

MAINE STATE LEGISLATURE

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June 2, 1994

Honorable Joseph G. Carleton
State Representative
P. O. Box 369
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Dear Representative Carleton:

I am responding to your letter of May 17, 1994, requesting an opinion from this office concerning the eligibility of a member of the 116th Legislature to serve on the Maine Health Care Reform Commission in light of the provisions of Maine Constitution, Article IV, part 3, section 10. Inasmuch as the 116th Legislature created the Maine Health Care Reform Commission and established reimbursement for the commissioners at \$75 per day plus expenses, the Constitution does preclude one of its members from serving as a commissioner. Moreover, a sitting legislator cannot hold such an office under the terms of Article IV, part 3, section 11.

The Maine Health Care Reform Commission was established by P.L. 1993, c. 707 to create alternative comprehensive health care proposals for consideration by the 117th Legislature. The Commission consists of three commissioners: one to be appointed by the Governor, one to be appointed jointly by the Senate President and House Speaker, and the third to be appointed jointly by the Governor, Senate President, and House Speaker. These appointments are subject to review and approval by the joint standing committee of the Legislature having jurisdiction over banking and insurance matters. Chapter 707, Part AA, sec. AA-2. The commissioners serve until May 1, 1996; they are to "perform their duties on a part-time basis and are entitled to reimbursement of \$75 per day for work performed in their capacities as commissioners, plus reasonable and necessary expenses." Sec. AA-3.

Article IV, Part 3, Section 10 of the Maine Constitution provides:

No Senator or Representative shall, during the term for which the Senator or Representative shall have been elected, 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

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emoluments of which increased during such term, except such offices as may be filled by elections by the people.

The resolution of your inquiry turns on the meaning of the phrase "civil office of profit under this State." There are two distinct issues to be determined. First, is the position of Maine Health Care Reform Commissioner a "civil office under this State?" Second, if so, is it an "office of profit?"

The prohibition contained in Art. IV, pt. 3, § 10 has been a part of our Constitution since Maine became a State in 1820. Over the course of the past 175 years, however, the meaning of the term "civil office" has not been definitively settled. In 1822, the Justices of the Supreme Judicial Court expressed the opinion that the term "office" as used in the Constitutional provision under consideration "implies a delegation of a portion of the sovereign power to, and possession of it by the person filling the office." Opinion of the Justices, 3 Me. 481, 482 (1822). See also, Op. Me. Att'y Gen. No. 87-1 (January 20, 1987); Op. Me. Att'y Gen. (May 14, 1976).

On the other hand, a slightly broader construction of the term "civil office" appears to have emerged in other opinions of the Justices and of this Department. For example, in 1901, three Justices of the Supreme Judicial Court expressed the view that certain positions were "office[r]s under this State" because "[e]ach of such persons wields some part of the power of the State, however small, and in some sphere of state action, however limited". Opinion of the Justices, 95 Me. 564, 585 (1901). See also, Op. Me. Att'y Gen., (January 2, 1991) (office is one under this State where it is created by statute and discharges state statutory functions); Op. Me. Att'y Gen., (December 29, 1977) (position is "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 of the office are to be performed independently for the benefit of the public.").

In our view, a member of the Maine Health Care Reform Commission as established by P.L. 1993, c. 707, occupies a "civil office" under this State within the meaning of Art. IV, pt. 3, § 10, under any of the formulations discussed above. The Commission has been statutorily created with specifically designated statutory duties and responsibilities. The Commission is charged with the responsibility of gathering information and evidence through public meetings and public participation, and ultimately developing three models for health care reform as well as implementing legislation for all models. The Commission is required to "participate in the legislative process from January 1, 1996 to May 1, 1996."

While the Commission does not possess the ultimate power of enacting laws, it does have significant statutory authority to develop implementing legislation for specific consideration by the Legislative and Executive Branches of State

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Government. In short, the Commission is authorized to exercise significant authority on behalf of the State pursuant to its statutory mandate. Accordingly, it is the opinion of this Department that the position of Maine Health Care Reform Commissioner is a "civil office ... under this State," within the meaning of Art. IV, pt. 3, § 10 of the Maine Constitution.

Generally speaking, an "office of profit" is one in which there is any compensation allowed beyond expenses. It does not "matter whether ... [the] ... compensation be large or small, by regular annual salary, by per diem-pay for days actually employed, or by fees for each act of service. If there be any compensation allowed over and above sums allowed for expenses, the office is one of profit." Opinion of the Justices, 95 Me. 564, 585-86 (1901). Judged by this well-established standard, a member of the Maine Health Care Reform Commission is clearly occupying an office of "profit" within the meaning of Art. IV, pt. 3, § 10.

Moreover, the specific language of Art. IV, pt. 3, § 10, focuses on the emoluments established for the office, rather than the actual receipt of compensation by a particular individual. Cf. Op. Me. Att'y Gen. (April 9, 1889) at 15-16. Accordingly, a waiver of compensation payable under the statute does not avoid or eliminate the prohibition established by the Constitutional provision.

Since the commissioners appointed to the Maine Health Care Reform Commission are to receive \$75 per day for work performed, in addition to expense reimbursement, and will be independently performing duties for the benefit of the public which duties have been legislatively defined, it would appear that the position of commissioner on the Health Care Reform Commission is a civil office of profit. Since the Commission was created by the 116th Legislature, it follows that a member of that Legislature may not be appointed during its term consistent with the Constitution.

Additionally, Article IV, Part 3, Section 11 of the Maine Constitution 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.

The prohibition of Section 11 thus also applies to a sitting legislator appointed to a position on the Health Care Reform Commission. This restriction may be avoided by resignation of a legislative position as Section 11 precludes only the simultaneous

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holding of an office of profit and a position as a legislator. Opinion of the Justices, 95 Me. at 586. However, resignation does not affect the applicability of Section 10, which bars appointment to an office of profit of any legislator who was elected to serve for the term of the Legislature which created the position. This office has previously opined that the prohibition in Section 10 extends to the entire term for which the legislator is elected, regardless of whether the legislator serves the full term. Op. Me. Att'y Gen. (October 7, 1977).

Finally, nothing in this Opinion should be construed as suggesting that a legislator may not serve on a legislative study committee and receive the compensation specified in 3 M.R.S.A. § 2, if approved by the President of the Senate or the Speaker of the House of Representatives. The Maine Health Care Reform Commission, however, is not a legislative study committee. Rather, it is an independent, statutorily created Commission.

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

Sincerely,



MICHAEL E. CARPENTER
Attorney General

MEC/dab

cc: Honorable John R. McKernan, Governor
Honorable Dennis L. Dutremble, President of the Senate
Honorable Daniel A. Gwadosky, Speaker of the House