

MAINE STATE LEGISLATURE

The following document is provided by the
LAW AND LEGISLATIVE DIGITAL LIBRARY
at the Maine State Law and Legislative Reference Library
<http://legislature.maine.gov/lawlib>



Reproduced from scanned originals with text recognition applied
(searchable text may contain some errors and/or omissions)

Conflict of Interest in the office

STATE OF MAINE

Inter-Departmental Memorandum Date January 8, 1975

To James B. Longley, Governor Dept. Executive
From Joseph E. Brennan, Attorney General Dept. Attorney General
Subject Commissioner of Finance and Administration; Question of Conflict of Interest or Incompatibility of that Office with Positions in Private Business

SYLLABUS:

If the Commissioner of Finance and Administration simultaneously held the positions of President and Director of a national bank located in Maine, and was also a stockholder in that bank as well as a paid consultant to the bank, the situation would constitute a conflict of interest. The enumerated positions with the bank carry rights, duties and obligations that are incompatible with the statutory rights, duties and obligations of the office of Commissioner of Finance and Administration.

FACTS:

The name of the President of the First National Bank of Farmington, Maine, a federally chartered institution, has been posted to the position of State Commissioner of Finance and Administration. Under an arrangement with the Bank, the nominee would remain as a Director of the Bank and also serve as a paid consultant to the Bank. Although inquiry was made as to the amount of compensation the nominee would be paid by the Bank as consultant, the information was not supplied. Too, no description of the consultation services was given this office although inquiry therefor was made. We therefore assume that as consultant to the Bank, the nominee would respond to a broad range of Bank policy matters. The nominee would continue to hold the position of Bank President, although another individual would be named to the position of Chief Executive Officer of the institution. The nominee would be a stockholder of the Bank, although we are not apprised of the extent of that interest.*

QUESTION AND ANSWER:

Whether the nominee's continuing relationships with the Farmington Bank, while serving as State Commissioner of Finance and Administration, would result in either an incompatibility of positions or a conflict of interest? Yes.

* Federal statutes require directors of a national bank to own stock in that bank in at least a stated minimum amount.
12 U.S.C.A. § 72.

James B. Longley, Governor

Page 2

January 8, 1975

REASONS:

One of the functions of the Commissioner of the Department of Finance and Administration is employment of several bureau chiefs, one of whom is the State Tax Assessor. 5 M.R.S.A. §§ 282, 283. The State Tax Assessor is under the Commissioner's immediate supervision, direction and control.

" * * * The bureau chiefs shall be under the immediate supervision, direction and control of the commissioner and shall serve at his pleasure and perform such duties as he may prescribe, except as otherwise provided by law." 5 M.R.S.A. § 282.

The Commissioner has statutory authority to exercise all the powers of the State Tax Assessor in the latter's absence from the State or from his official duties, or whenever there is a vacancy in that office.

"In the absence of any bureau chief from the State, or from his official duties, or in the event of a vacancy in the position of any one of them, the commissioner, or his authorized agent, may exercise the powers and perform the duties prescribed for such bureau chief." 5 M.R.S.A. § 283.

The taxation laws of the State impose a franchise tax upon banks, including national banks.

"A tax is imposed for each calendar year or fiscal year ending during that calendar year upon the franchise or privilege of doing business in this State of every corporation which is a bank, savings bank, savings institution, trust company and every savings and loan association, that has a business location in this State. The tax is measured by the taxable income of the corporation or association for that taxable year under the laws of the United States as follows: * * * " 36
M.R.S.A. § 5205.

According to Federal statute, national banks, like the First National Bank of Farmington, are not exempt from payment of State taxes.

James B. Longley, Governor

Page 3

January 8, 1975

"For the purpose of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located." 12 U.S.C.A. § 548.

National banks are also amenable to the payment of sales and use taxes in Maine. 36 M.R.S.A. §§ 1811, 1861.

Because the Commissioner of Finance and Administration has authority to exercise the powers of the State Tax Assessor in designated instances, and because that power includes, among other things, collection of franchise taxes, sales taxes and use taxes, attention must be given to the ramifications attending the situation whenever the Commissioner holds a directorship with a national bank in Maine, is a stockholder, carries the title of president (albeit someone else is designated as chief executive officer) and also is paid by that bank as a consultant. The State Tax Assessor, and the Commissioner are charged with the enforcement of the bank franchise tax provision in 36 M.R.S.A. § 5205, by virtue of 36 M.R.S.A. § 5340 and 5 M.R.S.A. § 283.

The term "conflict of interest" bespeaks a situation in which regard for one duty tends to lead to disregard of another. United States v. Miller, 463 F.2d 600. In Tappan v. Helena Federal Savings & Loan Ass'n., Etc., 193 Ark. 1023, 104 S.W.2d 458, the court stated the following rule:

"The inconsistency, which at common law makes offices incompatible, . . . lies rather in the conflict of interest, as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one office has the power to remove the incumbent of the other or to audit the accounts of the other." 104 S.W.2d 459.
(Emphasis supplied.)

As Commissioner of Finance and Administration, he would have authority to call for an audit of the accounts of his Bank's competitor banks, at a time when he would be a Director, President and stockholder of his Bank, and while holding a paid consultant's position with that Bank. 5 M.R.S.A. §§ 282, 283. Authority to audit books of a bank for tax purposes is as follows:

James B. Longley, Governor

Page 4

January 8, 1975

"3. Examination of books and witnesses. The assessor for the purpose of ascertaining the correctness of any return, or for the purpose of making an estimate of taxable income of any taxpayer, shall have power to examine or cause to have examined, by any agent or representative designated by him for that purpose, any books, papers, records or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the taxpayer rendering the return or any officer or employee of such taxpayer, or the attendance of any other person having knowledge in the premises, and may take testimony and require proof material for his information, with power to administer oaths to such person or persons." 36 M.R.S.A. § 5340(3).

The facts of this matter can result in a situation where the nominee, if appointed and qualified as Commissioner of Finance and Administration, would have statutory power to audit the books of the Bank that employs him as a consultant and over which he has a guiding hand as Director; the very institution in which he holds an equity interest as stockholder, as well as those banks in direct competition with his Bank. What was said by the Maine Supreme Judicial Court in Howard v. Harrington, 114 Me. at page 446, has significance:

"Two offices are incompatible when the holder cannot in every instance discharge the duties of each." (Emphasis supplied.)

An examination of the Maine Statutes does not reveal the presence of any express constitutional or statutory inhibitions against the holding of the plural positions involved here, but that's not the end of the matter if there be an impediment to such holding of positions under the common law doctrine of public policy which is well recognized as the foundation for many court decisions.

"The doctrine arising from attempts by single individuals to exercise the functions of incompatible offices springs out of consideration of public policy * * *, such considerations arising naturally from the view that two offices cannot be held by one person when, from the divergent character of the offices, the

January 8, 1975

public interest will suffer thereby."
People v. Garrett, 72 Cal. App. 452,
237 P. 829, 830. (Emphasis supplied.)

When examining a factual situation to determine the presence or absence of a conflict of interest or incompatibility of positions, the true test is not whether the person involved will decide to perform duties or obligations, but whether the positions in question are incompatible in their natures, in the rights, duties or obligations connected with them or flowing from them.

" * * * even though specific constitutional and statutory provisions furnish no bar to the holding of particular offices or positions at the same time, the common law must be considered in determining whether there is any incompatibility therein unless the legislature has, by clear and unequivocal language, manifested its intention to abrogate the common-law principle * * * .

" * * * The question of incompatibility of necessity depends on the circumstances of the individual case. Although there is authority holding that offices are incompatible when it is physically impossible that they be performed properly by the same person, the general rule is that the inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest, as where one is subordinate to the other * * * or (has power) to audit the accounts of the other * * * ." (Emphasis and parenthesis supplied.) 67 C.J.S., Officers, § 23.

So far, we have noted the factors of taxation and audit of accounts as having significance in answering the question posed. There is also a matter of confidentiality of records that should be noted. Earlier in this writing, it was recognized that the Farmington Bank was answerable to the Maine franchise tax provisions. There are also State statutes calling for secrecy of State tax returns and related information in 36 M.R.S.A. § 5340, sub-§ 4:

January 8, 1975

"Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the assessor or any officer or employee of the Bureau of Taxation, any person engaged or retained by such bureau on an independent contract basis, or any person who, pursuant to this section, is permitted to inspect any report or return or to whom a copy, an abstract or a portion of any report or return is furnished, to divulge or make known in any manner the amount of income or any particulars set forth or disclosed in any report or return required under this part. * * * ."

The nominee, if appointed and qualified to the office of Commissioner of Finance and Administration would, by virtue of 5 M.R.S.A. §§ 282, 283 be privy to tax information considered confidential under Maine law, at a time when he was a Director and President of a Bank in Maine required to file reports pursuant to that law and while holding stock in that Bank and a paid position as consultant with that Bank. While in the performance of his statutory duties as Commissioner, he could readily be required to act with respect to reports filed by a bank or banks in competition with the one in which he held the several positions enumerated.

To those who might argue that no conflict of interest or incompatibility of positions would likely result should the nominee avoid acting on behalf of the Bank with respect to any matters involving the State, it must be remembered that under Maine law directors have certain duties and obligations that must be met; that they owe a trust to stockholders that cannot be lightly set aside.

" * * * Persons who become directors of a corporation place themselves in the situation of trustees, and the relation of trustees and cestue que trust is thereby created between them and the stockholders * * * ."
Railroad Company v. Poor, 59 Me. 278.

"The directors of a corporation stand in fiduciary relations to it and to its stockholders. They are trustees. They are held to the exercise of the utmost good faith. It is commonly stated in the cases that they are the trustees and the corporation and stockholders are the cestuis que trustent. They manage the corporation for the benefit of the stockholders. Holders of the majority

January 8, 1975

of the stock have a right to control the corporation. * * * ." Trask v. Chase, 107 Me. 144.

Moreover, under federal statutes relating to national banks, each director must have taken an oath that he will, so far as the duty devolves on him, diligently administer the affairs of the bank.

"Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate or willingly permit to be violated any of the provisions of this chapter, and that he is the owner in good faith, and in his own right, of the number of shares of stock required by this chapter, subscribed by him, or standing in his name on the books of the association, * * * ." 12 U.S.C.A. § 73.

Additionally, by reason of federal statutes, each director must own, in his own right, shares of the capital stock of the bank of which he is a director.

" * * * . Every director must own in his own right shares of the capital stock of the association of which he is a director the aggregate par value of which shall not be less than \$1,000, unless the capital of the bank shall not exceed \$25,000, in which case he must own in his own right shares of such capital stock the aggregate par value of which shall not be less than \$500. Any director who ceases to be the owner of the required number of shares of the stock, or who becomes in any other manner disqualified shall thereby vacate his place." 12 U.S.C.A. § 72.

The purpose for requiring a director of a national bank to own stock in that bank is to insure that the director shall have a sufficient individual financial interest in the bank to induce him to be vigilant in protecting the bank's interest.

January 8, 1975

" * * * The purpose of the ownership provision is to insure that a director, when he serves, shall have sufficient individual financial interest in the Bank to induce him to be vigilant in protecting the Bank's interests. * * * " Cupo v. Community National Bank & Trust Co. of New York, 324 F. Supp. 1390 at 1393 (1971).

Having in mind that federal statutes and federal decisional law requires this nominee, as a Director of the Bank, to diligently administer the affairs of the Bank, and also to be "vigilant in protecting the Bank's interest," Cupo, supra, it is not in the public's interest to invest that nominee with Maine statutory authority to supervise, direct and control the State Tax Assessor (1) in collecting State franchise taxes from that Bank, (2) in auditing the books of that Bank, and (3) to insure confidentiality of certain records of all the other banks in this State. The public's interest is not served when the nominee, if Commissioner of Finance and Administration, acts as State Tax Assessor (which is permitted by 5 M.R.S.A. § 283) regarding Maine banks, particularly where the federal law delineates the nominee's allegiance to his Bank in one direction, and State law requires his allegiance to the public in another direction.

In arguing for a result opposite that reached here, one might contend that there is no more of a conflict of interest under the present facts than would exist in the case where, for example, the State Tax Assessor is bound to pay an income tax to the Taxation Bureau of which he is chief. However, such an example is distinguishable from the present facts. The State Tax Assessor pays an income tax because he is not to be considered as being "above the law." He pays the tax out of the fact he is an individual subject to the taxation law. In the present situation, the nominee would have a conflict of interest, not because of dual roles as Commissioner and as an individual, but because of the duties and obligations attending the public position (Commissioner) and the duties and obligations attending the several business positions and interests he holds, i.e., bank director, president, stockholder and paid consultant. Unlike the State Tax Assessor who is bound by law to pay State taxes, the nominee is not bound to accept public employment as Commissioner of Finance and Administration.

"While offering every man the opportunity to serve in a public capacity, the law does not require any individual to hold a government position." 47 Va. Law Review, page 1035.

January 8, 1975

Another Maine statute which requires attention is 5 M.R.S.A. § 1504 relating to charging off accounts due the State. The Commissioner of Finance and Administration plays a direct role in that procedure.

"The State Controller shall charge off the books of account of the State or any department, institution or agency thereof, such accounts receivable, including all taxes for the assessment or collection of which the State is responsible, and all impounded bank accounts, as shall be certified to him as impractical of realization by or for said State, department, institution or agency. Such certification shall be by the Attorney General, the Commissioner of Finance and Administration and the head of the department, institution or agency responsible for such account, subject to the approval of the Governor and Council. In each such case, the charging off of such accounts shall be recommended by the head of the department, institution or agency originally responsible for such account."
5 M.R.S.A. § 1504.

Note the reference to "all taxes for the assessment or collection of which the State is responsible." That includes franchise taxes Maine banks must pay the State under the previously mentioned 36 M.R.S.A. § 5205. With respect to bank franchise taxes, the statutory guide to the Commissioner, to the Attorney General and to the "head of the department, institution or agency responsible for such account" (§ 1504), i.e., the State Tax Assessor, is that the sum be "impractical of realization" (Ibid). It is reasonably foreseeable that the nominee, if Commissioner, could be confronted with a decision respecting the charge off vs. non-charge off of taxes of his own or a competitor banking institution.

In addition to the foregoing, we would observe that there is a strong public policy not only to avoid an actual conflict of interest, but particularly when dealing with public officers and employees to avoid even the appearance of conflict of interest. Whatever conclusion one might reach in the merits, we suggest that no one could seriously argue that the appointment of this nominee under the present circumstances involves the appearance of a conflict of interest.

James B. Longley, Governor
Page 10
January 8, 1975

In conclusion, it is our opinion that if the Commissioner of Finance and Administration simultaneously held the positions of president and director of a national bank located in Maine, and was also a stockholder in that bank as well as a paid consultant to the bank, the situation would constitute a conflict of interest. The enumerated positions with the bank carry rights, duties and obligations that are incompatible with the statutory rights, duties and obligations of the office of Commissioner of Finance and Administration.

Joseph E. Brennan
JOSEPH E. BRENNAN
Attorney General

JEB/ec