

# MAINE STATE LEGISLATURE

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*Attorney Conflict of Interest*

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STATE OF MAINE  
DEPARTMENT OF THE ATTORNEY GENERAL  
AUGUSTA, MAINE 04333

August 9, 1976

Edward Lee Rogers, Esquire  
Counsel  
Natural Resources Council of Maine  
20 Willow Street  
Augusta, Maine 04330

Dear Lee:

This letter responds to your correspondence of June 7, 1976, concerning the application of 5 M.R.S.A. § 15, as amended. That section prohibits and contains penalties for certain activities on the part of former State employees, which is of special interest to you as a former Assistant Attorney General. In order to fully examine your questions, it will be helpful to first set forth the statutory provisions and some factual background.

5 M.R.S.A. § 15, as amended by P.L. 1975, c. 770, §§ 16-17, reads in pertinent part:

"1. Any person who has been a member of the classified or unclassified service employed by an executive agency shall be fined not more than \$1,000 or imprisoned for not more than 6 months if he:

"A. Within one year after his employment has ceased, knowingly acts as an agent or attorney for anyone other than the State in connection with any official proceeding in which:

- (1) The State is a party or has a direct and substantial interest; and
- (2) The particular matter at issue was pending before his agency and was

directly within his official responsibilities as a state employee at any time within one year prior to the termination of his employment.

"B. Within one year after his employment has ceased, appears personally before any state or quasi-state agency for anyone other than the State in connection with any proceeding in which:

- (1) The State is a party or has a direct and substantial interest; and
- (2) The particular matter at issue was pending before his agency and was directly within his official responsibilities at any time within one year prior to the termination of his employment."

From mid-1973 to May, 1976, you served as an Assistant Attorney General, which is a position in the State's unclassified service. Among your other activities during this period, you represented the Department of Marine Resources, the Office of Energy Resources, and the Department of Inland Fisheries and Wildlife as intervenors in hearings before the Board of Environmental Protection (BEP). The hearing was on the application of the Pittston Company under the site location of development law (38 M.R.S.A. § 481, et seq.) for an oil refinery at Eastport. BEP's hearings on this matter continued during most of the period you were a member of our staff, and the decision is presently on appeal by the agencies you represented, an appeal which you initiated. Although you resigned in mid-May of this year, your relationship with this office continues on a contract basis for the limited purpose of a specific utility rate hearing before the Public Utilities Commission.

It is our understanding from your letter that you now propose to represent the Natural Resources Council (NRC) in proceedings when Pittston seeks federal approval of its refinery project under the National Environmental Policy Act and other federal laws. We also understand you propose to represent the NRC before the BEP regarding air emission and water discharge permits for the Pittston project, matters which were indirectly before BEP during the hearings under the site location law. The question is whether your intended representation of NRC, in light of the background just described, would violate 5 M.R.S.A. § 15.

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It is our opinion that such representation would not only violate § 15, but would also create ethical problems.

As you know, 5 M.R.S.A. § 15 is a recent innovation in Maine, though very similar prohibitions have existed for former federal employees for over ten years. P.L. 87-849, § 1(a), 76 Stat. 1123, codified as 18 U.S.C. § 207. The legislative intent for § 15, as stated in the Statement of Fact for the enactment (P.L. 1975, c. 539; L.D. 1608, as amended by Committee Amendment "A" S0297), is to punish former State employees ". . . who continue to participate in a substantial way in certain of the governmental areas they were responsible for while state employees." The section is a penal statute and it should be strictly construed. 3 Sutherland Statutory Construction § 59.03. Also, the scope of the section has recently been narrowed by amendment of sub-paragraph (2) of both paragraphs A and B of subsection 1. Prior to amendment, these sub-paragraphs read, in part, "The subject matter at issue was directly within his official responsibilities. . . ." After amendment these sub-paragraphs read, "The particular matter at issue was pending before his agency and was directly within his official responsibilities." P.L. 1975, c. 770, §§ 16-17. However, despite the penal nature of section 15 and the narrowing amendment, we nevertheless believe that the scope of the statute is sufficiently broad that your proposed representation would be included.

There is no question that until very recently you were an unclassified State employee and that legal matters concerning the Pittston Company proposal to build a refinery at Eastport were directly within your official responsibilities as a State employee. It is also clear that the State would have a direct and substantial interest, if not party status, in any proceeding involving any phase of the Pittston project, and that representation of the NRC would be for someone other than the State. Therefore, the question is whether ". . . the particular matter at issue was pending before [your] agency. . . ."

It is our opinion that the phrase "particular matter at issue," as applied to your case, would include all aspects of the Pittston refinery proposal. The hearings by the BEP under the site location law covered many environmental factors, including water and air quality, as exemplified by the varied interests of the three State agencies you represented. In other words, the particular matter at issue was not the issue of whether Pittston should receive a permit from BEP under the site location law, but rather whether Pittston should build and operate an oil refinery/tanker terminal at Eastport. Therefore, the representation you propose would include the "particular matter at issue" during the prior Pittston refinery hearings. It is also our

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opinion that the phrase "pending before his agency," at least when applied to a former member of the Attorney General's Office, means matters in which the Office has taken an active interest through investigation, representation, advice or litigation. In other words, "pending before his agency" is not limited to matters which are formally before an agency for quasi-judicial or legislative action, especially where an individual's position was such that it would have allowed him special access to information and experience which could be used by a party other than the State.

Therefore, we conclude that your proposed representation of the NRC in matters concerning the Pittston refinery proposal, regardless of the forum in which these matters are being considered, would violate 5 M.R.S.A. § 15.

In addition, we believe your proposed action could cause ethical problems as a result of the possible appearance that you would be using information and experience gained during public employment for the benefit of a private client. Such action would raise the question of whether there is a conflict of interest. Title 18 U.S.C. § 207, previously noted, has been interpreted as proscribing an unethical practice, in the sense that "Avoiding conflicts of interest is a traditional ethic of the legal profession." United States v. Nasser, 476 F.2d 1111 (7th Cir., 1973). The same statement could be made of 5 M.R.S.A. § 15. You may wish to review Canon 9 of the Code of Professional Responsibility, DR 9-101(B), and EC 9-3, which concern this general subject and which have been used to disqualify a former Justice Department attorney in circumstances similar to those you have set forth. General Motors Corporation v. City of New York, 501 F.2d 639, 642 (2nd Cir., 1974).

I would like to add, in closing, that I appreciate and respect the responsible and professional manner in which you sought our opinion on this matter. While I am sorry that our answer could not be more favorable to your plans, I am pleased that you recognized the problem and brought it to our attention, since your action is a credit both to yourself and the legal profession.

Sincerely,

  
JOSEPH E. BRENNAN  
Attorney General

JEB/ec