

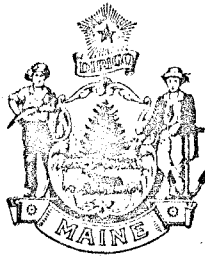
# MAINE STATE LEGISLATURE

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March 8, 1979

TO: James Datsis, Division of Health Engineering, Department of  
Human Services

FROM: Sarah L. Downs, Assistant Attorney General

SUBJECT: Legality of a sanitary inspection of an establishment  
not subject to licensure under 22 M.R.S.A. §2491 et seq.

The Division of Health Engineering of the Department of Human Services seeks advice regarding its authority to conduct a sanitary inspection of the food preparation and service facilities of a non-profit organization which prepares and serves food on twelve different occasions within a year but which is not subject to the licensure requirements of 22 M.R.S.A. §2491 et seq.

ISSUE:

May the Department conduct a sanitary inspection of food preparation and service facilities of an establishment not subject to licensure pursuant to 22 M.R.S.A. §2491 et seq.?

CONCLUSION:

The Department of Human Services may not conduct an inspection of the food preparation and service facilities of an establishment not subject to licensure pursuant to 22 M.R.S.A. §2491 et seq. absent a health hazard for which there is other statutory authority to inspect.

REASONING:

At the outset, it should be noted that the Department has represented that a non-profit organization preparing and serving food on twelve different occasions within a year is exempt from licensing under 22 M.R.S.A. §2501. In fact, §2501 only exempts non-profit organizations from Department rules and regulations relating to dispensing foods and non-alcoholic beverages. 22 M.R.S.A. §2492 governs which entities are required to be licensed.

22 M.R.S.A. §2497 authorizes the Department of Human Services to enter and inspect any establishment licensed pursuant to 22 M.R.S.A. §2491 et seq. (hereinafter referred to as chapter 562). The purpose of such inspection is to determine the state of compliance with chapter 562 and with any regulations and rules in force pursuant thereto.

Moreover, there exists a right of entry and inspection if the Department has reason to believe that a facility is being operated or maintained without a license.

It is axiomatic that investigative powers of an administrative agency are not unbounded, but are derived from, and limited by, authorizing statutes. See, U.S. v. Morton Salt Co., 338 U.S. 632 (1950); Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946); NLRB v. United Aircraft Corp., 200 F. Supp. 48 (D.C. Conn. 1961), aff'd, 300 F.2d 442 (2nd Cir. 1962); Temporary State Comm'n on Living Costs, etc. v. Bergman, 353 N.Y.S.2d 977 (1975). Therefore, in regard to an establishment not subject to licensing pursuant to chapter 562, §2497 provides no authority for the Department to conduct an inspection.

There are, of course, situations in which other statutory authority to inspect could be invoked notwithstanding the unlicensed status of an establishment. For instance, 22 M.R.S.A. §1013 gives the Department authority to conduct inspections to determine the actual or threatened presence of a communicable disease. At a local level, pursuant to 22 M.R.S.A. §454, a local health officer has the authority to enter upon or within any premises where nuisances or conditions dangerous to life are known or believed to exist.

  
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SLD:bw