

# MAINE STATE LEGISLATURE

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## STATE OF MAINE

80-111

Inter-Departmental Memorandum Date July 9, 1980

To William R. Malloy, Executive Director Dept. Office of Maine CETA  
From Susan P. Herman, Assistant Attorney General Dept. Attorney General  
Subject Lease of Building Owned by State Employee to Office of Maine CETA

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You have asked for an opinion as to whether the Office of Maine CETA may enter into an agreement to lease a building which is owned by an employee of the Office of Maine CETA. In giving this opinion I have assumed the following facts:

The owner of the building is a Vocational Trades Instructor employed by the Office of Maine CETA, a State agency. This individual teaches in a carpentry program for CETA funded participants. The building in question is used in connection with the carpentry program. The lease is awarded on a competitive basis as required by Federal procurement regulations, 29 CFR § 70.216-5(C).

The instructor has no administrative responsibilities and would not be involved in his official capacity in the award of the lease.

Contracts between State employees and State agencies must be scrutinized in light of both Federal law and regulations and State statutes. The Federal conflict of interest regulations provide as follows:

Each recipient and subrecipient shall avoid organization conflict of interest, and their personnel shall avoid personal conflict of interest in awarding financial assistance, and in the conduct of procurement activities involving funds under this Act, in accordance with the code of conduct requirements for financial assistance programs set forth in 41 CFR 29-70.216.4 (Emphasis supplied).

20 CFR § 676.62

See also Sec. 123 of the Comprehensive Employment & Training Act of 1978

and

...no officer, employee, or agent shall:  
...participate in the selection, award, or administration of a procurement subject to this section when to the individual's knowledge, any of the following has a financial or other substantive interest in any organization which may be considered for award - (i) the officer, employee, or agent.

41 CFR 29-70.216.4

The regulations would clearly be violated if an individual with a financial interest in a contract participated in the award of that contract. It does not appear under the facts as presented, that the carpentry instructor participates in his official capacity in the award of the lease. Therefore there is no actual conflict of interest between the instructor's individual and official roles.

However, the Federal regulations also prohibit the "appearance of a conflict of interest."

The Department of Labor has given little guidance as to what constitutes an "appearance of a conflict of interest." It is our opinion that the appearance of a conflict of interest prohibition would not be violated where there is no potential for an individual to abuse his/her position for personal gain. Under the facts as presented, the carpentry training instructor is not involved with the administrative aspects of the program and is not in a position to influence the award of the lease.

Since the lease will be awarded on a competitive basis as required by the Federal regulations, (29 CFR § 70.216-5(C)), it would not be possible for the instructor to use his position to insure that he would be awarded the lease or to gain a competitive advantage over other bidders. Therefore there would be no "appearance of a conflict of interest" if the lease were awarded on an open competitive basis to the vocational trades instructor.<sup>1</sup>

Since the applicable Federal regulations do not appear to prohibit the Office of Maine CETA from awarding a lease to one of its employees, it becomes necessary to consider the relevant State statutes.

The applicable State conflict of interest statute provides that:

No trustee, superintendent, treasurer or other person holding a place of trust in any state office or public institution of this State, shall be pecuniarily interested directly or indirectly in any contract 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 the authority of Title 1, section 814. 17 MRSA § 3104.

If the State employee in question is a trustee, superintendent, treasurer or other person "holding a place of trust," then the State conflict of interest prohibition would be violated if he leased a building which he owned to the Office of Maine CETA, a State agency.

This is unlike the factual situation presented in Opinion of the Justices 108 Me. 545, 82 A.90 (1912), in which an official head of a department, the Secretary of State, also held a substantial interest in a company to which the department had

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<sup>1</sup>The U. S. Department of Labor may not agree with this interpretation of its conflict of interest regulation. In such an instance, the Department of Labor would have the authority to disallow the costs associated with this lease pursuant to the provisions of 20 CFR § 676.88(C).

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awarded a contract. In that case the court found that even though the State officer had nothing to do with the awarding of the contract, the conflict of interest statute (the predecessor to the present § 3104) barred the contract. The position of Secretary of State, unlike the position of an instructor, is a position of trust. The instructor has no administrative responsibilities, and would not be involved in his official capacity in the decision to lease the building. Based on these facts, it does not appear that the employee is in a position of trust with respect to the carpentry training program. Therefore, there would be no violation of the provisions of 17 MRSA § 3104 if the Office of Maine CETA rented his building.

In addition, 5 MRSA § 18 provides<sup>2</sup>:

An executive employee commits a civil violation if he personally and substantially participates in his official capacity in any proceeding in which to his knowledge any of the following have a direct and substantial financial interest:

A. Himself, his spouse or his dependent children;

The carpentry instructor, as an unclassified employee of the Department of Manpower Affairs, falls within the definition of an executive employee contained in 5 MRSA § 18 (1) (B).<sup>3</sup> The statute would be violated if the instructor "personally and substantially" participated "in his official capacity" in the award of the lease. Under the facts as stated, the instructor plays no part in the award of the lease. Therefore no violation of 5 MRSA § 18 (2) would occur if, after open competitive bidding the lease were awarded to the instructor, a State employee.

In summary, neither the Federal nor State conflict of interest prohibitions would be violated if the lease were awarded to the carpentry instructor as a result of a competitive bidding process.

It should be noted that this opinion is based upon the assumption that the instructor has no authority over administrative matters and would not participate in his official capacity in the lease award process. A violation of both the Federal and State conflict of interest prohibitions would result if the instructor's official duties included participation in or authority over any part of the lease award process.

SPH/ldl

Susan P. Herman  
Susan P. Herman  
Assistant Attorney General

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<sup>2</sup>P.L. 1980 Ch. 734, effective July 3, 1980 repealed 5 MRSA, § 15 and enacted §§ 18 and 19.

<sup>3</sup>Executive employee is defined as:

...The constitutional officers, the State Auditor and compensated members of the classified or unclassified service employed by the Executive Branch...(the statute includes exceptions not here applicable.)  
[emphasis supplied]