JAMES E. TIERNEY
ATTORNEY GENERAL

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

January 26, 1989

Honorable Norman E. Weymouth
Maine Senate
State House Station #3
Augusta, Maine 04333

Dear Senator Weymouth:

You have inquired whether it is legally possible for a person simultaneously to occupy the offices of Supervisor of the Group Life Insurance Division of Benefits Division of the Maine State Retirement System and Trustee of the Maine State Retirement System. For the reasons which follow it is the Opinion of this Department that these two offices are incompatible, and therefore may not be held simultaneously.

The facts as this Department understands them are as follows: The statute establishing the Board of Trustees of the Maine State Retirement System provides that one member of the Board be a state employee who is elected to his or her seat on the Board by the Maine State Employees Association. 5 M.R.S.A. § 17102(1)(C). The MSEA is currently in the process of conducting the required election to fill this seat on the Board. One of the candidates for such election is the current Supervisor of the Group Life Insurance Division of the Benefits Division of the Retirement System. The question which you raise is whether this employee could continue to occupy the supervisory position in the Retirement System if elected to the Board of Trustees.

This question involves the common law doctrine of incompatibility of public offices. That doctrine, as set forth in the leading decision of the Supreme Judicial Court of Maine on the point, Howard v. Harrington, 114 Me. 443 (1916), is that

where the nature of the two positions is such that the discharge of one will inevitably affect the discharge of the other, they cannot be simultaneously held by the same person. Thus, "Two offices are incompatible when the holder cannot in every instance discharge the duties of each." Howard v. Harrington, supra at 446, quoting The King v. Tizzard, 9 B & C 418, and "The test of incompatibility is the character and relation of the offices, as where the function of the two offices are inherently inconsistent and repugnant." Id. at 447, quoting State v. Goff, 15 R.I. 505. The answer to any incompatibility of office question, therefore, turns on a precise examination of the particular offices involved to determine whether it is possible for one person to discharge both of them in all instances.

In the case of the two offices at issue here, it is clear that they cannot be discharged simultaneously. The position of Supervisor of the Group Life Insurance Division necessarily entails the formulation and implementation of policy regarding the activities of the Maine State Retirement System in the purchase and sale of group life insurance benefits to its members. The formulation of such policy is also the ultimate responsibility of the Board of Trustees. Thus, it is entirely possible that the person occupying the position of Supervisor of the Group Life Insurance Division would be obliged to carry out a policy which that person had opposed as a member of the Board of Trustees, were the person to occupy both positions simultaneously. In addition, the occupant of the position of Supervisor of the Group Life Insurance Division is a subordinate of the Executive Director of the Retirement System who serves at the pleasure of the Board of Trustees. Thus, if the Supervisor were also a member of the Board of Trustees, such a person would be in the untenable position of being both the superior and subordinate of the Executive Director, further rendering the discharge of the two offices incompatible. See generally Opinion 80-39 of this office, a copy of which is attached, indicating that it would be incompatible for an employee of a municipality simultaneously to serve as a selectman of the same municipality.

In view of the incompatibility of the two offices in question, a further issue arises as to the legal consequence of the actual election of the employee in question to the Board of Trustees. The general rule with regard to incompatible offices is that the acceptance of the later of the two incompatible offices necessarily vacates the former. Howard v. Harrington, supra at 447. In order to satisfy this requirement, therefore, the newly elected member of the Board of Trustees would have to obtain a different position in state government before taking office on the Board, in order to continue to satisfy the

statutory requirement that the Board member elected by the MSEA be a "state employee," as well as the common law requirement that such a person not occupy an incompatible office.

I hope the foregoing answers your question. Please feel free to reinquire if further clarification is necessary.

Sincerely,

JAMES E. TIERNEY
Attorney General

JET/ec
Enc.

cc: John P. Bibber, Chairman, Board of Trustees, MSRS
Claude R. Perrier, Exec. Dir., MSRS
Philip Merrill, Exec. Dir. MSEA
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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

February 8, 1980

Honorable Harold Hanson
House of Representatives
State House
Augusta, Maine 04333

Dear Representative Hanson:

You have requested an opinion of this office in regard to the question of whether an employee of a town may run for selectman of that town, and, if elected, may serve as a selectman while remaining an employee of the town. We answer the first question, whether he may run, affirmatively, subject to review of local provisions; but we answer the second, whether he may serve simultaneously as an employee of the town and as a selectman, in the negative.

For purposes of analysis, we will consider the questions presented in reverse order. Having found no constitutional incompatibility between the office of employee of a town and a town official, such as a selectman,[1/] the question becomes whether there is any common law incompatibility between these two positions. We find that there is. In our opinions, we have taken the position that a person may not simultaneously serve as a selectman and an employee who would be controlled by the selectman. See, e.g., Opinions of the Attorney General, January 22, 1980; February 5, 1974 (copies of which are attached hereto). The rationale of these opinions is that incompatiblity arises when the holder of two positions cannot discharge the duties of each. See Howard v. Harrington, 114 Me. 443 (1916). In the situation

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1/ Me. Const., art. III, § 2; art. IX, § 2.

of an employee and selectman, it is clear that the selectman would have power over the employee in the areas of hiring, firing, and determining compensation. Hence, we find that these two offices are incompatible.2/

What are the consequences of this incompatibility on the ability of the employee to run for selectman? We have found no state law which prevents an employee of a municipality from running for the office of selectman. There may, however, be existing ordinances of the town which would prohibit employees of the town from involving themselves in political activity and which might specifically prohibit an employee from running for a municipal office. A search of the ordinances should be made to determine whether such an ordinance exists. Assuming that no ordinance prohibits the employee from running for selectman, however, the incompatibility of the positions would prevent the employee from serving as selectman without vacating his position as a town employee. Hence, should the employee run for selectman and be elected, he should resign his employment by the town. In any event, as a techical matter, his election as selectman will automatically vacate his employment position.

I hope this information addresses your concerns. If you have any further questions, please feel free to contact this office.

Very truly yours,

PAUL F. MACRI
Assistant Attorney General

PFM/ec
Enclosures

2/ We take no position with regard to the question of whether 30 M.R.S.A. § 2251, which governs conflicts of interest in contractual situations for municipal officials, applies in an employment situation. While there is some authority that that section would apply and would create a conflict of interest where the selectman was also an employee of the town, see Davis v. Doyle, 323 S.W.2d 202 (Ark. 1959); Revis v. Harris, 243 S.W.2d 747 (Ark. 1951), a determination of this question is not critical to the result reached in this opinion. Furthermore, section 2251 does not per se prevent a selectman from being an employee of the town but merely governs the consequences where a municipal official is pecuniarily interested in contracts of the municipality.