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June 24, 1975

Seth H. Bradstreet, Chairman
Maine Agricultural Bargaining Board
R.F.D. #2
Newport, Maine 04953

Dear Mr. Bradstreet:

I am writing in response to your letter of May 23, 1975, to me, wherein you ask several questions concerning a proposed hearing by the Agricultural Bargaining Board (hereinafter the Board) on a petition from the Maine Agricultural Marketing Association (MAMA). MAMA has petitioned the Board to be qualified under 13 M.R.S.A. § 1957 as bargaining agent for growers raising broilers under contract with Bayside Enterprises, Inc.

You ask first whether member "M" of the Board should disqualify himself from participation in this hearing. Based upon our meeting of May 21, your letter of May 23, and my conversation with member "M" on June 9 and 10, I understand that member "M" contracts on a regular and continuing basis with Bayside Enterprises, Inc. Pursuant to this written contract, Bayside agrees to furnish, among other things, all chicks, feed and fuel; member "M", as a grower, agrees to furnish, among other things, adequate housing and labor. Member "M", pursuant to the contract, is paid directly by Bayside for his services.

Under the facts presented, member "M" should not participate in this hearing. At a quasi-judicial proceeding, such as the one being conducted by the Board, an administrative officer is disqualified to sit when he has a personal or pecuniary interest. 1 American Jurisprudence 2d Administrative Law § 64. In a judicial proceeding, the United States Supreme Court said that the test to determine whether the judge had a pecuniary interest was whether his ". . . situation is one 'which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to

hold a balance nice, clear and true between the State and the accused. . . . '" Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972). In Gibson v. Berryhill, 411 U.S. 564 (1973), the Supreme Court cited Ward, supra, and stated that the prevailing view was that the legal principle of disqualification because of pecuniary interest applied equally to administrative quasi-judicial proceedings. In Selectmen of Andover v. County Commissioners, 86 Me. 185, 188 (1893), the Maine Supreme Court said that ". . . any direct interest, however small, will disqualify a judicial officer. . . but it must be an interest direct, definite, and capable of demonstration; not remote, uncertain, contigent or unsubstantial, or merely speculative and theoretic."

Member "m's" pecuniary interest here might be small, but it is direct. Furthermore, his situation offers a "possible temptation to the average man" to forget the burden of evidentiary proof required of MAMA [See 13 M.R.S.A. § 1957(2)(3)] and "might lead him not to hold a balance nice, clear and true" between MAMA, as petitioner, and the Board. As a grower for Bayside, member "M" has direct financial dealings with Bayside. MAMA's qualification under 13 M.R.S.A. § 1957 as bargaining agent for its members, to bargain with Bayside, would have a direct effect on those financial dealings. Were MAMA to be qualified as requested in its petition to the Board, it would be unlawful for Bayside to negotiate with member "M"

> ". . . with respect to the price, terms of sale. . . and other contract provisions relative to such product while negotiating with . . . [MAMA if it were] able to supply all or a substantial portion of the requirements of . . . [Bayside] for such product." See 13 M.R.S.A. § 1958(4).

It would also be unlawful for Bayside to purchase birds from member "M"

> ". . . under terms more favorable to . . . [Member "M"] than those terms negotiated with . . . [MAMA] for such product, unless . . . [Bayside] has first offered to purchase said product under said more favorable terms from the members of . . . [MAMA] and said members have failed to supply the required product within a reasonable time according to said more favorable terms." See 13 M.R.S.A. § 1958(5).

Furthermore, Bayside would be under an obligation to bargain [as that term is defined in 13 M.R.S.A. § 1958(1)] with the producer members of MAMA, while Bayside would not be under a similar obligation to member "M". For failure of Bayside to bargain with MAMA, certain legal remedies set out in the statute would be available to MAMA; these same statutory remedies would not be available to member "M" if Bayside refused to bargain with him.

We wish to point out that the incapacity is no reflection on the integrity of the person involved, member "M".

Your second inquiry is whether, at the hearing, the question raised by the attorney for Bayside (Is member "M" a member of MAMA?) should be answered. This question is relevant and material to this hearing and should be answered.

Your third question is whether, at the hearing, you should furnish Bayside's attorney with a list of members whom MAMA claims to be 50-plus % of Bayside's growers. 13 M.R.S.A. § 1957(3) provides in applicable part that "[t]he board shall qualify. . . [an association that has petitioned the board] if based upon the evidence at the hearing, the board finds:

> "(D) The association represents 51% of the producers and produced at least 1/2 of the volume of a particular agricultural product for the specific handler involved with those producers and that agricultural product during the previous 12 months. . . . "

It is my understanding that the Board has been furnished a list of MAMA members. This should become a part of the record at the hearing. It is relevant and material to the hearing. Rule #7 of the Board's Rules and Regulations state that "[n]o member of the board shall divulge any information about the business of an interested party in a case before the Board that comes to the member by word-of-mouth or examination of records unless: . . . (c) the information becomes a matter of recorded, relevant and material testimony or evidence in the case being heard." Therefore, at the hearing, after the list of MAMA members is admitted into evidence as an exhibit, Bayside's attorney should be provided an opportunity to inspect that list.

Your last question is whether Bayside's attorney should be permitted to cross-examine witnesses at the hearing. In In Re Maine Clean Fuels, Inc., 310 A.2d 736 (1973), the Maine Supreme Judicial Court addressed this issue. The Court said that the right to cross-examine witnesses in an administrative proceeding was not absolutely, universally guaranteed. The Court said that an agency is bound by the "fundamentals of fair play." The Court noted that the right of cross-examination ". . . is constitutionally required in 'almost every setting where important decisions turn on questions of fact.'" [citations omitted.] 310 A.2d at 746. The Court said that whether or not cross-examination was required as a matter of due process was to be determined by looking at "the nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding." [citation omitted.] 310 A.2d at 747. In Maine Clean Fuels the Court examined these factors and determined that under all the facts of that particular case the administrative agency was justified in limiting cross-examination to written questions submitted through the chair. Since the Board will be conducting a quasi-judicial hearing, and since the Board will be making an important decision (see 13 M.R.S.A. § 1953) which will be based upon questions of fact [see § 1957(3)], it would be advisable for the Board to provide the right of cross-examination. The presiding officer at the hearing would have the right to prohibit repetitious or irrelevant questioning.

Very truly yours,

David Rose

DAVID ROSEMAN
Assistant Attorney General

DR/ec