

MAINE STATE LEGISLATURE

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JAMES E. TIERNEY
ATTORNEY GENERAL



87-5

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

March 3, 1987

Honorable Thomas W. Murphy
Minority Leader
Maine House of Representatives
State House Station #2
Augusta, Maine 04333

Dear Representative Murphy:

You have inquired of this office whether a conflict of interest would arise by the assumption of the office of State Auditor by Mr. Rodney L. Scribner, the past Commissioner of Finance. For the reasons which follow, it is the Opinion of this Department that there is no legal impediment to Mr. Scribner's assuming his new office.

The question which you raise arises because, pursuant to 5 M.R.S.A. § 244, the State Auditor is required to:

conduct a continuous post-audit of the accounts, books, records and other evidences of financial transactions kept in the Department of Finance and Administration or any other departments and agencies of the State Government. He shall prepare and publish a report for each fiscal year, setting forth the essential facts of such audit in summary form, within the following fiscal year after the books of the State Controller have been officially closed. If he shall find in the course of his audit evidences of improper transactions, or of incompetence in keeping accounts or handling funds or of any other improper practice of financial information, he shall report the same to the Governor and the Legislature

immediately. If he shall find evidences of illegal transactions, he shall forthwith report such transactions both to the Governor and to the Attorney General.

In his new capacity as State Auditor, Mr Scribner would be required to undertake an audit of the financial records of the Department of Finance for the current fiscal year. For the first seven months of that period, Mr. Scribner was the Commissioner of that department. Consequently, you have inquired whether there is any conflict of interest or other illegality raised by this situation.

It should first be noted that the question you raise does not involve one of so-called "incompatible offices." That common law doctrine, under which a public official is prohibited from occupying two offices where the discharge of one has an inevitable effect on the discharge of the other, applies only when the person in question proposes to hold two public offices simultaneously. Opinion of the Justices, 330 A.2d 912, 916 (Me. 1975). In this case, Mr. Scribner does not propose to hold both offices at the same time. His tenure as Commissioner of Finance has ended, and he has been elected by the Legislature to serve as State Auditor effective March 27, 1987. Thus, no question of incompatible officeholding arises.

The more pertinent question is whether a "conflict of interest" arises out of the foregoing situation. On this score, it is important to note that the Legislature has passed no statute defining a conflict of interest which applies to this situation. There is a general conflict of interest statute applicable to all state employees, 17 M.R.S.A. § 3104, but that statute applies only to contracts with state government entered into by persons holding state office. The only specific restriction imposed on the position of State Auditor by the State Legislature prohibits the Auditor from having "any financial interest in the transactions of any department, institution or agency of state government." 5 M.R.S.A. § 245 (emphasis added). The conflict which you describe, namely, that Mr. Scribner may not be disposed to rigorously audit the financial records of a department of which he was formerly the Commissioner for fear of public embarrassment, is not financial in nature. Thus, a discharge of the functions of the State Auditor by Mr. Scribner would not violate this statute.

In the absence of statute, the only remaining inquiry is whether the courts would find the actions of a State Auditor in reviewing the financial records of a department of which he was formerly the head to be within the common law concept of a

"conflict of interest." As the Maine Supreme Judicial Court has noted, "Questions concerning whether there is a 'conflict of interest' violative of law are not susceptible of generalized answers. Essentially, each case will be a 'law' only unto itself." Opinion of the Justices, 330 A.2d 912, 917 (Me. 1975). The Court has stated the question as whether the public official is placed "in a situation of temptation to serve his own personal interests to the prejudice of the interests of those for whom the law authorized and required him to act in the premises as an official." Tuscan v. Smith, 130 Me. 36, 46 (1931), quoting with approval Lesieur v. Inhabitants of Rumford, 113 Me. 317, 321 (1915). Nonetheless, as an authority relied upon by the Law Court in the Tuscan case states, "In general the disqualifying interests must be of a pecuniary or proprietary nature." Dillon, Municipal Corporations § 733 (5th ed. 1911).

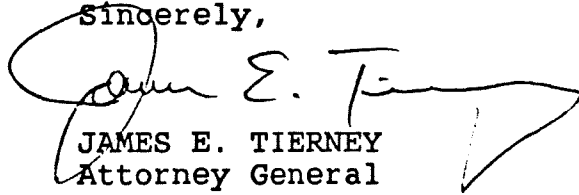
As indicated above, the interest at issue in the problem which you present is not pecuniary in nature. Rather, it consists of the possibility that Mr. Scribner, in his new capacity, will be less than rigorous in scrutinizing the work for which he was responsible in his prior capacity, for fear that he might be subject to public embarrassment. This kind of interest does not appear to be at the core of the courts' concern in formulating the common law rules governing conflicts of interest. In view of this, this Department is reluctant to conclude that the conduct of an audit by Mr. Scribner of the records of the Department of Finance would constitute such a conflict.

This is not to say that there are no legal controls applicable to this situation. For example, at least two provisions of the Maine Criminal Code might apply to the State Auditor in the conduct of his duties such as to deter conduct of the kind about which you are concerned. Section 608 of that Code makes it a crime for a public servant, acting with the intention to benefit himself, to refrain "from performing a duty imposed on him by law or clearly inherent in the nature of his office." 17-A M.R.S.A. § 608. Further, Section 456 of the Code makes it a crime for any person to "make a false entry in, or false alteration of any record, document or thing belonging to, or received by or kept by the government," 17-A M.R.S.A. § 456(1)(A). Thus, were Mr. Scribner to decline to audit the records of the Department of Finance for the period in question, or were he to conduct such an audit falsely, he might become subject to criminal prosecution. This prospect would seem, if anything, to give him a strong personal interest in discharging his new functions properly, rather than in such a way as to spare him embarrassment.

The Department would also note, in conclusion, that upon his assumption of office as State Auditor, Mr. Scribner could further protect himself against the appearance of impropriety by declining to participate personally in the audit of the Department of Finance for the portion of the current fiscal year during which he was Commissioner. Such action is not required by law, but it would eliminate any of the legal concerns which your inquiry raises.

I hope the foregoing is helpful to you. Please feel free to reinquire if further clarification is necessary.

Sincerely,



JAMES E. TIERNEY
Attorney General

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Enc.

cc: Hon. Charles E. Pray, President of Senate
Hon. John L. Martin, Speaker of House
Robert W. Norton, State Auditor
Rodney L. Scribner, State Auditor-elect