

# MAINE STATE LEGISLATURE

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# Department of Human Services

*2. 2. v. 7. Certificate of Need Law's Health Maintenance Organizations  
Health Maintenance Organizations, Certificate of Need*

STATE HOUSE, AUGUSTA, MAINE

Date September 28, 1978

To John Norton, Director, Health Planning & Development

From David A. Williams, Assistant Attorney General *Daw*

Subject Conflict of legislation regarding Health Maintenance Organizations

You have asked whether or not a Health Maintenance Organization should be required to first apply for a Certificate of Need before the insurance commissioner may consider an application to be recognized as a Health Maintenance Organization.

Rural Health Associates applied to the Bureau of Insurance on July 20, 1978 for recognition as a Health Maintenance Organization pursuant to the requirements of Title 24-A §4201 et seq.. However, on September 1, 1978, the Maine Certificate of Need Act became enforceable for the first time since its enactment on March 30, 1978. The question then becomes whether or not the HMO applicant is required to obtain a CON before it is authorized to apply to the Bureau of Insurance for its authority to operate as an HMO.

A review of both the Health Maintenance Organization Act of 1975 and the Certificate of Need Act of 1978 reveals that neither Act directly answers the question of which the prospective applicant must apply to first in time. Thus, the Legislature has left the applicant in a situation similar to that faced by applicants for many State services requiring multiple licenses. The applicant is free to select the order in which the applications are to be filed for the various licenses and may even choose to file for all of the licenses simultaneously. Of course, practicality tells us that the very nature of some licenses may require that they be filed after the completion of certain facilities for which other licenses were required. For example, application for a building permit from the town in which the facility is to be located would precede application for a license to operate a complete health facility from the appropriate State authority. Thus, in most cases, it is common sense and the nature of the activity requiring the permit that answers the question of which application comes first in time.

In the present case, while there is nothing to prevent a prospective HMO applicant from filing an application with the Bureau of Insurance prior to, or at the same time, with an application filed under the CON Act, practicality dictates that a CON must be obtained first. 24-A M.R.S.A. §4204(E) requires that before the Superintendent of the Bureau of Insurance issues a Certificate of Authority under the HMO Act he shall satisfy himself that "nothing in the proposed method of operation...is contrary to the public interest." While the statute was written prior to the enactment of the CON Act, it would clearly be contrary to the public interest for the Superintendent of Insurance to issue a Certificate of Authority to an HMO which had not yet received, or which had been denied, a Certificate of Need which is required to have under independent statutory authority. Thus, while not legally required to do so, the reasonable applicant would be better served by filing an application under, and receiving permission pursuant to the

September 28, 1978

RE: Conflict of legislation regarding Health Maintenance Organizations

CON Act prior to attempt to receive a Certificate of Authority under the HMO Act.

A better solution to this problem in the long run is to submit corrective legislation amending 24-A §4204(1) to remove the present procedures set forth for the Commissioner of Human Services and replacing them with the simple requirement that the applicant receive a Certificate of Need. I would be happy to work with you to prepare this legislation for submission.

A final note with regard to the particular applicant. It is important to note that at the time the applicant filed his application with the Bureau of Insurance in June of this year that the Certificate of Need Act was unenforceable as to him. Therefore, this particular applicant need not be required to obtain a Certificate of Need if he filed a Letter of Intent with the Bureau of Health Planning and Development prior to September 1, 1978. If, however, no Letter of Intent was filed, then the CON Act will apply.

DAW:bw

# Department of Human Services

STATE HOUSE, AUGUSTA, MAINE

Date 9/22/78

David Williams, Assistant Attorney General, Human Services

From John W. Norton, Director, Bureau of Health Planning & Development

Subject Rural Health Associates' HMO Application and CON

Rural Health Associates currently has filed with the Superintendent of Insurance an application for a certificate of authority to establish and operate a health maintenance organization. The Department of Human Services has a legislatively mandated role in the review of such applications.

During discussions between staff of this Bureau and Bureau of Insurance staff, concerns regarding the requirements of the Maine Certificate of Need Act of 1978 were introduced. The substance of those concerns are expressed in the attached internal memo on this subject from Glenn McKee.

That memo reaches the conclusion that RHA is required to apply for and receive a certificate of need prior to applying for and being granted a certificate of authority by the Bureau of Insurance.

Please give us your advice regarding the validity of that conclusion.

JWN/GM/rh

pc: C. O'Donnell  
G. McKee

# Department of Human Services

STATE HOUSE, AUGUSTA, MAINE

Date 9/7/78

Carl V. O'Donnell, John W. Norton

From <sup>Qm</sup> Glenn McKee, Health Planner

Subject RHA's HMO Application and CON

By September 18, the Department must convey to the Superintendent of Insurance its findings with respect to Rural Health Associates' application for a certificate of authority to establish and operate a health maintenance organization.

In lieu of the expected findings, I would suggest another course of action based on the following analysis.

RHA submitted an application to the Bureau of Insurance on July 20 in compliance with the Health Maintenance Organization Act of 1975 (24-A MSRA c. 56). Section 4203, paragraph 1, of that Act states in part: "No person shall establish or operate a health maintenance organization in this state, nor sell or offer to sell, or solicit offers to purchase or receive advance or periodic consideration in conjunction with a health maintenance organization without obtaining a certificate of authority under this chapter."

Final legal establishment of an HMO is thus dependent upon obtaining a certificate of authority from the Bureau of Insurance. Before receipt of a certificate of authority, the applicant is not a legally constituted HMO.

Provision was made in 24-A MRSA c. 56 (Section 4203, paragraph 2) that "every existing health maintenance organization submit an application for a certificate of authority under subsection 3 within 30 days of the effective date of this chapter." (The act was signed by the Governor on June 17, 1975.) The failure of RHA to come forth with an application under this provision seems to preclude any claim to their being a pre-existing HMO.

The above citations appear to establish the fact that RHA is not presently an HMO.

The Maine Certificate of Need Act of 1978 (22 MSRA § 301 et seq.) states that "a certificate of need from the Department shall be required for... the construction, development or other establishment of a new health care facility...."

HMOs are included in that act's definition of "health care facility." Also, the act's applicable definition of development "means the undertaking of those activities which on their completion will result in the offering of a new health service to the public."

With respect to "the construction, development or other establishment" of an HMO, the one crucial activity which "will result in the offering of a new health service to the public" (emphasis added) is the obtaining of a certificate of authority to establish and operate an HMO.

But note that a certificate of need is required for the development or other establishment of an HMO.

The only conclusion that can be drawn from this analysis of the applicable statutes is that an HMO-applicant is required to obtain a certificate of need before making an application to the Bureau of Insurance for a certificate of authority due to the fact that the application is a development activity.

The Department should so rule, further suggesting the RHA application, lacking a certificate of need, should be withdrawn by the applicant. RHA would then develop and file a CON application if desirous of pursuing HMO status.

GM/rh