

# MAINE STATE LEGISLATURE

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STATE OF MAINE

REPORT  
OF THE  
**ATTORNEY GENERAL**

For the Years  
1967 through 1972

given date would lead to an archaic and unworkable method of state financing.

An expenditure and an appropriation are not synonymous.

“An ‘expenditure’ is the expending, a laying out of money, disbursement, and is not the same as an ‘appropriation’, the setting apart or assignment of funds to a particular person or usage.” *Grant v. Gates*, 97 Vt. 434, 124 A. 76; *Suppiger v. Eniking*, 60 Idaho 292, 91 P. 2d 362.

In most appropriation acts including P & S 1967, c. 154, the following language occurs:

“Whenever it appears to the Commissioner of Finance and Administration *that the anticipated income of the State will not be sufficient to meet the expenditures authorized by the Legislature*, he shall so report to the Governor and Council and they may temporarily curtail allotments equitably so that expenditures will not exceed the *anticipated income*.”

The above-quoted language is clearly indicative of the fact that the approval of allotment, or expenditure requests, is based upon anticipated income and not actual income received. It is clearly permissible, and indeed an economic fact of life, that estimated expenditures of state government may be approved in any amount (subject only to the maximum limits set by the legislature), irrespective of the amount of actual funds in the state treasury at any given time.

PHILLIP M. KILMISTER  
Assistant Attorney General

June 10, 1968  
Maine State Retirement System

E. L. Walter, Executive Secretary

Prudent Man Investment Rule Required.

**SYLLABUS:**

The Board of Trustees of the Maine State Retirement System is without authority to waive the statutory provision which requires that all investments by its bank fiduciary be in accordance with the prudent man investment rule. Further, the Board is without authority to allow its bank fiduciary to commingle trust funds of the Maine State Retirement System with other trust funds in the fiduciary’s possession.

**FACTS:**

The First National Bank of Boston, the bank fiduciary for the Maine State Retirement System, has advised the Retirement System that starting July 1, 1968, it is the Bank’s intention to establish “Selected Pooled Funds”. The reason is to take advantage of investments which are frequently of such a size and such a nature that it is difficult to acquire them in the normal type of retirement fund. The selected funds will be growth oriented and will place particular emphasis on investments which have a projected high rate of overall annual increment which would tend to make them more volatile than other less specialized situations.

It would consequently be necessary to allow the First National Bank of Boston to invest without being bound by any rule of investment law, including, without restriction, investments that would yield a high rate or income or no income at all if the Maine State

Retirement Fund is to participate. In addition, it would be necessary for the bank to have authority to commingle funds of the Maine State Retirement System with other funds.

Title 5 M.R.S.A. § 1061, subsection 1, provides 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 re-invested by the bank fiduciary *in accordance with the prudent man rule* subject to periodic approval of the bank’s investment program by the trustees.” (Emphasis supplied.)

*QUESTION NO. 1:*

Does the Maine State Retirement System, acting through the Board of Trustees, have the authority to allow the bank fiduciary to invest part or all of the funds of the Maine State Retirement System that are in the bank fiduciary’s custody without being bound by any rule of investment law?

*QUESTION NO. 2:*

Would it be permissible for the bank fiduciary to commingle the funds of the Maine State Retirement System in its custody with other funds?

*ANSWER:*

1. No.
2. No.

*REASON:*

*Reason as to Question No. 1.*

Title 5 M.R.S.A. § 1061, subsec. 1 requires that all investments and reinvestments of the bank fiduciary be made in accordance with the prudent man rule. It is consequently the opinion of this office that the Board of Trustees of the Maine State Retirement System is without authority to allow the First National Bank of Boston to invest trust funds without being bound by any rule of investment law.

*Reason as to Question No. 2.*

The Supreme Judicial Court of Maine has indicated, in *Moore v. McKenzie*, 112 Me. 356, that there is no general authority of law for the mingling of trust funds. Although the legislature has authorized the commingling of trust funds in some specific instances, it must be observed that the statutory authority allowing the Board of Trustees to deposit funds in trust with a bank fiduciary does not authorize the commingling of such funds. It consequently is our opinion that the Board of Trustees is without authority to allow the commingling of Maine State Retirement trust funds with other trust funds.

HARRY N. STARBRANCH  
Assistant Attorney General