

MAINE STATE LEGISLATURE

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March 21, 1980

Honorable Mary Najarian
Maine Senate
State House
Augusta, Maine 04333

Dear Senator Najarian:

This letter is in response to your request for an opinion from this office regarding the validity of certain policies of the Voluntary Budget Review Organization of Maine.

BACKGROUND:

In 1977, the Health Facilities Information Disclosure Act (22 M.R.S.A. § 351 et seq.) (hereinafter "the Act") was enacted in response to rising costs of health care and services. This legislation established mechanisms for gathering health care information and instituted a review process for proposed budgets of hospitals. It permits a hospital to either submit its budget to a Voluntary Budget Review Organization (VBRO) or to the statutorily created Health Facilities Cost Review Board. However, the Act provides only for review and comment by either the VBRO or the Cost Review Board; these bodies have no authority to require modifications to a budget or to impose sanctions as a result of an adverse finding in regard to a budget.

By statute, a VBRO must be a non-profit organization established to conduct the required reviews and must be duly incorporated under the laws of the State. See 22 M.R.S.A. §§ 352(8) and 364(6). The Health Facilities Cost Review Board is empowered to approve a VBRO and to withdraw approval from a VBRO. 22 M.R.S.A. §§ 357(7) and 364. The Cost Review Board is mandated to approve a VBRO if it meets the criteria stated at 22 M.R.S.A. § 364(2). In particular, sub-paragraph B of that subsection establishes the criteria regarding membership as follows:

B. The structure of the organization provides for the reviews to be made and the actions to be taken with respect to the reviews by a body of the organization which includes equal representation for members approved by the Maine Hospital Association, major third party payers and consumers of health care. Neither the consumers nor their spouses, children or parents shall, within the twelve months preceding appointment, have been affiliated with, employed by or have any professional affiliation with any health care facility or institution, health product manufacturer or corporation or insurer providing coverage for hospital or medical care; provided that neither membership in a non-profit hospital and medical organization, coverage for health care under an insurance policy, nor service as a corporator or member of an honorary board of a health care facility or institution shall operate to disqualify a person from serving as a public member.

Grounds for withdrawal of approval are provided at section 364(4):

A. The actions of the Voluntary Budget Review Organization no longer satisfy the criteria contained in subsection 2; or

B. The performance standards established by the Board have not been met by hospitals in the organization.

The Voluntary Budget Review Organization of Maine, a non-profit organization, is an approved VBRO. This organization's budget review activities are conducted by its Hospital Budget Review Panel. The Board of Directors of this VBRO, through its nominating committee, has established criteria in addition to that specified in section 364(2)(B) for selecting candidates to serve as consumer representatives on the Budget Review Panel.

QUESTIONS POSED:

1. "Would additional requirements for membership in the reviewing body be sufficient to either authorize or require the cost review board to withdraw approval of the VBRO pursuant to 22 M.R.S.A. § 364(4)(A)?"
2. "In that a VBRO operates in lieu of a State agency pursuant to statute, do additional requirements for membership on the VBRO's reviewing body constitute rules within the meaning of 5 M.R.S.A. § 8052 or any other provision of the Administrative Procedure Act?"

CONCLUSIONS:

1. No.
2. No.

REASONING:

1. The answer to your first question depends upon whether § 364(2) is read as establishing the exclusive requirements for membership on a VBRO or simply as setting minimal standards which must be met to obtain approval by the board. In our view, the language of the section clearly suggests the latter interpretation. Section 364(2) provides that the board shall approve a VBRO "which meets each of the following criteria." Regarding membership, the criteria consist solely of a requirement that the organization have equal representation from various groups, including "consumers of health care." The only other provision excludes consumers with certain past or present affiliations, in what appears to have been a legislative attempt to avoid a conflict of loyalties. When contrasted with statutes clearly designed to establish exclusive requirements for membership on a board or agency, section 364(2) reflects an intent only to create minimal standards for board approval.^{1/}

It is a fundamental maxim of statutory construction that, when there is no manifest legislative intent to the contrary, a statute must be read according to the natural import of its language and resort to a forced or subtle construction must be avoided. 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). We do not find any legislative intent to regulate the recruitment policies of the VBRO's other than to require conformity with the minimum requirements specified in the statute. Therefore, it is the opinion of this office that the establishment of requirements for membership on the budget review body of a VBRO which are in excess of, but not inconsistent with, the standards stated in § 364(2) does not provide grounds for withdrawal of approval from the VBRO.^{2/}

^{1/} It is relevant to note that § 364(2) is silent on the number of members, their manner of appointment, the length of their terms, and the procedures for filling vacancies. These matters are generally addressed when the Legislature intends to deal with membership in a comprehensive fashion. Cf. 22 M.R.S.A. § 353.

^{2/} Since the membership requirements which prompted your concern are unknown to us, we express no opinion as to whether any of them would be inconsistent with the standards stated in § 364(2).

2. The rule-making procedures of the Administrative Procedure Act govern only the adoption of rules by "agencies." 5 M.R.S.A. § 8002(2) defines "agency" as "any body of State Government authorized by law to adopt rules, to issue licenses or to take final action in adjudicatory proceedings. . . . "

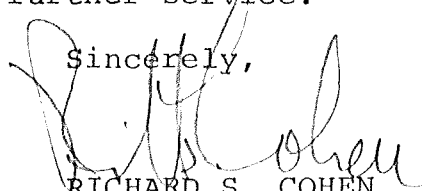
The VBRO is a non-profit organization which is regulated but not established by statute. The Act clearly provides the VBRO with no authority to adopt rules or to issue licenses. Nor does it authorize the VBRO to take final action in adjudicatory proceedings.^{3/} While a VBRO reviews budgets and makes certain findings, these findings do not bind the hospital in any way and thus do not affect its legal rights, duties or privileges so as to constitute final action.

In the absence of any specific statutory authority to adopt rules or to take final action in adjudicatory proceedings, the VBRO's powers are confined to those given to any non-profit corporation under the laws of the State. See 13-B M.R.S.A. § 201 et seq. Indeed, if the Legislature were to attempt to endow the VBRO with such rule-making or decision-making authority, it might well be making an unlawful delegation of authority.

In conclusion, it is the opinion of this office that the VBRO is not an agency within the meaning of the Administrative Procedure Act and that its membership requirements do not constitute rules within the meaning of that Act.

I hope this information is helpful. Please feel free to call on me if I can be of any further service.

Sincerely,


RICHARD S. COHEN
Attorney General

RSC/ec

^{3/} 5 M.R.S.A. § 8002(4) defines final agency action as "a decision by an agency which affects the legal rights, duties or privileges of specific persons, which is dispositive of all issues, legal and factual, and for which no further recourse, appeal or review is provided within the agency."