

MAINE STATE LEGISLATURE

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STATE OF MAINE

REPORT
OF THE
ATTORNEY GENERAL

For the Years
1967 through 1972

ANSWER:

Towns – by qualified voters at a town meeting.
Cities – by the city council.

OPINION:

30 M.R.S.A. § 3801 relates to devises and gifts for open areas, public parks and playgrounds and was amended by the 1965 Public Laws, c. 203, § 1, to read as follows:

“Any town *municipality*, as such, may receive, hold and manage devises, bequests or gifts for the establishment, increase or maintenance of public parks and playgrounds *and open areas, including marsh lands, swamps and other wet lands*, in such town *municipality*, and may accept by vote of the legal voters *legislative body* thereof any land in such town *municipality* to be used as a public park or playground or both combined, *or maintained as an open area and as marsh land, swamp or wet land as defined in section 3851*. When any plantation is incorporated into a town, such gifts and the proceeds thereof fully vest in such town.”

It is to be noted that in the above section that the term “legal voters” was replaced by the term “legislative body” and the term “town” was replaced by the term “municipality”. It is to be further noted that 30 M.R.S.A. § 3851, as amended (the section being interpreted here) replaces the term “cities and towns” by the term “municipality”. We interpret the words “choose by ballot” to mean choose by ballot of a legislative body of a municipality as in 30 M.R.S.A. § 3801, as amended.

A legislative body is defined as any body of persons authorized to make laws or rules for the community represented by them. It is one capable of or pertaining to the enactment of laws. *Burke v. Wood*, 162 F. 533 at 536. The legislative body of a town is the qualified voters of a town voting at a town meeting. 30 M.R.S.A. § 2054 (1) provides that:

“1. Qualified voter. Each person qualified to vote for Governor in the town in which he resides may vote in the election of all town officials *and in all town affairs*.” (Emphasis supplied.)

The legislative body of a city is usually its city council. The Maine Housing Authority Act defines a governing body as follows:

“Governing body. ‘Governing body’ shall mean the city council or other legislative body charged with governing a city.” 30 M.R.S.A. § 4552 (6).

Hence, it is our opinion that it is the legislative body of a municipality that chooses by ballot the park and conservation commissioners and chooses an annual replacement each year. It is also our opinion that the legislative body of a town is the qualified voters voting at a town meeting, and the legislative body of a city is its city council.

JEROME S. MATUS
Assistant Attorney General

August 31, 1967
Maine State Retirement System

E. L. Walter, Executive Secretary

Acceptance of funds by Maine State Retirement System from estate of deceased member or from third person for credit to decedent’s account; Me. Rev. Stat. Ann., Tit. 5, ch. 101 (1964).

FACTS:

An individual entered into the service of the State of Maine as a game warden on June 3, 1946 and served therein in such capacity continuously until his death on July 14, 1967. However, he did not become a member of the Maine State Retirement System until September 29, 1946. In the early part of this year he purchased credit for four of his years of military service, the maximum creditable. Me. Rev. Stat. Ann., Tit. 5, § 1094, par. 13 (Supp. 1966). At his death he had a total of 24 years and 9 months' service credited for purposes of the Maine State Retirement System.

It is undisputed that if the decedent, during his lifetime, had paid into the Retirement System his contributions for those three months in 1946 when he was an employee of the State but not a System member, he would have been credited with the 25 years of service necessary to render his wife eligible for these benefits. The wife was advised by a State official during decedent's lifetime that decedent "would not have 25 years of service unless the 4 years of military service was paid for." Letter of Hazel C. Foster, Retirement Claims Supervisor, dated August 14, 1967, on file in the Office of the Maine State Retirement System. The official admits that in advising the wife on survivor benefits, the unpaid-for three months of service were overlooked and that all parties believed that, upon payment to the State for the four years of military service, decedent had 25 years of creditable service. *Ibid.*

Since decedent had not 25 years credited service, his widow's benefits are governed by Me. Rev. Stat. Ann., Tit. 5, § 1124, par. 1 (1964). These benefits are substantially less than those accruing under § 1124, pars. 2 and 3 to widows of members *with* 25 years credited service.

The widow feels that she "was led to believe that payment had been made in full to secure all retirement benefits." Letter of Alan C. Pease, Esquire, dated August 7, 1967, on file in the office of the Maine State Retirement System. She feels that she should be permitted to pay in her late husband's contributions for the three months he was not a member of the system and thus obtain the greater benefits.

QUESTION:

May the Maine State Retirement System, after the death of a member, accept funds from the decedent's estate or from some living person for credit to the decedent's account?

OPINION:

Yes, in certain limited circumstances.

In computing creditable service, the Maine State Retirement System Act, Me. Rev. Stat. Ann., Tit. 5, ch. 101 (1964) specifies that contributions must be made by "members." See, e.g., Me. Rev. Stat. Ann., Tit. 5, § 1094, par. 13 (Supp. 1966) – "The *member* shall contribute to the retirement system for each year of military service claimed. . . ." (Emphasis added) Me. Rev. Stat. Ann., Tit. 5, § 1094, par. 9 (1964) – "Any *member*. . . may . . . pay into the Member's Contribution Fund. . . ." (Emphasis added). Membership ceases at death. Me. Rev. Stat. Ann., Tit. 5, § 1091, par. 6 (1964). We find no statutory authority to permit the Board to accept contributions of the type proposed to be made in the case presented; nor do we find any prohibitions *in these circumstances*.

There remains the issue of whether the System, as an agency of the State, is estopped

from denying that the decedent had 25 years, credited service as a result of the conduct of the Retirement Claims Supervisor. Research indicates that the System is not so estopped.

Equitable estoppel is ordinarily not available against a public agency functioning in its governmental capacity, a situation which reflects the ancient theory of sovereign immunity. See C.J.S., *Estoppel* § 138 and cases there cited. The doctrine may be invoked only where there has been a false and material misrepresentation by the public agency sought to be charged which caused the invocator to change his position or to fail to assert some right which he otherwise would have asserted. *Inhabitants of Town of Andover v. McAllister*, 119 Me. 153, 109 A. 750 (1920). We see no such conduct on the part of the Retirement Claims Supervisor here.

In a somewhat similar factual situation in *City of Chicago v. Miller*, 27 Ill. App. 2d 211, 188 N.E.2d 694 (1963), Miller went to City Hall in Chicago to see if his building met city fire code standards. A faceless clerk checked the records and told Miller his building was satisfactory. Miller did not bother to check the code himself or his building. Shortly thereafter the City brought mandamus to compel him to correct numerous fire code violations at heavy expense. *Held*, city not estopped by clerk's conduct from bringing the writ.

We conclude that while there is not question of estoppel which would force the State Retirement System trustees to accept funds offered under these circumstances by the widow, and while we find neither statutory authority to permit the acceptance nor any statutory bar to the acceptance, the matter is a discretionary one with the State Retirement System trustees. Clearly, the decedent could have made the payments himself and equally clearly thought he had made all necessary payments to bring his credit to the maximum. The law will not be violated if the payments offered by the widow are accepted at this time under these circumstances.

One final word with respect to precedent. It is the opinion of this Department that this particular opinion is based upon these particular facts and must not be used as a precedent with respect to future policy. The discretionary powers of the trustees of the State Retirement System will govern in every case. If every case is judged on the facts presented, then justice and equity will certainly be served. The question presented on this entire fact situation is no longer a question of law. It remains for those charged with the authority to determine whether or not a strict legalistic interpretation in these circumstances will work an injustice upon the survivors of a State employee who apparently was led to believe that his benefits had been fully purchased and processed.

ROBERT G. FULLER, JR.
Assistant Attorney General

September 1, 1967
Banks and Banking

Philip R. Gingrow, Director

Collection Agency Regulations.

FACTS:

A regulation has been proposed to permit collection agencies to charge an office fee or service fee to debtors.