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RICHARD S. COHEN
ATTORNEY GENERAL

STEPHEN L. DIAMOND
JOHN S. GLEASON
JOHN M. R. PATERSON
ROBERT J. STOLT
DEPUTY ATTORNEYS GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

March 3, 1980

Carroll Farrington
Acting Chairman
Maine Veterans Home
State House
Station #105
Augusta, Maine 04333

Re: Opinion Request.

Dear Mr. Farrington:

This letter is in response to your request of January 11, 1980 for a formal opinion from this office on the allowability under the Department of Human Services' Principles of Reimbursement for Long-Term Care of certain capital costs to be incurred by the Maine Veterans Home.

The Board of Trustees of the Maine Veterans Home (hereinafter Home) proposes to construct a 200-bed Intermediate Care Facility (ICF). $3.9 million dollars of the funds which will be used to construct the facility are anticipated to be generated through a grant from the Veterans Administration. These funds are to be designated for paying a portion of the construction costs of the facility and will not be required to be paid back.

Once constructed, the Home would render services to recipients of assistance under the State medical assistance ("Medicaid") program which is administered by the Department of Human Services. 42 U.S.C.A. § 1396a(a)(13)(E) requires reimbursement for ICF services to be made on a reasonable cost-related basis in accordance with methods and standards developed by the State and approved by the Secretary of Health, Education and Welfare (hereinafter "HEW"). Federal regulations delineating reasonable cost-related payment are found at 42 U.S.C. § 447.272 et seq. The State regulations governing reimbursement are entitled "State of Maine Department of Human Services' Principles of Reimbursement for Long-Term Care Facilities."

The issue presented by your request is whether depreciation on assets acquired with funds received under a restricted Federal grant is an allowable cost under the Department's Principles of Reimbursement for Long-Term Care Facilities. We conclude that it is an allowable cost under Principle 3023.

At the outset, we note that an agency's interpretation of the law which it administers is entitled to deference. Hillside Community Hospital of Ukiah v. Matthews, 423 F. Supp. 1168 (N.D. Cal. 1976); Brooks v. Smith, 356 A.2d 723 (Me. 1976). Its interpretation should not be overruled without compelling reasons such as a finding that the agency has rendered a construction which is contrary to statute, in excess of statutory authority, or clearly erroneous. Kantor v. United States, 205 Ct. Cl. 1 (1974). Since it is clear that the Department has considerable latitude under both state and federal law in establishing reimbursement and allowable costs, our determination rests on whether or not the Department's interpretation of its regulations pertinent to the issue raised is clearly erroneous.

The Department has interpreted its Principles of Reimbursement to exclude from allowable costs depreciation based on assets acquired with funds received under a restricted grant. In its view, the controlling principle is Principle 4051 which provides as follows:

> 4051. Principle. Unrestricted grants, gifts, and income from endowments should not be deducted from operating costs in computing reimbursable costs. Grants, gifts, or endowment income designated by a donor for paying specific operating costs should be deducted from the particular operating cost or group of costs.

Section 4052.2 defines designated or restricted grants as follows:

> 4052.2. Designated or restricted grants, gifts, and income from endowments. Designated or restricted grants, gifts, and income from endowments or funds, cash or otherwise, which must be used only for the specific purpose designated by the donor. This does not refer to grants, gifts or income from endowments which have been restricted for a specific purpose by the provider.

An apparent conflict exists, however, between the Department's interpretation of Principle 4051 and the clear language of Principle 3023, which reads as follows:

> 3023. Allowance for depreciation on assets financed with federal or public funds. Depreciation is allowed on assets financed with Hill-Burton or other federal or public funds.

The Department construes 3023 as allowing depreciation on assets acquired with public funds only where such funds are not an outright grant but are required to be repaid.

We do not accept the Department's harmonization of Principles 3023 and 4051. On its face, Principle 3023 provides for the allowance of depreciation on assets acquired with public funds, and we conclude that this Principle controls in the situation posed. First, we look to the common meaning of words in an enactment to avoid resort to a forced or subtle construction. See In re Belgrade Shores, Inc., 359 A.2d 59 (Me. 1976); Union Mutual Life Ins. Co. v. Emerson, 345 A.2d 504 (Me. 1975). The word "finance" in Principle 3023 is not restricted to the acquisition of funds on credit.1/ Indeed, by referencing Hill-Burton funds, which include both outright grants and loans, the regulation appears to contemplate the broader, more common meaning of "finance."

Read in this light, then, Principle 3023 would create an exception to Principle 4051 for the allowance of depreciation on assets acquired with funds from a restricted public grant. It is well-settled law that, to the extent two enactments cover the same subject matter, those parts of either enactment which treat the matter in the more direct and specific manner will prevail. See Opinion of the Justices, 311 A.2d 103 (Me. 1973).

A further consideration militating against the Department's interpretation of Principles 3023 and 4051 is its inconsistency with HEW's interpretation of a Medicare principle of reimbursement, 42 C.F.R. § 405.418(a) whose language is identical to Principle 3023. This Office has communicated with a member of the policy staff of HEW who indicated that depreciation is presently allowed under the Medicare program on assets acquired with funds received under a public grant. While it is clear that the Medicare principles do not govern reimbursement under the Medicaid program (except to act as a ceiling) and that there is no requirement under Title XIX or the regulations promulgated thereunder that the State pay depreciation on such assets, the Introduction to the Department's Principles at page 6 provides as follows:

1/ See Webster's Seventh New Collegiate Dictionary (1971).

> A determination of whether or not a cost is allowable and interpretations of definitions, not specifically detailed in these principles, will be based on Medicare Provider Reimbursement Manual (HIM-15) guidelines and Internal Revenue Services guidelines in effect at the time of such determination.

Because of this express policy, any ambiguity in the construction of Principle 3023 should be resolved in favor of the interpretation rendered by HEW. Moreover, it is generally recognized that where one state adopts a statute from another jurisdiction, absent other indices or considerations, it is assumed that constructions of the statute at the time of adoption are also adopted. Cf. Wing v. Morse, 300 A.2d 491 (Me. 1973).

In conclusion, it is our opinion that the Department's interpretation of its current Principles is erroneous and the depreciation on assets acquired with funds received under a restricted federal grant is an allowable cost.

If you should have further questions, please feel free to contact this office.

Sincerely,

RICHARD S. COHEN
Attorney General

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