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JAMES E. TIERNEY
ATTORNEY GENERAL

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

September 19, 1989

Margaret Russell, Chair
Maine Committee on Aging
State House Station #127
Augusta, Maine 04333

Dear Ms. Russell:

As Chair of the Maine Committee on Aging you have inquired regarding a conflict of interest issue that is currently of concern to your Committee. Your question asks whether the composition of the Committee is inconsistent with the provisions of Title III of the federal Older Americans Act (OAA), and thereby endangers the continued receipt of federal funds through the State Bureau of Maine's Elderly.

As your letter indicates, in 1987 the Older Americans Act was amended to strengthen the Long Term Care Ombudsman Program (LTCOP). Among those amendments was a section which requires the state agency administering the program (in this case the Bureau of Maine's Elderly) to insure that no one involved in designating the LTCOP Ombudsman is subject to a conflict of interest. It further requires that no "officer, employee or other representatives" of the LTCOP be subject to a conflict of interest. Your specific question is whether membership on the Committee on Aging (the Committee) by an owner or administrator of a licensed nursing home is inconsistent with these OAA conflict of interest provisions.

For the reasons which follow, it is the opinion of this Department that membership on the Committee on Aging by an owner or an administrator of a long term nursing home does indeed constitute a conflict of interest within the meaning of the OAA.

I. STATUTORY BACKGROUND.

A. Maine Committee on Aging.

The Maine Committee on Aging is an independent state agency. It is not a part of the Department of Human Services. (22 M.R.S.A. § 5108-A (Supp. 1988-89)). Among the Committee's powers and duties is to "serve as an ombudsman on behalf of individual citizens and older people as a class in matters under the jurisdiction of state government." (22 M.R.S.A. § 5112 (Supp. 1988-89)). Specifically, 22 M.R.S.A. § 5112(2) states:

In order to serve as an advocate and ombudsman for older people, the Committee shall have the power to enter onto the premises of any adult foster care facility approved by the State according to § 7908, any boarding home care facility licensed according to § 7801 and any nursing home facility licensed according to § 1817 in order to investigate complaints concerning those facilities. To carry out this function, the Committee may enter onto the premises of any adult foster care facility, and any boarding care facility or any nursing home during the course of an investigation, speak privately with any individual therein who consents to the conversation and inspect and copy all records pertaining to a resident held by a facility or home, provided that the resident or the legal representative of the resident consents in writing to that inspection.^{1/}

As the result of a contract with the State Bureau of Maine's Elderly, the Committee is responsible for administering the federal Long Term Care Ombudsman Program (LTCOP). Accordingly, the Committee receives federal funds under Title III of the OAA. Currently the Committee's ombudsman's efforts are funded by General Fund appropriation of approximately \$61,000 and the OAA grant of approximately \$51,000. The Committee is responsible for employing the LTCOP Ombudsman and

^{1/}In 1986 the Committee was given additional authority to be an advocate on behalf of elderly consumers of home care services. P.L. 1986, ch. 761, Part A (Appropriation to Maine Committee on Aging).

directing the Ombudsman's activities. The LTCOP Ombudsman utilizes the statutory investigative powers described above and parallel OAA powers^{2/} to enter and evaluate the living conditions of elderly care facilities licensed by the State. The LTCOP Ombudsman also appears before the Maine Legislature to testify on elderly matters and has appeared at hearings involving the licensing of elderly care facilities conducted by the Department of Human Services.

The Committee is authorized by Maine statute to employ, subject to the Civil Service Law, such staff as is necessary to carry out its objectives, including the LTCOP Ombudsman. (22 M.R.S.A. § 511 (Supp. 1988-89)). The Committee is the final authority in determining which complaints and projects the LTCOP Ombudsman will pursue.

The Committee itself is composed of fifteen members, thirteen of whom are appointed by the Governor. Two members must be current members of the Legislature, one from the House of Representatives who is appointed by the Speaker of the House and one from the Senate who is appointed by the President of the Senate. The Committee membership qualifications pertinent to this opinion are set forth at 22 M.R.S.A. § 5108-A (Supp. 1988-89) and are as follows:

1. The members shall have "an unselfish and demonstrated interest in older people . . .;" and
2. The 13 members appointed by the Governor shall be "current leaders of the State's

^{2/}The OAA contemplates that the LTCOP will investigate elderly "long term care facilities." These are defined at 42 U.S.C. § 3022(3):

(3)The term "long-term care facility" means any skilled nursing facility, as defined in section 1395x(j) of this title, any intermediate care facility, as defined in section 1396d(c) of this title, any nursing home, as defined in section 1396g(e) of this title, any category of institutions regulated by a State pursuant to the provisions of section 1382e(e) of this title (for purposes of section 3027(a)(12) of this title), and any other similar adult care home.

elderly from a number of fields, such as income, health, housing and community and social services, and who have proven experience in private, public and voluntary organizations on the state, regional and community level, such as state wide membership groups, task forces on aging, regional and county councils of older people and municipal level senior citizen clubs."

B. Bureau of Maine's Elderly.

The Bureau of Maine's Elderly is an administrative unit of the Department of Human Services. Among its duties is the administration of programs authorized and funded by the OAA. (22 M.R.S.A. § 5106(6) (Supp. 1988-89)). One of the OAA programs for which the Bureau of Maine's Elderly is responsible for is the Long Term Care Ombudsman Program (LTCOP). Since 1975 the Bureau of Maine's Elderly has contracted with the Committee on Aging to administer the LTCOP.

C. Older American's Act of 1965.

In 1987 The Older American's Act (OAA), 42 U.S.C. § 3011 et seq., was amended by Congress to strengthen the Long Term Care Ombudsman Program (LTCOP). Among these amendments was a section which required the state agency administering the program (in this case, the Bureau of Maine's Elderly) to insure that no one involved in designating the LTCOP or representing the LTCOP is subject to a conflict of interest. Specifically, OAA was amended at 42 U.S.C. § 3027(a)(12)(F) to read:

(F) the State agency will --

(i) insure that no individual involved in the designation of the Long-term Care Ombudsman (whether by appointment or otherwise) or the designation of the head of any subdivision of the Office [LTCOP] is subject to a conflict of interest;

(ii) insure that no officer, employee, or other representative of the Office [LTCOP] is subject to a conflict of interest; and

(iii) insure that mechanisms are in place to identify and remedy any such or other similar conflicts.

The LTCOP Ombudsman is authorized to investigate elderly "long term care facilities."

II. FACTS.

The current composition of the Committee on Aging has raised the possibility of a conflict of interest as defined by OAA. It is the understanding of this Department that one member of the Committee is employed by a licensed nursing home corporation which currently operates the largest nursing home chain in the State. This member administers one of the chain's nursing homes. The Department also understands that another member of the Committee owns a licensed nursing home and is member of a family that owns at least one other licensed elderly facility. This member reportedly is also the executive director of a licensed home health care agency. Finally, the Department is advised that the Committee's LTCOP Ombudsman has received at least one complaint against each of the nursing homes administered or owned by these Committee members.

At its 1989 session, the Legislature enacted Legislative Document 1515, "An Act Amending the Law Governing the Maine Committee on Aging." Section 1 of L.D. 1515 provided that the Governor was prohibited from appointing to the Committee on Aging persons who "have ownership interest in or who manage entities that provide elderly services." In a letter dated June 21, 1989 and signed by yourself as Chair, the Committee informed Governor John R. McKernan, Jr. that it had voted six to one, with two abstentions^{3/} against supporting this restriction on persons who could be appointed to the Committee. Governor McKernan then vetoed this bill and the Legislature subsequently voted to sustain his veto.

In his June 27, 1989 veto message to the Legislature, Governor McKernan provided two main reasons why he was vetoing L.D. 1515:

1. The legislation attempted to "encroach on executive appointment authority:" and
2. "[S]ince the legislation would prohibit the appointment of anyone who provides elderly services, such action would run counter to the original intent of the law which created the Committee.

^{3/}The membership of the Committee, including the Chair, totals fifteen members.

The Governor supported his veto by stating that the statute creating the Committee on Aging specifically allows the appointment of owner or managers of nursing homes.^{4/} In support of this claim he cited the following language from 22 M.R.S.A. § 5108-A(2)(A) (Supp. 1988-89):

A. The Governor shall appoint 13 members who are current leaders of the State's elderly from a number of fields, such as income, health, housing and community and social services, and who have proven experience in private, public and voluntary organizations on the state, regional and community level^{5/}

^{4/}It is of course within the prerogative of the Legislature to mandate nonarbitrary qualifications for members of public boards (e.g., professional expertise in the industry being regulated). In Re Maine Clean Fuels, 310 A.2d 736, 750 (Me. 1973).

^{5/}A less expansive reading of the legislation cited by the Governor indicates that the Legislature was not contemplating nursing home owners as Committee members. Section 5108-A(2)(A) continues on to list examples of the kind of "organizations" that should be represented on the Committee. None are private, for-profit licensed homes:

The Governor shall appoint 13 members who are current leaders of the State's elderly from a number of fields, such as income, health, housing and community and social services, and who have proven experience in private, public and voluntary organizations on the State, regional and community level, such as state wide membership groups, task forces on aging, regional and county councils of older people and municipal level senior citizens clubs. (Emphasis added.)

The Governor's veto message did not address the issue of whether Committee members who own or administer elderly long term care facilities regulated by the State would have a conflict of interest within the meaning of the OAA.

III. LAW APPLIED TO FACTS

The following analysis of whether it is a conflict of interest for members of the Committee on Aging to own or manage licensed nursing homes is limited to the restrictions set forth in the OAA, which provides a significant portion of the financing for the LTCOP. The issue as to whether Maine common law^{6/}

^{6/}While this Opinion does not address this common law issue, there is good reason to believe that any Committee member with a pecuniary interest in long term care facilities would have frequent conflicts of interest in the course of the Commission's business. At common law the basic rule against a conflict of interest is simply stated: "A man cannot serve two masters at the same time." Atherton v. City of Concord, 245 A.2d 387, 388 (N.H. 1968). The leading Maine case on the subject characterizes the position of public office as a "legal trust," and therefore:

[t]he law requires of . . . [public officers] perfect fidelity in the exercise of . . . [the powers and duties of their officer], . . . whatever has a tendency to prevent their exercises of such fidelity is contrary to the policy of the law, and should not be recognized as lawful

Opinion of the Justices, 330 A.2d 912, 916 (Me. 1975), quoting Lesieur v. Inhabitants of Rumford, 113 Me. 317, 321 (1915) (Emphasis and editing original.) Thus, the decision maker must be free of legal bias and the most obvious form of bias occurs when an officer has a pecuniary interest in the outcome of the dispute. Gibson v. Berryhill, 411 U.S. 564, 579 (1973), relying on Tumey v. Ohio, 273 U.S. 510 (1927). See also Tuscan v. Smith, 153 A. 289 (Me. 1931) (lease held unlawful because of the selectman's interest therein as his brother's creditor):

[T]he question really is whether the town officer by reason of his interest 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. . . ."

(Footnote continued on next page.)

or the Committee on Aging statute^{7/} bars such membership on the Committee as an illegal conflict of interest is not treated in this opinion.

Given that the Committee on Aging is responsible for employing the LTCOP Ombudsman (22 M.R.S.A. § 5111 (Supp. 1988-89)) and given that the Committee is authorized to direct the LTCOP Ombudsman's investigations, it seems certain that membership on that Committee by persons who own or are employed

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Id. at 294. Certainly, owners or administrators of nursing homes on the Committee on Aging would seem constantly "placed in a situation of temptation." At common law, such conflicts of interest would require the recusal of the committee member from participation in all matters in which he or she has a pecuniary interest. See generally, Op. Me. Att'y Gen. 88-1 at 4-6; Op. Me. Att'y Gen. 83-4 at 7-8.

^{7/}The Maine Committee on Aging statute requires that its members shall have an "unselfish" interest in older people. (22 M.R.S.A. § 5108-A(1)). A reasonable interpretation of the word "unselfish" would exclude those persons who have an ownership interest in the long term care facilities which the Committee is specifically authorized by statute to investigate, and thus bar their membership on the Committee. In support of this position is the fact that Section 5108-A(2) lists only non-profit service groups as likely sources of prospective members: ". . .such as state-wide membership groups, task forces on aging, regional and county councils of older people and municipal level senior citizens clubs." Unlike the situation at common law, a person in violation of Section 5108-A(1) could not cure such violation by recusal in individual cases; the statutory prohibition against "unselfish" interest is absolute.

by^{8/} "long-term care facilities (including any other residential facility for older individuals)"^{9/} would be in direct violation of the OAA conflict of interest prohibitions. Persons having such a direct interest in such a facility would have a direct pecuniary interest in the results of any investigation carried out by the ombudsman which might effect his or her facility, and would therefore have a strong interest in the selection of the ombudsman in the first place.

This conclusion is inescapable given the restrictions set forth in 42 U.S.C. § 3027(a)(12)(F). The OAA prohibits conflicts of interests in the designation of the LTCOP Ombudsman (§ 3027(a)(12)(F)(i)), and it also prohibits conflicts of interest on the part of any officer or representative of the LTCOP (§ 3027(a)(12)(F)(ii)). The Committee fulfills both functions: it employs the LTCOP Ombudsman and its members are both officers and representatives of the LTCOP in that they administer the program, supervise all investigations and, indeed, on occasion conduct investigations themselves. (22 M.R.S.A. § 5112 (Supp. 1988-89)). Indeed, it appears that such conflicts of interest are not merely theoretical: at least one complaint has been received by the LTCOP Ombudsman concerning each of the nursing homes either owned or managed by a member of the Committee.^{10/}

^{8/}While your opinion request raised only the question of conflicts of interest with regard to owners or administrators of long term care facilities, the prohibition against such conflicts extends to other employees of any long term care facility subject to investigation by the LTCOP. For example, it is the understanding of this Department that a current member of the Committee is also employed as a nurse at a licensed nursing home. This person would also seem subject to the OAA conflict of interest prohibition.

^{9/}42 U.S.C. § 3027(12)(A).

^{10/}Moreover, this conflict of interest issue is not only a Maine concern. In response to the OAA prohibitions, the National Association of State Units on Aging has published conflict of interest recommendations for a State Long Term Care Ombudsman. Among the possible guidelines an Ombudsman program should consider adopting are:

Definitions of possible conflicts for individuals who are designating or are designated to perform the ombudsman service at the State, the Area Agency, and at the service delivery level of the program. The

(Footnote continued on next page.)

In short, the membership of owners, administrators or employees of a "long term care facility" on the Committee and in control of the LTCOP Ombudsman presents the very conflict of interests that the OAA seeks to prohibit.^{11/} Therefore, those members of the Committee for whom such conflicts exist should take whatever steps are necessary to resolve the conflicts, either by resigning from the Committee or by terminating their

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conflicts could include: 1) having financial investments in the long term care industry; 2) receiving financial gain such as salary or consultation fees; 3) being a former employee of the industry; and 4) seeking employment in the industry.

See National Association of State Units on Aging, Analysis of Policies and Procedures of State Long Term Care Ombudsman Offices 121 (1988).

^{11/}The federal Administration on Aging has not issued any regulations that elaborate on the OAA conflict of interest prohibitions. However, in responding to Congressional concerns about conflicts of interest in the LTCOP program, the Administration on Aging has stated that:

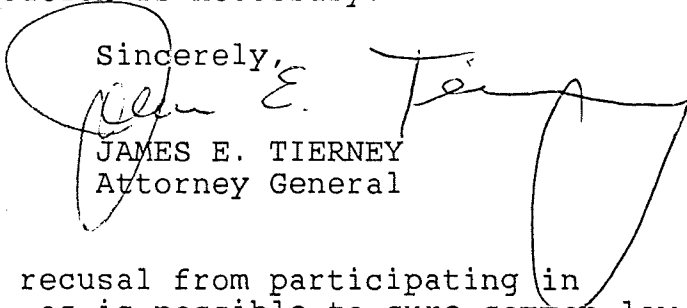
We are sensitive to the concern expressed [concerning an LTCOP program placed in the agency that licenses nursing homes] that an operation of the Ombudsman Program be free from even the slightest appearance of conflicts of interests We agree . . . that . . . special care must be taken and consideration given to assure the protection of the Ombudsman Program from even a hint of conflict of interests.

53 Fed. Reg. 33760 (1988).

relationships with their respective facilities.^{12/} If the conflicts continue to exist, future Administration on Aging funding of the LTCOP will be jeopardized, in addition to which the legality of particular Commission actions may be subject to challenge under both common law and the Maine statute establishing the Committee. See above footnotes 5-7.

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

Sincerely,



JAMES E. TIERNEY
Attorney General

^{12/}Such steps cannot include recusal from participating in particular Committee matters, as is possible to cure common law conflicts of interest. See note 6 supra. The prohibition of the OAA is absolute; no person involved in the selection of the ombudsman or serving as an officer in the ombudsman program may have any conflict of interest.