

# MAINE STATE LEGISLATURE

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Maine Potato Board Authority

LD 1954

JOSEPH E. BRENNAN  
ATTORNEY GENERAL



RICHARD S. COHEN  
JOHN M. R. PATERSON  
DONALD G. ALEXANDER  
DEPUTY ATTORNEYS GENERAL

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

February 6, 1978

Honorable Walter W. Hichens  
Senate Chambers  
State House  
Augusta, Maine

Honorable Luman T. Mahaney  
House of Representatives  
State House  
Augusta, Maine

Re: Maine Potato Board, L.D. 1954.

Dear Senator Hichens and Representative Mahaney:

This is in response to your memorandum of January 9, 1978, in which you raise several questions as to the proposed legislation creating the Maine Potato Board. In particular, you have asked the following questions, the answers to which are discussed further herein:

1. Does the bill unconstitutionally or illegally deny the rights of potato growers to be represented on the Board? No, but see discussion.

2. Does Section 4853.4, as proposed, concerning removal from the Board, meet constitutional and legal requirements? Yes.

3. Does Section 4854.6, as proposed, concerning the Board's power to borrow funds, comply with federal and state law? Yes.

4. In order for the Potato Board to undertake the functions indicated in proposed Section 4854.7 and to meet all the legal requirements, is it necessary for the Legislature to provide further standards by which grades, brands, and labels will be defined? No.

5. Does Section 4854.8, as proposed, concerning trade practices, meet constitutional and legal requirements? Yes.

6. Could Sections 4859 - 4861, as proposed, be interpreted to legally require potato shippers to pay the potato tax as many as three times per load of potatoes? Yes.

7. Does Section 4862, as proposed, which delegates the powers of the State Tax Assessor to a private organization, conflict with or violate any federal or state laws or the federal and Maine Constitutions? No, but see discussion.

DISCUSSION:

As an introductory matter, it should be noted that the Attorney General's Office is reluctant to provide its opinion on legislation which is not yet in final form. Problems of ambiguity and uncertainty are especially difficult where a full legislative history concerning the bill has not yet been developed. In addition, once enacted, a statute is presumed to be constitutional and to have been enacted by the Legislature with knowledge of the applicable constitutional and legal requirements. See, e.g., State v. Fantastic Fair and Karmil Merchandising Corp., 158 Me. 450, 186 A.2d 352 (1962) (upholding the constitutionality of the so-called Sunday Sales Law). Nevertheless, we hope that the following discussion will prove helpful to the Committee's efforts concerning L.D. 1954.

Before answering your specific questions, I would like to point out to you an inherent constitutional problem with the proposed method for establishing the Maine Potato Board. This problem necessarily affects all other aspects of the Board and the answers to all other questions should be considered with these concerns in mind.

The power of the Legislature is provided in Article IV, Part Third, Section 1, of the Constitution as follows:

" \* \* \* The Legislature, with the exceptions hereinafter stated, shall have full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State, not repugnant to this Constitution, nor to that of the United States."

The Maine Supreme Court has stated that:

"The Legislature may create offices and provide for the manner of appointment, tenure, and the like, subject only to the restraint of the Constitution." Ross v. Hanson, 227 A.2d 606, 611 (Me., 1967)

(holding unconstitutional a statute which attempted to extend the term of office of the Deputy Secretary of State).

The proposed delegation in L.D. 1954 of regulatory, investigative and promotional functions to a board, the majority of which is made up of grower members elected by the growers, poses a constitutional concern. The issue is indirectly addressed in your seventh question, and is basically one of the propriety of a delegation of legislative functions to a private organization. The Maine Potato Board, unlike most other State boards and agencies, is not appointed by any governmental official. Cf. 12 M.R.S.A. § 681 concerning the Land Use Regulation Commission; or 36 M.R.S.A. § 4563, concerning the present Maine Potato Commission.

The decisions of the Courts of the United States and the various other states are not unanimous as to the constitutionality of the delegation of governmental power to private organizations. Accordingly, while we are not able to state unequivocally that the delegation such as that proposed in L.D. 1954 is clearly unconstitutional, we do wish to have the Committee be aware of the problem.

The leading case in the field is that of Carter v. Carter Coal Company, 298 U.S. 238, decided by the United States Supreme Court in 1936. The Carter decision concerned the Bituminous Coal Conservation Act of 1935, which, in part, was designed to promote the bituminous coal-mining industry and to otherwise provide for the general welfare. Part of the Bituminous Coal Conservation Act addressed the question of labor relations within the industry and delegated to the majority of producers and the majority of miners the authority to fix maximum hours of labor and minimum wages for certain districts. The United States Supreme Court characterized this effort as follows:

"The effect, in respect of wages and hours, is to subject the dissentient minority, either as producers or miners or both, to the will of the stated majority . . . . The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority,"  
298 U.S. 238, 311.

The United States Supreme Court rejected this delegation out of hand:

"This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. . . .

and a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this Court which foreclosed the question," 298 U.S. 238, 311-312.

While this decision in the Carter case presents a strong view as to the unconstitutionality of a delegation to private organizations of the authority to adopt rules and regulations affecting the industry as a whole, the courts have not been unanimous in their view. Compare, St. Louis I.N.M. & S.Ry.Co. v. Taylor, 210 U.S. 281 (1908) (upholding the constitutionality of a law which allowed the American Railroad Association to certify height requirements for freight cars for the ICC. See also, Davis Administrative Law § 214.

Most of the cases which have discussed the question of delegation to private organizations have, in large part, turned on the question of whether or not there was sufficient standards to guide the body in its decision-making. In this regard, as discussed further herein, the standards provided for the Maine Potato Board appear to be sufficient. This does not, however, completely address the concern of the propriety of those who are part of the regulated community passing regulations for that community. In many ways this is similar to the suggestion that it would be appropriate to have the public utility industry elect members of the Public Utilities Commission. While the case law does not unanimously support the view that such a delegation would be an unconstitutional delegation of authority and a denial of procedural and substantive due process in relation to the impartiality of a decision-making body, nevertheless, it appears that it is the better and more analytical view that such delegation would be unconstitutional. See, generally, Davis at § 214.

With this in mind, the following is a discussion of the specific questions which you addressed to the Attorney General's Office:

QUESTION #1:

While the answer to the question which you have asked is considered herein, it is perhaps most appropriate to suggest that an approach which would be most likely to be held constitutional would be the appointment of the Maine Potato Board pursuant to Article V, Part First, Section 8, of the Maine Constitution, rather than the election of the seven grower members by the growers themselves. With this suggestion in mind, your specific question is answered as follows:

Title 36 M.R.S.A. § 4853, as proposed by L.D. 1954,<sup>1/</sup> provides that the Maine Potato Board shall consist of 11 members: 7 growers, 2 dealers, 1 processor, and the Commissioner, all as defined by § 4852. The grower members are to be actively engaged in the commercial production of 5 or more acres of potatoes in the district from which they are elected, § 4853.1.A; 1 grower member is to represent each district as those districts are defined by § 4852.4. See also § 4853.2. The grower members shall be "elected by a plurality vote of the growers voting in that district, providing that more than 1/2 of the eligible voters of that district actually vote," § 4853.1.A. There is apparently no provision in the proposed legislation for membership of that district if 1/2 of the eligible voters do not "actually" vote. There is, accordingly, an ambiguity in the statute which the Legislature may wish to clarify prior to final enactment.

In any case, whether the Legislature addresses this ambiguity or not, it does not appear that the legislation in its present form constitutes an unconstitutional or illegal denial of the rights of potato growers to be represented on the Board. In establishing the Maine Potato Board, the Legislature is engaging in an exercise of its police power to protect the health, safety and general welfare of the people of the State of Maine. The police power of the State is inherent and plenary and its exercise is not unconstitutional so long as it is not unreasonable or arbitrary—and so long as a substantial relationship to the public health, morals or general welfare has been indicated. See, e.g., State v. Union Oil Company of Maine, 151 Me. 438, 120 A.2d 708 (1956) (setting out the test of constitutionality of an exercise of the police power in a decision declaring a statute regulating signs advertising gasoline prices unconstitutional). Compare, Wiley v. Sampson-Ripley Co., 151 Me. 400, 120 A.2d 289 (1956) (upholding the constitutionality of a statute which made sale below cost illegal where the Legislature intended to prohibit the destruction of competition).

It has also been generally held that where the Legislature establishes certain classifications or categories as the object of legislation, this will not be seen as an unconstitutional denial of equal protection. The case law in this regard arises mainly from cases concerning the classifications of persons or activities to be regulated, but appears to be equally applicable to cases concerning representation in various forms of government. See, e.g., State v. King, 135 Me. 5, 188 A. 775 (1936).

Basically, the State may classify the objects of legislation so long as the classification is not clearly arbitrary or unreasonable. With these principles in mind, it does not appear that the fact that the growers of a given district may not be represented on the Maine Potato Board due to failure of the eligible voters in that district to vote is a deficiency which reaches constitutional proportions.

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<sup>1/</sup> All further references, unless otherwise indicated, are to section numbers as proposed in L.D. 1954.

QUESTION #2:

Section 4853.4 provides:

"The Board shall, by regulations, establish procedures for the removal after public hearing of members who cease to qualify, or for inefficiency, neglect of duty or misconduct in office."

While it is always difficult to ascertain the requisite level of specificity, it would appear that the delegation to the Board to establish standards for removal is, in this case, sufficiently defined so as to present no constitutional problem. See, e.g., Andrews v. Police Board, 94 Me. 68 (1900) (apparently upholding the standard of "removal for cause after hearing"). Compare, Small v. Maine Board of Registration and Examination in Optometry, 293 A.2d 786 (Me., 1972) (holding unconstitutional the legislative delegation to the Board to "make such rules and regulations, not inconsistent with law, as may be necessary to govern the practice of optometry. . . .").

QUESTION #3:

Section 4854 concerning the powers and duties of the Maine Potato Board provides, in pertinent part, that the Board is empowered "to borrow money not in excess of estimated revenue from current year's crop, when deemed advisable for the well-being of the potato industry," § 4854.6.

Article IX, Section 14, of the Maine Constitution provides, in pertinent part:

"The credit of the State shall not be directly or indirectly loaned in any case except as provided in sections 14-A, 14-B, 14-C, 14-D and 14-E. The Legislature shall not create any debt or debts, liability or liabilities, on behalf of the State, which shall singly, or in the aggregate, with previous debts and liabilities, hereafter incurred at any one time, exceed two million dollars. . . . except for temporary loans to be paid out of money raised by taxation during the fiscal year in which they are made; . . . .

Temporary loans to be paid out of moneys raised by taxation during any fiscal year shall not exceed in the aggregate during the fiscal year in question an amount greater than 10% of all the monies appropriated, authorized and allocated by the Legislature from undedicated revenues to the General Fund and dedicated revenues to the Highway Fund for that fiscal year, exclusive of proceeds or expenditures from the sale of bonds, or greater than 1% of the total valuation of the State of Maine, whichever is the lesser."  
(emphasis supplied)

Section 4854.6 contemplates the borrowing by the Maine Potato Board of money not in excess of estimated revenue from the current year's crop. At the same time, § 4856 provides that a tax is to be levied and imposed at a certain rate on all potatoes raised in this State not otherwise exempted. Section 4857 provides that all taxes imposed and collected pursuant to this law shall be in addition to other taxes collected by the State. Section 4858 provides that taxes are due in a manner provided in § 4859, which section in turn indicates that on the 15th day of each month, every shipper must report to the State Tax Assessor the quantity of potatoes received, sold or shipped by him during the preceding calendar month, and that at the time of filing such report, each shipper shall pay to the State Tax Assessor a tax at the rate of \$.025 per hundredweight.

Pursuant to these sections, while not free from doubt, it appears that the borrowing of funds contemplated by § 4854.6 is a "temporary loan" in the anticipation of taxes for the current fiscal year, and as such, is within the constitutional limitations of Article IX, Section 14, so long as the amount borrowed does not exceed the lesser of the amounts specified in the last sentence of Article IX, Section 14, as quoted above.

QUESTION #4:

Section 4854.7 provides that the Maine Potato Board be empowered to improve the marketing of Maine potatoes by "defining and describing such grade or grades of potatoes that may be advertised and sold, consistent with Title 7, Sections 441 to 447, and 951 to 957. . . ."

The existing provisions of Title 7 M.R.S.A. §§ 441 to 447 addresses the power of the Commissioner of Agriculture to prescribe rules and regulations establishing grades and standards for farm products. Similarly, Title 7 M.R.S.A. §§951 to 957 deal generally with the grading of potatoes, the promulgation of official standards for grading of potatoes, and the definition of violations of law for misbranding or mislabeling potatoes. Specifically, Title 7 M.R.S.A. § 951 provides that:

"The Commissioner is authorized and empowered, after holding public hearings, to establish and promulgate official definitions and standards for grading, or classifying, packing and labeling potatoes and to change such official standards from time to time. Such official standards shall not be lower in their requirements than the minimum requirements in the official standards for corresponding grades or classifications as promulgated from time to time by the Secretary of Agriculture of the United States, commonly known as U.S. Grades."



Section 4854 of the proposed legislation incorporates by reference the limitations of Title 7, §§ 441 to 447 and 951 to 957, as cited above, and also provides that the purpose of regulations adopted pursuant to this section shall be to "provide the consuming public a consistent supply of potatoes of the highest quality."

In reviewing the principles of law concerning an overbroad or unlawful delegation of power by the Legislature to an administrative agency, the Maine Supreme Court has said:

"From the constitutional prohibition of the delegation of legislative powers, two fundamental concepts emerge: '(1) the legislature may not confer a discretion as to what the law shall be but it may confer in the execution or administration of the law; and (2) the legislature must declare a policy and fix a standard in enacting a statute conferring discretionary power upon an administrative agency, but the agency may be authorized to fill up the details' in promoting the purposes of the legislation and carrying it into effect."

"In order to avoid an unlawful delegation of power, the legislative authority must declare the policy or purpose of the law, and, as a general rule, must also fix the legal principles which are to control in given cases by setting up standards or guides to indicate the extent, and prescribe the limits, of the discretion which may be exercised under the statute or ordinance by the administrative agency. Otherwise, the law may be construed as vesting an uncontrolled discretion and held to violate the inhibition against delegation of legislative powers," Small, supra, 293 A.2d 786, 787-788, quoting from the text of 1 Am. Jur.2d 903, 913, §§ 105 and 113; see also, 1 Am. Jur.2d §111, 116-118.

In the present instance, the Legislature has explicitly stated the purpose of the establishment of the Maine Potato Board as follows:

"The production and marketing of Maine potatoes is of such major importance to the agricultural economy of the State and to the general well-being of the people of Maine, that it is in the public interest to stabilize, conserve and promote the prosperity and welfare of the State

and of the potato industry by fostering more effective advertising, more adequate research, and better methods of production, processing, transportation and marketing of potatoes grown in Maine. To this end, there is created a Maine Potato Board."

The Legislature has also specifically stated the purpose of enactment by the Maine Potato Board of standards for potato grades to be as follows:

"To improve the marketing of Maine potatoes . . . so as to provide the consuming public a consistent supply of potatoes of the highest quality. . . ."

In view of the explicit statement of legislative purpose in delegating the authority to promulgate grades and standards to the Maine Potato Board as well as the provisions of § 951 relating the standards to those set by the Secretary of Agriculture of the United States, it does not appear that the legislative delegation of authority contemplated by § 4854.7 is constitutionally or illegally vague. See, generally, 7 U.S.C. § 257 concerning several grades for agricultural products. Compare, Small v. Board of Optometrists, supra.

QUESTION # 5:

Section 4854.8 empowers the Maine Potato Board to "prevent, modify or eliminate trade barriers restricting free flow of potatoes produced in the State, and to investigate and take necessary action to prevent unfair trade practices and to correct, where possible, trade practices which hinder marketing of potatoes produced for process in Maine." Terms, such as "unfair trade practices" in federal law have been specifically held not to be unconstitutionally vague. See Sears Roebuck Co. v. FTC, 258 F. 307 (1919) ("unfair methods of competition"). See also, 5 M.R.S.A. § 207, defining as unlawful in the State of Maine "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. . . ."

QUESTION #6:

Section 4859 provides that every shipper of potatoes shall keep certain records of "all purchases, sales and shipments of potatoes," and shall render a report to the State Tax Assessor concerning the quantity of potatoes received, sold or shipped by him during the preceding calendar month. Section 4859 provides also that at the time of filing such a report "each shipper shall pay to the State Tax Assessor a tax at the rate of \$.025 per hundredweight upon all potatoes so reported as purchased, sold, or shipped." As you aptly pointed out in your letter, there is sufficient ambiguity within the text of this section so that it could legally be construed to require a three-time payment. This could adequately be addressed by amending the proposed legislation to specifically state the intent of the Legislature one way or another.

QUESTION #7:

Sections 4856 to 4864 address various aspects of the collection of the tax on potatoes to be used by the Maine Potato Board. Section 4860 provides that every shipper of potatoes must file an application with the State Tax Assessor indicating the name under which the shipper transacts business in the State of Maine and other data about his business. The State Tax Assessor is then required to issue a certificate to the shipper, and no shipper may sell potatoes in Maine without such a certificate. Section 4862 provides:

"The State Tax Assessor or his duly authorized agent shall have authority to enter any place of business of any shipper, or any car, boat, truck or other conveyance in which potatoes are to be transported, and to inspect any books or records of any shipper for the purpose of determining what potatoes are taxable under this chapter or for the purpose of determining the truth or falsity of any statement of return made by any shipper and he shall have authority to delegate such power to the Board, its agents or employees."

Your seventh question addresses the propriety of the delegation of authority from the State Tax Assessor to the Maine Potato Board to inspect records or facilities of potato shippers. This question directly relates to the concern discussed previously as to the constitutionality of a delegation of legislative authority to a board constituted by election of those to be regulated. Your question, in fact, presupposes that the delegation of authority to the Maine Potato Board by the State Tax Assessor is a delegation "to an industrial organization."

The unfairness, and perhaps unconstitutionality, of such an arrangement is most obvious in the case where those who have the power to inspect records of their competitors are not appointed by any State agent. With this concern in mind, it might generally be pointed out that the Legislature is, basically, able to delegate to a State agency any functions which are reasonable and appropriate.

Similarly, it would appear that the Legislature would be free to authorize delegation through the State Tax Assessor's Office. Compare, Title 36 M.R.S.A. § 5340.4 contemplating delegation by the Bureau of Taxation to agents of various sorts. In this regard, it should perhaps be noted that certain tax statutes have provisions for confidentiality. See,

e.g., Title 36 M.R.S.A. §§ 2062 and 5340.4. While it may be that the Legislature would wish to enact a similar provision concerning taxes pursuant to this law, the system now contemplated by L.D. 1954 would not appear, except as previously discussed, to be inappropriate constitutionally, nor would it appear to be in conflict with any existing State law.

If we can be of further assistance to you in this matter, please do not hesitate to call upon us.

Very truly yours,

*Sarah Redfield*

SARAH REDFIELD  
Assistant Attorney General

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