upon the termination of the existence of its predecessor agencies. Thus, since your power of appointment extends beyond September 23, 1983, it is the Opinion of this Office that the members of the Finance Authority and its related boards may be prospectively nominated and confirmed before September 23, 1983.^{8/} Of course, these appointments cannot take effect until that date.

Similarly, the Chief Executive Officer of the Finance Authority may also be prospectively nominated and confirmed, provided, however, that the members of the Authority have already been prospectively nominated and confirmed. This condition is necessary in order to fulfill the statutory requirement that the Governor "consult with the Maine Finance Authority Board regarding his proposed appointee" for Chief Executive Officer.^{9/}

^{8/} In reaching this conclusion, we are aware of a prior Opinion of this Office, dated June 20, 1974, which advised that the members of a reconstituted Maine Milk Commission could not be nominated or confirmed until the effective date of the legislation creating the new Commission. This Opinion would appear to be incorrect, since the authority to appoint did not expire during the period in question, and there was no explicit or implied legislative prohibition against advance nomination and confirmation.

^{9/} It should be noted that prospective nomination and confirmation of the Chief Executive Officer might be inappropriate if the Finance Authority was required to perform some official act regarding his appointment. Here, however, the Finance Authority must simply be consulted by the Governor regarding his proposed appointee, and, under these circumstances, there would appear to be no logical reason why such consultation cannot take place prior to September 23, 1983.

2. Does the Finance Authority Exist As a Public Entity As of September 23, 1983, Even If Its Members and Chief Executive Officer Have Not Been Confirmed?

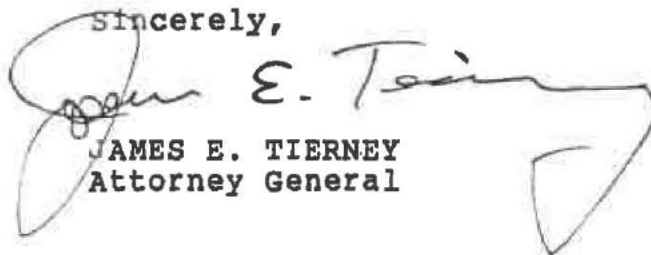
Chapter 519 creates the Finance Authority and its related boards and, as noted above, becomes effective on September 23, 1983. As of that date, and by operation of law, the Finance Authority becomes a legally established public entity regardless of whether its members and Chief Executive Officer have been nominated, confirmed, or appointed. Nothing in Chapter 519 suggests that the life of the Finance Authority begins only upon nomination, confirmation, or appointment of its members or Chief Executive Officer.

3. What is the Status of the Entities the Finance Authority Replaces if its Members Have Not Been Confirmed by September 23, 1983?

Consistent with the response provided to your second question, the entities which the Finance Authority replaces have no legal status as of September 23, 1983. Once again, this is true regardless of when the members of the Finance Authority are nominated, confirmed, or appointed.^{10/}

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

Sincerely,



JAMES E. TIERNEY
Attorney General

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^{10/} It should be pointed out that 5 M.R.S.A. § 3 has no application here. That statute provides that all appointed civil officers 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." While the Finance Authority is the successor to the Maine Guarantee Authority, the Maine Veterans' Small Business Loan Authority, and the Maine Small Business Loan Authority, its members are not the "successors in office" of the officials of those authorities.