STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

For the Years
1967 through 1972

REASON:

The State of Maine has no collective bargaining agreement or any other type of Labor Relations Contract with any Labor Union, with respect to any State employees.

It is, therefore, our Opinion that if employees of a State institution who are members of a Labor Union walk off their jobs in concert or otherwise, such employees act within the contemplation of the Personnel Law and Rules as individuals, and may be regarded by the institution as employees who have absented themselves from their jobs without leave. For authority we cite the provisions of Personnel Rule 11.4, which reads as follows:

> "Any absence of an employee from duty that is not authorized by a specific grant of leave of absence under the provisions of these rules or taken as earned vacation leave about to expire, shall be deemed to be on absence without leave. Any such absence shall be without pay and may be made grounds for disciplinary action. In the absence of such disciplinary action any employee who absents himself for three consecutive days without leave shall be deemed to have resigned, but such absence may be covered by a subsequent grant of leave without pay in accordance with Rule 11.14."

Under this Rule, disciplinary action may be taken against such employees for walking off their jobs.

Under Title 5, § 678, repealed and replaced by P.L. 1968, c. 539, § 2:

> "An appointing authority may dismiss, suspend or otherwise discipline an employee for cause. This right is subject to the right of appeal and arbitration of grievances set forth in sections 751 to 753."

Absence without leave, in our view, would constitute "cause" under the Statute.

In the absence of disciplinary action against any such employee, and in the event that such employee shall continue in absence from work by way of walk-off for a period of three days he may be regarded as having resigned from his employment.

COURTLAND D. PERRY
Assistant Attorney General

January 15,1969
Water and Air Environmental
Improvement Commission

R. W. Macdonald, Chief Engineer

38 M.R.S.A. § 413 and changes of ownership

SYLLABUS:

The legislative license granted by the last sentence of 38 M.R.S.A. § 413 (1964) accrues only to the owners of the manufacturing, processing and industrial plants and establishments discharging prior to August 8, 1953, and does not pass to successive owners of the facilities from whence the discharge emanates, either as a matter of law or by a purported assignment.

FACTS:

Prior to August 8, 1953 Corporation A operated a manufacturing plant which

discharged effluent into a body of water. The legislative license granted in 38 M.R.S.A. § 413 permitted such discharge. After August 8, 1953 Corporation A sells the plant to Corporation B, which continues to operate the plant and to discharge effluent without applying for a waste discharge license.

QUESTION:

Must Corporation B apply to the Commission for a waste discharge license?

ANSWER:

Yes.

OPINION:

38 M.R.S.A. § 413 (1964) provides:

> "No . . . corporation . . . shall discharge into any stream, river, pond, lake or other body of water or watercourse or any tidal waters, whether classified or unclassified, any waste, refuse or effluent from any manufacturing, processing or industrial plant or establishment or any sewage so as to constitute a new source of pollution to said waters without first obtaining a license therefor from the commission. No license from the commission shall be required under this section or section 414 for any manufacturing, processing, or industrial plant or establishment, operated prior to August 8, 1953, for any such discharge at its present general location, *such license* being hereby granted." (Emphasis supplied.)

We interpret the last sentence of this section as a legislative grant, to the owners of manufacturing, processing or industrial plant or establishments, operated prior to August 8, 1953, of a license to continue discharging effluent of the same general composition and volume, into the waterways of this State, as was discharged by them on that date.

We reject the argument that the language in the last sentence of § 413 – ". . . manufacturing, processing, industrial *plants* or *establishments* . . . " – means that the *building* wherefrom the effluent is discharged is licensed, and that as long as such building is in existence, the effluent from it, as long as it does not vary in composition or volume so as to constitute a new source of pollution to the receiving body of water, may never be the subject of review by the Commission at a license hearing. A license granted to a building is a nullity – the license must be granted to the owner thereof. An order issued by the Commission under the provisions of 38 M.R.S.A. § 451 (Supp. 1968) to a building for violation of license would likewise be a nullity. *Water Improvement Comm. v. Morrill,* 231 A.2d 437, 440 (Me. 1967).

Neither is it the *discharge* which is granted license by § 413. That section only exempts the owner on August 8, 1953 of the facilities, from whence the discharge emanates, from the necessity of obtaining a license for that particular volume and type of discharge. Any change in the volume or nature of such discharge, so as to constitute a new source of pollution to the receiving body of water, must be licensed by the Commission to be lawful. See opinion of this office dated December 29, 1967.

The privileges of the license granted by the legislature under § 413, then, extend to the *owners* of those manufacturing, processing and industrial plants and establishments, operated prior to August 8, 1953. We note that the legislature refers to the privileges granted by § 413 as a "license", not only in § 413 itself, but also in § 416 and § 451 as well of Title 38.

It seems clear that the legislature did not create an equitable servitude appurtenant to the land from whence the effluent emanated, which might pass with the transfer of such land, but rather conferred a uniquely personal and limited privilege upon a specified, limited and existing class to continue using the public waters of the State for the disposal of waste – a privilege which, it cannot be argued, exists of right.

Given this view of the statute, it follows that such privilege cannot continue from owner-of-effluent-source to successive owner. It is inapt to attempt an analogy to the "non-conforming use" in zoning law, a use which, although outlawed by ordinance, may nonetheless continue in existence after the effective date of the ordinance under successive owners as long as such use is not abandoned. It is the *use*, in the zoning situation, which is protected and allowed to continue. See *Toulouse v. Bd. of Zoning Adjustment,* 147 Me. 387, 87 A.2d 67 (1952); see generally 2 Metzenbaum, *Law of Zoning* 1210, 2 Yokley, *Zoning Law and Practice* §16-2. Such use, further, has been held to run with the land and to be entitled to constitutional protection. See Yokley, *op. cit.,* §16-3 and cases there cited.

In the situation at hand, it is not the *use* (*i.e.,* the discharge– which is protected. Rather, it is the *users* – who have been granted license [perhaps "franchise" would be a more appropriate term – see *Madden v. Queens Jockey Club,* 296 N.Y. 249, 255, 72 N.E.2d 697, 699 (1947)] to continue the use, which they do not possess of right, so long as they do not materially increase or change it. This license being granted to a specified, limited and existing class, there being no provision in the statute providing for transferability, either as a matter of law or by a purported assignment, and there being no compelling reason of public policy apparent to imply such transferability, we conclude that transfer was not intended to be capable of accomplishment. See Restatement, *Property* §517, American Law of Property §8.122.

ROBERT G. FULLER, JR.
Assistant Attorney General

January 16, 1969
Education

Kermit S. Nickerson, Deputy Commissioner

School Construction Aid; Subsidy on Interest Accrued re Temporary Borrowing Prior to Sale of Bonds by Administrative Unit.

SYLLABUS:

Interest paid by a school administrative district on temporary borrowing, done in anticipation of receiving state aid for school construction, is eligible for school construction aid under 20 M.R.S.A. § 3457.

FACTS:

The voters of a particular school administrative district authorized its Board of Directors to issue bonds totaling $2,000,000 for the purpose of constructing a high school. The vote occurred between May 11, 1966 and April 27, 1967, at a time when the statutes provided for a lump sum payment of the State's share of such capital outlay expenditures. Too, at the time the voters of the district authorized the directors to issue bonds, the State's percentage of school construction aid for this particular district was