MAINE STATE LEGISLATURE

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STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

For the Years
1967 through 1972

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.

QUESTION:

Would such a regulation be permitted under the provisions of 32 M.R.S.A. §§ 571-583, inclusive (chapter 10, The Collection Agency Act) as enacted by P. L. 1965, c. 430?

ANSWER:

No.

OPINION:

32 M.R.S.A. § 582 provides in pertinent part:

> "The commissioner may make such reasonable rules and regulations, not inconsistent with this chapter, pertaining to the operation of the business of licensees as he may deem necessary to safeguard the interest of the public. * * *"

Thus a rule and regulation relating to Chapter 10 of Title 32, i.e., the collection agency act, must meet three criterion:

1. It must not be inconsistent with 32 M.R.S.A. c. 10;
2. It must pertain to the operation of the business of licensees; and
3. The commissioner must deem the regulation as necessary to safeguard the interests of the public.

The proposed regulation meets the second criteria. We shall not decide whether or not the third criteria is met for it is the commissioner who must make the determination whether or not a regulation is necessary to safeguard the interests of the public. We do conclude, however, that the proposed regulation does not meet the first criteria. The proposed regulation is inconsistent with the following language of 32 M.R.S.A. § 576:

> "No collection agency shall: * * * collect or attempt to collect from any person an amount in excess of the amount legally due the creditor."

In our opinion the making of a service charge or office fee would be an attempt to collect an amount in excess of the amount legally due the creditor, and the collection of the service charge or office fee would be the collection of an amount in excess of the amount legally due the creditor.

There is added justification for our opinion that the proposed regulation is invalid inasmuch as the 103rd Legislature specifically refused to amend the prohibited practices set forth in 32 M.R.S.A. § 576 by refusing to strike out the words "collect or attempt to collect from any person an amount in excess of the amount legally due the creditor" and refusing to replace those words with the words "collect or attempt to collect from any person an amount in excess of that submitted by the creditor for collection, except a service charge of not more than $2." See *L.D. No. 136* of the 103rd Legislature.

The promulgation of the proposed regulation would be legislating by regulation in clear contradiction to legislative intent and is clearly outside the scope of the commissioner's authority.

JEROME S. MATUS
Assistant Attorney General