

MAINE STATE LEGISLATURE

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STATE OF MAINE

Inter-Departmental Memorandum Date 29 February 1972

To William F. Kearns, Jr., Commissioner

Dept. Mental Health and Corrections

From Courtland D. Perry, Assistant Atty. Gen'l.

Dept. Mental Health and Corrections

Subject Authority to Retain, Or Pay For, Attorney Services

SYLLABUS:

The provision of legal services and payment therefor, outside the purview of Title 5, M.R.S.A. 1964, §191, as to employees of the Department of Mental Health and Corrections and its institutions, apart from legal defense in civil cases provided for as an incident to insurance coverage, which may be obtainable under Title 5, M.R.S.A., §1728, is dependent upon legislative action. The Department of Mental Health and Corrections as a part of the Executive Branch of Government, absent legislative authority, can not expend State funds for legal fees for services rendered to State employees against whom civil or criminal action is brought.

FACTS:

This office has been requested to submit its opinion with reference to the following question.

QUESTION:

Do the Department of Mental Health and Corrections and any institutions under its control have authority to retain, or pay for, the services of attorneys in connection with the defense of employees at such institutions, against whom personally, civil actions are brought or who are charged with criminal offenses, e.g., assault and battery upon a patient or inmate of an institution?

ANSWER:

No.

REASON:

In connection with the provision of legal representation on behalf of certain

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employees of the State of Maine, the only legislative authority is found in Title 5, M. R.S.A. 1964, §191, as amended:

"The Attorney General shall appear for the State, the Secretary of State, the Treasurer of State, the Bank Commissioner, the Insurance Commissioner, the head of any other state department, the head of any state institution and the state boards and commissions in all civil actions and proceedings in which the State is a party or interested, or in which the official acts and doings of said officers are called in question, in all the courts of the State; and in such actions and proceedings before any other tribunal when requested by the Governor or by the Legislature or either branch thereof. All such actions and proceedings shall be prosecuted or defended by him or under his direction. Writs, summonses or other processes served upon such officers shall forthwith be transmitted by them to him. All legal services required by such officers, boards and commissions in matters relating to their official duties shall be rendered by the Attorney General or under his direction. Said officers, boards and commissions shall not act at the expense of the State as counsel in any action or proceedings in which the State is interested....."

We apply here the maxim Expressio Unius Est Exclusio Alterius (Expression of one thing is the exclusion of another), considering that the Legislature in this section has prescribed the limits of authorized provision of legal defense, by and at the expense of the State.

State employees not mentioned in this section may not be the recipients of its protections in suits brought against them, personally. In a suit wherein a State employee other than one named in this section is designated a party Defendant, it may be that in view of the nature of the suit the Attorney General may determine that the State is the real party in interest, and may on that basis respond to the Complaint; this is not, however, State representation of such State employees, personally.

The Commissioner of Mental Health and Corrections is without authority to authorize the expenditure of State funds in the defense of State employees, in either civil or criminal actions.

Art. V, Pt. 4, §4 of the Maine Constitution provides as follows:

"Section 4. No money shall be drawn from the treasury, except in consequence of appropriations or allocations

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authorized by law."

We find no authority under the appropriations measures currently in force nor under the general law relating to the operation of the Department of Mental Health and Corrections and its institutions, permitting the expenditure of State funds for the purpose suggested in the question. Absent legislative authority the Department of Mental Health and Corrections, as an arm of the Executive Branch of State Government, can not expend funds in the indemnification of State employees, in connection with their legal defense in personal law suits.

".....Constitutional provisions requiring the existence of appropriations made by law secure to the legislature this exclusive power of deciding how, when, and for what purposes the public funds shall be applied in carrying on the government, and are conservative, not restrictive or prohibitory of the legislative power over the public revenue...

".....The executive branch is not invested, in the absence of statutory or constitutional authorization, with the right to make or alter appropriations, or to exceed the limit of those made by the legislature; and, even when authorization exists, the executive is strictly confined, in the exercise of such power, to the authority given....."

81 C.J.S. States §161.

"An appropriation may be expended only in pursuance of legislative authority, and for the purpose or object specified. Accordingly, an appropriation to a department cannot be used for purposes and objects not within the authority of the department;"

81 C.J.S. States §167.

SEE: P&SL. 1971, Chapter 91.

It is true that legal defense is provided for some State employees through the expenditure of State funds, when acts and omissions of such employees give rise

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to civil actions with respect to which the State maintains in force, liability insurance coverage, e.g., the State's insurance on its Fleet of Vehicles and liability insurance coverage pertaining to the Maine State Police. It is pertinent and necessary to note that legal defense in such cases is provided as an incident to insurance coverage, which insurance coverage is authorized to be obtained under legislative authority. We cite Title 5, M.R.S.A. 1964, §1728 (P.L. 1971, c. 239, §2) relating to the Maine Insurance Advisory Board as the general legislative authority for the purchase of insurance coverage. It may be that under the last cited section, liability insurance coverage could be obtained and made applicable to employees in institutions under the Department of Mental Health and Corrections, providing coverage similar to that currently in force as to the Maine State Police. Under such insurance it also may be that legal fees would be paid by the insurer. Beyond this we find no authority for the provision of legal services and payment therefor; except, within the limits of Title 5, M.R.S.A. 1964, §191.

Title 5, M.R.S.A. 1964, §191 limits the authority of the Attorney General to perform or supervise the performance of legal defense services only in civil cases for obvious reasons, viz., the Attorney General can not, at the same time, represent the People in the prosecution of a criminal case and the individual Defendant, charged with crime.

The State guarantees an indigent accused person's constitutional right to representation by counsel in criminal cases under Title 15, M.R.S.A. 1964, §810, M.R.Cr.P. 44; D.C.Cr.P. 44 and Newell vs. State of Maine, et al 277 A.2d 731 (1971). No authority beyond this presently exists permitting State funded legal defense in criminal cases. The Department of Mental Health and Corrections is without authority to expend State money in the defense of State employees, charged with crime.

The provision of legal services and payment therefor, outside the purview of

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Title 5, M.R.S.A. 1964, §191, as to employees of the Department of Mental Health and Corrections and its institutions, apart from legal defense in civil cases provided for as an incident to insurance coverage, which may be obtainable under Title 5, M.R.S.A. 1964, §1728, is dependent upon legislative action. The Department of Mental Health and Corrections as a part of the Executive Branch of Government, absent legislative authority, can not expend State funds for legal fees for services rendered to State employees against whom civil or criminal action is brought.



Courtland D. Perry
Assistant Attorney General

Reviewed and cleared, Office of the Attorney General, 2 March 1972