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STATE OF MAINE

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Inter-Departmental Memorandum Date April 22, 1976

To John S. Walker

Dept. Forestry

From David T. Flanagan, Assistant

Dept. Attorney General

Subject Forestry Personnel Serving on Quasi-Municipal Board

FACTS: A Regional Entomologist of the Bureau of Forestry is currently serving as the duly elected Chairman of the Moosehead Sanitary District, a quasi-municipal corporation organized to dispose of solid waste from the Town of Greenville. The entomologist in question has, as his principal Bureau of Forestry duty, the conduct of insect and disease surveys in the forests of Western Maine. He supervises two insect rangers and reports to a Regional Director who in turn reports to the Director, Bureau of Forestry.

The District of which he is Chairman operates a sewerage treatment plant which discharges waste into Moosehead Lake. In compensation for his services to the District he is paid \$10.00 per meeting. Meetings ordinarily are held twice monthly.

Because of difficulties which have apparently beset the treatment facility, it is possible that the District may sue the Department of Environmental Protection and the U. S. Environmental Protection Agency. It is also possible that the District may request the use of public reserved land managed by the Bureau of Public Lands or waste treatment facilities owned by the Bureau of Parks and Recreation, both of which are agencies of the Department of Conservation, in connection with its efforts to solve its waste treatment problems. In any event, the waste discharge pipe is on submerged land belonging to the State and under the jurisdiction of the Bureau of Public Lands.

QUESTION NO. 1: Under these circumstances does a conflict of interest arise by employment both as a Bureau of Forestry Regional Entomologist and Chairman of the Moosehead Sanitary District?

ANSWER: No.

REASONING: The Supreme Judicial Court has said that "questions concerning whether there is a 'conflict of interests' violation of law is not susceptible of generalized answers. Essentially, each case will be 'law' only unto itself." Opinion of the Justices, Me., 330 A2 912, 917 (1975).

In this case, a decision must be made by applying the facts given above to a framework of statutory law.

12 M.R.S.A. 521 provides "all persons employed by [the Director, Bureau of Forestry] shall not be concerned directly or indirectly in the purchase of state lands, nor of timber or grass growing or cut thereon except in their official capacity."

This provision does not prevent the Entomologist from chairing the District Board since in no case does the District contemplate purchasing public land or timber and grass rights, but rather leasing rights to use public land under 12 M.R.S.A. 602(1) or 30 M.R.S.A. 4162(4). More fundamentally, as a member of the board of the District, the Entomologist would have no more interest in the State public land acquired than would any other citizen or taxpayer of Greenville. The land or facilities acquired would no more be his personal property than they would be that of any and all residents of the Greenville area.

The Law Court has had the occasion to deal with analagous circumstances in a case where a commissioner laying out a road was challanged for interest for being a taxpayer in the town which was the site of the road. The analogy arises because the commissioner would have a benefit in the existence of the new road, which presumably would enhance the value of his own land; just as here the Entomologist would have the benefit of proper sewage treatment and so on. The court ruled:

"An interest that disqualifies from judicial action may be small, but it must be an interest, direct, definite and capable of demonstration; not remote, uncertain, contingent or unsubstantial, or merely speculative or theoretic. * * * The liability of taxation for public works is not such an interest as disqualifies action in their construction. Otherwise, government would be impossible."

Andover v. County Commissioners, 86 Me. 185, 188, 29 A 932 (1893).

The particular benefit the Entomologist would receive from successful dealings with the State would be as remote and uncertain as those of any taxpayer.

Consequently, it must be concluded that service on this District panel violates neither the letter nor the spirit of 12 M.R.S.A. 521.

Likewise, this service violates neither the letter nor the spirit of 5 M.R.S.A. 14. On the contrary, this statute appears to authorize the kind of service to the municipality in question here. It provides that employees of the State may participate in the "non partisan affairs of any municipality or any other political subdivision of this State" so long as there is not conflict of interest. The statute goes on to define "conflict of interest" as participation in municipal affairs which results in financial gain to him or his family other than the compensation paid for such service.

The entomologist's participation in this case would be non partisan and, as noted above, his only gain is the regular compensation of \$10.00 paid for attendance at meetings.

Because 5 M.R.S.A. 14 precludes action by any state official to prevent service to a municipality under these circumstances, and because there is no conflict in the case with respect to 12 M.R.S.A. 521, these statutes cannot serve to disqualify the State employee from serving on the District Board.

QUESTION NO. 2: Under these circumstances are the offices of Bureau of Forestry Regional Entomologist and Chairman of the Moosehead Sanitary District incompatible?

ANSWER: No.

REASONING: Maine's common law provides a test of incompatibility of offices that lies outside the scope of the statute discussed above. Perhaps the leading Maine case is Howard v. Harrington, 114 Me. 443, 96 A 769 (1916). The Supreme Judicial Court said, at 446:

"The doctrine of incompatibility of offices is bedded in the common law
* * * Incompatibility arises where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both."

The common law issue is, therefore, somewhat different from the statutory one. Here it is a question of whether employment by the Bureau of Forestry and service to the District are incompatible.

Offices may be held to be incompatible if they either place the official (1) "in a situation of temptation to serve his own personal interests to the prejudice of the interests of those for whom the law authorized and required him to act in the premises as an official." Lesieur v. Rumford, 113 Me. 317, 321, 93 A 838 (1915); or (2) in a position in which the nature of the rights, duties or obligations connected with or flowing from the occupation of two offices are in conflict. Opinion of the Attorney General, January 8, 1975, p. 5. See also Howard v. Harrington, supra.

As we noted in the first part of this opinion, the Entomologist would receive no greater personal benefit from litigating or cooperating with the State than his fellow citizens. There is no personal profit to him in any of the relationships conceivable between the District and the State. Thus, the test set out both in Lesieur and the statutes is passed successfully.

With respect to the second, that is, whether or not there may be personal gain, does there exist an inherent conflict in the duties of the two offices, the answer is again in the negative.

The statutory duties of the State Entomologist and his assistants are set out in 12 M.R.S.A., c. 213. These duties relate to research, inspection and reports on various of the insect pests found in Maine. The regional entomologists are in an entirely different department of the government from the Department of Environmental Protection and have no responsibility to assist or advise the DEP any greater than that of any citizen of the State properly subpoenaed. Moreover, the entomologists have no statutory or practical relationship to the Bureau of Parks or Public Lands other than as they may advise as to the presence of insects on their lands. Thus the position of a regional entomologist is readily distinguished from that of an employee of the Department in a discretionary policy-making position.

In Opinion of the Attorney General, August 2, 1973, p. 5, we advised that the Commissioner of the Department of Conservation could not simultaneously serve as a member of the Board of Environmental Protection because "[he] would have supervisory and appointive powers over [a Bureau] and would otherwise be involved with the activities of that Bureau [and would at the same time] sit on the board vested with the authority and obligation to issue or deny. . . permits [to that Bureau] ."

Here the Department of Conservation employee has no relevant supervisory and no appointive powers, nor is he involved with the activities of the State agencies which will make the decisions relevant to the District's actions.

In the absence of either the possibility of personal gain or an official position from which he can either legally or practically influence the decisions of the State agencies likely to deal with the District, there is no conflict of interest and hence no incompatibility of office.

The regional entomologist need resign neither his position with the State nor with the District.

DTF/cmb