

# MAINE STATE LEGISLATURE

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State Employees! Charges For Living in State Housing  
5 M.R.S.A. § 8-B

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DEPARTMENT OF THE ATTORNEY GENERAL



Memo From

WILLIAM J. KELLEHER  
ASSISTANT ATTORNEY GENERAL  
COUNSEL, MENTAL HEALTH & CORRECTIONS

A handwritten signature in black ink, appearing to read "William J. Kelleher".

Date: February 7, 1977

To: O.W. Seibert, State Budget Officer Dept: Finance & Administration

Subject: Rental and Other Housing Charges for State Housing at the Maine State Prison

This responds to your memorandum of January 28, 1977, seeking advice on the above subject in light of a letter received from the Maine State Employees Association and dated January 25, 1977. In that letter, the Maine State Employees Association makes a number of statements regarding current housing payment practices and the applicability of the law relating to housing payments, 5 M.R.S.A. § 8-B.

Section 8-B specifies the requirements for provision of State housing. It requires that "where State housing is provided, a rental charge be assessed and that the rental charge include, but not be limited to, the rates charged to the State, in operating such facility, for water, electricity, heat, telephone and furnishings and any other maintenance costs." The law then requires that:

"No charge shall be made for the provision of housing facilities when the state employee involved is required as a condition of his employment to reside in such housing facilities and when the state employee involved receives salary less than the salary received by an employee at pay range 21, merit service step E of the compensation plan for classified employees."

Thus, § 8-B basically requires that rental payments be assessed for all state employees residing in state-owned housing. However, it specifically exempts from the payment requirement state employees with a salary below salary range 21, step E., where those employees are required to live in state housing as a condition of their employment.

It should also be noted that 5 M.R.S.A. § 8-F provides for publication of rules and regulations to implement this section subject to the approval of the State Budget Officer. Attached is a copy of a formal opinion of this office dated June 23, 1972, subject "Institutional Housing Rate", for your and the Department of Mental Health and Correction's assistance in the promulgation of such rules.

The following advice is given regarding the letter from the Maine State Employees Association. In giving the advice, it is assumed that all employees in question are required to live in state housing as a condition of their employment. No part of this opinion applies to employees who are not required to live in state housing as a condition of their employment.

1. The MSEA letter asserts that present guidelines require that employees below range 23, step E pay certain utility charges and asks that the guidelines be revised to eliminate all sections which require utility and other costs to be charged to employees below range 23, step E. The references to range 23, step E in the MSEA letter are not in

accord with the provisions of 5 M.R.S.A. § 8-B. It should be understood that any change in this regard may be accomplished solely through legislative action.

Section 8-B is quite specific that costs to be considered as part of rental, where employees are charged rental, include water, electricity, heat, telephone and other undefined costs. Employees below range 21, step E, who are required to live in state housing are then exempted from paying rental charges, which rental charges include those costs. Accordingly, it would appear that, to the extent that Department of Mental Health and Corrections guidelines require payment for water, electricity, heat, and telephone services, these guidelines should be revised and the Department of Mental Health and Corrections should assume those costs for employees who are required to live in state housing and receive a salary less than range 21, step E. Additionally, there may be other costs beyond those of water, electricity, heat and telephone which are covered under the more general terms "furnishings" and "other maintenance costs" in the statute. The guidelines developed by the Department of Mental Health and Corrections with the approval of the State Budget Officer could address what additional costs might be covered by these terms. We have no additional data available in giving this advice to suggest that the State should assume costs for any other utility services than water, electricity, heat, and telephone for employees receiving salaries below the statutory limit.

2. The MSEA letter suggests that 5 M.R.S.A. § 8-B is unconstitutional in authorizing charging of employees - specifically those employees receiving salaries at or above range 23, step E - because it violates the Equal Protection and Due Process requirements of the State and Federal Constitutions.

We see no constitutional problem with the statute. The Equal Protection Clause of both the Federal and State Constitutions permits the Legislature to make reasonable distinctions in dealing with persons. Within this range, it is perfectly appropriate for the Legislature to set a certain salary level above which it will require state employees to assume their housing costs, even if the housing costs are a condition of employment. Further, it is no violation of the Due Process Clause to impose certain conditions of employment such as requiring that one live in certain housing. There is no prohibition on charging employees for such housing costs. In this connection, it should be noted that in some instances charging a specific sum for housing costs may be an advantage to employees as the charges assessed may be below the true value of the housing. However, as charges are assessed, the employees may be saved the necessity of declaring the true value of the housing as income earned and then paying federal and state income taxes on that declared true value.

Accordingly, the Department of Mental Health and Corrections regulations on state housing should be revised in accord

with § 8-B that "(n)o charge shall be made for the provision of housing facilities when the state employee involved is required as a condition of his employment to reside in such housing facilities and when the state employee involved receives a salary less than the salary received by an employee in pay range 21, merit service step E., of the compensation plan for classified employees."

Employees receiving a salary less than the salary received by an employee at pay range 21, merit service step E, who have been required as a condition of their employment to reside in state housing facilities and who have been assessed rental charges by the State or who have been otherwise required to pay for the costs of water, electricity, heat, telephone and furnishings which the State provides in such facilities, should be compensated for such expenditures.

In developing revisions of rules and regulations pursuant to § 8-F, the Department of Mental Health and Corrections may include provisions to assure that the use of water, electricity, heat, telephone and furnishings is not excessive and that irresponsible use of such services for which charges are paid by the State will be avoided.

It cannot be gainsaid that any habitable housing facility must be equipped with water, electricity, heat and be properly maintained, e.g. see 14 M.R.S.A. §6021. However,

telephone and furnishings are essentially personal benefits the provision of which is not required by § 8-B. The intent of Chapter 1 of Title 5 in which the subject provisions appear is set forth in § 8-A. Such intent is "to provide essential state services more efficiently and economically" (underlining mine). Should the State choose to equip housing facilities with furnishings and telephone services, § 8-B requires any rental charge include the costs for same. However, should the telephone be provided essentially for State business, § 8-B provides that no charge may be made.

While the Maine State Employees Association is attempting to redress perceived irregularities with regard to charges for state provided housing at the Maine State Prison, it should be understood that the letter from Ms. Mayo on behalf of unidentified state employees does not appear to be a "grievance" within the meaning of that term in 5 M.R.S.A. Chapter 63. The MSEA letter contains indications that the writer believes a grievance pursuant to Chapter 63 is being properly advanced. The provisions of that chapter contemplate individual employee grievances.

I trust this advice will prove helpful in administering the provisions of 5 M.R.S.A. Chapter 1 and in resolving differences between the State and its employees who are required to reside in state housing.

WJK/reb

# STATE OF MAINE

Inter-Departmental Memorandum Date 23 June 1972

William F. Kearns, Jr., Commissioner

Dept. Mental Health and Corrections

From William J. Kelleher, Ass't. Atty. Gen'l.

Dept. Mental Health and Corrections

Subject: Institutional Housing Rate

## SYLLABUS:

Chapter 588 of the Public Laws of 1971 requires that the Department of Mental Health and Corrections propose a plan which will arrive at the total operating cost of any housing facility it determines to be necessary for the operation of the Department. This cost is to be the rental charge made to any state employee occupying such facility. Any proposed plan is subject to the approval of the State Budget Officer but that officer lacks the authority to impose a plan of his own on the Department.

## FACTS:

Chapter 588, Public Laws of 1971, mandates to the Department of Mental Health and Corrections that it shall review all the housing provided to its State employees and determine if those facilities are necessary for the operation of the Department and if so, to determine a rental charge which shall cover the total operating cost of any such facility. The Department shall establish and promulgate such rules and regulations which are necessary to carry out the purposes of chapter 588, subject to the approval of the Budget Officer. The Commissioner has requested an opinion of the Attorney General's Office on several aspects of such proposed rules.

## QUESTIONS:

1. Is the method adopted by the Department of Mental Health and Corrections a proper method for determining charges under the act?
2. Is it legal under the statute to use a percentage of the insured valuation as a basis of the rate inasmuch as the statute explicitly states that the rental charge shall cover total operating costs of the facility?

3. Has the State Budget Officer authority to impose an alternate plan of his making if he disapproves of the plan of the Department?

ANSWERS:

1. See Reasoning.
2. No.
3. No.

REASON:

In response to Question 1, reference may be had to the text of Chapter 588, § 8-B which lists some of the operating costs which the legislature had in mind.

"These costs shall include, but not be limited to, rates charged to the State, in operating such facility, for water, electricity, heat, telephone, furnishings, and any other maintenance costs." The formula used by the Department of Mental Health and Corrections to arrive at a total operating cost of each facility does take into

account water, electricity, maintenance cost, building depreciation and fuel. Except for furnishings, the Department has at least covered all the costs which the

legislature enumerated. However, the statute specifically states that the costs

shall include those enumerated but not be limited to them. Chapter 588, requires

that the total operating cost of each facility be recouped. Consequently, another

cost, such as the insurance cost of each facility, may properly be an operational

cost. However, this is obviously an accounting problem and not a legal determination.

Construing the language of § 8-B reasonably, it is considered that the legislature

intended that, wherever possible, actual costs should be the basis for a determination

of rental charges. However, it may be impossible, practically, to make such determi-

nations in every instance, averaging then being the only practical devise for reaching

a cost determination. The method by which the Department of Mental Health and

Corrections reaches the total operating cost of each facility is not properly a matter

to which this Department should address itself.

In response to Question 2, using a percentage of the insured valuation of each piece of property as a basis of the rate to be charged, does not seem proper.

However, using the actual cost of the insurance as one of the figures which is to be added into the other costs of maintaining each facility, does seem proper. By the enumeration of Section 8-B, the legislature specifically mandates that each of the listed costs shall be covered. Just using a percentage of the insured valuation as the basis of the rate to be charged, would be in contravention of the statute. The legislature has spoken on this point and each one of those charges must be used in computing the total operating cost of any such facility. It is true however, that insurance is a cost of operating a facility and the cost of that insurance may properly be included in the makeup of the total operating cost.

Chapter 588, Section 8-F, answers Question 3. It states, "Each department shall establish and promulgate, subject to the approval of the Budget Officer, rules and regulations to carry out the purposes of Sections 8-B to 8-C." Section 8-B mandates that all housing facilities of each state department shall be reviewed by the state department involved and if those facilities are necessary for the operation of the department, a rental charge shall be made to cover the total operating cost of any such facility. While that section does not specifically state that the state department involved shall determine the total operating cost of any such facility, Section 8-F does mandate that that department shall have the responsibility of establishing and promulgating the rules and regulations necessary to carry out Section 8-B. In addition, the last sentence of Section 8-B states, "Any facility used on a seasonal basis shall be partially exempt from rental charges, at the discretion of the department." This sentence removes any doubt about who has the determining responsibility which may exist in this matter. Clearly, the Department of Mental Health and Corrections has the responsibility to determine the charge which will cover the total operating cost of any of its housing facilities. Section 8-F states that any rules and regulations promulgated by each department are subject to the approval of the Budget Officer. The meaning

of the word "approval" must be discussed.

In Gustafson v. Wethersfield Tp. High School Dist. 191, 49 N.E. 2d 311, the court stated,

"Generally when the "approval" of a distinct officer or body of officers is made necessary to validate, the act of another, the legislature intends that such officer or Board should be vested with discretion to sanction officially, or disapprove the acts submitted to him or them."

See also Harris v. Board of Education of Vance County, 4 S. E. 2d 331. These cases are helpful in determining just what the legislature meant by "approval" in Section 8-F. There are many cases on what the meaning of that word is in contexts like the one before us here. Baynes v. Bank of Caruthersville, Mo. App., 118 S.W. 2d 1051, serves to emphasize the above cases.

The words "approved" and "approval" when used in a statute requiring that a certain action meet with some designated approval, may merely contemplate the doing of a purely ministerial act.

See also Powers v. Isley, 183 P. 2d 880. The role of the Budget Officer under Section 8-F then, is to sanction or disapprove the proposed method of determining the total operating cost as drawn up by the Department of Mental Health and Corrections. Obviously the Budget Officer may make suggestions as to a method which will meet with his approval. Chapter 588 does require that any plan proposed by the Department be approved by the Budget Officer before it can be effective. It is equally clear that the Budget Officer has no authority to impose his own plan if he disapproves of a plan proposed by the Department of Mental Health and Corrections.

  
William J. Kelleher  
Assistant Attorney General

WJK/vv