

# MAINE STATE LEGISLATURE

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80-142

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AUGUSTA, MAINE 04333

October 7, 1980

Samuel Nesbitt, Jr.  
Secretary  
Penobscot Bay and River  
Pilotage Commission  
Main Street  
Bucksport, Maine 04416

Dear Mr. Nesbitt:

You have inquired whether the ability of the Penobscot Bay and River Pilotage Commission ("Commission") to function is affected by the recent problems of the Penobscot Bay and River Pilot Association ("Association"). I have been asked to answer your inquiry. With some reservations, my conclusion is that the Commission may still carry out its duties and functions.

The Commission was established to regulate the qualifications, fees and activities of pilots in the Penobscot Bay. 38 M.R.S.A. § 90. The Commission consists of three members appointed by the Governor, "one of whom shall be a licensed pilot of the" Association. 38 M.R.S.A. § 89. Commissioner Gamache presently holds the office. The information presented indicates that all those piloting in the Penobscot Bay and River were affiliated in some way with the Association. It now appears that the Association has been dissolved, disbanded or at least abandoned by all but possibly two of its three or four members. Needless to say, without defining the legal characteristics of the Association and the ramifications of the recent events, some change has occurred which could be interpreted to affect the requirement that one of the members of the Commission be a licensed pilot of the Association.

In setting qualifications for holding administrative office, the Legislature must consider the functions and duties entailed in carrying out the duties of the agency. In re Maine Clean Fuels, Inc., 310 A.2d 736, 750 (1973). In this case, the provision requiring one member of the Commission to be a licensed pilot of the Association appears to have a twofold purpose. First, this member brings to the Commission valuable knowledge and experience necessary for the Commission to carry out its

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responsibilities with respect to piloting in the Penobscot Bay area. Second, this member represents the interests of the pilots. The two other members of the Commission "represent the marine interest of Penobscot Bay and River industry" and "represent the public." 38 M.R.S.A. § 89. It is quite logical to have the third member represent those who are actually engaged in the piloting of the marine traffic.

The intent of the Legislature would not be undermined by permitting Commissioner Gamache to continue as a qualified member despite the recent events involving the Association, and, indeed, might be frustrated if he were found to be ineligible to serve. Gamache's status as a working pilot, albeit semi-retired, in the Penobscot Bay and River remains unchanged. Thus, he will continue to have the valuable intimate knowledge of piloting in the area as well as represent the interests of his fellow pilots. In other words, his membership on the Commission will continue to carry out the intent of the Legislature.

The disagreement among the pilots should not be permitted to frustrate the purposes for which the Commission was established. The Commission could not function if the licensed pilot member was unable to serve as a member. As a general rule, in the absence of a statute providing otherwise, where authority is conferred on an administrative body of three or more members, such authority may be exercised by a majority of the members. 72 CJS, Public Admin. Bodies and Proc., § 21. However, there is authority in Maine for the proposition that where a board must consist of three or more members, two members of that board may not act unless the third member has been qualified, i.e., is eligible to serve. See Town of Warren v. Norwood, 138 Me. 180 (1941); Inhabitants of Williamsburg v. Lord, 51 Me. 599 (1863). In this case, if the licensed pilot Commission member is not qualified (and not able to be qualified), an argument could be made that the Commission, which would then consist of only two qualified members, could not act until the problem was solved. Thus, accepting the argument, the Commission could not act even though the purposes for which the licensed pilot is on the Commission continue to be fulfilled. This would lead to an absurd result rendering the Commission unable to function as a result of the disagreement among the pilots, not a substantive reason. In interpreting the requirement that one member be a licensed pilot of the Association, effect should be given to its spirit and not to a literal reading which wholly frustrates the effectiveness of that statute. See, Ballard v. Edgar, 268 A.2d 884, 885 (Me. 1970); Reggep v. Lumber Shoe Products Co., 241 A.2d 802, 805 (Me. 1968). Here, permitting

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Gamache to continue as a Commissioner despite the Association's problems effectuates the statute's purposes; an interpretation resulting in his disqualification renders the statute inoperative. Clearly, the former should be chosen over the latter. Id.

My conclusion is made with some reservation relating to possible bias of the member of the Commission who is the licensed pilot. The Administrative Procedure Act provides:

Hearings shall be conducted in an impartial manner. Upon the filing in good faith by a party of a timely charge of bias or of personal or financial interest, direct or indirect, of . . . [an] agency member in the proceeding requesting that person disqualify himself, that person shall determine the matter as a part of the record. 5 M.R.S.A. § 9003(1).

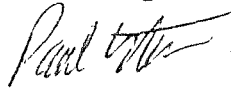
The Courts have been sensitive to the risks of unfairness in the administrative process. See In re Maine Clean Fuels, Inc., supra; Gashgai v. Board of Registration of Medicine, 390 A.2d 1080, 1082 n. 1 (Me. 1978). In view of Commissioner Gamache's affiliation with the Association and the pilots, he as well as anyone who may replace him should be sensitive to any possible conflicts of personal or financial interest in dealing with the pilots. Although no authority on point has been found, it appears that Commissioner Gamache could disqualify himself from participating in a particular matter without affecting the ability to act of the two remaining Commissioners. Cf. In re Maine Fuels, Inc., 310 A.2d at 751, n. 16, supra; Federal Home Loan Bank Board v. Long Beach Fed. S & L Ass'n, 295 F.2d 403, 408 (9th Cir. 1961). The difference between this type of disqualification and the type discussed with respect to continued membership on the Commission is that the former relates to the legality of dealing with a particular matter while the latter goes to the actual eligibility of Gamache to serve on the Commission.

Legislation clarifying this matter may be in order; I have been informed that there are plans for such legislation. In any case, at present, with the reservation discussed above, my conclusion upon the information presented is that the Commission may

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continue to function with Commissioner Gamache as a qualified member. Finally, I should note that this answer to your inquiry has not been reviewed through our customary opinion process. Accordingly, I would ask that you treat this letter not as a formal opinion, but rather as an informational letter which reflects my research and the conclusions I have drawn from the research. Needless to say, this Office would be happy to provide you with a formal opinion should one prove necessary.

Sincerely,



PAUL STERN  
Assistant Attorney General

PS/d

bc: Steve Diamond ✓  
Lore Ford