NOT AN OPINION #79-42 Stokes

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DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

March 8, 1979

Mr. Lance Tapley
Executive Secretary
Maine Common Cause
72 Winthrop Street
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Dear Mr. Tapley:

On January 24, 1979, you requested this Office to conduct an investigation to determine whether Mr. Keith Ingraham, the former Director of the Bureau of Alcoholic Beverages, had violated the provisions of 5 M.R.S.A.§15(1979). (The Maine Conflict of Interest Law). In particular, you inquired whether 5 M.R.S.A. §15 (1979) was violated by Mr. Ingraham when he appeared before the State Liquor Commission as a liquor broker representing various liquor distributing companies. Our investigation into Mr. Ingraham's conduct has now been completed. As a result of that investigation, and for the reasons stated below, it is my conclusion that Mr. Ingraham has not violated the conflict of interest law since his resignation as Director of the Bureau of Alcoholic Beverages on September 15, 1978.[1]

FACTS

From 1966 to 1972, Mr. Ingraham was a member of the State Liquor Commission, and for much of that time held the position

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1. As will be discussed in greater detail, infra, 5 M.R.S.A. §15 (1979) establishes a limitation on the length of time a former state employee is subject to the provisions of the Conflict of Interest Law. Accordingly, our investigation into Mr. Ingraham's conduct was limited to the time period from September 15, 1977 to the present. It should be noted, however, that assuming that the Conflict of Interest Law applies to Mr. Ingraham (and I conclude it does) he would be subject to its terms for "one year after his employment has ceased" (5 M.R.S.A.§15(1)(A) & (B)), which in his case would be September 15, 1979.

of chairman of that commission.[2] On June 9, 1972, Mr. Ingraham was appointed Acting Director of the Bureau of Alcoholic Beverages and on July 3, 1972, he was appointed Director of that agency.[3] Mr. Ingraham held the position of Director until his resignation on September 15, 1978.

After his resignation as Director on September 15, 1978, Mr. Ingraham entered private employment as a liquor broker representing various liquor distributing companies.[4] One of Mr. Ingraham's functions as a liquor broker is to represent and appear on behalf of his clients at "listing hearings" before the State Liquor Commission.

One of the powers of the State Liquor Commission is

> "To sell at retail in state stores in original packages and for cash, either over the counter or by shipment to points within the State, wine, except table wine, and spirits of all kinds for consumption off the premises at state stores to be operated under the direction of the commission."

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2. It is my understanding that Mr. Ingraham was appointed chairman of the State Liquor Commission on August 7, 1967.

3. Mr. Ingraham's appointments as Acting Director and Director of the Bureau of Alcoholic Beverages were occasioned by the enactment of Chapter 615 of the Public Laws of 1971 (effective June 9, 1972), which reorganized the State Liquor Commission and created the position of Director of the Bureau of Alcoholic Beverages. Prior to the enactment of Chapter 615, the State Liquor Commission consisted of three commissioners including a full-time Chairman, who performed the duties which are now performed by the Director.

4. Our investigation has revealed that Mr. Ingraham represents the following liquor distributing companies; Austin-Nichols & Co., Inc.; W.A. Taylor & Company; M.S. Walker, Inc.; Somerset Importers, Ltd.; Daviess County. It should also be observed that Mr. Ingraham has complied with the requirements of 28 M.R.S.A. §902 (1974) by applying for and receiving a license to act as a salesman representing liquor concerns in the State. Mr. Ingraham made an initial application for a salesman's license on October 2, 1978, and was granted a license by the State Liquor Commission. Mr. Ingraham has renewed his license for the 1979 calendar year and that license discloses the names of the firms which he represents.

28 M.R.S.A. §53(7)(1978-79). In order to determine which items to sell at state liquor stores, the Commission conducts "listing" hearings throughout the course of the year. Each liquor distributing company is scheduled for one 15-minute listing hearing per year. At the hearing, the liquor distributing company is permitted to introduce or to make a presentation of a maximum of three products sought to be listed for sale at state liquor stores. Twice each year, the Commission announces its listing decisions, i.e. those items to be added to the price list in state stores as well as those to be deleted from the price list.[5]

Since his resignation from the directorship of the Bureau of Alcoholic Beverages on September 15, 1978, Mr. Ingraham has appeared at listing hearings before the State Liquor Commission on two occasions. On November 21, 1978, Mr. Ingraham appeared on behalf of Somerset Importers, Ltd., and made presentations with respect to the following products; (1) Johnny Walker (Black) Scotch and (2) Alvanit Schnapps. On January 16, 1979, Mr. Ingraham appeared on behalf of Austin-Nichols & Company and made presentations with respect to the following products; (1) Wild Turkey Bourbon (Pints) (101 proof); (2) Wild Turkey Liqueur; (3) Stella Sambuca (Banana Liqueur).

Within the one year prior to Mr. Ingraham's departure from state service, individuals representing Somerset Importers, Ltd., and Austin-Nichols & Company appeared at listing hearings before the State Liquor Commission. On December 6, 1977, Somerset Importers, Ltd., made a presentation to the Commission with respect to Begg's Scotch (80 proof).[6] On January 17, 1978, Austin-Nichols & Company made presentations to the Commission with respect to the following

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5. With respect to delisting an item, the Commission is required to give the vendor of the product reasonable written notice of the intention to delist. 28 M.R.S.A. §53(6)(1978-79 Supp.).

6. It is my understanding that 86 proof Begg's scotch had been listed by the State Liquor Commission since approximately 1975. On December 6, 1977, a representative of Somerset Importers, Ltd., requested permission from the Commission to replace this product with 80 proof Begg's scotch. This request was granted and Begg's scotch (80 proof) is now sold at state liquor stores. However, because Begg's scotch (80 proof) was not an additional product sought to be listed, it was not officially included in the listing decisions made effective July 24, 1978.

products; (1) Wild Turkey Bourbon (3/4 liter size- 86.8 proof[7]); (2) Metaxa Ouzo (Greek After-Dinner Drink).[8] Thus, during the year immediately preceding Mr. Ingraham's resignation as Director of the Bureau of Alcoholic Beverages, representatives of the two liquor distributing companies (on behalf of which he has appeared before the Commission subsequent to his resignation) appeared at listing hearings for the purpose of making presentations to the State Liquor Commission.

It is with the foregoing factual background in mind, that Mr. Ingraham's post-state employment conduct must be evaluated as it relates to any possible violation of 5 M.R.S.A. §15 (1979).

THE MAINE CONFLICT OF INTEREST LAW

The relevant provisions of Maine's Conflict of Interest Law which conceivably apply to Mr. Ingraham's conduct are set forth in 5 M.R.S.A. §15(1)(A) and (1)(B)(1979) which provide:

> "1. Any person who has been a member of the classified or unclassified service employed by an executive agency shall be guilty of a Class E crime, if he:
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> 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:
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> (1) The State is a party or has a direct and substantial interest; and
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> (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.
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> 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 proceedings in which:
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> (1) The State is a party or has a direct and substantial interest; and
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> (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."

While there is considerable overlap between paragraphs A and B of subsection 1, the two paragraphs do cover different situations.

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7. This product was eventually listed by the State Liquor Commission as of July 24, 1978.

8. This product was not listed by the State Liquor Commission.

For example, paragraph A prohibits a former state employee, within the time period specified, from acting in the capacity of agent or attorney for anyone but the State before any official proceeding. Thus, the prohibition embodied in paragraph A applies to a state employee acting in a certain capacity (agent or attorney) in any official proceeding and would not be limited to proceedings before state agencies in general or the particular state agency with which he was formerly employed. Paragraph B, on the other hand, prohibits a former state employee, within the time period specified, from appearing personally (in any capacity) on behalf of anyone but the State before any state or quasi-state agency (not necessarily the agency with which he was formerly employed). It is obvious, however, that under certain circumstances conduct may violate both paragraphs.

Because of the complexity of the Conflict of Interest Law, it may be helpful to set out the elements that would have to be established, by proof beyond a reasonable doubt, in order to obtain a conviction of 15 M.R.S.A. §15(1)(A) or (1)(B). Initially, it should be determined whether the person sought to be charged with a violation of 5 M.R.S.A. §15(1)(1979) meets the following threshold requirements:

(1) Was he a member of the classified or unclassified service and if so
(2) Was he employed by an executive agency.

The foregoing elements apply to a violation of either paragraph A or paragraph B of subsection 1. Assuming that those requirements are met in any given case, the additional elements necessary to establish a violation of subsection 1 are broken down as follows:

5 M.R.S.A.§15(1)(A)(1979)

(3) within one year after his employment ceased, did the employee
- (a) knowingly act as an agent or attorney;
- (b) for anyone other than the State;
- (c) in connection with any official proceeding.

(4) Was the official proceeding one in which the State was a party or had a direct and substantial interest; and
(5) At anytime within one year prior to the termination of his employment,
- (a) was the particular matter at issue pending before the employee's agency and
- (b) was the particular matter at issue directly within his official responsibilities as a state employee.

5 M.R.S.A.§15(1)(B)(1979)

(3) within one year after his employment ceased, did the employee
- (a) appear personally;
- (b) for anyone other than the State;

(4) Was the proceeding one in which the State was a party or had a direct and substantial interest; and
(5) At any time within one year prior to the termination of his employment,
- (a) was the particular matter at issue pending before the employee's agency and
- (b) was the particular matter at issue directly within his official responsibilities as a state employee.

In order to determine whether Mr. Ingraham's post-employment conduct is potentially violative of the Conflict of Interest Law, it is necessary to assess that conduct in view of the statutory elements presented above.

1. WAS MR. INGRAHAM A MEMBER OF THE CLASSIFIED OR UNCLASSIFIED SERVICE?

The question whether the Director of the Bureau of Alcoholic Beverages is a member of the classified or unclassified service is easily disposed of by reference to 5 M.R.S.A. §711(2)(A)(5)(e) (1979). That provision specifically provides that the Director of the Bureau of Alcoholic Beverages is included within the unclassified service.

2. WAS MR. INGRAHAM EMPLOYED BY AN EXECUTIVE AGENCY?

Notwithstanding the fact that a person is a member of the unclassified service it does not automatically follow that he is an employee of an executive agency. See Op.Atty.Gen., December 20, 1978 at page 4; Op.Atty.Gen., December 5, 1975, at page 1. It is apparent, however, that the Director of the Bureau of Alcoholic Beverages is "employed by an executive agency" within the meaning of 5 M.R.S.A.§15(1)(1979). The Director is appointed by the Commissioner of Finance and Administration[9] (28 M.R.S.A.§57 (1978-79 Supp.) who, in turn, is appointed directly by the Governor. 5 M.R.S.A. §287 (1979). The Director is subject to removal by the Liquor Commission and the Commissioner of Finance and Administration and he receives a regular salary which is fixed by them. 28 M.R.S.A.§57(1978-79 Supp.). The Director is statutorily subject to the direction of the State Liquor Commission and administers the policies and implements the laws under the supervision of and as established by the State Liquor Commission.[10] In sum, the Director of the Bureau of Alcoholic Beverages satisfies the traditional criteria for being an employee. See, e.g., Black v. Black Brothers Construction, Me., 381 A.2d 648, 650 (1978); Cardello v. Mt. Hermon Ski Area, Inc., Me., 372 A.2d 579, 581 (1977); Owen v. Royal Industries, Inc., 314 A.2d 60, 62 (1974); Pennell v. Portland,

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9. With the advice and consent of the State Liquor Commission. 28 M.R.S.A.§57 (1978-79 Supp.). The members of the State Liquor Commission are appointed by the Governor subject to review by the Joint Standing Committee on Liquor Control and confirmation by the Legislature. 28 M.R.S.A.§52 (1978-79 Supp.).

10. 28 M.R.S.A. §58 (1978-79 Supp.) provides in pertinent part:

> "The Director of the Bureau of Alcoholic Beverages within the Department of Finance and Administration shall be the chief administrative officer of the bureau. The Director of the Bureau of Alcoholic Beverages shall be subject to the direction of the State Liquor Commission as defined in this chapter. The director of the bureau shall administer the policies, rules and regulations of the State Liquor Commission under the supervision of the commission. The director of the bureau shall operate the bureau and implement the liquor laws according to the procedures established by the State Liquor Commission."

See also 28 M.R.S.A. §52(1)

124 Me. 14, 15 (1924). It is my conclusion that while he was Director of the Bureau of Alcoholic Beverages, Mr. Ingraham was "employed by an executive agency" as that phrase is used in 5 M.R.S.A. §15(1)(1979).

3. WITHIN ONE YEAR AFTER HIS EMPLOYMENT CEASED, DID MR. INGRAHAM KNOWINGLY ACT AS AN AGENT OR ATTORNEY AND APPEAR PERSONALLY FOR ANYONE OTHER THAN THE STATE OF MAINE IN CONNECTION WITH ANY OFFICIAL PROCEEDING AND BEFORE A STATE OR QUASI-STATE AGENCY?

Having concluded that Mr. Ingraham was a member of the unclassified service employed by an executive agency, it must now be determined whether Mr. Ingraham's conduct since his departure from state service falls within the confines of "element 3" referred to above. In other words, does the fact that Mr. Ingraham has twice appeared at "listing" hearings before the State Liquor Commission on behalf of liquor distributing companies bring his conduct within the scope of 5 M.R.S.A. §15(1)(A) and/or (1)(B)?[11] I have concluded that Mr. Ingraham's post-state employment conduct falls within the scope of both paragraphs A and B.

On those occasions[12] when Mr. Ingraham made "listing" presentations to the State Liquor Commission on behalf of two liquor distributing companies, it is apparent that he was appearing personally and acting as an agent for a party other than the State of Maine. Moreover, the State Liquor Commission is a state agency, (28 M.R.S.A.§§51, 52 (1978-79 Supp.)), and the "listing" hearings are official proceedings which the Commission conductsin order to carry out its responsibilities under 28 M.R.S.A. §53(7)(1978-79 Supp.).

In view of the foregoing, it is my conclusion that Mr. Ingraham was a member of the unclassified service employed by an executive agency who, within one year after his employment had ceased, knowingly acted as agent and personally appeared for a party other than the State of Maine in connection with an official proceeding and before a state agency.

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11. It will be recalled that paragraph A applies to a former state employee meeting certain criteria who, within the time specified, "knowingly acts as an agent or attorney for anyone other than the State in connection with any official proceeding...."
Paragraph B applies to a former state employee meeting certain criteria who, within the time specified, "appears personally before any state or quasi-state agency for anyone other than the State in connection with any proceeding...."

12. Since Mr. Ingraham's appearances before the State Liquor Commission occurred on November 21, 1978 and January 16, 1979, it is clear that his conduct is within the time limitation specified in 5 M.R.S.A.§15(1)(A) and (1)(B).

4. WAS THE PROCEEDING ONE IN WHICH THE STATE WAS A PARTY OR HAD A DIRECT AND SUBSTANTIAL INTEREST?

I have also concluded that the State was a party to or at the very least had a direct and substantial interest in the "listing" hearings conducted by the State Liquor Commission and attended by Mr. Ingraham in his capacity as a liquor broker. The Commission is charged with the overall administration of the liquor laws in the State of Maine [13] and has the specific statutory duty to regulate the retail sale of liquor in state stores. 28 M.R.S.A.§53(7)(1978-79 Supp.).[14] There can be no doubt that the "listing" hearings attended by Mr. Ingraham were proceedings in which "[t]he State [was] a party or [had] a direct and substantial interest." 5 M.R.S.A.§15(1)(A)(1) and (1)(B)(1).

5. AT ANY TIME WITHIN ONE YEAR PRIOR TO THE TERMINATION OF MR.INGRAHAM'S EMPLOYMENT, (a) WAS THE PARTICULAR MATTER AT ISSUE PENDING BEFORE HIS AGENCY AND (b) WAS THE PARTICULAR MATTER AT ISSUE DIRECTLY WITHIN HIS OFFICIAL RESPONSIBILITIES AS A STATE EMPLOYEE?

The question now remaining to be decided is whether when Mr. Ingraham appeared at listing hearings before the State Liquor Commission

> "[t]he 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." 5 M.R.S.A. §15(1)(A)(2)(1979). See also 5 M.R.S.A.§15(1)(B)(2)(1979).

The answer to this question lies in an interpretation of the phrases "[t]he particular matter at issue," and "directly within his official responsibilities." After a thorough review of the legislative history of 5 M.R.S.A.§15(1979) and an examination of

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13. 28 M.R.S.A.§51 (1978-79 Supp.) provides, in relevant part, that "[t]he administration of the state liquor laws shall be vested in the State Liquor Commission...."

14. The text of 28 M.R.S.A.§53(7)(1978-79 Supp.) appears at page 2, supra. See also 28 M.R.S.A.§151(1974) which provides in relevant part that "[t]he commission is authorized to lease and equip in the name of the State, such stores, warehouses and other merchandising facilities for the sale of liquor as are necessary to carry out this Title...." (emphasis supplied).

the analogous federal conflict of interest statute, it is my conclusion that Mr. Ingraham's post-employment conduct, to date, does not fall within the scope of either paragraph A or B of section 15.

(a) Was the Particular Matter At Issue Pending Before Mr. Ingraham's Agency?

With respect to the phrase "[t]he particular matter at issue," a dilemma is created as to how broad or narrow an interpretation that phrase should be given. For example, does the phrase prohibit Mr. Ingraham from appearing at listing hearings on behalf of liquor distributing companies which appeared at hearings while he was director regardless of the particular products presented to the State Liquor Commission? Or, does the phrase simply prohibit Mr. Ingraham from presenting a particular product which was pending before the State Liquor Commission while he was director of the Bureau of Alcoholic Beverages and within one year prior to the termination of his state employment? For the reasons stated below, I have concluded that the latter interpretation is the correct one.

As originally enacted by Chapter 539 of the Public Laws of 1975 (effective October 1, 1975), 5 M.R.S.A. §15(1)(A)(2) and (1)(B)(2) read as follows:

> "The subject matter at issue was directly within his official responsibilities as a state employee."[15]

The provisions of the original Conflict of Interest Law were introduced into the First Regular Session of the 107th Legislature by the Committee on State Government as S-297, being Committee Amendment "A" to S.P. 474, L.D. 1609, "An Act Establishing Registration Procedures for Administrative Lobbyists and Proscribing Certain Lobbying Activities." In the "Statement of Fact" accompanying S-297, the Committee stated:

> "The purpose of this amendment is to provide criminal penalties for former members of the classified or unclassified service employed by an executive agency who continue to participate in a substantial way in certain of the governmental areas they were responsible for while state employees." (emphasis added).

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15. As enacted by Chapter 539, P.L. 1975, 5 M.R.S.A. §15(1) provided, in its entirety, as follows:

"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 employement 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

Shortly after Maine's original Conflict of Interest Law went into effect, Senator David Graham of Cumberland introduced S-552 in the First Special Session of the 107th Legislature. S-552, which was Senate Amendment"C" to S.P. 799, L.D.2345, an Errors and Inconsistencies bill, was enacted[16] and amended 5 M.R.S.A.§15(1)(A)(2) and (1)(B)(2) to read as they presently do.[17] The "Statement of Fact" appearing on S-552 is quite instructive regarding the purpose that amendment was designed to serve.

> "Present law disqualifies a former state employee from acting or appearing for another in any proceeding the subject matter of which was directly within his official responsibilities as a state employee. This Amendment limits the applicability of the law to proceedings which were pending before the agency at the time of the employee's departure. The purpose of the amendment is to permit departing state employees to utilize the professional expertise which they may have brought to or developed in state service, but still prohibit them from using their influence to affect pending proceedings in which they may have been involved. As the law now stands, it creates a significant impediment to the ability of state employees to obtain alternative employment." (emphasis added).

Senator Graham made an almost identical statement on the floor of the Senate when he moved for adoption of the amendment. See 1976 Leg. Rec., Vol. III, at pages 1066-67, April 9, 1976. In the House, after S-552 had been read and adopted in concurrence, Representative Greenlaw of Stonington urged reconsideration of the decision to adopt the amendment in concurrence. He stated:

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15. (con't)

> (2) The subject matter at issue was directly within his official responsibilities as a state employee.
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> 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 subject matter at issue was directly within his official responsibilities at any time within one year of the termination of his employment."

16. S-552 was enacted as sections 16 through 18 of Chapter 770 of the Public Laws of 1975, and became effective, as emergency legislation, on April 13, 1976.

17. S-552 also amended the Conflict of Interest Law to add subsection 3 to 5 M.R.S.A.§15. See P.L. 1975, C.770, §18. 5 M.R.S.A. §15(3)(1979) provides:

> "This section shall not be construed to prohibit former state employees from doing personal business with the State."

> "It seems to me, Mr. Speaker, Men and Women of the House, that perhaps this procedure that is presently in law is a good procedure. I am not sure that we necessarily want to have state employees immediately go out into the private sector and then be able to represent clients before an agency of state government in which they have had previous knowledge or workings." (emphasis added).

1976, Leg. Rec., Vol. III, at page 1074, April 12, 1976.

In light of the foregoing, it would appear that the Legislature viewed the Conflict of Interest Law, as originally enacted, as too restrictive on the post-employment activities of state employees. Replacing the phrase "[t]he subject matter at issue" with the phrase "[t]he particular matter at issue" reflects a legislative intent to narrow the scope and application of the Conflict of Interest Law. It is a well-established principle of statutory construction that statutes imposing criminal sanctions are to be construed strictly. See, e.g., State v. S.S. Kresge, Inc., Me., 364 A.2d 868 (1976); State v. Granville, Me., 336 A.2d 861 (1975). Nevertheless, even in the case of a penal statute, it is the Legislature's intent which is the controlling consideration in interpreting the law. See State v. Heald, Me., 382 A.2d 290 (1978); Davis v. State, Me., 306 A.2d 127 (1973). Moreover, the effect of a criminal statute should not be extended beyond the meaning of the language used. See Jenness v. State, 144 Me. 40, 45, 64 A.2d 184 (1949). See also State v. King, Me., 371 A.2d 640 (1977).

Based upon our review of the pertinent legislative history and the expressions of legislative intent by members of the Senate and House during the debate on S-552, it is my conclusion that the phrase "[t]he particular matter at issue" refers to the specific matter which was pending before a former employee's state agency. It does not include matters which are similar in nature or which relate to the same general subject. For the purposes of the Maine Conflict of Interest Law, the matter which is before an official proceeding or a state or quasi-state agency, must be the particular matter which was pending before the former employee's agency.

As mentioned previously,[18] Mr. Ingraham appeared at listing hearings before the State Liquor Commission and made presentations for various brands of liquor on behalf of Somerset Importers, Ltd., and Austin-Nichols & Company on November 21, 1978 and January 16, 1979, respectively. Within one year prior to the termination of Mr. Ingraham's state employment and while he was director of the Bureau of Alcoholic Beverages, representatives of Somerset Importers, Ltd., and Austin-Nichols & Company appeared before the State Liquor Commission and made presentations for various brands of liquor. In view of my interpretation of the phrase "[t]he particular matter at issue," as used in 5 M.R.S.A.§15(1)(A)(2) and (1)(B)(2)(1979), Mr. Ingraham's post-employment conduct would fall within the scope of

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18. For a complete recitation of Mr. Ingraham's post-employment conduct before the State Liquor Commission, see pages 1-4 supra.

the Conflict of Interest Law only if he presented the same products to the State Liquor Commission as had been presented a year earlier while he was director of the Bureau of Alcoholic Beverages. The results of our investigation reveal that the products presented by Mr. Ingraham were different from those presented one year earlier by the representatives of Somerset Importers, Ltd., and Austin-Nichols & Company. It is true, of course, that on January 17, 1978, the representative of Austin-Nichols & Company introduced Wild Turkey Bourbon (3/4 liter size-86.8 proof) before the Commission. On January 16, 1979, Mr. Ingraham also introduced Wild Turkey Bourbon before the Commission. However, the product presented by Mr. Ingraham was a different size (pints) and a different proof (101 proof) than that presented one year earlier. Furthermore, as will be discussed in greater detail below, the product presented by Austin-Nichols & Company on January 17, 1978, had already been listed by the State Liquor Commission prior to Mr. Ingraham's appearance before the Commission on behalf of that company.

By the time Mr. Ingraham appeared before the State Liquor Commission as a liquor broker, the Commission had already decided whether to list or not to list the products that had been presented by Somerset Importers, Ltd. and Austin-Nichols & Company on December 6, 1977 and January 17, 1978.[19] 5 M.R.S.A. §15(1)(A)(2) and (1)(B)(2)(1979) prohibits certain former state employees from acting as agents or attorneys or appearing personally for anyone but the State of Maine before an official proceeding or a state or quasi-state agency. Furthermore, the Conflict of Interest Law provides that the matters at issue before the official proceeding or the state or quasi-state agency must be the particular matters which were pending before the former state employee's agency. The Conflict of Interest Law contemplates that the matters which were pending before the former state employee's agency are the particular matters pending before the official proceeding or state or quasi-state agency before which the former employee is now appearing. In view of the foregoing, it is apparent that the particular matters which were pending before Mr. Ingraham's agency when he was Director of the Bureau of Alcoholic Beverages had already been decided and were not the "particular matter[s] at issue" before the State Liquor Commission when he appeared on behalf of the liquor distributing companies referred to above.

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19. The listing decisions pertaining to these products were made effective July 24, 1978. In fact, the decisions were announced in a memorandum dated July 18, 1978, from Mr. Ingraham to all state store managers. See text accompanying notes 6-8, supra.

(b) Was the Particular Matter Which Was Pending Before His Agency Directly Within Mr. Ingraham's Official Responsibilities?

5 M.R.S.A. § 15(1)(A)(2) and (1)(B)(2)(1979) also provide that the "particular matter" which was pending before the former employee's agency must be one which "was directly within his official responsibilities." Once again, the question arises as to the meaning of this phrase and whether the facts of Mr. Ingraham's situation fall within its scope.

As Director of the Bureau of Alcoholic Beverages, Mr. Ingraham was statutorily prohibited from being a member of the State Liquor Commission. See 28 M.R.S.A. § 59(1978-79 Supp.). Consequently, Mr. Ingraham could cast no vote in deciding which products were to be listed for sale in state liquor stores. However, the director is the Chief administrative officer of the bureau and is mandated by statute to carry out the policies, rules and regulations of the State Liquor Commission. 28 M.R.S.A. §59 (1978-79 Supp.). Moreover, the director is responsible for the supervision of the daily operations of the Bureau of Alcoholic Beverages. Id. Whether or not the director chooses to advise the Commission on listing decisions, it is important to point out that he has no statutory authority with respect to those decisions. Given these facts, the question remains whether the decision to list products for sale in state liquor stores is a matter directly within the director's official responsibilities.

In utilizing the phrase "directly within his official responsibilities," the Legislature obviously contemplated that a state employee would have more than a tangential or ministerial involvement in a particular matter.[20] The use of such language certainly implies that it refers to persons who occupy positions of direct authority over a particular matter. As a general rule, language in a statute is to be given its common and ordinary meaning.[21] 1 M.R.S.A. §72(3)(1979). In re Belgrade Shores, Me., 359 A.2d 59 (1976); State v. Flemming, Me., 377 A.2d 448 (1977). Applying this rule of statutory construction to the phrase quoted above, it would seem reasonable to conclude that it was designed to apply

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20. See Beall v. Kearney & Tricker Corp., 350 F. Supp. 978 (D.C. Md. 1972) (ministerial acts on part of former Patent Office employee did not bring his conduct within federal conflict of interest law).

21. Of course, where the Legislature intends language to have a special meaning, this general rule does not apply. See, e.g., Coffin v. Hannaford Brothers Co., Me. ___ A2d ___, slip op. at 4 (January 24, 1979); Hurricane Island Outward Bound v. Town of Vinalhaven, Me., 372 A.2d 1043 (1977). It should be observed that a search of the history of 5 M.R.S.A. §15(1979) disclosed no express legislative intent regarding the meaning of the phrase "directly within his official responsibilities."

to state employees who had some direct decision-making authority over a particular matter.

A comparison of Maine's Conflict of Interest Law with its federal counterpart supports this interpretation. Given the similarity in language between the two statutes, an examination of the provisions of 18 U.S.C.A. §207 (1969) may be worthwhile in interpreting similar provisions in Maine Law.

18 U.S.C.A. §207(a) and (b)(1969) provide as follows:

> "(a)Whoever, having been an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, after his employment has ceased, knowingly acts as agent or attorney for anyone other than the United States in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest and in which he participated personally and substantially as an officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, while so employed, or
>
> (b) Whoever, having been so employed, within one year after his employment has ceased, appears personally before any court or department or agency of the Government as agent, or attorney for, anyone other than the United States in connection with any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States is a party or directly and substantially interested, and which was under his official responsibility as an officer or employee of the Government at any time within a period of one year prior to the termination of such responsibility-
>
> Shall be fined...or imprisoned...." (emphasis supplied).

It will be observed that while the Maine and Federal statutes have distinct differences, there is also a significant area of similarity between the two. Furthermore, like Maine law, paragraphs (a) and (b) of section 207 overlap considerably but are designed to address different problems. For example, paragraph (a) prohibits a former government employee from ever representing a person regarding a matter in which he participated personally. Paragraph (a) continues and specifies the type of personal participation prohibited, which includes making recommendations and rendering advice.

Paragraph (b), on the other hand, prohibits for one year, a former government employee from representing a person regarding a particular matter which was under his official responsibility as an employee. Thus, paragraph (b) covers a former employee who did not necessarily participate personally in a particular matter but who did have official responsibility over it. See 1962 U.S. Code Cong. and Admin. News, Vol. 2, at 3861.

As used in paragraph (b), the term "official responsibility" obviously means more than simply making recommendations and rendering advice. The prohibition contained in paragraph (b) reflects a congressional desire to extend conflict of interest coverage to former government employees who have decision-making authority over a particular matter. As stated by the Senate Committee on the Judiciary, which recommended passage of the Conflict of Interest Law, "...there is...a distinct possibility of harm to the Government when a supervisory employee may sever his connection with it one day and come back the next seeking an advantage for a private interest in the very area where he has just had supervisory functions." 1962 U.S.Code Cong. and Admin. News, Vol.2, at 3861.

In order to make it clear that the term "official responsibility" referred to those government employees in supervisory capacities who had direct authority over a particular matter, Congress statutorily defined that term as follows:

> "...[T]he term 'official responsibility' means the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action." 18 U.S.C.A.§202(b)(1969).

Given the fact that the Maine Legislature used the identical phrase, namely, "official responsibilities," it is reasonable to conclude that it intended to cover the same situations.

It is my conclusion, therefore, that the phrase "directly within his official responsbilities" as used in 5 M.R.S.A.§15 (1)(A)(2) and (1)(B)(2)(1979) refers to those former state employees who had some direct decision-making authority over the "particular matter at issue." Applying this interpretation to the facts of Mr. Ingraham's situation, it is apparent that as Director of the Bureau of Alcoholic Beverages the decision to list products for retail sale in state liquor stores was not "directly within his official responsibilities." Stated simply, Mr. Ingraham had no direct authority to decide which products were listed and which were not.

In view of the length of this letter, I would like to take the opportunity to summarize my conclusions. I have concluded that Mr. Ingraham, at the time he was Director of the Bureau of Alcoholic Beverages, was a member of the unclassified service employed by an executive agency. I have also concluded that within one year after the termination of his employment, Mr. Ingraham knowingly acted as agent and appeared personally for someone other than the State of Maine in an official proceeding before a state agency with respect to which the State was a party or had a direct and substantial interest. Finally, I have concluded that the particular matters at issue in these proceedings were not pending before Mr. Ingraham's agency and were not directly within Mr. Ingraham's official responsibilities at any time within one year prior to the termination of his employment as Director of the Bureau of Alcoholic Beverages. Consequently, it is my opinion that Mr. Ingraham has not violated the provisions of 5 M.R.S.A. §15(1979).[22]

Sincerely,

RICHARD S. COHEN
Attorney General

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22. I wish to emphasize that I do not mean to imply that the Conflict of Interest Law does not apply to Mr. Ingraham. It is my conclusion that 5 M.R.S.A.§15(1979) does apply to Mr. Ingraham and to anyone who holds the position of director of the Bureau of Alcoholic Beverages. However, based upon our investigation, it is my conclusion that Mr. Ingraham has not violated the Conflict of Interest Law since his resignation on September 15, 1978.