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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

June 13, 1980

Philip G. Clifford, Manager
Maine Guarantee Authority
83 Eastern Avenue
Augusta, Maine 04333

Re: MGA Revenue Bond and CIB Guidelines

Dear Phil:

This letter will confirm my oral advice that the adoption of guidelines by the Maine Guarantee Authority ("MGA") for the Revenue Obligations Securities Program, under 10 M.R.S.A. §861 et seq., and for the Community Industrial Buildings Program, under 10 M.R.S.A. §671 et seq., do not require rulemaking under the Maine Administrative Procedure Act, 5 M.R.S.A. §8001, et seq. (the "APA").

A "rule," for purposes of the APA, is defined by 5 M.R.S.A. §8002(9) in part as follows

A. "Rule" means the whole of any part of every regulation, standard, code, statement of policy or other agency statement of general applicability, . . . that is or is intended to be judicially enforceable and implements, interprets or makes specific the law administered by the agency, or describes procedures or practices of the agency. ***

B. the term does not include: *** (4) Any . . . explanatory statement of policy which in itself is not judicially enforceable, and which is intended solely as advice to assist persons in determining, exercising or complying with their legal rights, duties or privileges.

The underscored portions of this definition indicate that the critical question is whether the MGA's guidelines are "judicially enforceable." There are circumstances under which

agency "policies" may be considered to be judicially enforceable. See, Op. Atty. Gen., June 27, 1979 concerning the Maine State Housing Authority. (Attached). However, the MGA has made it clear that its "guidelines" are intended to be non-binding in that they neither preclude applications nor the MGA from approving applications for proposed projects that do not conform to the guidelines. The guidelines, as I understand them, are merely intended to inform the public of the MGA's preferences with regard to applications under the two programs.

Under these circumstances, we have concluded that the guidelines are not "rules" within the meaning of the APA and therefore do not require rulemaking proceedings in order to be adopted.

If I can be of any further assistance in this matter, please let me know.

Sincerely,



RUFUS E. BROWN
Senior Assistant Attorney General

REB:jg

RICHARD S. COHEN
ATTORNEY GENERAL



79-130
Attachment

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

June 27, 1979

Honorable Judy Kany
18 West Street
Waterville, Maine 04901

Honorable David Ault
Morrison Heights
Wayne, Maine 04284

Dear Senator Ault and Representative Kany:

You have asked for our opinion on whether certain "policies" adopted by the Maine State Housing Authority ("MSHA") are regulations within the meaning of the Maine Administrative Procedure Act ("APA"). The documents to which you refer and about which you seek our opinion are attached hereto as Exhibit A.

The definition of "rule" in the APA is set out in 5 M.R.S.A. § 8002(9). The definition in its entirety states:

"9. Rule

"A. 'Rule' means the whole or any part of every regulation, standard, code, statement of policy, or other agency statement of general applicability, including the amendment, suspension or repeal of any prior rule, that is or is intended to be judicially enforceable and implements, interprets or makes specific the law administered by the agency, or describes the procedures or practices of the agency.

"B. The term does not include:

"(1) Policies or memoranda concerning only the internal management of an agency or the State Government and not judicially enforceable;

"(2) Advisory rulings issued under subchapter III;

"(3) Decisions issued in adjudicatory proceedings; or

"(4) Any form, instruction or explanatory statement of policy which in itself is not judicially enforceable, and which is intended solely as advice to assist persons in determining, exercising or complying with their legal rights, duties or privileges."

The concept encompasses any written document, regardless of whether it is defined as a rule on its face, which regulates the conduct of citizens, defines generally the relationship of the agency to the persons with whom it deals (e.g., rules of procedure for the agency), or establishes other substantive or procedural rights, liabilities or legal standards. Excepted from that definition are internal management policies and material provided to the public to explain the agency's policies or practices.

The key provision in the definition, and the one which causes your question to be so complex, is the definitional requirement that a policy be or intended to be "judicially enforceable" in order to be a "rule." In construing the meaning of the terms "rule" and "judicially enforceable," it should be noted that the Maine APA is in some respects unique. We have found no case law under the federal APA or other states to assist us in interpreting these terms. Nor is there any legislative history to shed any light on these provisions. Our interpretation is, therefore, limited to what we perceive to be the logic and intent of the APA.

In the ordinary sense, a rule is usually understood to mean a written standard of conduct expressed either in prohibitory or mandatory language. Such a rule is "judicially enforceable" in the sense that a civil or criminal suit can be brought for its violation or to compel compliance with its requirements. Customarily rules are employed by regulatory agencies exercising the police power of the State. In some instances, however, agencies adopt rules of conduct not for purposes of exercising police power, but in connection with the distribution of government benefits (e.g., rules of eligibility for welfare, food stamps, unemployment compensation, special educational programs, and the like). Nevertheless, the fact that some standards of conduct are related to distribution of government benefits does not make such standards any less rules.

It is the clear rule of law that government may not act arbitrarily in granting or withholding benefits merely because there is no constitutional entitlement to the benefits. See, e.g., Goldberg v. Kelly, 397 U.S. 254 (1969). Once a program of benefits is begun, it must be administered uniformly and according to prescribed standards. It would follow that the standards for distribution of such government benefits are judicially enforceable since the agency is bound by the standards as the rule of law governing the agency's decision-making process and the citizen is bound by the standard as the rule of law governing his/her eligibility.

In this case, the State Housing Authority is performing a function akin to that of other agencies distributing government monies. Unlike other government benefit programs, however, the decisions of the Housing Authority are more like investment decisions and less like a program involving distribution of welfare benefits. Clearly the Housing Authority has wide discretion to invest in those projects which it thinks will best meet the public's needs. Nevertheless, we think that where the Housing Authority elects to establish standards on which to base its decisions, the standards thus set may in certain respects constitute rules under the APA.

As is the case with welfare rules, the standards which constitute rules under the APA are those which, once adopted, are the rule of law governing the agency's discretion and the eligibility of an applicant. Although they are not police power regulations, such standards clearly make specific and implement the statutory criteria under which the Housing Authority operates. While it might be argued that such standards are merely unenforceable policies and not rules, we think that such an argument is unpersuasive. If a standard establishes clear criteria for conduct, e.g., the criteria to be used in determining whether to finance a particular project, those criteria bind the agency and are, in our judgment, judicially enforceable.

Of course, we recognize that it is possible to draft a statement in such a way that it not be construed to be a rule. Thus, for example, the Housing Authority could phrase a policy as an explanatory statement of the general kind of criteria that would be considered in making a judgment to finance a project, making it clear in the policy that the agency reserved the right to consider other unenumerated criteria. If phrased in this manner, such a policy would probably not be judicially enforceable.

Having discussed the issue generally, we think it necessary to indicate the limits of this opinion. First, the Housing Authority has adopted many operating policies, only two of which we have been asked to review. The opinion expressed herein may not necessarily be applicable to all such policies. Each must be reviewed individually. Second, in addition to the Housing Authority, there are many State agencies involved in the distribution or awarding of government grants, benefits or contracts, the purchasing of real and personal property, and the management of public resources. Whether or not the operating policies or procedures of any other such agencies constitute "rules" cannot be determined without a detailed review of each such agency's function and responsibilities, the statutory authority of the agency and the text of the particular policy.

Turning then to the specific documents that you have asked us to review, each requires a detailed analysis to determine whether they are rules subject to the APA or are policies exempt from that definition.

Consent Resolution "Policy"

The first document analyzed, although denominated a "policy," is, we believe, at least in part a "rule" under § 8002(9)(A). From an examination of the text of this policy, it appears quite clear that at least part of the document is more than a mere internal operating guide for the staff. In particular, sections (a), (b) and (c) contain "criteria" that specify circumstances under which the MSHA "will not" allocate housing assistance subsidies. Such express language in this context creates an operative legal standard that governs the decisions of the MSHA under the circumstances specified, and thereby determines the legal status of those entities affected by those sections. The result of the "policy" is to give a limiting interpretation to the statutory requirement of a consent resolution. It implements and makes specific the statutory requirement and is evidently intended to be judicially enforceable.

The second part of this policy may, however, be correctly characterized as an internal management guide, since it constitutes a directive to the MSHA staff setting forth for the scope of their authority to participate in the process in question. This policy instructs the staff on the processing of MSHA paperwork and does not delegate decision-making power nor create legal standards. Thus, this portion of the policy is not a rule.

Housing: Unit Reservation "Policies"

As is the case with the previously analyzed "policy," this document is in part an internal management policy and in part a rule. Parts I and II could be characterized in part as internal management policies since they constitute directives to MSHA staff for informing the public on the MSHA's interest in receiving housing proposals. In essence, they are guidelines to the staff on how to go about soliciting proposals for projects. However, section II(A)(1) establishes a deadline for submission of proposals to the MSHA in response to public notice. From the language of this paragraph, it appears that the deadline establishes a legal standard regulating conduct of those with whom the Authority does business. This paragraph clearly affects the legal rights of those who fail to meet the deadline. To that extent, therefore, that portion of Section II constitutes rules.

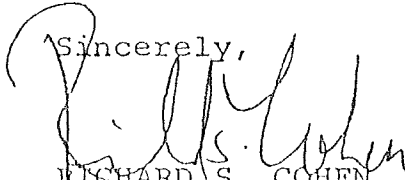
Parts III-VI are clearly rules since they establish standards for approval or disapproval of applications and therefore implement and interpret the statutes affecting substantive legal rights of affected parties. These parts cannot be characterized, despite the introductory language, as internal management standards.

Read as a whole, therefore, this particular set of "policies" are rules, as defined in the APA.

Manner of Promulgation, Amendment or Repeal

It is not clear from the fact of the documents the date on which they were adopted; however, it is possible to infer from the dates that appear thereon that these materials were prepared and approved by the MSHA prior to July 1, 1978, the effective date of the APA. If that is the case, those portions of the policies that constitute rules may be ineffective after July 1, 1979, unless repromulgated in accordance with 5 M.R.S.A. § 8057(1), second sentence. Any further modification or repeal of these rules or adoption by MSHA of any other substantive standards regulating conduct or prescribing legal rights or remedies and thus constituting rules must be done in a manner consistent with §§ 8051-8058 of the APA.

Sincerely,


RICHARD S. COHEN
Attorney General

RSC/ec
Enc.

cc: Genevieve K. Gelder