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June 13, 1979

Senator Robert M. Farley
State House
Augusta, Maine 04333

Re: State Harness Racing Commission

Dear Senator Farley:

This letter responds to your request asking whether the prohibition in the Harness Racing Act 8 M.R.S.A. §261, et seq. (the "Act"), against any member of the State Harness Racing Commission (the "Commission") having a pecuniary interest in racing applies to two members of the Commission who are affiliated with agricultural fair associations.

We have concluded that the Act requires one member of the Commission to be affiliated with an agricultural fair but, when considered against the background of common law rules of conflict of interest, should not be interpreted as permitting two members to be so affiliated. For the reasons explained more fully below, we have concluded that of the two members presently affiliated with agricultural fairs the member first appointed, Mr. Thaxter R. Trafton, alone qualifies as the fair affiliated member and that he is not prohibited from serving on the Commission because he is compensated in part by the fair association with which he is affiliated.

BACKGROUND

The Commission consists of three members appointed by the Governor for three year terms. §261 of the Act. Its principal function is to make rules and regulations for the conduct and operation of harness horse races and race tracks. §268 of the Act.[1/]

1/ In this connection the Commission is specifically granted the power to regulate the operation of pari-mutuel pools (§§274 and 279), to supervise and regulate medication administered to horses, (§§279 and 280), and to license those participating in harness horse racing, including owners, drivers, pari-mutuel employees and race officials. (§279-A)

In doing so, the Commission is directed to protect the wagering public, the State's share of pari-mutuel pools (as specified by the Act), the health and welfare of spectators and those participating in racing, and the health and welfare of standard-bred horses. (§279-A) Finally, the Commission is authorized to issue licenses annually to persons and organizations to conduct harness racing on specific dates at specific locations after the Commission is satisfied that all the rules and regulations prescribed by it have been complied with. §271 of the Act.

Mr. Trafton was appointed to the Commission on May 19, 1977. He is the Director of Parks and Recreation for the City of Bangor. In that capacity he is responsible for Bass Park, which we understand was donated to the City of Bangor and is used for agricultural fairs and harness racing under lease arrangements. Mr. Trafton is also the Executive Director of Bangor State Fair Inc., a non-profit agricultural society which conducts harness races with a pari-mutuel pool in connection with its annual State fair.2/ Bangor State Fair is licensed by the Commission to conduct races at Bass Park in late June, July and early August, 1979. It is our understanding that Bangor State Fair reimburses the City of Bangor for the time Mr. Trafton diverts from his municipal functions to performing duties as Executive Director and that he is separately paid by Bangor State Fair for his "overtime" work as Executive Director.

Mr. Hall was appointed to the Commission on June 30, 1977. He is also the president of Cumberland Farmers Club, which is a non-profit agricultural society.3/ Like Bangor State Fair, Cumberland Farmers Club operates harness racing with pari-mutuel pools in connection with a State fair and is licensed to do so at the Cumberland fairgrounds (which it owns) in September and one day of October, 1979. Mr. Hall is also president of Cumberland Raceway Inc., which was organized under the Business Corporation Act to run and manage "extended" harness races at available racetracks and fairgrounds. It is our understanding that all of the stock of Cumberland Raceway is owned by Cumberland Farmers Club. Cumberland Raceway is licensed by the Commission to operate harness racing at the Cumberland fairgrounds, which it leases from Cumberland Farmers Club, in late April, during the month of May and early June, 1979. It is our further understanding that Mr. Hall is not paid any compensation for acting as president of either Cumberland Farmers Club or Cumberland Raceway.

2/ As an agricultural society, Bangor State Fair, Inc. qualifies for and receives financial support from the State under the "Stipend Fund" provisions of 7 M.R.S.A. § 61, et seq.

3/ As such it too receives Stipend Fund financial support from the State.

ANALYSIS

Section 261 of the Act provides that:

> [N]o member of the commission shall have any pecuniary interest in any racing or the sale of pari-mutuel pools licensed under this chapter.[4/]

The same section of the Act specifies that:

> One member shall, in some capacity, be connected with agricultural societies which operate pari-mutuel racing.

This latter provision was added to the Act in 1953 (P.L. 1953, ch. 402) as a means of promoting the interests of agricultural societies,[5/] a policy which was already reflected in the licensing

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4/ We have elided from this quote the provision that "[s]o far as practical they [the members of the Commission] shall be persons interested in the establishment and development of a Maine breed of standard bred horses and . . ." because our reading of Section 261 is that the provision quoted in the text stands on its own. In other words, the phrase "so far as practical," in our view, modifies the legislative preference for members with an interest in a Maine breed of standard bred horses and not the prohibition against pecuniary interests in racing.

5/ See the remarks of the sponsor of the legislation (Rep. Center) and its opponent (Rep. Childs):

> MR. CENTER: . . . [I] introduced this measure into this Legislature so that the agricultural fairs might have a little fuller representation on the Harness Commission. This is simply one of tho bills designed to protect and help the agricultural fairs.
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> As I pointed out the other day, the chief reason why pari mutuel betting was authorized in Maine was to assist the fairs and it has done so materially. ***.

(Continued)

provisions of the Act.[6]

5/ Cont.

> Now this bill will not tie down the Governor's hands or embarrass him in any way, but will serve only as a guide. It will insure that at least one member of the Commission knows, understands and appreciates the problems of the agricultural fairs, and will serve to tie in the harness racing activities with the other activities of the fairs. It is broad enough so that the commission will be picked from a list of over 2500 eligible people, and yet would be a safeguard to protect the agricultural interests of the fairs.
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> MR. CHILDS: Mr. Speaker, on the one racing commission I proposed to put one man from the fair association on it. At that time there would be five members on the commission and the one from the fair association could not have too much influence. Now they are proposing one member of the fair association to be on the Harness Commission when only three members are there. Here they are attempting to put a particular member on the Commission from one fair association who has a direct and pecuniary interest in what is going on. He is a man who cannot help but be prejudiced, so it would be to the detriment of harness racing, there is no question about that. This makes about as much sense to me as putting one of the executives from the telephone company upon the Public Utilities Commission or putting Herman Sahagian on the Liquor Commission.

Leg. Rec. (May 7, 1953) Vol. 2 at 2437-38.

6/ Section 271 of the Act provides that when a license is issued to an agricultural association for a pari-mutuel harness meet in connection with its annual fair between the first Monday of August and October 20 in any year, no other person or association shall be licensed to operate harness races within a radius of 150 miles. The same section of the Act further provides that:

> "The commission is directed to assign such dates for holding harness horse races or meets for public exhibition with pari-mutuel pools as will best serve the interests of the agricultural associations of Maine and may accordingly refuse to issue a permit if the issuance of the permit would in the opinion of the commission be detrimental to the interest of said agricultural associations or any of them." [Emphasis added].

For purposes of this analysis there is an inherent tension between these two provisions because in general terms the first prohibits all members from having, while the second requires one member to have, certain interests in the very activities regulated by the Commission -- namely racing. Thus before we can apply the statute we must interpret it and we do so against the background of conflict of law principles developed by the common law.

(1) General Common Law Principles

At common law the basic rule against having conflict of interests is simply stated: "A man cannot serve two masters at the same time". Atherton v. City of Concord, N.H., 245 A.2d 387, 388 (1968). It is rooted in public policy and frequently expressed in terms "borrowed from the common law of trusts that those in public employment have an obligation to act solely in the interests of the cestui que trust - the public." Marsh v. Town of Hanover, N.H., 313 A.2d 411, 414 (1973). This is how the courts of Maine have articulated the common law. Drawing upon earlier cases, the leading Maine case on the subject characterized the position of public office as a "legal trust":

> [H]ence,
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> "[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 lawfull. . . ."

Opinion of the Justices, Me., 330 A.2d 912, 916 (1975) [Emphasis and editing original]. Embraced by the general common law rule are two essentially separate types of conflicts, both of which will be independently addressed in this opinion -- (1) non-pecuniary conflicts in fiduciary obligations -- viz., where the duties of loyalty and responsibilities of a private position are fundamentally incompatible with the responsibilities of a particular public office; and (2) a direct pecuniary conflict of interest, such as that explicitly prohibited by the Act. Opinion of the Justices, supra, 330 A.2d at 918.

In both cases the conflict must be "direct, definite, and capable of demonstration; not remote, uncertain, contingent or unsubstantial, or merely speculative or theoretic." Selectmen of

Andover v. County Commissioners, 86 Me. 185, 188, 29 A. 982, 983 (1893).[7] Moreover, in determining whether a potential conflict is such as to disqualify one from public office, consideration must be given to the official's "opportunity to step aside and allow other independent persons to perform the duties involved as a means of avoiding the conflict of interests actually occurring when action must be taken." Opinion of the Justices, supra, 330 A.2d at 917. See, In the Maine Clean Fuels, supra, 310 A.2d at 751, n. 16. Finally it has been recognized that however one formulates the common law principle, its application is guided by the particular circumstances of a given case. "Essentially, each case will be 'law' only unto itself." Opinion of the Justices, supra, 330 A.2d at 917.

(2) Application of Fiduciary Conflict of Interest Standards

The Act explicitly prohibits pecuniary conflicts and in this regard is viewed as declarative of the common law.[8] Its failure to address non-pecuniary conflicts in fiduciary obligations, however, does not warrant the inference in this case that this prong of the common law rule has been abrogated by the Act.[9] Thus the question that is posed by the common law is whether the responsibilities of a member of the Commission to regulate harness racing is fundamentally incompatible with the private duties and loyalties of those two members who are affiliated with organizations that conduct harness racing meets.

7/ Accord, Hughes v. Black, 156 Me. 69, 75, 160 A.2d 113, 116 (1960); In Re Maine Clean Fuels, Me., 310 A.2d 736, 751 (1973). Also see, Atherton v. City of Concord, supra, 245 A.2d at 388; 1 Am. Jur. 2d, Administrative Law, §64 at 861; and 67 C.J.S., Officers, §204 at 668.

8/ See, Wilson v. Iowa City, 165 N.W.2d 813 (Io. 1969); 63 C.J.S. Municipal Corporations, §988 at 551; 67 C.J.S., Officers, §204 at 671.

9/ See, Price v. Edmonds, 232 Ark. 381, 337 S.W.2d 658 (1960) (statutory prohibition against municipal officials entering into private contracts for services was intended to emphasize that prohibition and not exclude the common law prohibition against entering into similar contracts for materials).

In the absence of the provision of the Act requiring a fair affiliation by one member, we think the question answers itself in the case of both Mr. Trafton, who is an executive director of an agricultural fair which runs harness meets, and Mr. Hall, who is president of a fair association and a business corporation which also conduct harness races. Simply put, at common law one cannot both regulate and be regulated.

But here we have a statute one of the purposes of which is to foster the interests of agricultrual fair associations and, to more effectively accomplish this objective, directing one Commission member to be connected in some capacity with the fairs. Statutory requirements of the kind -- viz., that a board or commission reflect, through its membership composition, certain legislatively prescribed policy perspectives -- are not uncommon and have been held to be valid.[10/] Under this Act in the

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10/ The Maine Supreme Court has ruled, in a case involving the former Environmental Improvement Commission, that imposition of special interest membership requirements is within the prerogative of the Legislature and is not unconstitutional provided that the mandated qualifications are not arbitrary but "meet the test of reasonableness" in view of "the functions and duties entailed in carrying out the purposes of the agency." Maine Clean Fuels, supra, 310 A.2d at 750.

But see, Johnson v. Michigan Milk Marketing Board, 295 Mich. 644, 295 N.W. 346 (1940) where a divided court held that an act creating a milk commission was unconstitutional because by statute a majority of its membership possessed a pecuniary interest in the regulation of milk prices, depriving the regulated industry of the right to impartial hearings satisfying due process requirements. The majority opinion in Johnson was expressly repudiated in Board of Supervisors of Elizabeth City County v. State Milk Comm., 191 Va. 1, 60 S.E.2d 35 (1950), not followed by others (see, Southeast Milk Sales Association Inc. v. Swaringen, 290 F. Supp. 292 (D. N.C. 1968)) and criticized by others. See, Note, 54 Harv. L.Rev. 872, 873 (1940) ("Even though it might be unwise to load an administrative agency with members representing a single economic group, such considerations have been held to be for the legislature rather than for the courts."), 2 Davis, Administrative Law Treatise, §12.03 at 158-59, and Justice Traynor's dissent in State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, 40 Cal.2d 436, 254 P.2d 29, 37 (1953). Also see, Cooper, 1 State Administrative Law at 345-46 (1965) and Ops. of the Atty. Gen. dated November 4, 1974 and December 3, 1974 and cases cited therein. But see, memorandum of Assistant Attorney General E. Stephen Murray on Conflicts of Interest for the Maine Land Use Regulation Commission (March 16, 1973) at pp. 2-5.

circumstances of this case we are of the opinion that, notwithstanding the general common law prohibition against non-pecuniary conflicts of fiduciary responsibilities, one member of the Commission can meet the statutory requirement of a fair affiliation by serving as an executive director or president of a fair. The Act does not specifically require this particular type of affiliation but, given the legislative purpose for requiring the affiliation, we may presume that either position is not only permissible but especially qualifies one to act as the fair representative.[11/]

In this case there are two members of the Commission who are affiliated with agricultural fairs, raising the question of whether both may serve when the Act requires the affiliation by only one. Having just concluded that at common law the affiliation would create an incompatible conflict of fiduciary responsibilities and applying the long-established principle that statutes in derogation of the common law should be strictly construed (see, Churchill v. SAD No. 49 Teachers Association, Me., 380 A.2d 186, 192 (1977)), we further conclude that the Act permits the affiliation for no more than one member of the Commission. In reaching this conclusion we wish to stress the special considerations that make it particularly compelling in this case. In our view, it is one thing to construe the literal words of the Act and its specific legislative history to permit one member of the Commission to also hold the position as executive director or president of a regulated fair in accordance with a legislative policy that the actions of the Commission reflect the interests of the fairs; it is quite another to extend the Act by interpreting it to allow such an affiliation by a majority of the Commission permitting Commission action to be dominated by the interests of the fairs. What is good for the fairs is not necessarily good for the other interests which the Commission has the duty to protect, such as the wagering public and the State's share of the proceeds of wagering.

With only one position of the Commission reserved for a fair affiliated member, we are compelled to conclude that Mr. Trafton, who was appointed before Mr. Hall, alone qualifies for it provided that Mr. Trafton is not otherwise disqualified by the statutory prohibitions against a member possessing a pecuniary interest. Our conclusion here should not be viewed as reflecting on Mr. Hall's

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11/ See, Atty. Gen. Op. dated December 3, 1974, discussing Maine Clean Fuels in relation to the qualification of the Director of the Maine Audubon Society to serve as a member of the Board of Environmental Protection.

qualifications but only as to the timing of his appointment.[12/]

(3) Application of Pecuniary Conflict of Interest Standards

Having narrowed the issue to the question of whether Mr. Trafton possesses a pecuniary conflict of interest, we turn to the prohibition in the Act explicitly proscribing this kind of conflict. In measuring the type of interest that may present a pecuniary conflict we think that it is appropriate to be guided by the common law requirement that a conflict be direct and capable of demonstration, not speculative or theoretic. See pp. 5-6 above.

With this background we turn to Mr. Trafton's situation. As noted earlier, his salary as Executive Director consists of two components: first his municipal salary which Bangor State Fair pays by way of reimbursement to the City of Bangor on a prorated basis; second, the salary which Bangor State Fair pays directly to Mr. Trafton for "overtime" work performed outside of his municipal working hours. In our opinion the first component of Mr. Trafton's salary does not constitute a "pecuniary interest" in racing within the meaning of the Act because he would receive his municipal salary in any event without regard to his affiliation with Bangor State Fair. The second component requires more comment.

A number of the cases that have focused on the question of whether an employment relationship creates a pecuniary conflict of interest within the meaning of particular statutes or the common law have either held or by their reasoning implied that the receipt of a fixed salary is not alone a sufficiently direct conflict of interest

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12/ At the time Mr. Trafton was appointed the term of Mr. Earle Johnson, who was then affiliated with a fair, had expired as had the term of Mr. Joseph D'Alfonso, who possessed no such affiliation. Mr. Trafton was appointed to succeed Mr. D'Alfonso and Mr. Hall succeeded Mr. Johnson. Arguably, under these circumstances, it could be said that Mr. Hall's appointment, although later in time, takes precedence over that of Mr. Trafton because of the affiliations of their respective predecessors. However nothing in the Act requires one fair affiliated member to succeed another, and even though Mr. Johnson was continuing to serve as a "hold-over" (5 M.R.S.A. §3) at the time of Mr. Trafton's appointment, we are of the opinion that when he was appointed Mr. Trafton properly filled the single position on the Commission reserved for a member affiliated with a fair.

within the meaning of a statute or the common law.[13] Here we have, in addition to Mr. Trafton's salary, the fact that he is affiliated as executive director of a regulated fair association. However we have already concluded that this fiduciary affiliation is not a disqualifying factor in this case. Some cases have held that the employment relationship may create a pecuniary conflict on the rationale that the employee has a personal stake in the good fortunes of his employer. See, Opinion of the Justices, supra, 330 A.2d at 918.[14] But here too, Mr. Trafton would possess a personal stake in the financial good fortunes of Bangor State Fair even if he were not paid because of his position as executive director, a position which we have concluded may be held by one member of the Commission. Under these circumstances, we do not consider the fact that part of Mr. Trafton's fixed salary is paid by the Bangor State Fair to constitute a sufficiently direct and immediate "pecuniary interest" in racing within the meaning of the Act's proscriptions.

Accordingly, because we have concluded that Mr. Trafton is qualified to serve on the Commission, we further conclude, for the reasons stated above, that Mr. Hall is not.

I hope this opinion has been helpful. If I can be of any further assistance, please do not hesitate to call me.

Sincerely,

RICHARD S. COHEN
Attorney General

RSC:jg
cc: Joseph Kenneally
Thaxter Trafton
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13/ See, People ex rel. Crowe v. Peck, 88 Misc. 230, 233, 151 N.Y.Supp. 835, 837 (Sup. Ct. 1914); Mumma v. Town of Brewster, 174 Wash. 112, 24 P.2d 438 (1933); Pressey v. Township of Hillsborough, 37 N.J. Super. 486, 117 A.2d 646 (App. Div. 1955), cert. denied, 20 N.J. 303, 119 A.2d 789 (1956), Wilson v. Iowa City, supra. See generally, Kaplan & Lillich, "Municipal Conflicts of Interest: Inconsistencies and Patchwork Prohibitions," 58 Col.L.Rev. 164, 178-79 (1958); Note: "The Doctrine of Conflicting Interests Applied to Municipal Officials in New Jersey, 12 Rutgers L.Rev. 582, 589 (1958); 63 C.J.S., Municipal Corp., §991 at 558. But see, Yonkers Bus Inc. v. Maltbie, 23 NYS.2d 87, 90 (Sup. Ct.), aff'd, 260 App. Div. 893, 23 N.Y.S.2d 91 (3d Dep't 1940) and Pyatt v. Mayor and Council of Dunellen, 9 N.J. 548, 557, 89 A.2d 1, 5 (1952).

14/ Also see, Edward E. Gillen Co. v. City of Milwaukee, 174 Wis. 362, 183 N.W. 679 (1921); People ex rel. Pearsall v. Sperry, 314 Ill. 205, 145 N.E. 344 (1924).