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January 5, 1968

E. L. Walter, Executive Secretary

Maine State Retirement System

Robert G. Fuller, Jr., Assistant

Attorney General

Status of Merrill Memorial Library - Yarmouth, Maine

FACTS:

As stated by the Office of the General Counsel to the Boston Regional Office of the Social Security Administration in letter to the Regional Assistant Commissioner in Augusta dated November 28, 1967, the facts are as follows:

On September 15, 1904 Joseph E. Merrill conveyed certain land and buildings to the Town of Yarmouth for use as a free public library, subject to certain conditions and restrictions. The inhabitants of the town accepted the deed on October 15, 1904. Among the conditions and restrictions imposed by the instrument of conveyance were the following: (1) the land and buildings should always be held, occupied and used by the Town for the maintenance of a free public library; (2) the Town should provide at least \$1200 per year for financial support of the library unless certain designated exceptional circumstances should arise; (3) the ". . . management and control of said lot of land and buildings and the contents of said buildings shall be and forever remain . . ." under the control of a self-perpetuating Board of Trustees initially made up of named individuals and the "first selectman" of the Town of Yarmouth, ex officio; (4) the Board shall elect by ballot a President, Clerk, Treasurer, and Librarian and may appoint other proper and necessary officers and assistants; (5) the officers and assistants ". . . shall hold office and tenure during the pleasure . . ." of the Board; (6) the Board shall adopt By-Laws and make regulations for the care, management, protection, security and well-being of the library and its property; and (7) upon failure by the Town to use and occupy the premises as provided or to perform and abide by all conditions and restrictions, the grantor, his heirs or assigns, have a right of entry for condition broken.

The action of the Town in accepting the conveyance was ratified by Me. Priv. & Spec. Laws 1905, ch. 309. This act also authorized the Town to accept donations, bequests and devises for the purpose of maintaining a free public library. With respect to the Board of Trustees, the act stated:

"Section 2. The management and control of said Library and of the buildings and grounds connected therewith shall be vested in a board of trustees to be designated

Trustees of Merrill Memorial Library. Said board of trustees shall be constituted in the first instance as provided in said deed of gift of said Joseph E. Merrill and the successors of such trustees shall be selected and determined as in said deed provided. Said board of trustees and their successors shall have the powers conferred upon them by said deed and all of them shall serve without compensation."

Though you have not specified the problem in your memorandum to us dated December 4, 1967, it appears that the State of Maine wishes to enter into an agreement with the Secretary of Health, Education and Welfare, pursuant to the provisions of § 217 (a) 1 of the Social Security Act (42 U.S.C.A. § 418 (a) 1), for the purpose of extending Federal old-age, survivors and disability insurance coverage to employees of the Merrill Memorial Library. The cited section of the Social Security Act provides that Federal OASDI coverage may extend ". . . to services performed by individuals as employees of (a) State or any political subdivision thereof."

The General Counsel doubts whether employees of the Merrill Memorial Library are employees of a "political subdivision" of the State of Maine so as to be eligible for the proposed coverage. He states:

"To have the status of a separate political subdivision, the Library must be a separate legal entity and a wholly owned instrumentality of the State or the Town of Yarmouth. In order to constitute a separate legal entity the Library must be vested with the power to hire, supervise and discharge its own employees and generally in its own name to sue and be sued, contract and hold and convey real and personal property."

Believing that such doubt is resolvable by reference to local law, the General Counsel through your office requests our opinion on the following question:

QUESTION:

Do the trustees of the Merrill Memorial Library constitute an identifiable legal entity existing separate and distinct from the Town of Yarmouth; and, are such trustees a "wholly owned instrumentality" of the Town of Yarmouth?

ANSWER:

Yes ; No.

OPINION:

Though we feel that the answer to the General Counsel's question is capable of discovery by reference to the instruments creating the library and by a priori reasoning from the language therein, hence making reference to local law unnecessary, we offer the following reply:

In the first instance, cognizance must be had of the distinction between, on the one hand, the library building and the land on which it stands, both of which, by the terms of the Merrill deed, have vested in the Town of Yarmouth (subject to the right of entry for condition broken), and on the other, the control of the operations of the library, which is, likewise by the terms of the deed, vested in the Board of Trustees. It is not helpful, in answering the General Counsel's question, to refer to "the Merrill Memorial Library" as though a legal entity existed by that name.

This distinction points out the strange division between ownership and control of the library building, its contents, and the land on which the library stands. Such division results in the anomalous situation of the Town of Yarmouth being obligated, by its acceptance of the deed of gift, to annually appropriate a sum to be paid over to the Board; yet the disposition of the funds so appropriated, although in some wise governed by the terms of the gift, lies, in the final analysis, with the discretion of the Board which is in no way accountable to the Town. Further, although it is the Town and not the Board which is authorized to accept donations, bequests and devises for maintaining the library, the Town can be considered no more than a stakeholder in this regard. Although the Town may conceivably decline a gift or renounce a legacy, the terms of the gift or bequest (not the Town's wishes) would control the passage of the gift to the Board, which would then administer it free from municipal interference. Finally, and of special significance in the context of the request, it is the Board, not the Town, which has complete control over the hiring, supervision and discharge of library employees.

In view of the foregoing, it is difficult to see how any conclusion can be reached other than that the Trustees of the Merrill Memorial Library comprise an identifiable legal entity existing separate and distinct from the Town of Yarmouth. We pass to the second stage of the General Counsel's inquiry, viz: whether the Library (sic) is a "wholly owned instrumentality" of the Town (or State).

The General Counsel states in letter above-mentioned: "The principal question has been stated to be whether the organization has any non-Town appointed members who can control the officers of the organization or lay claim to any assets or exercise any rights of internal self-government independently of or even contrary to the wishes of the Town. (Citing previous G. C. opinions.)" We have already shown in this opinion that the Board's exercise of discretion in matters financial is limited only by the terms of Merrill's deed of gift, and is not subject to any Town restraint whatever. Further, the terms of the gift endow the Board with complete control over the hiring and tenure of library employees. However, it is true that the Board's seeming independence from the Town could be negated if the Town elected a majority of the Board's members. Even the most cursory look at Merrill's deed of gift, however, dispels such an assumption. The Town has but one representative of seven on the Board, and that only ex officio. Further, as the General Counsel correctly points out, the Board elects its own replacements entirely divorced from municipal desires. A greater degree of independence, under the circumstances, is difficult to visualize.

We conclude from the evidence presented to us that the Board of Trustees of Merrill Memorial Library is a separate legal entity apart from the Town of Yarmouth and is not a wholly owned instrumentality of the Town or of the State of Maine.

Robert G. Fuller, Jr.
Assistant Attorney General

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