

MAINE STATE LEGISLATURE

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Yes ✓
September 20, 1966

E. L. Walter, Executive Secretary

Maine State Retirement System

Phillip M. Kilmister, Assistant

Attorney General

Employment of a Fiduciary-Investment and other Counsel.

ISSUE:

May the Board of Trustees of the Maine State Retirement System employ a fiduciary for the full management of the investment functions of the System?

ANSWER:

No.

The fiduciary duties imposed upon a trustee or several trustees cannot be delegated to others without committing a breach of said trust. The administration and responsibility for the effective operation of the Maine State Retirement System is clearly posited in the Board of Trustees. 5 M.R.S.A. § 1031 (1).

This is not to say that the Board may not utilize the services of investment counsel or other professional employees however. Clearly, such services may, and perhaps must be utilized, in order to enable the Board of Trustees to carry out the proper administration of Retirement System funds.

5 M.R.S.A. § 1031 (15) "Investment and other counsel. The board of trustees shall employ investment counsel or advice and may employ or engage such other expert, professional or other assistance as may be necessary or appropriate to aid in carrying out its functions."

The final decision and control over the investment of trust funds must be exercised solely by those in whom the power of investment is granted, to wit: the trustees, and subject to any limitations placed upon the power of investment.

5 M.R.S.A. § 1061 (1) Funds.

"Duties of board of trustees. The members of the board of trustees shall be the trustees of the several funds created by this chapter and shall have full power to invest and reinvest such funds, subject to all of the terms, conditions, limitations and restrictions imposed by the laws of this State upon savings banks in the making and disposing of their investments; and subject to like terms, conditions, limitations and restrictions, said trustees shall have full power to hold, purchase, sell assign, transfer and dispose of any of the securities and investments in which any of the funds created by this chapter shall have been invested, as well as the proceeds of such investments. . . ."

(Emphasis supplied)

It is one thing for a trustee to engage the services of another as a necessary and reasonable expense for carrying out the purpose of a trust. It is a vastly different situation however and a breach of duty for a trustee or group of trustees to go beyond the terms of the trust agreement and substitute another fiduciary in their place in order to carry out the terms of any given trust.

The manner in which the above-stated question is posed in your memorandum leaves some doubt as to what is meant by the words, "full management of the investment functions of the system." We interpret the words literally and answer the question in the negative.

If the inquiry is simply as to whether or not the trustees may employ the services of investment counsel to assist and provide advice in the investment of trust funds, then surely such employment is permissible and is expressly provided for by statute. 5 M.R.S.A. § 1031 (15) quoted supra.

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Where the ultimate authority to govern investment activity of trust funds is exercised by the board of trustees, and investment counsel is employed simply as an agent of the board in carrying out the investment of trust funds according to the dictates of said board, then we would answer the question presented in the affirmative.

In short the Board may not employ a fiduciary and authorize him to handle investments without consultation with the Board. The Board must make the final decision as to sale or purchase of specified securities.

Phillip M. Kilmister
Assistant Attorney General

PMK/slf