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

February 22, 1979

Mrs. Maria A. Hanley
Chairman, Maine Milk Commission
58 Federal Street
Brunswick, Maine 04011

Dear Mrs. Hanley:

This letter responds to your January 26, 1979, request for an opinion from this office as to whether William F. Gore is qualified to serve as a member of the Maine Milk Commission (the "Commission") in view of the fact that he is a member of the Portland School Committee (the "School Committee").

For the reasons explained below, we have concluded that Mr. Gore, through the School Committee, conducts official business with dealers whose activities are subject to the jurisdiction of the Commission and is therefore disqualified to act as a member of the Commission by reason of 7 M.R.S.A. §2952.

1. Factual Background

Mr. Gore was appointed to the Commission in December, 1978. He is also a member of the School Committee. Under the Charter of the City of Portland, the School Committee is vested with responsibility for managing the Portland schools. (Art. III, Sec. 4). One of its functions is to enter into contracts for the purchase of milk for the School Lunch and Milk Program. 20 M.R.S.A. §1053(5). According to the School Committee's Business Manager, the School Committee contracts to purchase milk in half-pint containers from Maine milk dealers through a bidding process. The Deputy Business Manager signs a contract on behalf of the School Committee based on the lowest bid.

2. Reasoning

The statute creating the Commission, as amended in 1975, contains the following restrictions on who may serve as a Commission member:

None of the remaining 4 members of the commission [members other than the Commissioner of Agriculture] shall at the time of appointment or while serving as a member of the commission, and no employee of the commission shall have any official business, other than retail purchases of milk, or professional connection or relation with, or hold any interest or stock or securities in, any producer, dealer, store or other person whose activities are subject to the jurisdiction of the commission; nor shall any member or employee of the commission render any professional or other service against any such producer, dealer, store or other person whose activities are subject to the jurisdiction of the commission or be a member of a firm which shall render any such service.

7 M.R.S.A. §2952 [emphases added].

Before analyzing the scope of Section 2952 and its application to Mr. Gore, the distinction must be recognized between a statute which prescribes specific qualifications for membership and one that defines conflicts of interest.^{1/} Conflict of interest statutes are often limited to situations where a public officer has a direct or indirect pecuniary interest in a particular contract,^{2/} although the common law concept of conflict of interest is broad enough to embrace inherent conflicts between public office and private position.^{3/}

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- 1/ The distinction is akin to the one between "conflict of interest" and "incompatibility of positions." See, Opinion of the Justices, Me., 330 A.2d 912, 916 (1975).
- 2/ See, e.g., 17 M.R.S.A. §3104 (conflict of interest for state or public institution officers), 20 M.R.S.A. §309-C (contracts made by school directors), and 30 M.R.S.A. §2251 (conflict of interest for municipal officers). See, generally, 67 C.J.S., Officers §204 at 666 et seq.
- 3/ See, e.g., Opinion of the Justices, Me., 330 A.2d 912 (1975), where the Court described the public office of Commissioner of Finance and Administration to be in conflict with the private position of president and director of a bank because the latter positions "create special legal fiduciary obligations owing . . . to the bank." (330 A.2d at 918). The court separately described the individual's status as a stockholder of the bank as creating a pecuniary conflict of interest. Id.

While the enactment of Section 2952 in 1975 was intended to dis- 4/
affiliate producer, dealer and retailer influences on the Commission,
the resulting legislative restrictions constitute qualifications for
membership. Section 2952 is thus not limited to situations where
there would be a "conflict of interest" between Commission membership
and producer-dealer-retailer interests.

Applying section 2952 to the present problem, the issues are
whether Mr. Gore (i) conducts official business, (ii) with a dealer
whose activities are subject to the jurisdiction of the Commission,
(iii) other than retail purchases of milk.

The first question, then, is whether Mr. Gore conducts "official
business" with a dealer. It is quite obvious that the School Committee
conducts business with dealers. The fact that the ministerial function
of purchasing milk through bidding contracts may be delegated to a 5/
business agent does not make a milk contract that of the business agent.
Under the Portland City Charter and the School Lunch and Milk Program,
the School Committee alone has the responsibility of purchasing milk
for the schools. Because the School Committee can act only through
its members, it seems equally clear that Mr. Gore, as a part of his
official duties as a member of that body, shares responsibility for
the School Committee's contracts to purchase milk. In his capacity
as a member of the School Committee, Mr. Gore thus conducts "official
business" with the dealers. 6/

4/ Prior to the 1975 legislation, the Commission's membership in-
cluded two producers, a dealer, a producer-dealer and a retailer.
The 1975 amendments to Section 2952 changed the composition of
the Commission "so that there is no more dairy or producer interest
on the commission. The Commission will be composed of members of
the public with no special affiliation." Legislative Record,
June 11, 1975, at p. 1837. [emphasis added]. Also see, statements
at pp. 1367 (May 28, 1975) and 1658 (June 5, 1975) of the
Legislative Record.

5/ Under 20 M.R.S.A. §309-C (contracts made by school directors) and
30 M.R.S.A. §2251 (contracts made by municipal officers), there
is a special exception to the personal and pecuniary conflict of
interest rules for official contracts entered into pursuant to
certain bidding procedures. However, as pointed out above,
section 2952 is not limited to conflicts of interest.

6/ There is no reason to suggest that the term "official business"
should be given a meaning different from its ordinary and common
use. The term "official," in its broad sense, is often used to
include officers of a lodge, society, or a school. Pennell v.
Portland, 124 Me. 14, 125 A. 143 (1924) (holding that in the con-
text of the Workmen's Compensation Act the term "official" had a
special meaning restricted to an incumbent of an office created by
statute or municipal ordinance). In Maine the term "official act"
has been defined as an "act which...was a part of [his] official
duty to perform." Chase v. Cochran, 102 Me. 431, 67 A. 320, 322
(1907). Also see Black's Law Dictionary (4 ed) at p. 1236 de-
fining "official act" as "one done by an officer in his official
capacity under color and by virtue of his office."

The second issue is whether the activities of the dealers with whom Mr. Gore conducts official business through the School Committee are "subject to the jurisdiction of the Commission." Clearly the activities of dealers generally are subject to the jurisdiction of the Commission; one of the principal purposes of the Commission is to establish minimum prices for milk purchased by or from dealers. 7 M.R.S.A. §§2953 and 2954. Section 2952 may be construed to require an additional factor, namely, that the disqualifying official business be an activity which is itself subject to the jurisdiction of the Commission. Assuming this more restrictive construction of Section 2952, it still cannot be questioned that the sale of milk in half-pint containers to the School Committee is subject to the jurisdiction of the Commission. The fact that the Commission does not currently regulate such sales does not detract from the conclusion that it has the "jurisdiction," that is, the authority,^{7/} to do so.

The third issue is whether Mr. Gore's official business comes within the statutory exception for "retail purchases of milk." The statute does not define a "retail purchase," but such a purchase must logically^{9/} result from a "retail sale"^{8/} or a purchase from a "retail store"^{9/} -- i.e., "a consumer buying at retail." Cumberland Farms Northern, Inc. v. Maine Milk Commission, Me., 377 A.2d 84, 86 (1977). This exception obviously does not cover sales to schools.

The foregoing analysis addresses all of the issues raised by the statute as applied to Mr. Gore's qualification as a Commission member. However, even if the qualification provisions were interpreted as implicitly incorporating general conflict of interest standards,^{10/} our conclusion would be the same. The Commission has recently conducted hearings to determine whether it should exercise its authority to regulate the sale of milk in half-pint containers. As a result of its interest in this subject, the School Committee was designated as a permanent and formal "intervenor" in the Commission's "Hearing Procedures." At the Commission's hearing on January 24, 1979, the School Committee submitted evidence that the regulation of half-pints could increase the school's cost of milk purchases for the 1978-79 school year by as much as \$50,000. (Exhibit 42).

7/ See State v. True, Me., 330 A.2d 787, 789 (1975) ("Jurisdiction of the court means the authority of the court to decide a particular case . . .") [emphasis added].

8/ 7 M.R.S.A. §2951(10) defines a "retail sale" as "a doorstep delivery and over-the-counter sales by stores."

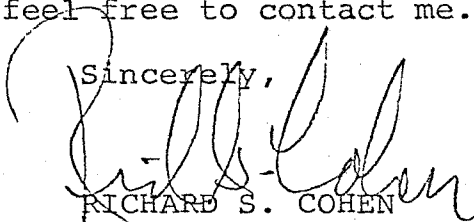
9/ 7 M.R.S.A. §2951(14) defines a "retail store" as "a grocery store, dairy products store or any similar commercial establishment where milk is sold to consumers for consumption off the premises." [emphasis added].

10/ As discussed previously, we do not construe section 2952 to be simply a "conflict of interest" provision.

Accepting this evidence and assuming arguendo that the Commission might otherwise consider the regulation of half-pints to be desirable, any member of the Commission who is also a member of the School Committee (or any other school committee or School Administrative District) would have an immediate and direct conflict of interest in passing on the question of whether to regulate the sale of half-pints. That conflict would be a continuing one were the Commission to decide to regulate half-pints on a permanent basis. Even if the Commission were to decide against this type of regulation, the issue might arise again in the future. This prospect of future regulation, as well as the continuing interest in the price of milk charged by milk dealers to the schools, might influence the judgment of a person on a school committee in connection with other Commission responsibilities, such as the fixing of a "just and reasonable return" for dealers. Therefore, even if it were possible to put aside the language of the statute and assess the problem in general "conflict of interest" terms, it would appear that there is an inherent conflict of interest between the positions of a School Committee member and a Milk Commission member.

I hope the foregoing information is helpful. If I can be of further assistance, please feel free to contact me.

Sincerely,



RICHARD S. COHEN
Attorney General

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