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Health Care Certificate of Need
Maine Health Systems Agency
State Official's Conflict of Interest
Conflict of Interest
Delegation of Power to Private
Agency

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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333
September 23, 1977

The Honorable Olympia J. Snowe
Maine State Senator
114 Nottingham Road
Auburn, Maine 04210

Dear Senator Snowe:

You have requested an opinion on two questions relative to the constitutionality of the delegation of legislative power to a private, non-profit corporation in two bills introduced in the last session of the Legislature: L.D. 1202, An Act Establishing a Maine Certificate of Need Program, sponsored by Representative Najarian, and L.D. 1358, An Act Relating to Certificate of Need, of which you are the sponsor.

Facts:

Both L.D. 1202 and L.D. 1358 were introduced in response to the National Health Planning and Resources Development Act of 1974, Public Law 93-641 (42 USC §300k et seq.). P.L. 93-641 was enacted by Congress as a result of its concern over the increasing cost of health care and the lack of effective and evenly distributed health care delivery. It establishes new programs at the state level to provide for the review of all existing and all proposed new institutional health services in the state. It further requires as a pre-condition to certain federal funds the creation of a state certificate of need program which applies to new institutional health services proposed to be offered or developed within the State and which provide for review and determination of need prior to the time such services are developed so that only those services and functions found to be needed shall be offered or developed in the state. 42 USC §300m-2(a)(4)(B).

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It is pursuant to the Act that the Maine Health Systems Agency [hereinafter MHSA] is authorized as one of the new entities designed to implement these programs. 42 USC §300 1-1 specifically dictates both the organization and operation of the MHSA. Set up in Maine as a private non-profit corporation, its governing body is required to be composed of a majority of consumers. The MHSA's functions include preparation of health plans for its area, review and approval of each use of federal funds in its area, review and comment to the state agency on new service projects in area institutions, and recommendation of health facilities projects to the state for funding.

Under the Act, the State Health Planning and Development Agency, in Maine, the Department of Human Services [hereinafter the Department], is mandated to administer the certificate of need program, 42 USC §300m-2(a)(4)(B), and the MHSA is required to review and make recommendations to the Department regarding the need for new institutional health services. 42 USC §300 1-2(f). There is no statutorily mandated function for the Statewide Health Coordinating Council in the certificate of need review under the Act.¹

Questions posed:

1. Is it an unconstitutional delegation of legislative power for the Legislature to require that applications for certificate of need be reviewed by the MHSA, a private, non-profit corporation?

2. If it is a constitutional delegation of power to the MHSA, are there sufficient standards contained in that delegation in L.D. 1358 under which the MHSA may determine the procedures and criteria to be used in conducting its certificate of need reviews?

Conclusions:

1. In view of the limited advisory capacity of the MHSA and the substantial procedural safeguards provided by the statutes, it is the opinion of this office that it is a constitutional delegation of power for the Legislature to require that

1. The Statewide Health Coordinating Council is another new agency established by the Act. 42 USC §300m-3. The Council is composed of representatives appointed by the Governor approximately 60% of which are from the MHSA and 40% are such other persons as the Governor may deem appropriate. The SHCC's functions include advising the department, preparing a state health plan and approving any state plans and applications for funds under federal health legislation.

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applications for certificates of need be reviewed by the Maine Health Systems Agency, Inc., a private, non-profit corporation.

2. While there are sufficient standards contained in the delegation in L.D. 1358 under which the MHSA may determine the procedures and criteria to be used in conducting its certificate of need reviews, it is the opinion of this office that L.D. 1358 does not comply with Sec. 42 USC §300 n-1(a) as it does not enable the MHSA to develop its own procedures and criteria.

3. It is the opinion of this office that this review and recommendation process of certificate of need applications by the MHSA would not constitute a conflict of interest.

Reasons:

Delegation of power by the Legislature to non-public agents is not inherently unconstitutional. The Maine Supreme Judicial Court recognized the validity of such delegation in City of Biddeford v. Biddeford Teachers Assoc., 304 A.2d 287 (Me. 1973). In that case, the court found it permissible for the Legislature to provide for ad hoc arbitration boards, made up of private citizens, to exercise ultimate authority in certain areas of school management such as hours and working conditions and to make recommendations in other areas such as salaries and pensions. The limits of permissible delegation to private entities thus initially depend on the nature of the actions to be taken by the delegates. Final determinations are sanctioned in non-policy areas whereas only recommendations may be allowable in policy matters.

Similarly, the Supreme Judicial Court has held that, after making the preliminary determination that property must be taken, the Legislature may then delegate the determination as to the particular parcel of property to be taken and this function may even be delegated to a private corporation which is to take land for a public use. In re Bangor Hydro-Electric Co., 314 A.2d 800 (Me. 1974).

Turning to the statutory scheme at issue here, it is noted that the contemplated functions of the MHSA relative to the Certificate of Need Program are to review all applications for a certificate of need and to submit recommendations to the Department of Human Services. 42 USC §§ 300 1-2(f), 300m-2(a)(4)(B); L.D. 1202 §305; L.D. 1358 §310. Whether classified as policy making or non-policy making, then, the delegated advisory authority of the MHSA's is clearly within the limits enunciated in City of Biddeford and Bangor Hydro-Electric.

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The constitutionality of a comparable scheme, moreover, was upheld in Simon v. Cameron, 337 F.Supp. 1380 (C.D. Cal. 1970). There the court found the Community Health Planning Association, a private, non-profit corporation whose approval was required on certain applications, to be so closely connected with the state as to make it a public administrative body. In particular, the court emphasized that the final decision-making authority rested in a statewide council, a quasi-public body responsible to government officials. That the MHSA's determinations here are subject to review and overruling by the Department, a public agency, is clearly a significant factor in finding the delegation constitutional. See R.H. Johnson & Co. v. S.E.C., 198 F.2d 690 (2d Cir. 1952), cert den. 344 U.S. 855 (1952); Corning Glass Works v. Ann & Hope, Inc. of Danvers, 294 N.E. 2d 354, 362 (Mass. 1973); Group Health Insurance of New Jersey v. Howell, 193 A.2d 103, 109 (1963).

The adequacy of procedural safeguards to prevent arbitrary action by delegates is a further consideration in determining the constitutionality of a particular delegation. Finks v. Maine State Highway Comm., 328 A.2d 791 (Me. 1974); City of Biddeford v. Biddeford Teachers Assoc., supra. A number of important procedural safeguards are required by P.L. 93-641. At the beginning of a review, written notice must be given by the MHSA or by the Department to persons directly affected; the MHSA must make written findings; and the MHSA must provide for public hearing if requested by a person directly affected. 42 C.F.R. §122.306(a). L.D. 1202 provides for these procedures in §306. L.D. 1358 provides for the first two procedures in §§309 and 310. It further provides in §309 for a public hearing, but does not specify that the MHSA will make provision for such a hearing. Pursuant to federal regulations the requirement that the Department make provision for public hearing may be satisfied by the MHSA's hearing procedures, but the MHSA may not satisfy its requirement by the Department's hearing process. 42 C.F.R. §§ 122.306(a)(7); 123.407(a)(7) and (c).

Finally, in order for a delegation of power to be constitutional there must be "sufficient standards to guide the agents in the exercise of the legislative authority." City of Biddeford v. Biddeford Teachers Assoc., supra, at 398; Opinion of the Justices, 261 A.2d 58 (Me. 1970). In reviewing the standards at issue in the Biddeford case, the court enunciated certain factors relevant to the extent of detail required. Although the fact that the MHSA is a private entity demands greater exactitude, the need for precise standards is abated where, as here, there are adequate procedural safeguards, the delegatee is an on-going entity, and the delegatee is not authorized to make final and binding determinations.

In view of the foregoing factors and in view of the fact that the adequacy of standards may be determined by reference to related legislation, Kovak v. Licensing Board, City of Waterville, 157 Me. 411, 173 A.2d 554 (1961) there are sufficient standards contained in the delegation by which MHSA may determine the procedures and criteria to be used in conducting its reviews. Under L.D. 1358, the MHSA's review criteria and procedures are established by the Department after consultation with it. In turn, the Department is bound to formulate the criteria and procedures in accordance with a number of definite guidelines set forth in L.D. 1358 as well as in accordance with the underlying principles expressed in the Statement of Fact and the Declaration of Purpose. §302. §§306, 307, 309, 311 and 312 provide for the basic procedures to be utilized for the application process, for notice and hearing, and for the review procedure and waiver. §313 states specific principles and minimum criteria to be used in determining whether a certificate of need should issue. These guidelines, moreover, conform in substance to the procedures and criteria required by P.L. 93-641 and the regulations promulgated thereunder.²

One of the legal problems raised by L.D. 1358, however, is its non-compliance with the provisions of P.L. 93-641 that both the Department of MHSA are to develop their own procedures and criteria. 42 USC §300n-1(a). While the two agencies are permitted to coordinate performance of certain functions, 42 Federal Register 4011 (Jan. 21, 1977) and coordination in the development of their procedures and criteria is encouraged, 42 Fed. Reg. 4018 (Jan. 21, 1977) there is no statutory authority for the Department to direct the development of criteria or procedure by the MHSA.

A further issue is whether the delegation to the MHSA of this review and recommendation function would constitute a conflict of interest. Since the MHSA governing body is responsible, among other things, for the approval of all actions taken pursuant to the certificate of need program, and since the MHSA governing body is composed of approximately 45% providers of health care, the existence of a conflict of interest in particular situations is clearly possible. Providers could be in the position of passing on applications submitted by their own facility or a competitor's.

The common law in Maine holds that "perfect fidelity"

2. It is recommended that §313(D) include a reference to the applicable federal regulations.

in the exercise of their powers and duties is required of public officers. Lesieur v. Inhabitants of Rumford, 113 Me. 317, 321, 93 A. 838 (1915). Recently the Supreme Judicial Court applied the common law principles to the position of an individual who was contemplating assuming the office of Commissioner of the State Department of Finance and Administration while retaining ownership of stock and other ties in a bank. Opinion of the Justices, 330 A.2d 912 (Me. 1975). In that case, the court did not categorically apply a rule of "perfect fidelity" but first engaged in a qualitative analysis of the relationship between the Commissioner's powers and duties and the regulation of banking institutions. Only if there is a sufficiently close relationship between the two will a candidate for public office be considered a "trustee" and be required to have no personal interest. 330 A.2d at 918.

One of the factors underlying the court's findings of a conflict of interest in the banking case was that the Commissioner's approval was required in matters relating to the regulation of banks. He lacked the opportunity to step aside to avoid conflict. The situation at issue under L.D. 1358 is quite distinguishable. A provider's approval on a particular application would not be prerequisite to the MHSA's action. 22 M.R.S.A. § 319, as proposed in L.D. 1358, contemplates the problem and addresses the matter by requiring that persons whose economic or fiduciary interests may be effected by certain decisions excuse themselves from those decisions. Moreover, Article XVI of the MHSA's by-laws specifically provides that a member who has a conflict of interest disclose the existence of it and that he shall be excused from participation during the review of the matter under consideration.

The nature of the duties and powers given to the MHSA here are significantly different as well. In the certificate of need program, the MHSA's function is merely to review applications and make recommendations to the Department. It does not have the direct supervisory and comprehensive regulatory powers that were involved in banking cases or in the case addressed by an opinion of this office on November 4, 1975, finding that a conflict of interest would arise where a regulator would have direct plenary power and supervision over competitors' businesses and his own. Again, the MHSA is not empowered to regulate, but merely to review and advise. Rather than being endowed with the authority to have access to all records and transactions of their competitors, providers would merely have access to the limited information encompassed in the applications.

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Thus, the potential for conflict of interests is minimized, and the possibility of conflict is specifically addressed by the proposed legislation.

I hope this information is helpful.

Very truly yours,

JOSEPH E. BRENNAN
Attorney General

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