

MAINE STATE LEGISLATURE

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JAMES E. TIERNEY
ATTORNEY GENERAL

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

January 2, 1991

Representative Fred L. Richardson
Maine House of Representatives
State House Station #2
Augusta, ME 04333

Dear Representative Richardson:

I am writing to confirm the advice rendered in summary form to you by my office several weeks ago that there is no constitutional or legal impediment to your serving simultaneously as a member of the Maine Legislature and a member of the School Board of the City of Portland. The question of the ability of members of the Legislature to hold municipal office is one that has frequently been posed, in that many members of the Legislature, past and present, have held municipal offices of some kind. As set forth more fully below, it has been the longstanding Opinion of this Department that there is no constitutional or other legal difficulty presented by such simultaneous office holding, except for certain county officers, and except for the office of municipal tax assessor.

The question of the extent to which members of the Legislature may hold municipal office is essentially one of interpretation of Article IV, Part 3, Section 11 of the Maine Constitution. That section provides:

No member of Congress, nor person holding any office under the United States (post officers excepted) nor office of profit under this State, justices of the peace, notaries public, coroners and officers of the militia excepted, shall have a seat in either House while a member of Congress, or continuing in such office. (emphasis added)

The question which your inquiry raises is whether a municipal office constitutes a "office of profit under this State" within the meaning of this Section.

The Supreme Judicial Court of Maine has not had occasion to interpret this provision of the Maine Constitution with regard to the holding of municipal office by a member of the Legislature. Nor has this Department had any occasion to examine the question in any extensive way.^{1/} This Department has, however, formally addressed the question of whether a State legislator may simultaneously hold the office of county commissioner or county treasurer, as well as whether he or she could hold the particular municipal office of tax assessor. In the county Opinions, the Department concluded because the officers of county commissioner and county treasurer were created by statute, they must be considered "offices of profit under this State," and therefore subject to the constitutional prohibition. Op. Me. Att'y Gen. 85-22 and Dec. 29, 1977, copies of which are attached. The 1977 Opinion, however, was careful to point out that it should "not be extended to municipal offices, unless the office also has State duties," *Id.* at 3. On this point, the Department has advised that since the office of municipal tax assessor is charged with certain duties by state law, that office must be considered "under this State" for purposes of the Constitution. Op. Me. Att'y Gen. (Feb. 1, 1971), copy attached. None of these Opinions, however, specifically address the question of whether members of the Legislature may hold municipal office generally.

While, as just indicated, there is no Maine law directly on point, such authority as exists elsewhere in the country generally supports the position that unless an office is created by statute or discharges a State statutory function, it is not an "office of profit under this State" within the meaning of a State constitutional provision. The overwhelming majority of states having such a provision in their constitution who have addressed the question have found it determinative whether the office in question was created by the state statute or discharges a governmental function under State law. Compare Wilkins v. Connors, 9 So. 7 (Fla. 1891); People v. Capuzi, 170 N.E. 2d 625 (Ill. 1960); State ex rel. Platt v. Kirk, 44 Ind. 401 (1874); Britton v. Steber, 62 Mo. 370 (1876);

^{1/}The Department has on numerous occasions advised that there is no constitutional or legal impediment to such dual office holding, but has never accompanied such advice with any supporting legal analysis. See letters of the Department dated March 6, 1923; February 20, 1926; March 3, 1932; May 6, 1936; and December 17, 1948.

Klair v. Bacharach, 159 A. 538 (N.J. 1932) (municipal office held not an "office of profit under this State" because not created by statute or performing statutory duties) with Smith v. State, 162 So.2d 473 (Ala. 1964); Wood v. Miller, 242 S.W. 573 (Ark. 1922); Attorney General ex rel. Moreland v. City of Detroit, 70 N.W. 450 (Mich. 1897) (municipal office held to constitute an "office under this State" because created by statute or discharging statutory duties). The only authority of which this Department is aware to the contrary is a divided decision of the Supreme Court of Texas in Willis v. Potts, 377 S.W.2d 622 (Tex. 1964) in which the court ignored the question of whether the municipal office was created by statute or exercised statutory duties in finding it to be an "office under . . . this State" under the Texas Constitution, and a similar decision of the Supreme Court of Delaware in State v. Peterson, 369 A.2d 1076, 1078-79 (Del. 1976). This Department, however, finds these decisions to be against the general weight of authority and otherwise unpersuasive. Indeed, the dissenting opinion of Justice Hamilton in Willis constitutes perhaps the best summary of the state of the law at the time of its writing of which this Department is aware. Willis v. Potts, 377 So.2d at 627-630.

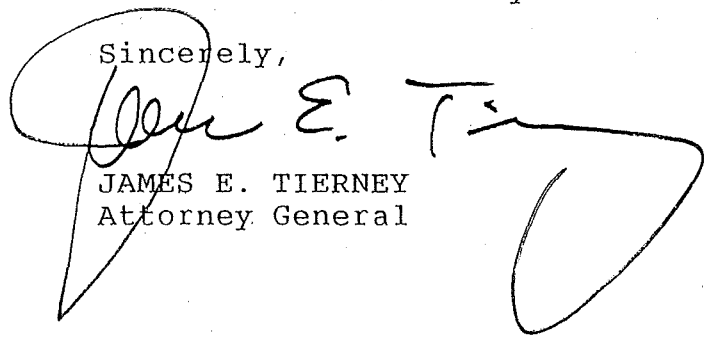
Applying these principles to the problem presented by your inquiry, it is clear that a member of a municipal school board, like a member of a city council or a municipal board of selectmen, occupies an office which is neither created by State statute, nor vested with State statutory powers. While municipalities in Maine, as in all other states, are "creatures of the Legislature" in the sense that they are created by legislative act, they are granted considerable latitude by the municipal laws of the State in establishing their forms of government and the nature of the municipal offices which will exercise governmental powers. Thus, unlike the offices of county commissioner or county treasurer^{2/} and unlike the office of municipal tax assessor,^{3/} municipal offices in general cannot be considered to be created by State statute, nor exercising State statutory powers. Consequently, they are not "offices of profit under this State" within the meaning of the Maine Constitution, and may therefore be held by members of the Legislature.

^{2/}These offices are established by 30-A M.R.S.A. §§ 61 and 151 respectively.

^{3/}The holders of this office have been found by the Supreme Judicial Court to be "agents of the State." Inhabitants of the Town of Frankfort v. Waldo Lumber Co., 128 Me. 1, 4 (1929).

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

Sincerely,

A large, stylized handwritten signature in black ink, appearing to read "James E. Tierney". The signature is written over the typed name and title.

JAMES E. TIERNEY
Attorney General

JET:sw



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

October 31, 1985

Honorable Gary C. Cooper
Rural Route #2
Box 241
South Windham, Maine 04082

Dear Representative Cooper:

This will respond to your oral request for an opinion of this Department as to whether, in view of the enactment of Chapter 413 of the Public Laws of 1985, a State Legislator may also hold the office of Cumberland County Commissioner or Treasurer. For the reasons discussed below, it is the opinion of this Department that, notwithstanding Chapter 413, Article IV, Part 3, Section 11 of the Maine Constitution forbids a State Legislator from simultaneously holding the office of Cumberland County Commissioner or Treasurer.

Article IV, Part 3, Section 11 provides in its entirety as follows:

No member of Congress, nor person holding any office under the United States (post officers excepted) nor office of profit under this State, justices of the peace, notaries public, coroners, officers of the militia excepted, shall have a seat in either House during his being such member of Congress, or his continuing in such office.

The issue presented by your question is whether the office of County Commissioner or County Treasurer is an "office of profit under this State" within the meaning of this provision. In a prior Opinion of this office dated December 29, 1977, it was concluded that the office of Aroostook County Treasurer is an "office of profit." That Opinion concluded that an office

"under this State" is one that is created by the Legislature and has powers and duties which have been legislatively defined and are to be performed independently for the benefit of the public. It was also concluded that an office is one "of profit" if there is any compensation received over and above expenses.

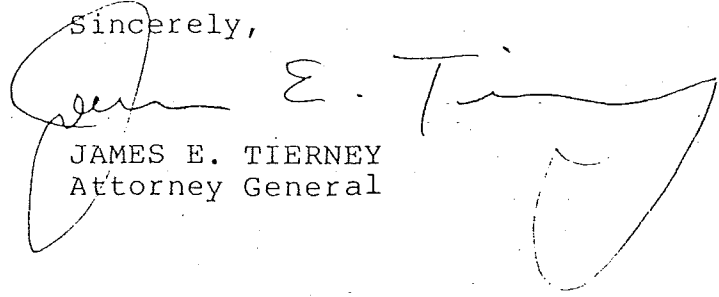
This analysis clearly applies to the offices of Cumberland County Commissioner and Treasurer, which are similarly created by statute, 30 M.R.S.A. §§ 101 and 602, and whose occupants receive compensation above expenses. In accordance with our prior Opinion, therefore, a State Legislator is constitutionally prohibited from simultaneously holding a seat in either House of the Legislature and the office of county commissioner or treasurer.

You have specifically asked whether this conclusion should be reconsidered in view of the enactment by the 112th Legislature of Chapter 413 of the Public Laws of 1985 (effective September 19, 1985). That legislation enacted 30 M.R.S.A. §§ 1651, et seq. to authorize the Cumberland County Commissioners to appropriate money, according to a budget and with the assistance of an advisory committee, without the necessity of obtaining legislative approval. From the foregoing, however, it should be clear that this legislative action cannot affect the conclusion reached above for the simple reason that acts of the Legislature cannot alter provisions of the Constitution. Thus, even though the Legislature may have delegated to the Cumberland County Commissioners the power to fix compensation for themselves and for the County Treasurer, those offices remain "offices of profit under this State" within the meaning of Article IV, part 3, Section 11. Consequently, their occupants are prohibited from simultaneously holding a seat in either House of the Legislature.^{1/}

^{1/} In a subsequent Opinion dated January 6, 1978, this Office concluded that Article IV, Part 3, Section 10 of the Maine Constitution would not prohibit a State Legislator from being appointed to fill a vacancy in the office of Arrostook County Treasurer since the office of county treasurer is an elective office, provided, of course, that the Senator or Representative resigned his seat in the Legislature prior to taking office as Treasurer. The reasoning of this Department's January 6, 1978 Opinion would also apply to the office of county commissioner. For your convenience, copies of the Opinions dated December 29, 1977 and January 6, 1978 are enclosed with this Opinion.

I hope this information is helpful to you, and please do not hesitate to contact this office if we can be of further assistance to you.

Sincerely,

A handwritten signature in dark ink, appearing to read "James E. Tierney". The signature is fluid and cursive, with a large, sweeping loop at the end.

JAMES E. TIERNEY
Attorney General

JET/ec

*Incompatible Offices: Legislator - County Treasurer
Me Const. Art IV PT 3rd §§ 10 & 11*

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 29, 1977

Honorable Harry F. Rideout
R.F.D. #2
State Road
Presque Isle, Maine 04769

Dear Representative Rideout:

I am responding to your oral request to this office for an opinion concerning simultaneous tenure of the offices of State Legislator and County Treasurer. It is our understanding that your question stems from the fact that the Aroostook County Treasurer has submitted his resignation to be effective on January 1, 1978. Pursuant to the provisions of 30 M.R.S.A. § 611, the Governor will appoint a resident of the County to serve as Treasurer until the first day of January following the next biennial election, i.e., January 1, 1979. Your question is if the Governor should choose a member of the 108th Legislature to serve as County Treasurer, would it be legally permissible for the individual to continue to hold both offices during the period of appointment. Our answer to this question is that it would not be permissible to hold both offices simultaneously, for the reasons stated below.

Title 30 M.R.S.A. § 601, cited above, contains a listing of certain officers who may not be County Treasurer. Though State Legislators are not included in this list, the list cannot be considered as exclusive or exhaustive because of additional constitutional prohibitions. Article IV, Part Third, Sections 10 and 11, Article IX, Section 2, Constitution of Maine. Two of these constitutional provisions - Article IV, Part Third, Sections 10 and 11 - are of special concern with regard to your question. Section 10 provides that no legislator may be appointed to ". . . any civil office of profit under this State, which requires the approval of the Legislature for appointment or which shall have been created, or the emoluments of which increased during such term, except such offices as may be filled by elections by the people." This section has at

least arguable applicability to your question since the salary of the Aroostook County Treasurer was increased by the 108th Legislature (P.L. 1977, Chapter 67), and the office would be filled on an interim basis by appointment rather than by election even though the office of Treasurer is otherwise an elective office. Section 11 may be more directly applicable since it states that no person holding any "office of profit under this State" shall hold a seat in the Legislature during the period that he continues in his "office of profit." Either or both of these constitutional provisions would prevent a member of the present Legislature from holding the interim appointed position as Aroostook County Treasurer if that position is a "civil office of profit" or "office of profit" under the State.

Guidance in identifying an "office of profit" is found in an Opinion of the Justices, 95 Me. 564 (1901),^{1/} and in a previous opinion of this Office, Report of the Attorney General, 1951-1954 at page 56. Generally speaking, an office is one "of profit" if there is any compensation received over and above expenses of the office. The office of Treasurer of Aroostook County is clearly one of profit since the compensation is \$6,000 per year, plus expenses. 30 M.R.S.A. § 2. Also, generally speaking, an office is a "public office" or "civil office" under the State if the office is created by the Legislature, the powers and duties of the office have been legislatively defined, and the duties are to be performed independently for the benefit of the public. Since the office of County Treasurer is a statutorily created office and its powers and duties are also thus defined (30 M.R.S.A. §§ 601 et seq.), it is clear that the office of County Treasurer is an office or civil office under the State, as well as being an office of profit. Therefore, simultaneous tenure of office as a State Legislator and a County Treasurer, particularly in the circumstances set forth in your question, would be prohibited by either or both of the constitutional provisions cited above.^{2/}

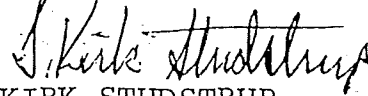
1/ The cited Opinion of the Justices is most notable for the fact that 5 of the 8 Justices declined to answer the question. However, the answers given by the 3 Justices who felt that answers were necessary, are helpful here.

2/ An opinion of this Office dated January 11, 1960, concluded, with limited rationale, that appointment of a Legislator to the position of County Treasurer would not conflict with Article IV, Part Third, Section 10 of the Constitution, in part because an increase in the salary of the position had been made during a preceding term of the Legislature. To the extent that the January 11, 1960, opinion conflicts with this one, it should be reversed. In addition, that opinion did not consider the question of compatibility of the offices under Article IV, Part Third, Section 11.

The foregoing opinion is intended to be limited to the specific offices in question, though the same rationale may be applicable to simultaneous tenure in the Legislature and in other county offices established by statute. The opinion should not be extended to municipal offices, unless the office also has State duties, since municipal government and offices have a different status than county government and offices vis-a-vis the State.

Please continue to call on us whenever you believe we may be of assistance.

Sincerely,



S. KIRK STUDSTRUP
Assistant Attorney General

SKS:jg