

MAINE STATE LEGISLATURE

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STATE OF MAINE

REPORT
OF THE
ATTORNEY GENERAL

For the Years
1967 through 1972

programs, there seems to be no good reason why the mere fact that other state aid is also available should bar the Authority from a section 411 award.

ROBERT G. FULLER, JR.
Assistant Attorney General

April 4, 1968
Education

Hayden L. V. Anderson, Executive
Director, Div. of Professional Services

Proposed Employment of Commission Member by Study Group Employed by
Commission.

FACTS:

The State Board of Education acting as the Maine State Commission for the Higher Education Facilities Act of 1963, (sometimes referred to hereafter as the "Commission"), pursuant to the provisions of P. L. 1967, c. 292 (20 M.R.S.A. §§ 2720-2721), is preparing a contract with the Institute for Educational Development, a non-profit, non-stock New York corporation, for the purpose of securing a study of Maine's higher education institutions under the comprehensive planning grant program of the Federal Act.

Presently, the New York corporation is in the process of recruiting Maine people to supplement the corporation's out-of-state staff; and the corporation has indicated a desire to employ Mrs. Jean Sampson of Lewiston as a consultant on a day-to-day basis at a fixed fee per day. Mrs. Sampson is willing to accept such an assignment. Presently, Mrs. Sampson is a member of the State Board of Education.

QUESTION:

Whether or not a member of the State Board of Education acting as the Maine State Commission for the Higher Education Facilities Act of 1963 may be employed by a study firm which will contract with the State Board, without creating a conflict of interest?

ANSWER:

If the given employment takes place, a conflict of interest will result.

REASON:

The Commission referred to in the given facts is, together with the aforementioned New York entity, presently preparing a contract in which the New York corporation will undertake a planning study for presentation to the State. So far, the subject Commission member is only involved with one side of that contract, i.e., as a member of the Commission hiring the New York entity in order to secure planning services. When such member becomes employed by the New York entity, remuneration will be paid the member by the New York entity; and by reason of that fact, the member would possess positions of interest on both sides of the contract simultaneously.

(NOTE: Because the contract is still in the drafting stage, this office has not been

presented with the proposed terms of the contract in order to learn the extent of supervision which will be exercised over the New York entity by the Commission.)

Unless the contract is completely silent regarding the Commission's supervision over the planning firm (and we cannot envision that the New York entity would not be answerable to the Commission under the terms of the contract), "incompatibility of offices" would result from the stated facts. The common law doctrine of "incompatibility of offices" is expressed in *Howard v. Harrington*, 114 Me. 443, 96 A. 769. (In citing *Howard v. Harrington*, supra, we do not borrow the facts of that case; but, do borrow the expressed doctrine and the reasoning advanced in support of the doctrine.) Clearly, a conflict of interest exists from a situation where, on the one hand, a person sits in a supervisory capacity while, at the same time, holding a position calling for the performance of work subject to that supervision.

In a recent opinion by this office, dated February 15, 1968, we determined that the appointment of an employee of a State college to the State Board of Education would constitute a violation of the common law doctrine of "incompatibility of offices." The facts of that opinion are parallel to the facts given here; and certain of the language there is applicable in this opinion:

"It has been generally decided that the inconsistency, which at common law renders offices incompatible, does not accrue by reason of the physical impossibility to discharge the duties of both offices; but lies, instead, in a conflict of interest, such as when one office is subordinate to the other, and is subject in some degree to the supervisory power of the other. *Russell v. Worcester County*, 232 Mass. 717, 84 N.E. 2d 123; *In Re Opinion of the Justices*, 61 R.I. 197, 21 A. 2d 267 * * *."

Your attention is directed to the provisions of 17 M.R.S.A. § 3104 which provides, among other things, that: "No trustee, superintendent, treasurer or other person holding a place of trust in any state office or public institution of the state, * * * shall be pecuniarily interested directly or indirectly in any contracts made in behalf of the state * * * in which he holds such place of trust, and any contract made in violation hereof is void * * *." The Maine Supreme Judicial Court, in *Lessieur v. Rumford*, 113 Me. 317, 93 A. 838 and *Opinion of the Justices*, 108 Me. 545, 82 A. 90, states that the instant section clearly indicates that it is the policy of the State that persons, whom the law has placed in positions where they may make, or be instrumental in the making, or in superintending the performance of, contracts in which others are interested, should not themselves be personally interested in such contracts.

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Assistant Attorney General

April 4, 1968

State Retirement System

Pension Plans under 5 M.R.S.A. § 1121, sub. 4A

SYLLABUS:

A State Prison Guard seeks ½ pay retirement benefits under 5 M.R.S.A. § 1121 sub. 4A. For this he must have 25 years service in "his respective capacity." Time spent on the Rockland Police Force before he became a Prison Guard qualifies under this section as being in "his respective capacity."