

MAINE STATE LEGISLATURE

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AUGUSTA, MAINE 04333

December 11, 1980

Robert Bourgault, Chairman
Board of Trustees
Maine State Retirement System
State House
Augusta, Maine 04333

Dear Chairman Bourgault:

You have requested an opinion from this office regarding whether the Board of Trustees of the Maine State Retirement System may properly authorize a loan from Retirement System funds to the Maine State Employees Credit Union when one member of the Retirement System Board of Trustees and the Executive Director of the System are members/shareholders in the Credit Union, hence raising the question of a possible violation of 5 M.R.S.A. § 1061(5). While the question posed is a close one, we conclude that the Trustees would violate 5 M.R.S.A. § 1061(5)^{1/} by making this loan.

We reach this result for a number of reasons. First, the statute is clear on its face and does not appear to authorize any exception. The relevant portion reads:

[N]o trustee. . . shall have any direct interest in the gains or profits of any investment made by the board. . . .

5 M.R.S.A. § 1061(5).

Unfortunately, neither this statute nor similar legislation in other jurisdictions have ever been interpreted to provide

^{1/} While that section does not specify the consequences of its violation, at the very least, the System would be open to an action to nullify the loan, while individual trustees might be held personally liable for any loss to the System which resulted from the loan.

definitions or further meaning to the words "interest" or "investment." Nonetheless, in light of the statute's apparent purpose and the applicable conflict of interest rules in Maine, a common sense reading leads to the conclusion that the "interest" of a shareholder in a credit union receiving a loan is one of the types of interests contemplated by the statute. The nature of the shareholder's interest in a credit union is such that he might receive a higher rate of return on his shares as a result of such a loan being made, since the loan would make more money available to the credit union from which it could derive additional reserves. It also seems clear that a loan made by the Board of Trustees to a credit union is an investment for purposes of the statute.

Because there is no interpretive case law on this or comparable statutes, we must seek to determine its meaning by applying the general rules of conflict of interest as they have developed in Maine and other jurisdictions. Maine has retained strict rules in this area, see, e.g., Hughes v. Black, 156 Me. 69 (1960), which have been subject to little of the modernizing influence which has led courts to assess the substantiality of the interest in question, e.g., Atherton v. City of Concord, 245 A.2d 387 (N.H. 1968), and to consider whether a party's interest in a given transaction has resulted in actual loss or unfairness.

The Maine courts have generally taken a strict approach in determining whether a conflict of interest exists in a transaction involving a public body or public monies. While some jurisdictions, as discussed above, have developed rules which attempt to determine whether an apparent conflict will lead to actual harm to the public, the approach in Maine (as well as other jurisdictions) has been to focus on whether a given action presents the possibility or appearance of conflict, regardless of actual effect. See, e.g., Lesieur v. Inhabitants of Rumford, 113 Me. 317 (1915); Tuscan v. Smith, 139 Me. 36 (1931). It is the existence of a substantial and direct pecuniary interest of a public officer in a transaction in which he has the authority to take part which constitutes the conflict and calls the transaction into question. See Opinion of the Justices, 330 A.2d 912 (Me. 1975); Opinion of the Justices, 108 Me. 545 (1911). The theoretical underpinning of this approach is the view that a public officer is a trustee for the public and owes to the public a duty of perfect fidelity. See Lesieur v. Inhabitants of Rumford, supra. The consequence is a strict rule under which a conflict is found in every situation in which there is the possibility of harm. Tuscan v. Smith, supra.

The moderating doctrine of the de minimis interest has been recognized in Maine, see Opinion of the Justices, 330 A.2d 912, 918 (Me. 1975), but, in that opinion, it was, by implication, deemed inapplicable where the person in question was a stockholder of an institution for which he would have some responsibility and was furnished by that institution with a car. Id. Such interests were held to be "direct pecuniary interests of [the proposed officer] which cause him to have a personal stake in the continuing good fortunes of the [institution]. . . ." Id. Under this and other cases, then, the interest of a shareholder/member of a credit union would probably be deemed substantial and not de minimis for purposes of determining the existence of a conflict of interest. Accord, Opinion of the Justices, 108 Me. 545 (1911).^{2/} Indeed, it has been held that the interest of a shareholder of a corporation was a sufficient pecuniary interest to raise a conflict. Consolidated Coal Co. v. Board of Trustees of Mich. Employment Institution for the Blind, 129 N.W. 193 (Mich. 1910).

The question might be posed whether the trustee who is a member of the credit union may abstain from voting to approve this loan and thereby avoid the conflict of interest. The statute appears to preclude this alternative because it prohibits any trustee from "having" a direct interest in one of the board's investments. 5 M.R.S.A. § 1961(5). If the trustee with the conflict abstains and the loan is made, he will nonetheless remain a trustee and, subsequent to the loan, will "have" an interest in an investment made by the board.^{3/} This result is consistent with the case law which generally holds that mere abstention does not cure the conflict. E.g., Stevens ex rel. Kuberski v. Hannermann, 172 A. 738 (N.J. Law 1934). The existence of statutes in other areas which permit abstention also supports this conclusion because of the failure of the Legislature to make such provisions part of the statute in question. E.g., 30 M.R.S.A. § 2251.

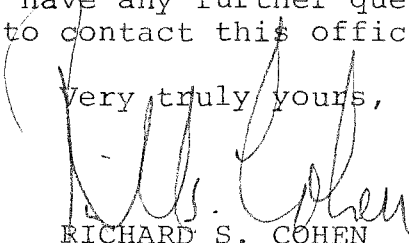
^{2/} The existence of conflict of interest statutes governing other bodies and officers which specify amounts of percentages of stock ownership or other interests which will be deemed to create a direct pecuniary interest, e.g., 30 M.R.S.A. § 2250, does not require a different result herein and, indeed, creates an implication that, in the absence of specified limits, the Legislature intended the common law interpretations to control.

^{3/} Even if the persons in question divest themselves of their interests in the credit union, it is our understanding that many of the employees of the Board of Trustees are also members of the credit union. While, by statute, these people are considered to be State employees; 5 M.R.S.A. § 1031(6), their connection with the Retirement System would raise problems of the appearance of conflict similar to those discussed in this opinion.

From the above analysis, it appears that it would be improper under 5 M.R.S.A. § 1061(5) for the Trustees to negotiate a loan to a credit union of which one of the Trustees and the System's Executive Director are members/shareholders and where such a loan might positively affect the shareholders' investments. It is quite possible that the action would be void or voidable upon legal action by beneficiaries, members or other interested parties. Lesieur v. Inhabitants of Rumford, supra; see also Stockton Plumbing Co. v. Wheeler, 229 P. 1020 (Cal. 1924). It is also possible that the Trustee in question, or the entire Board, might be subject to a suit for breach of his or their fiduciary duty.

As we indicated at the outset, the question you raise is a close one. However, in light of the law on this issue and the possible consequences to the System of making the loan, we recommend that the loan in question not be authorized by the Board of Trustees. If you have any further questions or problems, please feel free to contact this office.

Very truly yours,


RICHARD S. COHEN
Attorney General

cc: Members of the Board of Trustees
W. G. Blodgett, Executive Director