STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

For the Years
1967 through 1972

each such case, the charging off of such accounts shall be recommended by the head of the department, institution or agency originally responsible for such account." (Emphasis supplied.)

The charge off of a contractual debt owed the state by a debtor is not an extinguishment or discharge of the debt itself. Such a charge off actually represents an administrative determination by the state as creditor that the debt which is owed is for all practical purposes uncollectible as a bad debt. In other words, the legislature has merely provided in 5 M.R.S.A. § 1504 that the state as creditor may elect not to attempt to enforce certain contractual obligations. This does not mean that a debt which has been written off by the state may never be collected in the future however.

The language of 7 M.R.S.A. § 2104 quoted in the factual situation provides in effect that a delinquent debtor must pay for past indebtedness incurred for services rendered by the Department of Agriculture as a condition precedent to the receipt of further similar services by the Department. This is true whether or not such past indebtedness was at one time written off by the state as being uncollectible.

We believe that it is entirely proper for the legislature to provide that the state demand payment of prior debts for services rendered as a condition precedent to the supplying of further similar services to a debtor.

The Department of Agriculture, as creditor, may elect not to enforce the payment of a contractual debt pursuant to the terms of 5 M.R.S.A. § 1504. Read in conjunction with the language of 7 M.R.S.A. § 2104 however, we do not believe that the Department may excuse the payment of past contractual indebtedness incurred by a debtor and at the same time, enter into new contractual agreements to provide further services to said debtor.

PHILLIP M. KILMISTER
Assistant Attorney General

August 2, 1967
Maine State Retirement System

E. L. Walter, Executive Secretary

P. L. 1967, Chapter 59 – Relationship of Board of Trustees of the Maine State Retirement System and a Bank Fiduciary Employed by said Board.

FACTS:

Because of certain statutory amendments to the law governing the administration of the Maine State Retirement System, you have asked two general questions relative to the responsibility and authority of the Board of Trustees and a bank fiduciary to be employed by the Board. In reference to recently enacted statutory language you have asked the following questions:

QUESTION NO. 1:

Does the phrase "the framework of the general investment policy of the Board of Trustees" imply that the Board is limited to making policy or may the Board give instructions in detail or to any degree between these two positions? What would you consider to be the extent of the "investment functions" of the Board?

QUESTION NO. 2:

After a fiduciary is selected and a contract is consummated, to what extent is the Board responsible for the approval or disapproval of any changes in the portfolio? And, must all transactions be made by the fiduciary or may the Board execute orders or make commitments without reference to or consultation with the fiduciary?

ANSWERS:

The answers to the above-stated questions are set forth in the opinion.

OPINION:

In a previous opinion rendered by this office under date of September 20, 1966, we held that the Board of Trustees may not employ a fiduciary for the *full* management of the investment functions of the System. This conclusion was largely dictated by an interpretation of the statutory language then in effect set forth in 5 M.R.S.A. § 1061 (1) which defined the investment powers of the Board.

The language of 5 M.R.S.A. § 1061 (1) prior to amendment read in part as follows:

> "1. 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.)

Prior to the recently enacted amendments it was clear that the Board had the full power of investment of funds although said Board was given the authority to employ investment counsel or advice as an aid in carrying out its functions. Prior to amendment, 5 M.R.S.A. § 1031 (15) read as follows:

> "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."

Prior to the recently enacted amendments we believe that it was quite clear that the power of investment was to be exercised solely by the trustees, although said trustees could employ agents to assist in the investment function. We set forth the above-quoted statutory language so that it may be compared with the language of the recently enacted law relative to investment of funds. Clearly the legislature has enacted sweeping changes in regard to the investment of trust funds of the System and the statutory language of the amendments now constitute the terms of the trust and delineates the powers and the duties of the trustees of said trust.

5 M.R.S.A. § 1031 (15) now reads in part as follows:

> "Investment and other counsel. *The board of trustees shall employ a bank fiduciary* located in New England or New York City and may employ other investment counsel or advice and other expert professional or other assistance as may be necessary or appropriate to aid in carrying out its functions.
>
> *"The board shall have the power to enter into a contract with the bank*

fiduciary to carry out the investment functions of the board. Under the terms of the contract the bank fiduciary may be authorized to have custody of all or any of the assets belonging to any fund of the retirement system and to invest and reinvest the funds of the retirement system in its discretion within the framework of the general investment policy of the board of trustees. The board shall receive reports of the investments and any changes therein effected by the bank at least quarterly. . . ." (Emphasis supplied.)

In order to promote prudent investment and the application of expert knowledge in the field of investment, the legislature has declared that the Board shall employ the services of a bank fiduciary as an agent in carrying out its investment functions. The legislature has in effect provided that the Board may delegate its authority to invest funds to an agent, a bank fiduciary, subject to certain limitations.

We would answer the first question submitted by saying that the Board is still vested with the over-all authority of investment of funds and that the Board may describe in detail to its agent, the bank fiduciary, the type of investment which shall be made.

The extent of the investment functions of the Board cannot be delineated with any degree of specificity. The investment functions of the Board would depend to a large extent upon the terms of the contract consummated between the Board as principal and the bank as agent. Whatever contractual language is used, it is clear that the general investment policy of the Board must at all times be carried out. Failure to do so on behalf of the bank would constitute grounds for the Board to amend or repudiate its investment contract.

The recently enacted language of 5 M.R.S.A. §1061 (1) reads in part as follows:

"1. 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 be authorized to cause such funds to be invested and reinvested by a bank fiduciary in accordance with the prudent man rule subject to periodic approval of the bank's investment program by the trustees.*"

5 M.R.S.A. §1031 (15) quoted above provides "that the Board shall receive reports of the investments and any changes therein effected by the bank at least quarterly."

In answer to the second question, the statutory language does not spell out the method or frequency of approval which the Board must exercise over the bank's investment activities. Again, the time or method of approval or disapproval of the bank's investment practices is a matter which may be specified in the contract consummated between the Board and the bank.

In general a principal may dictate the terms of his agent's authority. Here however the legislature has limited somewhat the power of the principal to determine the limits of the agent's authority. In other words, the legislature has clearly stated that the agent, the bank fiduciary, may exercise discretion in the investment of funds providing the general investment policy of the principal is carried out. When a bank fiduciary invests in accordance with the prudent man rule and in a manner consistent with the over-all policy of the Board, it is surely unnecessary that every individual act of investment by the fiduciary agent be given approval by the Board.

Once a contract is consummated between the Board and the bank fiduciary, we believe that the legislature intended that the bank fiduciary should carry out the actual investment transactions, subject at all times to the terms of its contract with the Board.

The Board may not change the terms of its contract with the fiduciary or in any manner alter its investment policy without manifesting such intention to the fiduciary.

In summary, we believe that the Legislature has determined that the Board of Trustees may more effectively invest Retirement System funds through the employment

of a bank fiduciary. When a bank fiduciary is employed however, we do not believe that the legislature intended the Board to have a complete veto power over the day-to-day investment activities of its fiduciary employee. Furthermore, to allow the Board to execute orders or change investment policy without prior notification to its fiduciary agent could render the latter powerless to perform any useful service in regard to the investment of funds. This, we are certain, the Legislature did not intend as a consequence of the above-quoted statutory enactments.

PHILLIP M. KILMISTER
Assistant Attorney General

August 3, 1967
Indian Affairs

Edward C. Hinckley, Commissioner

Rights of Maine Indians Residing on Tribal Reservations to Hold State Elective Offices.

FACTS:

By memo you have requested information concerning rights of Maine Indians residing on any of the three tribal reservations in Maine to hold State elective offices.

QUESTION:

May a Maine Indian residing on one of the three tribal reservations in Maine run for any or all county and/or State elective offices, and if elected, serve?

ANSWER:

Yes, as qualified by the opinion.

OPINION:

The qualification for membership in the Maine State House of Representatives reads as follows:

> "No person shall be a member of the House of Representatives, unless he shall, at the commencement of the period for which he is elected, have been five years a citizen of the United States, have arrived at the age of twenty-one years, have been a resident of this State one year; and for the three months next preceding the time of his election shall have been, and, during the period for which he is elected, shall continue to be a resident in the town or district which he represents." Art. IV, Part First, § 4, *Constitution of the State of Maine.*

A Maine Indian residing on a Maine tribal reservation is a citizen of the United States. We assume, for purposes of this opinion, that the Indian citizen is 21 years of age and has been a resident of this State for one year.

Upon the effective date of the 1967 Private and Special Laws, c. 137 (L.D. 1720), Indian voting districts will be placed within representative class districts. For purposes of this opinion, we assume that in the 1968 elections the Indian citizen who runs for elective office shall have been a resident of the representative class district for three months next preceding the election day and shall continue to be a resident of such a