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ATTORNEY GENERAL OPINION NO. 88- 57

The Honorable Kerry Patrick
State Representative, Twenty-Eighth District
3420 W. 122 Street
Leawood, Kansas 66209

Re: State Departments; Public Officers and Employees--
Department of Corrections; Miscellaneous
Provisions--Ellsworth Correctional Work Facility

Synopsis: The secretary of corrections may not expend money appropriated pursuant to L. 1987, ch. 335, §8 to lease a facility having a structural capacity of less than 352 inmates. The secretary is not precluded, however, from making a policy determination to use the facility to house less than its maximum capacity. Such a policy decision would not require approval of the legislature under the current statutes, nor would such a decision require approval of the Ellsworth public building commission or the holders of the Ellsworth Public Building Commission Revenue Bonds, Series 1986. Cited herein: K.S.A. 75-5206; K.S.A. 1987 Supp. 75-52,124; L. 1987, ch. 335, §8; L. 1986, ch. 33, §25.

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Dear Representative Patrick:

You have requested our opinion regarding the legal authority of the secretary of corrections to reduce the number of available inmate beds at the Ellsworth correctional work facility.

L. 1987, ch. 335, §8, an appropriations bill amending certain appropriations provisions contained in L. 1986, ch. 33, §25, provides in part:

DEPARTMENT OF CORRECTIONS

"(a) There is appropriated for the above agency from the state general fund for [fiscal year 1987], the following:

. . . .

"Lease-purchase payment to the Ellsworth public building commission for the Ellsworth correctional work facility at Ellsworth, Kansas 1,200,000

Provided, That expenditures from this account shall be made in accordance with a lease-purchase agreement which is hereby authorized to be entered into by the secretary of corrections and the Ellsworth public building commission to plan, construct and equip the Ellsworth correctional work facility and all ancillary support facilities: Provided, however, That such agreement shall provide that the Ellsworth correctional work facility and all ancillary support facilities shall contain not less than 220 inmate beds have a maximum capacity of not less than 352 inmates and shall be constructed and equipped at a total cost of not more than \$9,735,000 \$10,600,000: Provided further, That such agreement shall provide for payments thereunder over a period of not more than 15 16 years: And provided further, That no expenditures shall be made from this account unless the preliminary and final plans for the Ellsworth correctional work facility and all ancillary support facilities have been presented to the joint committee on state building construction. . . ."

The power to appropriate the money of the state is a legislative power. State, ex rel., v. Fadely, 180 Kan.

652, 660 (1957). Except as restricted by the constitution, "the legislature has the exclusive power to direct how, when and for what purpose the public funds shall be applied in carrying out the objects of state government." State, ex rel., v. Bennett, 222 Kan. 12, 18, 19 (1977). It has been held that the ability to make specific appropriations includes the ability to direct that moneys be spent for a specific purpose and no other. Fadley, 180 Kan. at 661. Thus, it is within the legislature's authority to condition the ability to draw and expend state moneys on compliance with certain specifications.

L. 1987, ch. 335, §8 has placed such a condition on the appropriation for the Ellsworth correctional work facility. The second proviso states that the lease-purchase agreement between the secretary of corrections and the Ellsworth public building commission to plan, construct and equip the facility must provide that the facility "shall have a maximum capacity of not less than 352 inmates. . . ." In our opinion, this language prevents the secretary of corrections from using this appropriation to lease a facility having less than a maximum capacity of 352 inmates. It speaks to the physical capacity of the structure to accommodate a maximum of 352 inmates; however, rather than the actual number of inmates required to be housed in the facility at any given time. (Compare language stricken by amendment which required the facility to "contain not less than 220 inmate beds.") Thus, as long as the physical structure of the facility is such that 352 inmates can be accommodated therein, the language of the bill does not preclude the secretary of corrections from making a policy decision to house less than capacity at that facility. K.S.A. 1987 Supp. 75-52,124 provides that the secretary of corrections "shall have general management and control" of the Ellsworth correctional work facility, "the same as other correctional institutions under the secretary's control and jurisdiction." Pursuant to K.S.A. 75-5206, the secretary has the authority "to order the housing and confinement of any person sentenced to his or her custody to any institution or facility . . . placed under the secretary's supervision and management. . . ." We are aware of no law requiring the secretary to fill a facility to its maximum capacity if this is deemed inappropriate by the secretary. Apparently the secretary has determined that the operational capacity of Ellsworth correctional work facility is 228 inmates, and that it would be undesirable to fill it to its maximum capacity. (For further discussion on the distinction between maximum physical capacity and operational capacity, see 1987 Department of Corrections Annual Capacity Report.)

We note that L. 1987, ch. 335, §8 also raised the dollar figure allowed for the total cost of the project. It is our understanding that the additional cost contemplated was to change the facility from a minimum security to a medium-minimum security facility and not to fund a physical expansion of its housing capacity. It is also our understanding that the current building plans meet the maximum capacity requirement of L. 1987, ch. 335, §8.

You also question whether the secretary of corrections may modify the plans for the building of the Ellsworth correctional work facility absent consent of the legislature, the City of Ellsworth and the holders of the Ellsworth Public Building Revenue Bonds, Series 1986, issued for purposes of acquiring, constructing and equipping the facility. Assuming the physical structure of the facility remains such that it can accommodate 352 inmates, legislative approval is not necessary to change the building plans. L. 1986, ch. 335, §8 provides that "no expenditures shall be made from this account unless the preliminary and final plans for the Ellsworth correctional work facility and all ancillary support facilities have been presented to the joint committee on state building construction." (Emphasis added.) This language does not require approval of the joint committee on state building construction. Further, the proviso requiring approval of the state finance council prior to making expenditures was stricken from the appropriations bill in the 1987 amendments.

The City of Ellsworth is not a party to the lease-purchase agreement, so the city's approval of any building plan changes would not appear to be necessary. Further, approval of the Ellsworth public building commission would not appear necessary. Section 12.1 of the lease-purchase agreement provides in part:

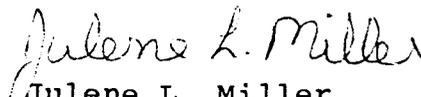
"Tenant shall have and is hereby given the right, at its sole cost and expense, to make such additions, changes and alterations in and to any part of the Project as Tenant from time to time may deem necessary or advisable; provided, however, Tenant shall not make any major addition, change or alteration which will adversely affect the intended use or structural strength of any part of the Project."

Thus, provided the building plan alterations do not make any major change which would adversely affect the "intended use or structural strength" of the facility, the secretary of corrections is free, under the terms of the agreement, to make such alterations. In any event, the decision to place fewer inmates in the facility than its maximum capacity will accommodate would not appear to require an alteration of the building plans or an amendment to the lease-purchase agreement. The project covered by the lease is described in a document marked "Schedule I," which is referenced in the lease recitals, page 1. Subsection (b) of Schedule I describes the facility as consisting of two housing units of two pods each. Each pod is to house 72 inmates. Neither the Schedule nor the lease state the facility's maximum capacity. It is our understanding that the description given in Schedule I does not contemplate double-celling. If two inmates were to be placed in one cell, obviously the facility will house a maximum of at least 352 inmates. Thus, neither the building plans nor the lease would need to be altered to reflect the secretary's decision to place one rather than two inmates per cell. By the same token, the bondholders would not need to approve such a decision which does not materially alter the terms of the bond issue or their security.

In conclusion, the secretary of corrections may not expend money appropriated pursuant to L. 1987, ch. 335, §8 to lease a facility having a structural capacity of less than 352 inmates. The secretary is not precluded, however, from making a policy determination to use the facility to house less than its maximum capacity. Such a policy decision would not require approval of the legislature under the current statutes, nor would such a decision require approval of the Ellsworth public building commission or the holders of the Ellsworth Public Building Commission Revenue Bonds, Series 1986.

Very truly yours,


ROBERT T. STEPHAN
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