

MAINE STATE LEGISLATURE

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JAMES E. TIERNEY
ATTORNEY GENERAL



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

January 9, 1984

Roberta M. Weil
Executive Director
Maine State Retirement System
State House Station #46
Augusta, Maine 04333

Dear Mrs. Weil:

You have requested an Attorney General's Opinion as to whether each of four senior staff employees of the Public Utilities Commission appointed by that Commission under 35 M.R.S.A. § 1 must be a member of the Maine State Retirement System or whether an option exists for each of those four employees as to their membership in the Maine State Retirement System. The four employees referred to are the Public Utilities Commission's Secretary, Director of Finance, Director of Technical Analysis and General Counsel. For the reasons which follow, it is the Opinion of this Department that the employees in question are not required to be members of the Retirement System.

Criteria for membership in the Maine State Retirement System (except for employees of participating local districts) are set forth in 5 M.R.S.A. § 1091. Subsection 1 of 5 M.R.S.A. § 1091 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 supplied).

The issue is whether those persons holding the four senior staff positions of the Public Utilities Commission can be considered as holding these positions for fixed terms within the meaning and intent of 5 M.R.S.A. § 1091(1).

In a July 2, 1981 Opinion on the question whether the Assistant to the Commissioner of Educational and Cultural Services has the option of joining the Maine State Retirement System, this Department formulated a general rule as to whether state employees are required to join the Maine State Retirement System as a condition of their employment:

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. Op.Me.Att'y Gen. 81-63 at 2.

The test set forth in that Opinion as to whether a state employee serves at the pleasure of his appointing authority is whether the employee may be removed at will or may only be dismissed for cause. Thus, if the Public Utilities Commission's Secretary, Director of Finance, Director of Technical Analysis or General Counsel have the protection of the Personnel Law in respect to dismissal and can only be dismissed for cause, then their membership in the Retirement System is mandatory.

The statute establishing the four positions, 35 M.R.S.A. § 1, is silent as to the manner of their removal. Nonetheless, an examination of the legislative history of the provisions of that law leads to the conclusion that all four positions serve at the pleasure of the appointing authority, the Maine Public Utilities Commission.

This conclusion is clearest with respect to the two positions which were most recently created. In 1982, the Legislature created the positions of Director of Finance and Director of Engineering. P.L. 1981, ch. 582.^{1/} The Statement of Fact of the Legislative Document which became Chapter 582 provided that:

The purpose of this bill is to establish the positions of director of finance within the Public Utilities Commission, to serve at the pleasure of the commission. The position of director of finance already exists pursuant to Title 2, sections 6 and 6-A. This bill simply includes a reference to the position in Title 35, as well. The position of director of engineering would replace that of director of transportation, which was eliminated by Public Law 1981, chapter 469; an existing vacant position will be used for this employee so that no additional positions will be created. L.D. 1979, Statement of Fact (110 Legis. 1982) (Emphasis supplied).

As the Maine Supreme Judicial Court recently noted: "The 'Statement of Fact' attached to the Act's legislative document is a proper and compelling aid to ascertaining the legislative purpose and intent." Franklin Property Trust v. Foresite, Inc., 438 A.2d 218, 223 (Me. 1981). It thus appears quite clear that the Directors of Technical Analysis and Finance serve at the pleasure of the Commission.

The situation with regard to the Secretary of the Commission is somewhat more complicated. The Legislature created the positions of Clerk and Assistant Clerk in the original Act creating the Public Utilities Commission. P.L. 1913, ch. 129. Following the creation of the classified service in 1937, P.L. 1937, ch. 221, the Legislature provided, sometime prior to the publication of the 1944 Revised Statutes of Maine, that the position of Assistant Clerk, but not that of Clerk, be "subject to the provisions of the Personnel Law." R.S. 1944, ch. 40, § 1. In 1965, the Legislature then changed the respective titles of the two positions to "secretary" and "assistant secretary." P.L. 1969, ch 91.

^{1/} The name of this position has since been changed to that of Director of Technical Analysis. P.L. 1983, ch. 344.

Thus, of the two positions, only the appointment of the Assistant Secretary is, by the terms of 35 M.R.S.A. § 1, subject to the Personnel Law. It is clearly implied that the Secretary's appointment is not subject to the Personnel Law. It is also significant that Section 678 of the Personnel Law provides that employees covered thereunder may only be dismissed for cause. 5 M.R.S.A. § 678. Presumably, employees not covered by the Personnel Law do not enjoy this protection. Thus, it must be concluded that it is the intention of the Legislature that the Secretary serves at the pleasure of the Public Utilities Commission.^{2/}

As to the General Counsel, there is no clear legislative history to determine whether the General Counsel can be dismissed for cause or serves at the pleasure of the Commission. The General Counsel's position was created in 1963, P.L. 1963, ch. 125, but the statute is silent as to the removal of the incumbent. Thus, the only indication which exists as to the legislative intent on this point is that the provision of law establishing the position appears in the same paragraph of the same section of the laws of the Commission as that establishing the other three positions previously discussed in this Opinion, and that the provision says nothing about any of the four positions being "subject to the Personnel Law." This would appear to be an indication that the Legislature intended that the tenure of these four positions be similar.

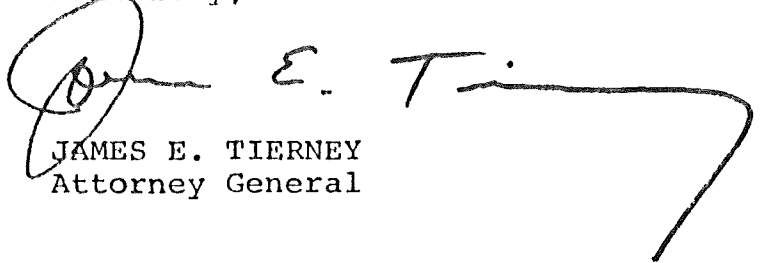
In summary, then, our conclusion is that appointments of the General Counsel, the Secretary, the Director of Finance and the Director of Technical Analysis are appointments at the pleasure of the Public Utilities Commission and therefore individuals holding these positions must be deemed to be serving for fixed terms within the meaning and intent of 5 M.R.S.A. § 1091(1). Accordingly, their membership in the Maine State Retirement System is optional.^{3/}

^{2/} Similarly, it must be concluded that the Assistant Secretary does not serve at the pleasure of the Commission, and that the participation of the incumbent in this position in the Retirement System is mandatory.

^{3/} This conclusion is not disturbed by the fact that the Public Utilities Commission is a multi-member Commission whose members serve staggered terms. There would appear to be no legal significance, for purposes of the Retirement Law, to the fact that some state employees serve at the pleasure of others with fixed terms while others serve at the pleasure of a majority group of employers with fixed terms.

I hope this answers your question. Please feel free to reinquire if further clarification is necessary.

Sincerely,

A handwritten signature in black ink, appearing to read "James E. Tierney". The signature is written in a cursive style with a large, looping initial "J" and a long, sweeping horizontal line at the end.

JAMES E. TIERNEY
Attorney General

JET/ec