

12-1-2013

Report of the Stakeholder Working Group to Review the Division for the Blind and Visually Impaired Business Enterprise Program

Maine Department of Labor

Maine Bureau of Rehabilitation Services

Stakeholder Working Group to Review the Division for the Blind and Visually Impaired Business
Enterprise Program

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**Report of the Stakeholder Working Group
to Review the Division for the Blind and Visually
Impaired Business Enterprise Program**

Transmitted to:

Joint Standing Committee on Appropriations and Financial Affairs

By:

Working Group to Review the Business Enterprise Program
of the Division for the Blind and Visually Impaired

December 1, 2013

As Required by Resolve Chapter 368

“Resolve, For the Director of the Division for the Blind and Visually Impaired within the Department of Labor shall convene a working group to review the Department of Labor's business enterprise program and invite interested parties including representatives of the Department of Administrative and Financial Services, associations providing advocacy and other services to persons who are blind or visually impaired, cafeteria operators and vending operations representatives to participate in the review.”

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Compiled by:
John Mc Mahon, Director
Division for the Blind and Visually Impaired

Introduction

At the conclusion of the first session of the 126th Legislature, PL 2013, Chapter 368 “Resolve, that the Director of the Division for the Blind and Visually Impaired within the Department of Labor shall convene a working group to review the Department of Labor's Business Enterprise Program” was passed into law on June 26, 2013. This resolve required the Director of the Department of Labor's Division for the Blind and Visually Impaired (DBVI) to establish a work group to review its Business Enterprise Program (BEP). The review of the Business Enterprise Program must include, but is not limited to, the charging of utility costs incurred during the operation of a cafeteria by a business enterprise program vendor. The working group shall also include, as part of its review, research as to who assumes responsibility for utility costs under similar programs in other states and in other cafeteria arrangements outside of the Department of Labor's business enterprise program, as well as report to the Joint Standing Committee on Appropriations and Financial Affairs findings and recommendations and any necessary implementing legislation. The DBVI Director established the required working group and allocated staff resources to convene, facilitate and participate in its deliberations.

The Resolve designated membership to include representatives from the Department of Labor (DOL), the Department of Administrative and Financial Services (DAFS), associations providing advocacy and other services to persons who are blind or visually impaired, and cafeteria operators and vending operations representatives. The DBVI Director worked to ensure that diverse stakeholder representation and high participation of consumers who are blind or visually impaired was incorporated into the membership of this work group. The work group was comprised of the following 11 members, including those stakeholder entities specified in the resolve.

John Mc Mahon, Director of DBVI, Chair of Resolve Work Group

Jim McManus, DBVI, BEP Administrator

Brenda Drummond, DBVI Rehabilitation Consultant

Jim Phipps, CEO/President of The Iris Network

Brad Strause, Chair of the State Rehabilitation Council for DBVI

Mel Clarrage, American Council of the Blind of Maine

Lynn Merrill, Pine Tree Guide Dog Users

Bill Leet, Director of Leased Space, Bureau of General Services, DAFS

Jack Beveridge, Chair of the BEP Blind Managers

Richard Desjardins, BEP Manager & Operator of the BEP location at the Cross State Office Building (Cross Café)

Susan Wasserott, Director of Legislative Affairs, Department of Labor

*Ed Dahl, Director Bureau of General Services, DAFS (attended the last meeting of this group as that is when he was hired into this position)

*Jennifer Smith, Director of Legislative Affairs and Communications, DAFS (was unable to attend)

*NOTE: The National Federation of the Blind of Maine was also invited to participate in this work group but was unable to send a representative.

The group met on four occasions between August 5 and October 25, 2013, to discuss and review the DBVI, BEP and the state and federal statutes that created this program. In addition, the work group explored how the charging of utilities are handled by other states and private food service industry who operate in state facilities in Maine, and identified various aspects of the BEP specifically related to maximum effectiveness of this program. The dialog from these meetings, as well as a list of identified needs, is the content of this report.

Background

The Division for the Blind and Visually Impaired is a comprehensive blindness agency that administers rehabilitation, education, and vocational programs for any resident of Maine who is blind or has a severe visual impairment significant enough to affect their daily functioning. For us to review DBVI's Business Enterprise Program first requires a basic understanding of the impact that blindness can have on the individual and the uniqueness of the needs associated with that impact, as well as the size of the issue.

Blindness education and/or rehabilitation is broader in scope than are general education or practices and the medical model of rehabilitation; they require very specialized services in order to address the specific communication, mobility, and vocational needs unique to blindness or visual impairment. This set of specialized skills is similar across all ages and across all DBVI programs. In other words, the alternative skills one needs to access print when he or she cannot read it visually, are much the same for any person who is blind, whether they are a student in school, an adult looking to obtain or maintain a job, or an older person who desires to remain independent in his or her home.

This basic premise also holds true for things like learning adaptations specific to blindness and severe vision impairment to conduct work tasks related to successfully obtaining or maintaining employment, traveling safely within their environment, being able to store and access information, being able to write the printed word or numbers in an accessible way, and being able to effectively accomplish ordinary day-to-day tasks. Each specialized service we provide under this philosophical umbrella is linked with the others, with the overriding goal of providing to the person the web of tools they need to take or regain more independent control of their lives.

Without providing specialized training to address the type of issues noted above, people who are blind are unlikely to experience the same opportunity for employment or independence as their sighted peers. This lack of opportunities is further influenced by the combination of this uniqueness of needs, the rural nature of our state and its large geographic size.

Furthermore, conventional teaching and instructional methods (i.e., "read this," "watch this video," "watch me do this") are ineffective in addressing the unique needs that blindness or severe vision impairment presents. Consequently, very specialized

methods of instruction are needed to teach the alternative skills needed by people who are blind. Therefore, this very unique perspective and specially trained instructional staff, as well as highly specialized skills and methods of teaching are simultaneously needed.

Current national data on the employment rate of individuals with visual disabilities in the United States is from the 2011 *American Community Survey*. This data indicate that nearly 37 percent of people with self-reported visual disabilities are working, with only approximately 24 percent working full-time/full-year. The Business Enterprise Program on the federal and state levels was created to provide an opportunity for people who are legally blind to obtain meaningful employment.

Achieving this high level of societal inclusion and fostering a cultural belief in the capability of persons who are blind to live their lives at the highest level of independence is one of the overriding guiding principles for any blindness system. This is essential because of the dominance of the stereotypes surrounding blindness, which is driven by the fear demonstrated in a recent national poll conducted by the American Foundation for the Blind, which indicates blindness being surpassed by only cancer and AIDS in terms of the amount of fear each condition produced. In Maine, this cultural belief in the capability of people who are blind is achieved by the DOL, Bureau of Rehabilitation Services, Division for the Blind and Visually Impaired through administration of its four major programs: Business Enterprise Program, Education of Blind Children, Vocational Rehabilitation, and Independent Living for Older Blind Adults.

Historical Overview

Although services for persons who were blind in Maine began around 1905, formalized state sponsored programs began in 1941 with the creation by statute of a Division for the Blind within the Department of Social Services. This occurred when the blindness community demonstrated to the legislature two important facts. The first was that the existing state vocational rehabilitation program was not serving any blind people, and the second was that people who are blind required very specialized services in order to address specific communication, mobility, and vocational needs unique to blindness or visual impairment. One component of the formalized state sponsored programs for people who are blind that were created in state statute in 1941 was the Business Enterprise Program.

Operation of BEP facilities on state and municipal property in the State of Maine is provided by state legislation (Title 26 MRSA Sections 1418 F-M), which parallels similar federal legislation (Randolph-Sheppard Act). The BEP was created as an entrepreneurial program that relies on a model of apprenticeship whereby legally blind individuals are given the priority to operate “vending facilities” on federal property. The type of products served may be very simple: coffee, snacks, newspapers and sundries, or it can be a full menu offered in a cafeteria/café.

BEP operations in Maine have changed substantially since the program’s beginning. They now operate three types of facilities: vending machine, snack bars, and

full-service cafes. In addition, operations have grown due to legislative amendments, program initiatives, competition, and customer demand for the highest level of quality, service and cleanliness.

The BEP is constantly reviewing new products and technology to provide additional opportunities for individuals who are legally blind. Currently the BEP is piloting a new program of offering unstaffed convenience stores at five locations throughout Maine. The Maine BEP is the first to open and operate this concept north of Boston. The initial metrics are indicating this concept will be a welcome addition to the services provided by the BEP.

The BEP, through its self-employed managers, currently provides employment for over 59 additional persons, many of them people with disabilities or veterans. In addition, the Business Enterprise Program is now big business nationally. Today there are more than 2,319 blind business managers nationwide in 49 states and three U.S. territories.

It is important to note that the BEP operates with no General Fund allotment. The BEP Administrator position is funded with federal dollars through the Rehabilitation Services Administration (RSA). All other activities conducted by the BEP are funded through revenues generated by the program and self-assessed contributions by the blind managers.

Also, the BEP reflects the spirit and intent of the new Employment First Maine Act especially regarding customized employment for people with disabilities. The BEP is a vivid, successful example of how well customized employment can work and serves as an outstanding model.

Randolph-Sheppard Act

The BEP was developed following the enactment of the *Randolph-Sheppard Act* of 1936, 20 USC 107 et. seq., as amended in 1954 and 1974. The 1936 act was enacted to provide blind persons with remunerative employment, enlarge their economic opportunities, and encourage their self-support through the operation of vending facilities in federal buildings. The Department of Education prescribes regulations, as set forth in 34 CFR, Part 395, implementing the Act as amended (See 41 CFR 101-20.2). Randolph-Sheppard vending facilities can be established in leased space and under Cooperative Use Space in General Services Administration (GSA) locations.

Under the Randolph-Sheppard Program, state rehabilitation agencies recruit, train, license and place individuals who are blind as operators of vending facilities located on federal and other properties. In FY 2010, a total of 2,319 blind vendors operated 3,031 vending facilities located on federal and other property. The program generated \$792.6 million, and the average vendor earnings amounted to \$56,168. The managers hired over 12,094 employees, with 400 of these being blind employees of the blind managers, and over 1322 employees identified with other disabilities.

Doctrine of Consistency

As a result of the Maine BEP being a parallel program to the federal Randolph-Sheppard program, it implies a doctrine of consistency between the federal and state programs when applying rules and regulations, including those related to occupancy charges to blind vendors. Therefore, “rent” and fees are prohibited at the federal level, and nationally there is no comprehensive practice of charging rent and utilities at the state level. Thus the rules and regulations are being applied consistently between the federal program and its parallel state programs (often called mini Randolph-Sheppard programs). The proposal to charge rent and utilities at the state level is counter intuitive to the goals of the Randolph-Sheppard Act. According to the presentation to the Resolve Work Group by Susan Gashel, former Attorney General for the State of Hawaii and the president of the National Blind Merchants Association, placing such a limitation on a site is generally understood to mean the collection of a commission or rent or utilities.

According to Dan Frye, the Randolph-Sheppard liaison from our federal partners at RSA, “Removal of the general prohibition on charging rent from your state act, without replacing it with any alternative language, seems unwise and promises to create ambiguity that will ultimately have to be resolved via a judicial proceeding, if the state ever tries to exercise a rental charge on state property, and if such charge is challenged by a blind manager. Legislative silence on this matter will make it difficult to know what was intended. Principles of statutory interpretation could not be construed to suggest that silence on this matter means that rents are permitted. I know of no other state that charges rent to its blind managers under state Randolph-Sheppard laws, and this is a practice that is out-of-step with creating a priority or preference for blind-operated businesses. The absence of a rental practice in states around the nation, and the prohibition of such a practice at the Federal level, would, I’d think, be to the advantage of the aggrieved blind manager if this question were ever reviewed in Maine.”

Mr. Frye further remarked that “charging rent on Federal property, under the Randolph-Sheppard Act, is understood to be definitely prohibited. Adoption of a contradictory policy at the state level is, at its best, inconsistent with the spirit and intent of the Randolph-Sheppard Act and program. Where blind managers in the Maine program earn substantially less than the national average for blind managers across the country, the prospect of charging rent on state properties promises only to negatively impact these earnings numbers and to work against the continued, successful employment of qualified blind and vision-impaired operators.”

Randolph-Sheppard Act Amendments of 1974

Susan Gaschel, of the National Blind Merchants Association, provided the work group with an overview of the 1974 amendments to the Randolph-Sheppard Act. These amendments changed the preference given to blind vendors to that of priority status. The highlights she provided contain examples of why the language was changed, and were taken directly from the text of the Summary of S. 2581 as it was printed in the Federal Register:

“Added to section 3 of the bill a requirement that to the maximum extent feasible, blind vending facilities should be placed in areas where' employees work. The Committee also provided in section 3 that a determination by the Secretary of Health, Education, and Welfare with respect to a request for limitation on the placement or operation of a blind vending facility based on adversity to the interests of the United States shall be binding, on any department, agency, in instrumentality affected by the determination.

The bill requires that a priority be given to the establishment of blind operated vending facilities on Federal property, and that to the maximum extent, such facilities be placed on all such property. Regulations governing the placement of facilities and the operation of the program are the responsibility of the Secretary of Health, Education, and Welfare. Program operation is to be principally the duty of the Commissioner of the Rehabilitation Services Administration. Regulations of the Secretary or the Commissioner additionally are to include provisions which require uniform application of the Act by State agencies; ceilings, where appropriate, on vending machine income for blind licensees; development of training and retraining programs for blind individuals; and determination of the purposes for which any vending machine income on Federal property remaining after assignment to a blind vendor or State licensing agency can be used. The Secretary is to prescribe such other regulations as are necessary to carry out the provisions of the Act.

"Sec. 6. Preference for the installation and/or operation of vending machines within Federal buildings shall be given blind operators of vending stands within same Federal buildings." Earlier in the debate, Senator Gore had engaged in a colloquy on the matter of preference in the operation of vending machines with Senator Purtell, the floor manager of the bill. Senator Gore pointed out that "even in cases in which blind persons have been given the privilege, of operating vending stands in certain Federal buildings' employees in such buildings have nevertheless proceeded to install competing coin-operated vending machines . . .," expressing the belief that such actions were not fair or commensurate with the program of rehabilitation. Senator Monroney pointed out that it was the Post Office Department's policy not to allow the installation of vending machines on its property.

The recorded vote on the rehabilitation amendments (S. 2759) was 82 to 0.

The findings of S. 2581 (section 2) conveys, in general, what is wrong with the current Randolph-Sheppard program, and how, in the Committee's view, the problems can be eliminated or ameliorated. The program has not developed as it should have, due to the factors outlined in the section of this report entitled "Need for Legislation." Removal of these inhibiting factors can result in a doubling of the size of the program within five years. The findings section indicates that a number of legislative actions should be taken to permit this objective to be

realized, including the establishment of uniform treatment of blind vendors by all Federal agencies ; establishment of uniform guidelines for State operation of the program; establishment of adequate administrative and judicial remedies for blind licensees; and creation of stronger administration, oversight, and coordination functions -within the Federal government to insure full compliance with law and regulation.

In the view of the Committee, S. 2581 as reported does create all the important safeguards, program direction, and uniformity necessary to permit the Randolph-Sheppard blind vendor program to flourish and expand.

The Committee regards the Randolph-Sheppard Act as one of the most practical and effective employment opportunity programs ever enacted by Congress. Blind vendors return in taxes and economic activity far in excess of the initial small investment required establishing their business operation & the ramifications of this program for the blind vendor; his family, his community, and the nation go far beyond the payment of taxes, however. The dignity and pride engendered by the development of skills and entrepreneurial ability represent the finest example of a healthy, vigorous, compassionate society combined with the true expression of an American ideal—self-respect, independence, and meaningful contribution to that society. The alternative faced by many blind people would also, without the existence of this program, be the fate of those who are vendors under the Randolph-Sheppard Act—a marginal existence on welfare, a life without hope or joy, a burdensome, stultifying dependence.

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Title 26 MRSA §1418, F-M

Title 26 Section 1418 is the Enabling Act for the Division for the Blind and Visually Impaired. subsections F through M of 1418 are those sections that speak specifically to the Business Enterprise Program. The role of the State Licensing Authority (SLA) to grant rights to operators, and for managing leases is clarified in these subsections. DBVI is the SLA for the State of Maine, and as such, agreements are between DBVI-BEP and a facility.

Although the entire text of subsections 1418 F-M was read to the group, subsection K is the portion of the statute that garnered most of the attention and

discussion, and then only as it applies to the BEP location in the Cross State Office Building (CSOB). This is discussed in more detail in a subsequent section of this report.

Section 1418-K, Fees, reads as follows:

1. Fees prohibited generally. Except as provided in subsection 2, a rental fee may not be required or received for the granting of authority to the division to operate a vending facility.

2. Fees authorized; limitation. A rental fee or other fee may be charged to the operator only if the vending facility is located on commercial municipal property, including a public airport, where the following conditions are met:

A. The vending facility generates revenue primarily from the general public at large rather than from public employees;

B. The vending facility occupies space for which there are other competing retail commercial uses and other retail users are, in fact, renting nearby public space on the property; and

C. The public owner depends on generating revenue from the space occupied by the vending facility.

Any rent or other fee charged to the operator must be less than what would otherwise be charged to a competing commercial tenant and must be pursuant to a written agreement. The terms of the agreement must adequately account for the value of investments made by the division to create or maintain the vending facility.

3. Application. This section applies to the rental of vending facilities and the renewal of any rental agreement after the effective date of this section.

Although the above text hasn't been revised since 1997, Section 1418-K has been in effect in some form since before 1971. The majority of the discussion of the Resolve Work Group surrounded 1418-K, subsection 2-A with BGS's perception being that the majority of the Cross Café's business is generated from the general public, while the DBVI BEP program perspective, as well as that of the representatives of various blindness organizations is that the facility does not generate revenue primarily from the public at large. On the contrary, the Cross Café is there primarily for public employees who work in the CSOB and State Capital. The general public is not there as the "public at large;" rather they are there because they have some business at the capital that is directly connected to the tenants of the buildings. These differing perspectives are discussed in more detail in a subsequent section of this report.

Current BEP locations in Maine

The BEP Managers currently operate 20 facilities: three Cafés, five vending, and eleven snack bars. In addition, the BEP has roadside vending facilities located in rest areas on the Interstate in five locations north and south of the Maine Turnpike portion of the Interstate. These BEP locations serve the Department of Defense, U.S. Postal Service, Colleges and State Parks as well as Federal and State government employees from Kittery to Limestone. Specific BEP locations include:

State locations;

Camp Keyes – snack bar serving approximately 200;
Cross Cafe – cafeteria serving approximately 750;
Dept. of Environmental Protection – snack bar serving approximately 290;
DHHS Augusta – snack bar serving approximately 256;
DHHS Bangor – self-serve convenience set-up serving approximately 270;
DHHS Portland – self-serve convenience set-up serving approximately 280;
DOT Augusta – snack bar serving approximately 590;
Dorthea Dix Psychiatric Center Bangor - self-serve convenience set-up serving approximately 350;
BMV Augusta – snack bar serving approximately 250;
Maine Revenue Service, OIT Augusta - self-serve convenience set-up serving approximately 700;
Riverview Psychiatric Hospital Augusta - self-serve convenience set-up serving approximately 370, and
State Capital – snack bar serving approximately 200.

Federal locations;

Homeland Security, Calais – Self-serve Convenience serving approximately 90;
Portsmouth Naval Shipyard, Kittery – cafeteria serving approximately 700 federal employees, 4K civilian workers, and 900 military staff;
DFAS federal facility in Limestone – cafeteria serving approximately 600 (may be changing to self-serve convenience or vending machine set-up due to reduction of on-site employees);
Eastern Maine Postal Processing Facility – snack bar serving approximately 180, and
Scarborough Postal Processing Facility – cafeteria serving approximately 600.

BEP also has seasonal locations (Memorial to Labor Day) at Sebago Lake State Park, Reid State Park, and Crescent Beach State Park. In addition, BEP has vending machines at Fort Knox, Bangor CareerCenter, EMCC, and Maine Maritime Academy.

In addition to almost 7,000 people a day being served at the above BEP locations (not including seasonal sites), BEP Managers reported employing 59 additional workers at their various locations, with 19 percent of these employees being veterans or people with disclosed disabilities.

In federal fiscal year 2013, the BEP purchased \$1,242,204 worth of Maine products, paid over \$160,000 in state sales tax, and had gross sales of \$2,339,309 (which is an 8.9 percent increase from the previous year).

Resolve Findings

Although the Resolve Work Group identified many issues across the DBVI Business Enterprise Program as being pertinent, much of the focus centered on the BEP location in the CSOB. The following is a summary of the discussion held around specific issues.

How Do Other States Handle the Issue of Charging Utilities

The work group conducted an examination of how other states handle the issue of charging utilities of their BEP locations. This was achieved by having the BEP Administrator poll the other state's BEP administrators with this query. It was found that there are 51 state versions of a BEP. This includes Washington D.C. and Puerto Rico (Wyoming is the only state that does not have a Randolph-Sheppard program). Of these 51 programs, 45 responded to our request for information (a response rate of 87 percent). Of the 45 responses, only four responded that they pay some type of utility cost, which is only approximately eight percent of those who reported. Nevada pays partially for utilities, but has not responded with a clarification on what "partial" means. Ohio pays utility costs but did not specify what constituted these utility costs. Vermont pays utility costs, but caps it not to exceed \$20,000 per year combined for all state locations. Washington D.C. pays for utilities in one food court location, which sounds like it is similar to our statute (1418-K, pays utility costs when the location depends primarily upon the general public) and is what we do at our seasonal locations at state parks, as well as rest areas along our interstate.

How Does Private Industry Handle the Issue of Charging Utilities in State Facilities

The BEP Administrator contacted representatives of a number of large and small food service operators within the private sector in Maine. Sodexo Systems and Canteen Services are large companies that operate food service locations across the country. Canteen Services reports having 20 locations within Maine where they do not pay occupancy costs, and stated they simply would not do so in any location where they provide food service. A specific example from Sodexo is the food service operation at the Maine Maritime Academy, where they do not pay for utilities. Yet another example of a state entity assuming occupancy costs for food service delivery comes from a recent Request For Proposal for food service at Northern Maine Community College, where the college covers utilities, rent, and equipment replacement and repair. All of these suggest that BEP is following the industry norm in not paying for occupancy costs (defined as utilities and equipment replacement and repair).

History of Business Enterprise Program in the Cross Office Building

In 1999, Donovan and Donovan, the prior operator of food service in the CSOB, discontinued providing food service to that location. It was at this time that the BEP asserted their legal preference to operate food service at this site.

The Bureau of General Services contracted with Phillip Kaminsky, of SMRT, who worked with an independent consultant from New York to assess food service options. The purpose was to provide different types of food service arrangements to meet the needs of this building and the expected gross sales from each food service scenario. The food service scenario selected by BGS was the fourth scenario, which included a full service cafeteria with vending to serve the tenants during hours the cafeteria was not in operation. This consultant concluded that fees such as utilities and rent would be prohibitive expenses for a vendor to make an adequate profit/living in a location that is inside a government building.

The proformas provided by the consultant's report for the type of food service requested by BGS projected that the café would generate approximately \$556,000 a year in total sales. At that level, the cafe would generate an operating loss of approximately \$37,000 per year. They also indicated that occupancy costs would have to be absorbed by the building to make this a viable location for the type of food service being requested.

The work group reviewed gross sales at the Cross Cafe from 2000 to date, and also reviewed these same data with the Consumer Price Index (CPI) factored in so we could review the data in real terms. When factoring in the CPI, the gross sales have never met the projections provided by the independent consultant. In fact, even without factoring in the CPI, the gross sales of the Cross Café only hit the projected gross sales for one year over the 14 years of its existence. This data shows that some occupancy benefits are clearly needed to support a food service business, which is consistent with what the independent consultant concluded in 1999.

It is important to note that the prior operator before the BEP took over food service operations paid a 3.15 percent of net sales to BGS; Fifty percent would go to a "reserve" account to cover repairs, and replacement of major equipment and furnishings, while 50 percent would go towards rent, which includes electricity, water, steam, telephone, waste and garbage removal, along with reasonable heat and air ventilation. This arrangement resulted in higher cost to the state as they also paid for equipment repair and replacement (which is done currently by BEP and the manager). The initial agreement between BEP and BGS had the manager reimbursing BGS for utilities and associated costs that BGS would then use for repair and replacement of equipment. In addition, the propane tank used for the entire Cross State Office Building was put under the manager's name, with a separate meter to track BGS's usage.

In 2006 BEP opted to assert 26 MRSA Section 1418-K, which does not allow for the charging of fees to the BEP, and completed a rules change process to clarify that utilities, specifically electricity, were part of those fees that could not be charged by the

state facility. At the time that these rules were promulgated the BEP took over the responsibility of repairing or replacing equipment. This is seen by BEP as an equitable offset as the electricity charges run approximately \$18,000 per year at the Cross Cafe, compared to the approximately \$20,000 cost paid in 2013 by BEP for propane usage and equipment replacement and repair. As the electricity bill became contentious, Assistant Attorneys General for DOL and DAFS/BGS agreed that the document in place related to this agreement between BEP and BGS was unenforceable.

Public Use

There was some discrepancy between the perspectives of BGS and BEP in terms of how much the “general public” utilized the BEP location in the CSOB. This is a critical point as it relates to 26 MRSA Section 1418-K, which states that fees cannot be charged unless “the vending facility generates revenue primarily from the general public at large rather than from public employees.”

The perspective of the BEP is that this food service is intended as a service and convenience to the employees who work in the building, just as it is for all BEP locations across the state. The BGS perspective is that the Cross Café is open to the public and that most of its business is generated from the general public at large. Although the work group agreed that the Cross Café generates more business while the legislature is in session (50 percent of annual gross sales which includes sales from legislators), the representatives of BEP and associations and organizations representing various blindness groups believe that the percentage of the buildings’ non-residential usage is appreciably less than that of the resident population of the buildings. The legislature is only in session 44 percent of the year. There is minimal general public at large usage during the remaining 56 percent of the time that the legislature is not in session. Therefore, although public use spikes periodically while the legislature is in session, gross sales decline during the rest of the year. The majority of service is still to employees of the Cross State Office Building. In addition, revenues from employees’ use also increase dramatically while the legislature is in session.

Although 50 percent of gross income for the Cross Café comes during the time the legislature is in session, we do not have a method to determine how much of this comes from public employees who work in the building or have business there, and how much comes from the general public at large (especially related to how much legislative business actually gets conducted at the Cross Café). The group considered the possibility of further analysis to identify a mechanism to measure general public and public employee usage. However, no additional support of this suggestion was provided in the remaining group discussion of this issue.

The majority of the work group found this to be irrelevant as the Cross Café does not primarily serve the general public at large. Furthermore, the Cross Café is not marketed to the general public at large and could not survive if it had to depend primarily upon the patronage of the general public at large. The available market is typically limited to those that either work in the building or have a specific need to visit

the building. In addition, the location cannot provide the same market opportunities and volume that local commercial food facilities in town enjoy. In other words, people do not go to government buildings to dine. The BEP locations have substantially less exposure to and convenience for the general public, and they are not businesses existing for, or benefitting from, a normal commercial business. The BEP locations also allow for employees to bring in their own lunch, which typically is not allowed in the private sector.

Commonly Used Cost Allocation

There was discussion of various types of food service locations where the general public is not the primary customer. The one thing that held true for each facility was that the tenants of the building, rather than the food service manager, paid the occupancy costs of the food service area based on some sort of cost allocation.

The group reviewed the state's approach to other BEP-run facilities. The utility costs for BEP-occupied space is allocated among the multiple or single state agency housed within the building, based on the square footage occupancy of each state agency. The majority of the work group stated this procedure should apply to the Cross Cafe as well.

The majority of the group felt that using a cost allocation method made sense and did not understand why this issue still remains. An explanation of why this issue remains for places like Cross Café is that it has a mixed clientele. It was further explained that there is no consistent approach to utilities charges. Some pay common-area charge, others pay price-per-square-foot, based on whatever the facility owner's costs are, and it can be different for owned versus leased buildings. The majority of the group asserted that regardless of whether the building is owned or rented by the state, there ought to be an allocation method to spread the utility costs among agencies just as other common areas costs are allocated. The majority of the group continued to question the persistence of the complexity of this issue since common sense solutions are readily available. They suggested using current space allocations and defining the Cross Café as "common space." A rough calculation of the square footage cost was done, and it was determined that using this methodology would add only \$0.005 (one-half cent) per square foot to the tenants that occupy the Cross State Office Building.

The majority of the group voted to recommend the use of space allocation to cover the utility costs of the Cross Café. All were in favor except two (see specific recommendation made in a subsequent section of this report).

Initially, this seemed to be a common sense solution that most everyone in the group supported, and felt could be supported by their respective departments. This solution was brought back to DAFS and DOL via their representatives. Both the DAFS and DOL representatives reported during the work group's last meeting that their departments could not support this, and therefore rejected the solution.

Language Change-Preference to Priority

Currently, 26 MRSA Section 1418-G,1 states that “The officer, board or other authority in charge of a public building or property shall adopt policies and take actions necessary to ensure that blind persons are given preference in the establishment and the operation of vending facilities on property under its jurisdiction.”

The federal Randolph-Sheppard Act, through its 1974 amendments changed the word “preference” to “priority,” as priority is a much stronger term. The Resolve work group agreed with this concept and discussed changing Section 1418-G,1 from “preference” to “priority.” The group recommended adding a paragraph under subsection G, specifying that, “priority shall require a right of first refusal” for the purpose of this statute. This change would ensure that blind vendors be given preference when state space is available (see specific recommendation in the Conclusions and Recommendations section later in this report).

Maine Turnpike Authority

26 MRSA Section 1418-F states “To provide blind persons with remunerative employment, enlarge the economic opportunities of blind persons and encourage blind persons to become self-supporting, the officer, board or other authority in charge of a public building or property shall grant to the division authority:...” This statute clearly covers the Maine Turnpike Authority (MTA) for the location of a BEP operation.

Although conversations have happened in the past with Director Mills about developing a BEP presence on MTA, there is already an existing long-term contract for food service with a private vendor. A variety of different ideas have been proposed for creating a BEP presence, but the existing contract appears to be exclusive.

The majority of work group members recommended that the BEP Administrator and MTA Director Mills should begin conversations about creating a BEP presence at the rest areas on the turnpike. Even though Director Mills has been responsive in the past, talks between him and DBVI have not occurred in some time.

One type of arrangement that could be explored is a third-party arrangement with a vending company. Through this type of arrangement, BEP collects a commission on sales that goes directly to the BEP operations. This type of an arrangement allows BEP to place vending on property that does not warrant a blind manager. Although these types of third-party arrangements are permissible by law, the intent of the BEP is to provide an employment opportunity to a blind person, and the majority of the group believed that is the direction we should be going with the MTA.

The group recommended that the BEP Administrator and MTA Director form a plan to achieve a BEP presence on the MTA without taking a vote (see Recommendations section for more details).

Continual Diversion of Business Enterprise Program Set-Aside Funds

The elected operator's committee of blind managers assesses a contribution among themselves that then goes into a fund called the "set-aside" fund. The set-aside fund is based on 6 percent of each manager's net profits and is held in the BEP Special Revenue Account. Funds in the set-aside fund are used to repair and replace equipment across the program and to expand the program into new locations.

Over the past decade, the set-aside account has lost \$368,000 due to the process where the legislature sweeps funds from General Fund and Special Revenue accounts during times when the state is experiencing a revenue short-fall. The group learned that this is a common practice across state government during such times and has constitutional authority to do so. The group also learned that these funds were not part of any General Fund allotment as the BEP does not receive even one dollar from the General Fund, but rather gets its operating budget from the set-aside funds and commissions paid to the BEP from sales of third-party vendors (like vending machines at rest areas on I-95).

The set-aside fund was not tax, or public money. Rather, it was money that was carefully put aside by the BEP blind managers so that there would be a reliable source of funds available when they needed to repair or replace equipment. It was a self-funded insurance fund of sorts; a wise business practice, in which they planned and saved adequately for the inevitable equipment emergencies that were likely to occur, and in trust and good faith they kept it under the State's protection.

Further clarification of the process of sweeping accounts was provided by the DOL Director of Legislative Affairs, who learned that the Appropriations Committee has authority to sweep set-aside funds if statute is silent. In addition, a Legislature cannot be bound by a previous Legislature and can change the statute whenever it wants, unless it is specifically prohibited by the Constitution (which, in this case, it is not). Even if the work group recommended adding language to 26 MRSA Section 1418 to prohibit the sweeping of the BEP Special Revenue account, the next Legislature would not be bound by such language.

The fact of the matter is that the money in the set-aside fund is now gone and there is equipment that needs to be repaired or replaced for which the blind managers no longer have the money to do at the needed level. This is a serious business issue for blind managers and it will now take many years to build the fund to adequate levels. In the meantime, equipment will continue to age, break down, and require repair and replacement. In addition, there will continue to be inadequate funds to expand the BEP into new locations, which deprives blind individuals of further employment opportunities.

The group felt very strongly that not only should the \$368,000 be restored to the BEP as part of the 2014 Supplemental Budget, but that these funds be preserved by establishing a set-aside fund outside of state government. The BEP reported that this is

allowed by the Randolph-Sheppard Act and that at least one state (Virginia) has a nominee agency to receive BEP funds.

Subsidies and concessions

Through the course of the discussions held by the work group, it became apparent that the Business Enterprise Program is perceived by the current administration as a program that unfairly subsidizes food purchased at the Cross Café at the expense of taxpayers from across the state that do not even use the facility. Representatives of the DBVI, BEP and blindness associations and organizations expressed their objection to this perspective. They discussed their perspective of how business is subsidized in every area of the state, and how the administration's perspective is inconsistent with such private industry subsidies by state funds, and seems quite arbitrary.

For example, the majority of the work group felt that the entire CSOB is subsidized, as public use of any of the areas is a taxpayer subsidy. They felt everything in the building needs to be considered instead of picking and choosing who is perceived as getting a public subsidy and who is not. This view goes well beyond the CSOB as public use anywhere is a subsidy.

The majority of the group felt that the administration's perception of "subsidy" also ignores the breadth of benefit, both to people with disabilities and the general public, and that it seems very specifically pointed to the Cross Cafe. Various group members disagreed with the administration's perspective, concluding that indirect or direct tax subsidies and concessions are extremely common throughout the private sector. They are used with the oil, dairy, and many other industries. Furthermore, in order to attract new, desirable businesses and services, it is very common for States and municipalities to offer direct tax breaks or other concessions, such as providing new sewer, water, and/or utility services. Offering a break on utilities to BEP blind managers is no different, and is actually a very minor concession for having these kinds of convenient, beneficial services. The group stated that it is important to remember that all tax payers that use a BEP facility are receiving the benefit of not having to leave their building, and consequently, the taxpayers benefit from increased productivity.

The objection of the majority of group members to the administrations perspective of unfair subsidy being provided to the Cross Café went far beyond this single issue to one of a philosophical issue concerning the employment of people with disabilities in Maine being able to make a livable wage competitive with anyone else. It seems like this approach as to who gets a subsidy and who does not is being selectively used against people with disabilities even though it is an example of what the Employment First Maine concept talks about; customized employment. For example, it is inconsistent that the current Legislature unanimously passed a law, and which was supported by the Governor, talking about employment first for people with disabilities. There was specific language about customized self-employment for people with disabilities in this law, and here is a person who is running a business who is self-employed under a federal customization rule and we are going to add disincentives for

him to be profitable? It seems like people with disabilities fight these same battles over and over again. It also appears like many people and private business get subsidies, but somehow it is different if a person with a disability gets one. There was a great deal of frustration related to this inconsistency, either we support employment for all or we do not.

Some in the group also asked if this level of scrutiny was going to be applied equally to every subsidized business, citing it as out of line with what is required for others. Furthermore, are we going to look at other private businesses gross, net, and profit and then decide who gets what subsidy? It appears that we will be asking an individual to do something we do not ask any other business to do. The majority of the group felt that if this is the direction that the administration wishes to take, then every business in Maine should be looked at through this same lens to be fair.

It was pointed out repeatedly during group discussions that the BEP is following the normal practice within private industry where private businesses are not required to pay utility costs or occupancy costs and cited examples of this statewide. The group was also reminded of the state having hired an independent business consultant who reached the exact same conclusion--that it is a bad idea to charge for utilities.

Recommendations

A majority of the Resolve work group recommended the following:

1. Recommendation: "The cost of utilities for any BEP facility should be charged to the state agencies (or other tenants) that occupy the building within which the facility operates and not the BEP operator, based on the square footage used by each agency/tenant in the building."
2. Recommendation: "Leave Title 26, Section 1418-K as it is currently written."
3. Recommendation: "Ask the Appropriations Committee to fund a \$368,000 restoration to the set-aside fund in the next state budget for the period starting July 1, 2014."
4. Recommendation: "Revise 26 MRSA, Section 1418-G to change the word 'preference' to 'priority' here and throughout the Enabling Act; and add new language to 1418-G.1. to give the Division (A) a Right of First Refusal whenever the state grants a contract to a food service operator, and (B) most favored nation status when contracting" (see Appendix B)
5. Recommendation: "Add a new subsection to 1418-H.1, E. "To give the Division power to adopt rules regarding the establishment of a set-aside account and allows those rules to give a board of vending facility managers authority to establish such a set-aside account in a private bank or credit union out of the reach of a "sweep" of state funds" (see Appendix B).
6. Recommendation: "Direct the Executive Director of the Maine Turnpike Authority and BEP Administrator to negotiate the creation of sites and business opportunities for BEP operators on the MTA, and to have progress on this effort reported back to the Appropriations Committee by December 1, 2014."

Appendix A

Resolve Chapter 368, PL 2013

PART BBB

Sec. BBB-1. Working group. The Director of the Division for the Blind and Visually Impaired within the Department of Labor shall convene a working group to review the Department of Labor's business enterprise program and invite interested parties including representatives of the Department of Administrative and Financial Services, associations providing advocacy and other services to persons who are blind or visually impaired, cafeteria operators and vending operations representatives to participate in the review. The review of the Department of Labor's business enterprise program must include, but is not limited to, the charging of utility costs incurred during the operation of a cafeteria by a business enterprise program vendor. The working group shall also include, as part of its review, research as to who assumes responsibility for utility costs under similar programs in other states and in other cafeteria arrangements outside of the Department of Labor's business enterprise program.

Sec. BBB-2. Report recommendations. No later than December 1, 2013, the working group under section 1 shall report to the Joint Standing Committee on Appropriations and Financial Affairs findings and recommendations and any necessary implementing legislation. The Joint Standing Committee on Appropriations and Financial Affairs is authorized to report out a bill related to the subject matter of the report to the Second Regular Session of the 126th Legislature upon receipt of the report.

Appendix B

Sample of 26 MRSA Section 1418-F through M with Proposed Language Changes

Below are sample suggested changes to the BEP Enabling Act. Each of the changes appears in [brackets] and is marked with a double asterisk ** at the beginning and end of each edit, but the changes are not shown in colored or bold type. In one situation the deletion of the word “not” is indicated with double asterisks and [] to show missing text. Where text is added, there may be words deleted that are not otherwise marked.

Title 26, §1418-F, Business enterprise program

1418-F. Business enterprise program

To provide blind persons with remunerative employment, enlarge the economic opportunities of blind persons and encourage blind persons to become self-supporting, the officer, board or other authority in charge of a public building or property shall grant to the division authority: [1995, c. 560, Pt. F, §13 (new) .]

1. **Vending facility.** To install in that building or property a vending facility whenever a vending facility may be operated by a blind person; and [1995, c. 560, Pt. F, §13 (new) .]

2. **Vending machines.** To place vending machines operated by the division in a building or property if a vending facility operated by a blind person is not warranted. Income from these vending machines must be used for the purposes set forth in this section. [1995, c. 560, Pt. F, §13 (new) .]

Title 26, §1418-G, ** [Priority] **

§1418-G. ** [Priority] **

The officer, board or other authority in charge of a public building or property shall: [1995, c. 560, Pt. F, §13 (new).]

1. Policies. Adopt policies and take actions necessary to ensure that blind persons are given ** [priority] ** in the establishment and the operation of vending facilities on property under its jurisdiction; ** [provided, however, that such policies shall (among other things):

A. Grant the Division a Write of First Refusal by which the Division shall have ninety (90) days to exercise the authority granted at Section 1418-F hereof to establish a vending facility whenever a contract for the operation of a commercial food service facility is to be issued or renewed by any officer, board or other authority in charge of a public building or property; and

B. Grant no contract to the division for the operation of a vending facility that includes terms less advantageous than the terms of any other contracts for operation of similar facilities in or on public buildings or property awarded either to commercial food service operators or to the division; ** [1995, c. 560, Pt. F, §13 (new).]

2. Surveys. Cooperate with the division in surveys of properties and buildings under its control in order to find suitable locations for the operation of vending facilities by managers and, after a determination that a facility may be operated by a manager, shall cooperate with the division in the installation of a vending facility; [1995, c. 560, Pt. F, §13 (new).]

3. Income. To achieve and protect the ** [priority] ** of blind persons in the operation of vending facilities, arrange for the assignment of the income derived from vending machines that are located in reasonable proximity to and in direct competition with a vending facility for which authority is granted pursuant to this article to the manager or managers affected. A vending machine that vends articles authorized for vending pursuant to section 1418, subsection 8 and is so located that it attracts customers who would otherwise patronize the vending facility is considered to be in reasonable proximity to and in direct competition with the vending facility; [1995, c. 560, Pt. F, §13 (new).]

4. Licensing. Inform the division not less than 60 days prior to the termination, issuance or renewal of a contract for the operation of a vending facility; and [1995, c. 560, Pt. F, §13 (new).]

5. Vending machines. Allow the division to place vending machines in a building where a vending facility operated by a manager would not be feasible. Income from these machines accrues to the division's set-aside account for purposes stated in section 1418-F. [1995, c. 560, Pt. F, §13 (new).]

Title 26, §1418-H, Powers and duties of the division

§1418-H. Powers and duties of the division

In carrying out this article the division shall: [1995, c. 560, Pt. F, §13 (new).]

1. Rules. Prescribe rules governing: [1995, c. 560, Pt. F, §13 (new).]

A. The maintenance of a roster of blind persons eligible to become managers and the issuance of licenses;

[1995, c. 560, Pt. F, §13 (new).]

B. A fair hearing. In the case of a manager desiring to appeal a decision, the division shall appoint a hearing board consisting of 3 persons, one to be chosen by the manager, one to be chosen by the division and the 3rd person chosen by the other 2 persons. The decision of the board is final;

[1995, c. 560, Pt. F, §13 (new).]

C. The right to, the title to and the interest in vending facility equipment and stock; and

[1995, c. 560, Pt. F, §13 (new).]

D. The civil rights of managers;

** [E. The establishment and use of a set-aside account for the maintenance, repair and replacement of equipment used by managers in vending facilities; provided, however, that such rules may grant authority to a board of managers of vending facilities to establish and maintain private set-aside accounts in any commercial bank or credit union lawfully operating within the State of Maine;] **

[1995, c. 560, Pt. F, §13 (new).]

2. Other. Prescribe rules necessary to carry out the purposes of this article; [1995, c. 560, Pt. F, §13 (new).]

3. Surveys. Conduct surveys to find locations where vending facilities may be operated by blind persons and establish vending facilities as it determines appropriate; [1995, c. 560, Pt. F, §13 (new).]

4. Management. Provide management and supervisory services determined necessary to ensure that each vending facility is operated in the most effective and productive manner possible; [1995, c. 560, Pt. F, §13 (new).]

5. Plans. Provide plans and specifications for proposed vending facilities and equipment to the appropriate officer, board or authority for approval prior to installation; and [1995, c. 560, Pt. F, §13 (new).]

6. Other action. Take any other action necessary or appropriate to carry out the purposes of this article. [1995, c. 560, Pt. F, §13 (new).]

Title 26, §1418-I, Construction; remodeling; planning for vending facility

§1418-I. Construction; remodeling; planning for vending facility

To carry out the purposes of this article, when new construction, remodeling, leasing, acquisition or improvement of public buildings or properties is authorized, the agency directing that construction, remodeling, leasing, acquisition or improvement shall, when the size of the building or property warrants, make available suitable space and facilities for vending facilities to be operated in the building or property by blind persons. [1995, c. 560, Pt. F, §13 (new).]

Title 26, §1418-J, Construction of buildings

§1418-J. Construction of buildings

If a suitable location is available for a vending facility that requires the construction of a portable building, the division may construct such a building and may have the use of the land on which to construct the building. [1995, c. 560, Pt. F, §13 (new).]

Title 26, §1418-K, Fees

§1418-K. Fees

1. Fees prohibited generally. Except as provided in subsection 2, ** [neither] ** a rental fee, ** [nor any other charge for utilities or other services] ** may ** [] ** be required or received for the granting of authority to the division ** [or any operator] ** to operate a vending facility. [1997, c. 393, Pt. A, §31 (new).]

2. Fees authorized; limitation. A rental fee or other fee may be charged to the operator only if the vending facility is located on commercial municipal property, including a public airport, where the following conditions are met: [1997, c. 393, Pt. A, §31 (new).]

A. The vending facility generates revenue primarily from the general public at large rather than from public employees;

[1997, c. 393, Pt. A, §31 (new).]

B. The vending facility occupies space for which there are other competing retail commercial uses and other retail users are, in fact, renting nearby public space on the property; and

[1997, c. 393, Pt. A, §31 (new).]

C. The public owner depends on generating revenue from the space occupied by the vending facility.

[1997, c. 393, Pt. A, §31 (new).]

Any rent or other fee charged to the operator must be less than what would otherwise be charged to a competing commercial tenant and must be pursuant to a written agreement. The terms of the agreement must adequately account for the value of investments made by the division to create or maintain the vending facility. [1997, c. 393, Pt. A, §31 (new).]

3. Application. This section applies to the rental of vending facilities and the renewal of any rental agreement after the effective date of this section. [1997, c. 393, Pt. A, §31 (new).]

Title 26, §1418-L, Correctional, mental and certain educational institutions

§1418-L. Correctional, mental and certain educational institutions

This article does not apply to or authorize the installation of vending facilities in a building wholly used by a correctional or mental institution or by an educational institution of any type supported in whole or in part from public funds, unless that educational institution is a university, college, junior college or a community college. [1995, c. 560, Pt. F, §13 (new); 2003, c. 20, Pt. 00, §2 (amd); §4 (aff).]

Title 26, §1418-M, Application

§1418-M. Application

If a vending facility not under the control of the division exists in a building or on property of the State, a county or a municipality, the person having jurisdiction over that building or property shall give ** [priority] ** to the division to continue operation of the vending facility when an existing lease or contract expires or is terminated. [1995, c. 560, Pt. F, §13 (new).]