

MAINE STATE LEGISLATURE

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JAMES E. TIERNEY
ATTORNEY GENERAL



81-41

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

May 4, 1981.

John M.R. Paterson, Esquire
90 Middle Street
Hallowell, Maine 04347

Dear Mr. Paterson:

This will respond to your letter of December 1, 1980 in which you asked a series of questions concerning 5 M.R.S.A. §18 (1980-1981 Supp.) (The Maine Conflict of Interest Law) and requested our opinion thereon. In order to properly respond to your inquiries, it is necessary to set out the factual information in your letter.

FACTS

You have advised us that in 1970 you became employed as an attorney in the Attorney General's Office and in 1976 you were appointed the Deputy Attorney General in charge of civil litigation, a position you continued to hold until your recent departure from State service. In your capacity as Deputy Attorney General, you had general supervisory responsibility over civil litigation in the Office including reviewing civil lawsuits initiated by or brought against the State of Maine, approving civil appeals, reviewing appellate briefs, consulting with other members of the staff with respect to investigations, opinions and the conduct of litigation. In some instances you assumed direct and personal responsibility for particular lawsuits and legal problems.

Earlier this year you terminated your employment with the Attorney General's Office and joined the law firm of Bernstein, Shur, Sawyer and Nelson. With respect to that law firm, you have advised us of the following:

"That firm represents a variety of clients that are involved in pending administrative and regulatory proceedings, are negotiating or are involved in litigation with, are under investigation by or are otherwise involved in civil or criminal matters with [the Attorney General's] Department or agencies represented by [the Attorney General's] Department. In some of those matters, I have been directly and

personally involved either as counsel of record [or] as consultant to other members of [the] staff, in reviewing investigations, research, advice, pleadings, briefs or otherwise. In other instances, I have not been personally involved in, aware of, or exercised authority or supervision with respect to such matters."

Based upon the foregoing facts, you have asked eight questions concerning the application of 5 M.R.S.A. §18 (1980-81 Supp.) to you as a former Deputy Attorney General, and to Bernstein, Shur, Sawyer and Nelson as the law firm with which you are now affiliated.

THE MAINE CONFLICT OF INTEREST LAW

5 M.R.S.A. §18(3) (1980-1981 Supp.), as enacted by Chapter 734 of the Public Laws of 1979, provides in its entirety as follows:¹

"3. Former executive employee. A former executive employee commits a civil violation if he, within one year after his employment has ceased, either knowingly acts as an agent or attorney for, or appears personally before, a state or quasi-state agency for anyone other than the State in connection with a proceeding in which:

- A. The State is a party or has a direct and substantial interest; and
- B. The particular matter at issue was pending before his agency and was directly within his official responsibilities as an executive employee at any time within one year prior to the termination of his employment."²

1. The original version of Maine's Conflict of Interest Law was enacted by the Legislature in 1975 as 5 M.R.S.A. §15. See P.L. 1975, c.539. The law was subsequently amended in several respects by P.L. 1975, c.770, §§16 to 18 and P.L. 1977, c. 696, §§31 and 32.

2. We would point out that there appears to be an error in punctuation in 5 M.R.S.A. §18(3). As a result of the comma after the word "before," the statute appears to forbid a former executive employee from acting as an agent or attorney for a state or quasi-state agency. Obviously, the Legislature never intended such an interpretation. We believe the statute should be interpreted as if it read as follows:

"A former executive employee commits a civil violation if he, within one year after his employment has ceased, either knowingly acts as an agent or attorney for, or appears personally before a state or quasi-state agency for, anyone other than the State in connection with a proceeding...."

QUESTION NO. 1

"May Bernstein, Shur, Sawyer and Nelson continue its representation of clients in any pending matter over which I exercised personal responsibility or took an active supervisory role if that firm adopts internal procedures designed to insure my isolation from such matter?"

The prohibitions contained in 5 M.R.S.A. §18(2) and (3) (1980-1981 Supp.) apply, respectively, to those individuals who are current or former "executive employees." Maine's Conflict of Interest Law does not contain any prohibitions against a person or organization who does not occupy such a status.³ Therefore, 5 M.R.S.A. §18 has no application to the law firm with which you are now affiliated.

QUESTION NO. 2

"May I accept employment in any pending matter over which I neither exercised personal responsibility nor took an active supervisory role although such matter was within my general supervisory responsibility?"

5 M.R.S.A. §18(3) prohibits a former executive employee, for one year after his state employment has terminated, from knowingly acting as an agent or attorney for or personally appearing before a state or quasi-state agency on behalf of anyone other than the State of Maine in connection with a proceeding in which:

"A. The State is a party or has a direct and substantial interest; and

B. The particular matter at issue was pending before his agency and was directly within his official responsibilities as an executive employee at any time within one year prior to the termination of his employment."

We believe the answer to your question lies in an interpretation of the phrase "directly within his official responsibilities as an executive employee."⁴ While the Legislature has not provided a definition of this phrase, we have observed on a previous occasion that this portion of Maine's Conflict of Interest Law appears to have been modelled upon its federal counterpart, 18 U.S.C.A. §207, which contains virtually identical language. See Informal Op. Atty. Gen., March 8, 1979.

3. The original version of Maine's Conflict of Interest Law (5 M.R.S.A. §15(2)) did prohibit certain conduct by a "former partner" of a current executive employee. The prohibitions against a "former partner" were repealed by P.L. 1979, c.734, §1.

4. For the purpose of this question, we have assumed that all the other criteria for the application of 5 M.R.S.A.

Like the federal statute, Maine's Conflict of Interest Law, when considered in its entirety, is clearly designed to address two separate and distinct problems. 5 M.R.S.A. §18(2) prohibits a current executive employee from "personally and substantially" participating in his official capacity in any proceeding in which certain specified individuals or organizations "have a direct and substantial financial interest."⁵ 5 M.R.S.A. §18(3) embodies prohibitions against a former executive employee regarding matters which were pending before his agency and which were "directly within his official responsibilities as an executive employee." When viewed in the context of the Conflict of Interest Law as a whole, we believe the phrase "directly within his official responsibilities" was intended to cover those former executive employees who did not necessarily personally participate in a particular matter but who did have supervisory responsibility over it.

In enacting the federal Conflict of Interest Law, Congress specifically defined the term "official responsibility" 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).

This definition would clearly apply to those government employees who possess supervisory authority and responsibility over matters within their agencies, notwithstanding the fact that such supervisory authority was never personally exercised with respect to a particular matter. In fact, the Senate Judiciary Committee, which recommended passage of the federal Conflict of Interest Law, specifically addressed the issue of whether the phrase "official responsibility" was intended to apply to those government employees with supervisory authority. It stated:

"The prohibition would thus cover cases where the former employee had actually not participated in a matter while in the Government....

The committee received testimony at its

§18(3) are present.

5. The phrase "[p]articipate in his official capacity" is defined in 5 M.R.S.A. §18(1)(C) to mean "to take part in reaching a decision or recommendation in a proceeding that is within the authority of the position he holds."

hearings on the bill recommending the complete omission of the subsection on the ground that it would certainly and adversely affect recruitment... The committee recognizes the possibility that this result might ensue but it believes there is also 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."

2 U.S. Code Cong. and Adm. News at 3861 (1962).

In view of the foregoing, it is our opinion that the phrase "directly within his official responsibilities as an executive employee" includes the general supervisory responsibility which you possessed as Deputy Attorney General in charge of civil litigation. Consequently, we believe that the prohibitions embodied in 5 M.R.S.A. §18(3) apply to you with respect to those particular matters which were pending before the Attorney General's Office and which were directly within your supervisory responsibility as Deputy Attorney General in charge of civil litigation.⁶ We believe these prohibitions apply notwithstanding the fact that you did not actually exercise any supervisory authority with respect to the particular matters at issue.

QUESTION NO. 3

"May I accept employment in any pending matter over which I did not exercise personal responsibility and which was not within my general supervisory responsibility but in which the staff of the office of the Attorney General was involved."

It is our opinion that 5 M.R.S.A. §18(3) would not prohibit your acceptance of such employment. As discussed earlier, in response to your second question, Maine's Conflict of Interest Law

6. We wish to emphasize that 5 M.R.S.A. §18(3) only applies for one year following the termination of your state employment and, with respect to those particular matters which were pending before the Attorney General's Office within one year prior to the termination of your state employment.

prohibits certain conduct by a former executive employee concerning particular matters which were pending before his agency and which were "directly within his official responsibilities." 5 M.R.S.A. §18(3)(B) (1980-1981 Supp.). The provisions of section 18(3) are not triggered merely because a particular matter was pending before a former executive employee's agency. Under the circumstances described in your third question, where the "pending matter" was not "directly within... [your] ...official responsibilities," we can see no basis for concluding that the Conflict of Interest Law would prohibit you from accepting employment in such matters.

QUESTION NO. 4

"In future cases, may I accept employment in matters involving State agencies which I formerly represented?"

It is our opinion that 5 M.R.S.A. §18(3) would not prohibit your acceptance of such employment.

The mere fact that you provided legal representation to a state agency in the past, does not, standing alone, prohibit you from accepting future employment in matters involving that state agency. The prohibitions embodied in 5 M.R.S.A. §18(3) apply only with respect to those "particular matter[s]" which were pending before a former executive employee's agency "within one year prior to the termination of his employment."

In an informal opinion issued on March 8, 1979 we interpreted the phrase "[t]he particular matter at issue" which appeared in the prior version of the Conflict of Interest Law (5 M.R.S.A. §15 (1)(A)(2) and (1)(B)(2)), and which has been retained in 5 M.R.S.A. §18(3)(B). After tracing the legislative history of that language, we concluded 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." See Informal Op. Atty. Gen., at 11, March 8, 1979.

QUESTION NO. 5

"In future cases, may I accept employment in matters involving State agencies which I did not represent but which were represented by other members of the staff of the Attorney General?"

For the reasons stated in response to your third and fourth questions, it is our opinion that 5 M.R.S.A. §18(3) would not

prohibit your acceptance of such employment.

QUESTION NO. 6

"In future cases, may I accept employment in matters involving laws, regulations or issues with which I was personally involved or took an active supervisory role if such representation does not involve their application to matters or fact situations not previously considered by me?"

It is our opinion that 5 M.R.S.A. §18(3) would not prohibit your acceptance of such employment.

As discussed earlier, in response to your fourth question, the phrase "the particular matter at issue," as used in section 18(3)(B), refers to those specific matters which were pending before a former executive employee's agency, not matters "which are similar in nature or which relate to the same general subject." Moreover, Congress has recently revised the federal Conflict of Interest Law (18 U.S.C.A. §207), and the Senate Committee on Government Affairs, which studied and recommended passage of the revision, specifically addressed your question. The Committee stated that the post-employment prohibitions against a former government official do not include "general rule-making, formulation of general policy or standards, other similar administrative matters, and legislative activities" which do not involve a specific party. 4 U.S. Code Cong. and Adm. News at 4264, 4368 (1978) (Senate Report No. 95-170).

QUESTION NO. 7

"In future cases, may I accept employment in matters involving laws, regulations or issues over which I neither exercised personal responsibility nor took an active supervisory role, although I have general supervisory responsibility over the subject?"

For the reasons stated in response to your fourth and sixth questions, it is our opinion that 5 M.R.S.A. §18(3) would not prohibit your acceptance of such employment.

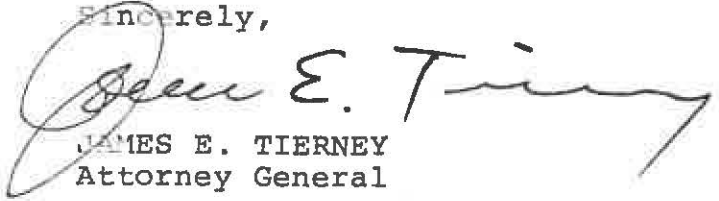
QUESTION NO. 8

"In future cases, may I accept employment in matters involving laws, regulations or issues over which I did not exercise personal responsibility and which were not within the area of my general supervisory responsibility but in which other members of the staff of the Attorney General were involved?"

For the reasons stated in response to your third, fourth and sixth questions, it is our opinion that 5 M.R.S.A. §18(3) would not prohibit your acceptance of such employment.

I hope this information is helpful to you. Please feel free to contact us if we can be of further assistance.

Sincerely,



JAMES E. TIERNEY
Attorney General

JET:sm