

MAINE STATE LEGISLATURE

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5 M.R.S.A. § 5005
17 M.R.S.A. 3104

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

August 23, 1978

Honorable David Ault
Wayne
Maine 04284

Dear Representative Ault:

This responds to your request for advice, dated August 2, 1978, on the question of whether P.L. 1977, c. 685, was properly implemented by use of a public "lottery" device and whether a State Legislator or a State constitutional officer could be winners of a grant made pursuant to Chapter 685.

FACTS:

The second regular session of the 108th Legislature enacted P.L. 1977, c. 685, in order to establish a solar water heater demonstration program for the State of Maine. In so doing, the Legislature amended 5 M.R.S.A. § 5005 to authorize the State Office of Energy Resources to sponsor research experiments and demonstration projects within the State to develop alternative energy sources, including solar energy. Further, Chapter 685 appropriated \$16,000 to the Office of Energy Resources to fund 40 grants of \$400 each to qualified applicants for installation of solar hot water heating systems. No particular method for distribution of the grants was specified.

It is our understanding that it was contemplated that the grants would only pay a portion of the cost of a solar hot water heating system (from 1/3 to 1/6 of the total cost, depending on the type of system installed).

The Office of Energy Resources determined that it would give all Maine residents an equal opportunity to apply for these grants by making the public aware of their availability and selecting applicants by chance. Accordingly, the Office of Energy Resources advertised with quarter-page ads in the Saturday edition of the Bangor Daily News and the Maine Sunday Telegram. The ads stated that \$400 grants were available, that people were urged to apply, and that applicants would be selected by lot.

In addition to these advertisements, the Office of Energy Resources put out news releases about the program, and in response to the news releases, several news stories about the availability of the grants appeared. Despite this publicity, only a small number of applicants, totalling approximately 138, were received. The Office of Energy Resources desired to have some geographic distribution of the grants in order to test solar systems in the various geographic and climatic regions of Maine. For that reason, and because of the low number of applicants, the applications which had been received were segregated by county and then the drawing was conducted on a county-by-county basis. There was at least one applicant for each county, but sometimes no more than one. After the various names had been drawn, it was determined that the State Treasurer and a State Legislator were among the successful applicants.

QUESTIONS:

Based on these facts, you have posed your questions:

1. Was the so-called lottery a proper procedure to use in issuing the grants pursuant to Chapter 685?
2. May the State Treasurer and the State Legislator be recipients of grants pursuant to Chapter 685 which were issued in the above-described manner?

ANSWERS:

We would answer your questions as follows:

1. There was no violation of the state gaming laws, 17-A M.R.S.A. c. 39, or of the state laws relating to operation of the state lottery, 8 M.R.S.A. c. 14, in use of the term "lottery" in connection with the grant application program or in the manner of selection of successful grant applicants. The program was not run in a manner similar to a statutorily prohibited gambling operation in that applicants were not required to risk any funds or other consideration which they would lose if they were not a successful applicant. Cf. 17-A M.R.S.A. § 952-4. Thus, only successful applicants must make commitments to spend their own funds in connection with the grant to build a solar heating system.

2. We also do not believe that the procedure used for the distribution of grants was improper on any other grounds based on the facts described above. As indicated, the Legislature provided no direction as to how the grants were to be distributed. In light

of this, we believe that it was within the reasonable discretion of the Office of Energy Resources to adopt the policies that the grants should be made widely available to Maine citizens and that grant recipients should have some significant geographical distribution to test the solar systems under varying climate and geographic conditions.

With these policies adopted, we do not think it was unreasonable for the Office of Energy Resources to proceed the way they did, initially to invite applicants on a state-wide basis, but subsequently to segregate applications on a county-by-county basis to assure geographic distribution.

3. The compensation to be paid to a State Legislator and the State Treasurer are specified at 3 M.R.S.A. § 2 (for legislators) and 2 M.R.S.A. § 7 and 5 M.R.S.A. § 121 (for the Treasurer). These sections set limits on the compensation which Legislators and the Treasurer respectively are to receive from the State for their services. Receipt of funds from the State in excess of these amounts would not be proper for services rendered in their official capacity. However, while the funds in question in this case are received from the State, they have no connection with services rendered. The grants have been awarded by lot without reference to any person's status as a State employee or State officer. Further, no work by any person in their capacity as a State officer or State employee is required as a condition of the grant. As the grant is unrelated to one's status as a State employee and unrelated to service rendered to the State, the grants are not compensation. Therefore, compensation limits specified for State Legislators and the State Treasurer are not violated.

4. It is our understanding that recipients will enter into agreements with the State committing the grantee to comply with certain requirements as a condition of the grant. State law, 17 M.R.S.A. § 3104, limits the ability of State employees to participate in contracts in which they may have an official interest. Section 3104 reads as follows:

"No trustee, superintendent, treasurer or other person holding a place of trust in any state office or public institution of the State shall be pecuniarily interested directly or indirectly in any contracts made in behalf of the State or of the institution in which he holds such place of trust, and any contract made in violation hereof is void. This section shall not apply to purchases of the State by the Governor under authority of Title 1, section 814."

The State officials in question were in no position to influence the awarding of the contract in question, nor will they have any role (beyond the Treasurer's pro forma signature on checks) in administering the State program under which the grants will be provided.

The Maine Courts have considered an earlier version of § 3104 in Opinion of the Justices, 108 Me. 545 (1911). There, the Court found a conflict of interest barring a contract with a company in which the Secretary of State held a substantial interest where "the department of which he is the official head, will necessarily be affected to a considerable extent in the performance of the same." 108 Me. 545, at 552. Here, the State Treasurer's Department and the Legislature are not affected in any significant way by the performance of the contract. Further, the general purpose of the statute noted by the Court: to avoid the temptation to bestow reciprocal benefits and to prevent favoritism or fraudulent collusion, would not be compromised by the grants made under the energy conservation program.

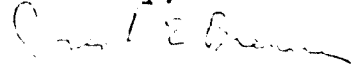
Accordingly, it is our view, again based on the facts as described above, that the grants in question in this case, which have been awarded by lot, are not contracts within the meaning of § 3104, and further, that to the extent there is any such contractual relationship between the Office of Energy Resources and the grantees, the State officials in question do not have a sufficient relationship to the program to put themselves in a place of trust with regard to the grant such as would bring the provisions of § 3104 into play.

5. According to the above-stated facts, there is no question of any improper influence in awarding of the contracts or otherwise in the connection with the solar water heating program such as would bring the prohibitions of Chapter 25 of the Maine Criminal Code (Title 17-A) and particularly §§ 603, 604 or 605 into play.

Thus, it is the view of this office that the procedures used by the Office of Energy Resources for distribution of grants pursuant to Chapter 685 were not inconsistent with the laws of Maine. Further, we find no violation of the laws of the State in the State Treasurer and a State Legislator receiving a grant pursuant to Chapter 685 considering the manner in which such grants were distributed under Chapter 685.

I hope this information is helpful.

Sincerely,



JOSEPH E. BRENNAN
Attorney General

JEB/ec

cc: Leighton Cooney, Treasurer
Rep. Harry Rideout
Office of Energy Resources