



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

April 7, 2011

Rep. James F. Dill
72 Sunset Drive
Old Town, ME 04468

Dear Representative Dill:

Thank you for asking for advice from the Ethics Commission staff concerning whether it would be a conflict of interest for you to influence certain bills during the 2011 session.

Information Provided

You have provided me with the following information.

Employment. You are a professor and pest management specialist at the University of Maine at Orono. Currently, you work full-time for the University of Maine Cooperative Extension. Your duties include assisting the public in diagnosing pest problems (including insect pests and plant diseases) and providing information concerning how to manage them. The constituencies served include farmers, agricultural commodity organizations, businesses, and homeowners.

The Cooperative Extension operates Integrated Pest Management (IPM) programs to assist growers, homeowners, and others in managing their pest problems. Some of the programs relate to different crops and farm products (*e.g.*, potatoes, blueberries, apples, or sweet corn). Others are directed toward a particular constituency, such as homeowners. As part of your work for the Cooperative Extension, you direct the programs. IPM programs typically receive funding from public sources (primarily the federal government) and private sources.

In addition, you are the director of the Cooperative Extension's Insect and Plant Disease Diagnostic Laboratory. The lab receives samples of insect pests or plant diseases from members of the public and identifies the pests. The funding for the facility usually comes from commodity groups and from special grants.

You became a tenured professor in 1985 or 1986. Since that time, your salary and benefits are determined by a collective bargaining agreement between the faculty and the school.

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Issue #1: Proposed State Funding for IPM Programs (L.D. 1043)

This year, the agricultural IPM programs in Maine will receive less funding from the federal government. Consequently, some of the commodity associations in Maine have lobbied the Maine Department of Agriculture to include funding for agricultural IPM programs in L.D. 1043, the budget bill for the 2012 and 2013 biennium. As originally proposed, the bill did not include funding for IPM programs. The Commissioner for the department has publicly discussed including in the bill \$200,000 in funding for the potato or other IPM programs. The Joint Standing Committee on Appropriations and Financial Affairs may vote on whether to include this funding in L.D. 1043. The House of Representatives will vote on a budget bill which may include this funding.

You have asked whether you may vote on or otherwise influence L.D. 1043, because it may include funding for IPM programs which you direct. As an expert on pest management and the director of the IPM programs, you expect to be consulted by colleagues in the Legislature concerning the funding. The Joint Standing Committee on Agriculture, Conservation & Forestry, of which you are a member, will make recommendations to the Appropriations Committee concerning the budget of the Department of Agriculture. Your constituents would presumably expect you to vote on the L.D. 1043, which will have a broad effect on state programs in Maine.

During our conversations on March 16 and 30, 2011, you explained that the Legislature's decision on whether to fund IPM programs through L.D. 1043 will have no financial effect on you personally. The salary and benefits for your position are determined by collective bargaining, and will not be affected by state funding for the IPM programs.

You also stated that any funding for IPM programs in L.D. 1043 will have little effect on your overall job responsibilities. Regardless of the Legislature's funding decision, most of the IPM programs will continue to operate in the coming year. If the state declines to provide funding, sources of funding may ultimately be available from other sources to replace the reduced federal funding. Even if one of the IPM programs for a particular commodity (*e.g.*, potatoes or apples) were to stop operating in 2011 or 2012, you would continue to direct the other IPMs. Directing the IPM programs would continue to occupy roughly 70% of your work time. Separately from the IPM programs, the Cooperative Extension would continue to provide pest management advice to individual growers and to commodity associations.

If the Legislature decides to provide \$200,000 in funding for IPMs this session, you would expect to receive no intangible benefit from the Cooperative Extension, such as a higher job evaluation or increased status within the Cooperative Extension.

Issue #2: Bond Issue for a Combined Animal and Plant Diagnostic Laboratory (L.D. 979)

During the 2011 session, the Maine Legislature will consider whether to submit to Maine voters the question of approving the issuance of a bond that would result in \$7,200,000 in funding to

build a new facility that would combine the current Insect and Plant Disease Diagnostic Laboratory with the university's current Animal Diagnostic Laboratory. The bond issue has been proposed in L.D. 979, which has been sponsored by Rep. Peter Edgecomb of Aroostook County, the House Chair of the Joint Standing Committee on Agriculture, Conservation & Forestry. It is also supported by Sen. Roger L. Sherman, the Senate Chair of the committee. The committee chairs decided to propose the bond after touring the university, and observed the need for diagnostic laboratories with greater resources. The bond would be considered by both chambers of the Legislature, but not by the Joint Standing Committee on Agriculture, Conservation & Forestry.

You explained that the Insect and Plant Disease Diagnostic Laboratory has outgrown its current building, which was constructed in the early 1990s. Because the laboratory is operating at full capacity, it cannot engage in desirable diagnostic projects. Also, the current laboratory does not use current biological security equipment. Consequently, it cannot conduct secure diagnosis of certain insect pests.

The proposed bond issue in L.D. 979 would pay for a new building with twice as much laboratory space and higher security equipment. This would allow the Cooperative Extension to engage in a greater number and variety of diagnostic projects to serve the public.

The larger laboratory would have no impact on your salary and benefits, for the reasons stated above. The greater number of diagnostic projects would result in an increased workload for you in terms of applying for grants and in overseeing researchers. Overall, the proposed new laboratory would increase your job responsibilities, and could result in greater job satisfaction from providing superior service to the public.

Advice from the Commission Staff

Role of Commission in Providing Advice

The Maine Legislature has authorized the Commission to issue advice to Legislators on ethical issues, such as whether it would be a conflict of interest to vote on or influence legislation. (21-A M.R.S.A. § 1013(1)(A)) Advice from the Commission on possible conflicts of interest is based on the Legislature's definition of a "conflict of interest" set forth in 1 M.R.S.A. § 1014(1). When the Commission staff applies this standard, it is necessarily guided by previous opinions by the Commission and by the Office of the Maine Attorney General. It is a violation of legislative ethics for a Legislator to attempt to influence a bill or other legislative matter if the member has a conflict of interest in connection with that matter. (1 M.R.S.A. § 1014(1))

The Commission's role is advisory only. In the Statement of Purpose for the Legislative Ethics Law, the Maine Legislature indicated that when voting on a bill could present a possible conflict for a Legislator, the Legislator must resolve for himself or herself whether to vote on the bill or to recuse in order to avoid a conflict. (1 M.R.S.A. § 1011)

Advice from the Commission and its staff is based on factual information provided by the Legislator requesting the guidance. If the Legislator provides incomplete or inaccurate information, he or she must accept that the Commission's assessment of the question may change if the Commission receives additional, contrary information.

Standards for Conflict of Interest

The Maine Legislature has defined the term "conflict of interest" in § 1014(1) to cover a number of situations which are set forth in paragraphs (1)(A) through (1)(F). Three of the paragraphs relate to situations involving a Legislator's employment:

A. When a Legislator or a member of the Legislator's immediate family has or acquires a direct substantial personal financial interest, distinct from that of the general public, in an enterprise that would be financially benefited by proposed legislation, or derives a direct substantial personal financial benefit from close economic association with a person known by the Legislator to have a direct financial interest in an enterprise affected by proposed legislation;

E. When a Legislator or a member of the Legislator's immediate family accepts or engages in employment that could impair the Legislator's judgment, or when the Legislator knows that there is a substantial possibility that an opportunity for employment is being afforded the Legislator or a member of the Legislator's immediate family with intent to influence the performance of the Legislator's official duties, or when the Legislator or a member of his immediate family stands to derive a personal private gain or loss from employment, because of legislative action, distinct from the gain or losses of other employees or the general community; and

F. When a Legislator or a member of the Legislator's immediate family has an interest in legislation relating to a profession, trade, business or employment in which the Legislator or a member of the Legislator's immediate family is engaged, and the benefit derived by the Legislator or a member of the Legislator's immediate family is unique and distinct from that of the general public or persons engaged in similar professions, trades, businesses or employment.

These paragraphs describe a number of circumstances or scenarios which constitute a conflict of interest. Mostly, they focus on whether the legislation results in a financial benefit to the Legislator or a member of the Legislator's immediate family.

- Paragraph 1(E) sets forth three circumstances constituting a conflict of interest, including whether the Legislator or immediate family member "derives a personal gain or loss from employment" that is "distinct from the gains or losses of other employees or the general community."

- Paragraph 1(F) states that a Legislator has a conflict of interest if two conditions are met: the Legislator or immediate family member “has an interest in legislation relating to [the Legislator’s or family member’s] profession, trade, business or employment” and the benefit derived from the legislation is “unique and distinct” from that of persons in similar professions or businesses.
- Paragraph 1(A) describes two scenarios which result in a conflict of interest. Both of them depend on the Legislator having a substantial financial interest in – or deriving a substantial benefit from – another entity that is benefited by legislation.

Last year, in a March 12, 2010 advisory opinion to Rep. Jon Hinck, the Commission took a view that voting on legislation results in a conflict of interest under § 1014(1)(A) only if the Legislator or immediate family member personally benefits from the legislation. The Commission endorsed the reasoning of a June 10, 1983 advisory opinion of Maine Attorney General James E. Tierney. In that opinion, a Legislator had inquired whether she was prevented from voting on a bill because her husband had rendered legal advice to a client concerning the bill. After reviewing the legislative history of 21-A M.R.S.A. § 1014(1)(A), the Attorney General observed that

[I]t is clear that the Legislature never intended that a member of either House must be disqualified from voting on a proposal merely because she or a member of her immediate family is compensated for work performed for an employer or a client who might be affected by the legislation. The “direct substantial personal financial benefit” referred to in 1 M.R.S.A. §1014(1)(A) must involve a financial reward separate and distinct from the remuneration one receives as an employee or agent for services rendered.

The Attorney General concluded that

In short, §1014(1)(A) does not prevent a Legislator from voting on a measure unless she or a member of her immediate family will receive a financial benefit either directly or through a third party, by virtue of the proposed legislation. To suggest otherwise, leads to the conclusion, clearly not contemplated by the Legislature, that any Legislator employed in the private sector must abstain from voting on legislative matters which affect the profession or business in which the Legislator is employed.

For purposes of this advice letter, the Commission staff is relying on the reasoning of Attorney General Tierney in his June 10, 1983 advisory opinion and the Ethics Commission’s endorsement of that reasoning in its March 12, 2010 advisory opinion to Rep. Jon Hinck. Both of those opinions interpret § 1014(1)(A) to mean that a Legislator does not have a conflict of interest merely because his or her employer is financially benefited by legislation. Under this reasoning, a conflict results only if the Legislator personally receives a benefit from the

legislation. In the section of this letter below which addresses the bond issue for the laboratory, we offer a caution that § 1014(1)(A) is open to other interpretations.

Staff Advice on Issue #1: Funding for IPM Programs in Budget Bill (L.D. 1043)

You anticipate that the Legislature will decide whether L.D. 1043, the biennial budget bill for FY 2012 and FY 2013, will include \$200,000 or another amount of funding for IPM programs administered by the Cooperative Extension. Because you direct the programs, you have asked whether you may

- provide information to fellow Legislators concerning IPM programs;
- participate in the Agriculture Committee's recommendations to the Appropriations Committee on the budget for the Maine Department of Agriculture; and
- vote on L.D. 1043.

Based on the factual information you have provided and the standards set forth in § 1014(1), the Commission staff advises that you may engage in all three activities and may otherwise influence the funding for IPM programs. Because the funding for IPM programs would not result in a financial gain or benefit for you, you may influence L.D. 1043 regardless whether the bill contains the proposed \$200,000 in funding for the IPM programs. You have described that the bill *could* have a minor impact on your job responsibilities, such as spending less time on potato IPM programs and more time on programs relating to other crops. The Commission staff does not believe that type of minor effect would constitute a conflict of interest as the term was defined in § 1014(1).

Staff Advice on Issue #2: Bond Issue for a Combined Animal and Plant Diagnostic Laboratory (L.D. 979)

L.D. 979 would submit a question to Maine voters whether they authorize the sale of up to \$7,200,000 in bonds from the State of Maine to construct a new facility that would combine the current Insect and Plant Disease Diagnostic Laboratory with the university's Animal Diagnostic Laboratory. You would direct the part of the facility relating to insect pests and plant diseases. Based on the factual information you have provided and the standards that the Legislature has set in 1 M.R.S.A. § 1014(1), the Legislative Ethics Law appears to permit you to vote on L.D. 979. As explained above, the bill would only present a conflict under §§ 1014(1)(A), (E), & (F) if it would result in a financial benefit or gain to you personally. You have stated as part of your request for advice that the bond funding would not change your compensation or benefits as a professor at the University of Maine. The primary impact on your performance of your duties would be an increase in the number of diagnostic projects that the lab would conduct, which would mean overseeing more personnel working on diagnosing pests and more grant applications to funders. While this could conceivably result in greater job satisfaction due to increased service to the public, this impact does not appear to be the kind of benefit to a

Legislator that the Legislature has deemed to constitute a conflict of interest. Therefore, the staff concludes that you may vote on or otherwise influence L.D. 979.

Having provided you that advice, the Commission staff adds one caution. In reaching the conclusion that you are permitted to vote on L.D. 979, the Commission staff is relying on the reasoning of Maine Attorney General James E. Tierney in his June 10, 1983 advisory opinion. In that opinion, the Maine Attorney General researched the legislative history of § 1014(1)(A), and concluded that a Legislator does not have a conflict of interest merely because his or her employer is financially benefited by legislation. He determined that “§ 1014(1)(A) does not prevent a Legislator from voting on a measure unless she or a member of her immediate family will receive a financial benefit either directly or through a third party, by virtue of the proposed legislation.” On March 12, 2010, the Ethics Commission endorsed that reasoning in the context of advising Rep. Jon Hinck that he could vote on legislation in the 2010 session, even though the bills could benefit his spouse’s law clients. It is possible to interpret § 1014(1)(A) more widely, but that has not been the past history of opinions by the Maine Attorney General or the Commission.

Even if you are not precluded from influencing L.D. 979, the Commission staff recommends that you consider whether to recuse yourself because of a possible appearance to the public of a conflict. The statement of purpose in the Legislative Ethics Law encourages members to consider the appearance of impropriety even when there is no actual conflict:

If public confidence in government is to be maintained and enhanced, it is not enough that public officers avoid acts of misconduct. They must also scrupulously avoid acts which may create an appearance of misconduct. The Legislature cannot legislate morals and the resolution of ethical problems must indeed rest largely in the individual conscience.

(21-A M.R.S.A. § 1011) Appearance of a conflict is a matter of public perception. In general, members of the public may not be aware that the Maine Legislature has defined “conflict of interest” to refer primarily to situations involving a personal financial benefit to the Legislator. They are more apt to rely on a subjective judgment of whether it seems appropriate for a Legislator to vote on whether to send a bond issue to Maine voters for \$7,200,000 in funding for a facility that the Legislator would partially direct. In that context, some members of the public could presumably conclude that it is a conflict for you to vote on L.D. 979, because it is targeted at one of the programs that you personally oversee.

There are countervailing factors for public consideration, however. First, L.D. 979 proposes to send the bond issue out to the voters. The passage of L.D. 979 itself does not result in the authorization for the state to issue bonds to fund a new Animal and Plant Disease Diagnostic Laboratory. The voters will ultimately make that decision. Second, your fellow Legislators will benefit from the scientific and professional expertise you can offer as they consider the need for a bond for a new diagnostic laboratory. As the director of the current facility, you have significant knowledge of how it serves different constituencies in Maine that have pest problems,

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and you know its limitations. The Legislature's consideration of L.D. 979 will likely be less informed if you do not share your expertise and experience. The risk of loss of expertise and experience due to recusals was noted by Attorney General Tierney in the June 10, 1983 advisory opinion:

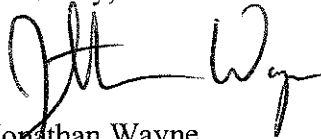
This opinion holds that the purpose of the conflict of interest statute is to prohibit the use of legislative office for private gain. Indeed, there is affirmative legislative history supporting the view that the conflict of interest laws were not designed to frustrate the legitimate attempts by publicly elected officials to use their personal experience in attempting to solve the problems of our State.

In conclusion, the Commission staff believes that the Legislative Ethics Law permits you to participate in the Legislature's consideration of L.D. 979, provided that the proposed funding for a new laboratory would not result in a personal financial benefit to you. Nevertheless, we believe that there is a significant potential for an appearance of a conflict of interest. Because our view is that there is no actual conflict, we believe that you may take any of the following options:

- 1) You may vote on L.D. 979 and influence its passage to whatever extent that you wish.
- 2) You could adopt a middle-ground approach by not voting on the bill or advocating for its passage. Nevertheless, you would make yourself available as an informational resource on the diagnostic laboratory to members of the Joint Standing Committee on Appropriations and Financial Affairs and to other colleagues in the Legislature.
- 3) If you are concerned about an appearance of a conflict and wish to avoid it altogether, you could recuse yourself from voting on the bill and not influence the Legislature's consideration of it in any way.

The members of the Commission are meeting on Tuesday, April 26, 2011. If you would like an advisory opinion from them directly, please let me know. If you have any questions about this advice, please call me at 287-4179.

Sincerely,



Jonathan Wayne
Executive Director