

MAINE STATE LEGISLATURE

The following document is provided by the
LAW AND LEGISLATIVE DIGITAL LIBRARY
at the Maine State Law and Legislative Reference Library
<http://legislature.maine.gov/lawlib>



Reproduced from scanned originals with text recognition applied
(searchable text may contain some errors and/or omissions)

Treasurer's Office
JOSEPH E. BRENNAN
ATTORNEY GENERAL



Me Const. Art 7 c. p 74 Sec. 3
5 April 121
5 April 127
RICHARD S. COHEN
JOHN M. R. PATERSON
DONALD G. ALEXANDER
DEPUTY ATTORNEYS GENERAL

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

December 1, 1978

Honorable Jerrold Speers
Memorial Drive
Winthrop, Maine 04364

Re: State Treasurer's Office.

Dear Senator Speers:

This responds to your request for an opinion on the question of whether the State Treasurer may, during his term of office, accept other employment or perform professional work for other compensation.

Response to this question requires an analysis of the provisions of the Maine Constitution and Maine statutes relating to the State Treasurer. Key to this analysis is Article V, Part 4, Section 3, of the Maine Constitution which reads as follows:

"The Treasurer shall not, during his continuance in office, engage in any business of trade or commerce, or as a broker, nor as an agent or factor for any merchant or trader."

This provision, as it exists in the Maine Constitution today, has remained unchanged since original adoption of the Maine Constitution in 1820. Its language would appear to bar persons, while incumbent in the office of Treasurer, from engaging in a business or trade or acting as agents for persons engaged in business or trade.

The original statute authorizing the office of Treasurer contained similar language prohibiting engagement in any business or trade. Laws of 1820, c. 2, § 1. Further, the

original laws for the office of State Treasurer authorized persons to issue complaints against the Treasurer and authorized the Treasurer to be removed from office if the Treasurer was absent from the State or absent from "the duties of his said office." Laws of 1820, c. 2, § 2.

The implication of this language, in the original law, was that if the Treasurer was found to be giving less than his full fidelity and time to the office of Treasurer and if he was engaged in another business activity which resulted in his being absent from the duties of the office of Treasurer, a complaint could be filed and the Treasurer could be removed. The statutory language relating to the duties of office has not carried over to the current law. The provisions of the current law relating to removal of the Treasurer, 5 M.R.S.A. § 127, authorize removal where the Treasurer "is absent from the State and neglecting his duties to the hazard of the trust reposed in him."

The effect of the change from the original law appears to permit the Treasurer to go out-of-state without the threat of removal from office, action which a strict interpretation of the original statute may have allowed. However, we do not think the change in statutory language is significant to our interpretation since the original statute, adopted at the same time as the original Maine Constitution, must be construed to provide some indication as to the intent of the drafters of the Constitution with regard to the Treasurer engaging in any business or trade which might divert his attention from a full-time commitment to his job as Treasurer. Accordingly, we must conclude that the position of Treasurer, by operation of the provisions of Article V, Part 4, Section 3, requires a full-time commitment and full fidelity to the job such that other employment or the seeking of income through the regular practice of a profession outside of the office of Treasurer would not appear to be consistent with the intent of the original Constitution.

This opinion is given based on the legal and historical research which we have had time to do. An exhaustive legal and historical research into the background of the office of the Maine State Treasurer has not been possible in this time. We recognize that at the time the State of Maine was created in 1820, most State offices were not full-time offices. They were occupied by persons otherwise engaged in trades or professions. However, the limited legal and historical research which we have been able to do has not provided any indication that, like other State officials, the Treasurer also was a part-time position held by persons in other businesses. As this other research has been inconclusive, we must look to the apparent meaning of the Constitution which, as it reads in 1978, appears to require full fidelity to the position.

This does not, however, mean that a Treasurer of the State of Maine can receive no income, other than compensation for his services as Treasurer, while serving as Treasurer. There is nothing in the law or the Constitution that bars receipt of income from investments such as stocks or real estate so long as the Treasurer is not, during his term of office, engaging in another business. This interpretation is confirmed by the current law, 5 M.R.S.A. § 121, which bars the Treasurer from receiving other fees, emoluments or prerequisites in addition to his salary for the office of Treasurer, but cannot be interpreted to bar receipt of other outside income or benefit. In this connection, we are enclosing for your review a copy of an opinion to the State Energy Office dated August 23, 1978, which addresses this issue.

Obviously, each source of outside income would have to be examined both for the question of whether the Treasurer was engaging in a business or profession which compromised his ability to give full fidelity to the office of State Treasurer and also for the question of whether any source of outside income represents a common law conflict of interest for the Treasurer, which conflict of interest would be independent of any constitutional or statutory provisions addressed above.*

In sum, we must advise that:

1. The State law and the State Constitution require that the Treasurer, while in office, not engage in any other business or profession.

2. The laws and Constitution of the State do not bar the Treasurer from receiving income from other sources during his tenure in office. However, the practices which result in receipt of that income and the sources of the income would have to be examined on a case-by-case basis to determine whether the Treasurer was engaging in a business to gain the income or whether the source of the income created a conflict of interest for the Treasurer in his position as Treasurer.

I hope this information is helpful.

Sincerely,


DONALD G. ALEXANDER
Deputy Attorney General

* For a discussion of common law conflicts of interest, see the opinion dated November 4, 1975, attached hereto.

17 MARCH 3104
5 MARCH 5005

JOSEPH E. BRENNAN
ATTORNEY GENERAL



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

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.

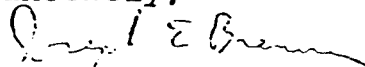
Accordingly, it is our view, again based on the facts as described above, that the grants in question in this case, which have been awarded by lot, are not contracts within the meaning of § 3104, and further, that to the extent there is any such contractual relationship between the Office of Energy Resources 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

JOSEPH E. BRENNAN
ATTORNEY GENERAL



JOHN W. BENOIT, JR.
RICHARD S. COHEN
MARTIN L. WILK
DEPUTY ATTORNEYS GENERAL

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

November 4, 1975

Honorable Carl E. Cianchette
Chairman, Executive Council
State House
Augusta, Maine 04333

Dear Carl:

This is in response to your request for an opinion whether Mr. Aaron Levine would be in conflict of interest serving as Commissioner of the Maine State Department of Agriculture if he continued to own stock in ALCO Packing Co., Inc.:

SYLLABUS:

A conflict of interest in violation of law would result if the controlling stockholder of the largest slaughterhouse and meatpacking concern in Maine simultaneously held the position of Commissioner of the State Department of Agriculture. The relationship of the controlling stockholder to his company would be inconsistent with the obligations and duties imposed upon the Commissioner of the Department of Agriculture.

FACTS:

The Governor has posted Mr. Aaron Levine to the position of Commissioner of the State Department of Agriculture. Mr. Levine is President and Chief Executive Officer of ALCO Packing Co., Inc., a corporation duly organized under the laws of Maine, engaged in the slaughterhouse and meatpacking business. Mr. Levine owns 79% of the voting stock of ALCO and serves on its Board of Directors.

ALCO is the largest meatpacking company in Maine. It is presently inspected solely by federal inspectors, and is engaged in interstate as well as intrastate commerce. There are several other slaughterhouses and meatpacking concerns in Maine engaged

solely in intrastate commerce which are inspected solely by state inspectors appointed by and acting under the supervision of the Commissioner of the State Department of Agriculture, pursuant to the Maine Meat Inspection Act, 22 M.R.S.A. §§ 2541-2589.

If confirmed by the Executive Council as Commissioner, Mr. Levine has indicated that he is prepared to resign as President and Director of ALCO and would disassociate himself from all the affairs of the company. He would not receive any salary from ALCO and would not be available for consultation with the company. Mr. Levine would prefer to retain his 79% ownership interest in ALCO while he serves as Commissioner of Agriculture.

At the public hearing before the Executive Council, there was testimony in opposition to Mr. Levine's appointment on the grounds that the appointment would result in a conflict of interest because of the nominee's proposed continued relationship to ALCO. The Executive Council has requested our opinion whether any conflict of interest would result under the foregoing facts.*

QUESTION AND ANSWER:

Whether Mr. Levine's retention of a 79% ownership interest in ALCO Packing Co. while serving as Commissioner of the Maine Department of Agriculture would constitute a conflict of interest? Yes.

REASONS:

In order to resolve conflict of interest questions, the Courts have looked to the common law. The criteria to be applied in such cases have been succinctly summarized in a recent conflict of interest Opinion of the Justices as follows (330 A.2d 912 at 916):

"[t]he law requires of . . . [public officers] perfect fidelity in the exercise of . . . [the powers and duties of their officer], . . . whatever has a tendency to prevent their exercise of such fidelity is contrary to the policy of the law, and should not be recognized as lawful. . . ." (emphasis supplied) (113 Me. p. 321, 93 A. p. 829)."

In the foregoing Opinion, the Justices addressed a question very similar to the instant one, namely: whether the ownership of stock in a national bank by a person who simultaneously serves as Commissioner

* The facts were voluntarily furnished relating to the nominee's ownership interest in ALCO by Mr. Levine himself. There is no indication that ALCO would be doing any business directly with the State.

of the State Department of Finance and Administration results in a conflict of interest. It was the opinion of the Justices that such continued stock ownership, even if subjugated to a voting trust by the terms of which the prospective Commissioner would have no beneficial or voting rights while in state service, would constitute a conflict of interest in violation of law. Opinion of the Justices, 330 A.2d 912, 919.

Applying these principles to the instant case, it is our opinion that Mr. Levine's continued stock ownership, according to acknowledged attitudes fixed by the habits and customs of the people, would be held to be "inconsistent with the discharge of a full fidelity to the public interest," as Commissioner of Agriculture. Opinion of the Justices, 330 A.2d at 918; Tuscan v. Smith, 130 Me. 36, 46, 153 A. 289, 294 (1931); Lesieur v. Inhabitants of Rumford, 113 Me. 317, 321, 93 A. 838, 839 (1915).

The conflicts fall into essentially three categories: (1) regulation of competitors, (2) regulation of the corporation which he controls, and (3) regulation of persons with whom both his corporation and his competitors do business.

Regulation of Competitors

The Commissioner of Agriculture, and those officials appointed by him and who are subject to his control, possess plenary power and supervision over those establishments engaged in the slaughterhouse and meatpacking business in intrastate commerce. The Commissioner has the statutory responsibility for administering and promulgating rules and regulations under the Maine Meat Inspection Act, 22 M.R.S.A. §§ 2541-2589 (a copy of which is annexed hereto for convenient reference). Pursuant to the Act, the Commissioner has express powers and duties in the following areas:

- a) inspection and examination, §§ 2543, 2544, 2545, 2546; 2549, 2553 (such examinations and inspections shall be made during the day and night, § 2549);
- b) labeling, §§ 2547, 2551;
- c) sanitation, § 2548;
- d) identification, § 2552;
- e) methods of slaughter, § 2554;

November 4, 1975

- f) days for slaughter or operation, § 2549;
- g) storage, § 2557;
- h) handling, § 2557;
- i) record keeping, § 2562;
- j) registration, § 2563;
- k) federal inspection, § 2571;
- l) detention, § 2582; and
- m) condemnation, § 2583.

State inspectors are appointed by the Commissioner, § 2553. Their duties and responsibilities are, by statute, under the direction of the Commissioner as follows:

"[They] shall perform such other duties as are provided by this chapter and by rules and regulations to be prescribed by said commissioner and said commissioner shall, from time to time, make such rules and regulations as are necessary for the efficient execution of this chapter, and all inspections and examinations made under this chapter shall be such and made in such manner as described in the rules and regulations prescribed by said commissioner not inconsistent with this chapter." § 2553.

Slaughterhouse and meatpacking establishments regulated by the Commissioner are required to "keep such records as will fully and correctly disclose all transactions involved in their businesses," § 2562(1), and the Commissioner has express authority:

- a) to gather any information covering, and to investigate, "the organization, business, conduct, practices and management of any person, firm or corporation engaged in intrastate commerce, and the relation thereof to other persons, firms and corporations." § 2587(1)(A),

November 4, 1975

- b) to require those engaged in the meatpacking business to furnish "such information as he may require as to the organization, business, conduct, practices, management and relation to other persons, firms and corporations. . ." § 2587(1)(B),
- c) to have access to and the right to copy "any documentary evidence of any person, firm or corporation being investigated or proceeded against. . ." § 2587(2),
- d) "to subpoena the attendance and testimony of witnesses and the production of all documentary evidence of any person, firm or corporation relating to any matter under investigation." § 2587(2).

Pursuant to § 2571 of the Maine Meat Inspection Act, those businesses which are regulated by the State must meet standards and requirements "at least equal to those imposed under Titles I and IV of the Federal Meat Inspection Act. . . ." § 2571.

The State Commissioner of Agriculture has promulgated regulations which incorporate the federal regulations and make them applicable to all slaughterhouses and meatpacking concerns regulated by the State. Thus, although the requirements for federally inspected establishments such as ALCO and State inspected establishments are presently the same, the Commissioner of Agriculture has authority to promulgate more stringent requirements for state regulated concerns.

It is clear from the foregoing that Mr. Levine would have direct supervisory and comprehensive regulatory power over competitor slaughterhouse and meatpacking concerns as well as access to their detailed business records and every day transactions.

Regulation of ALCO

At the present time, ALCO itself is neither inspected nor regulated by the Commissioner of Agriculture or his appointed inspectors. Rather, ALCO is regulated by federal authorities. Nevertheless, the Maine Meat Inspection Act expressly provides that the requirements of the Act may be applied to federally inspected establishments in certain areas:

"[the Act] shall apply to persons, firms, corporations, establishments, animals and articles regulated under the Federal Meat Inspection Act only to the extent provided in section 408 [21 U.S.C. § 678] of said Federal Act." 22 M.R.S.A. § 2588.

The Federal Act authorizes any state to "impose recordkeeping and other requirements. . .with respect to any such [federally inspected] establishment, and to exercise:

Hon. Carl E. Cianchette

Page 6

November 4, 1975

"concurrent jurisdiction with the Secretary [of Agriculture] over articles required to be inspected . . . for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded and are outside of such an establishment, or, in the case of imported articles which are not at such an establishment, after their entry into the United States." 21 U.S.C. § 678.

By virtue of the foregoing provision, if Mr. Levine were to continue to own a 79% controlling interest in ALCO while he served as Commissioner of the State Department of Agriculture, he would, in effect, be in the position of regulating a corporation in which he owns the controlling interest.

In addition, the Commissioner of Agriculture administers a disease control program which applies to cattle slaughtered at federally inspected as well as state inspected slaughterhouses, including ALCO. 7 M.R.S.A. Chap. 303, § 1751, et seq.

Regulation of Persons With
Whom Both ALCO and its
Competitors Do Business

In addition to the duties imposed by the Maine Meat Inspection Act, the Commissioner of Agriculture regulates and licenses dealers of livestock and poultry, 7 M.R.S.A. §§ 1301-1308, and is authorized to promulgate rules and regulations with respect thereto, 7 M.R.S.A. § 1303. Pursuant to 7 M.R.S.A. § 1809, the Commissioner may require any person seeking to transport cattle into the state to obtain a permit prior to time of entry, and he may require examinations at the owner's expense. Accordingly, the Commissioner of Agriculture does possess statutory powers, the exercise of which could have a significant impact on those persons who raise or import beef cattle and who, in turn, may sell the same to ALCO for slaughter or packaging.

* * * * *

In summary, because ALCO is at least in some manner in competition with state inspected establishments, since it sells its products in intrastate as well as interstate commerce, any exercise of regulatory power with respect to state inspected concerns, or for that matter, failure to exercise regulatory power, would be particularly subject to public question.


Hon. Carl E. Cianchette

Page 7

November 4, 1975

Moreover, as a 79% controlling stockholder, he would have a direct pecuniary interest and personal stake in the continuing good fortunes of ALCO, Opinion of the Justices, 330 A.2d at 918. And, he would have authority to regulate the largest slaughterhouse and meatpacking establishment in Maine, a company in which he owns the controlling interest. These interests would be inconsistent with high obligations of trust and "perfect fidelity" which the Commissioner of Agriculture owes the public in the discharge of his statutory responsibilities. Tuscan v. Smith, supra; Lesieur v. Inhabitants of Rumford, supra.

Very truly yours,


JOSEPH E. BRENNAN
Attorney General

JEB:mfe
Enclosure