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JAMES E. TIERNEY
ATTORNEY GENERAL



STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

January 26, 1984

Kevin W. Concannon, Commissioner
Department of Mental Health
and Mental Retardation
State House Station 40
Augusta, Maine 04333

Dear Commissioner Concannon:

This will respond to your inquiry as to whether the Human Rights Committee at the Elizabeth Levinson Center, which is created by state and federal regulation, and is composed of staff members, residents' relatives, and community members, may appoint its own members. For the reasons set out below, it is the opinion of this Department that such a practice would be an unconstitutional delegation of State power.

I

In order to understand this issue completely, it is necessary to consider the structure and the role of the Human Rights Committee ("HRC") at the Elizabeth Levinson Center ("Center"). The HRC is created by state and federal regulation and it performs an important public function at the Center.

Pursuant to 42 U.S.C. § 1905 (1976), the Secretary of the U.S. Department of Health and Human Services is empowered to issue rules and regulations to protect the human rights of residents of any intermediate care facility for the mentally

retarded ("ICF/MR") which receives federal Medicaid funds.^{1/} The Secretary has promulgated regulations, which provide, in pertinent part, that "[t]he ICF/MR must establish appropriate standing committees such as human rights, research review, and infection." 42 C.F.R. § 442.413(a) (1982).

Although federal regulations only encourage, but do not require, the establishment of an HRC at the Center, ^{2/} state regulations mandate the creation of an HRC at the Center. Pursuant to 22 M.R.S.A. §§ 42(1), 42(1-A) (1980), the Maine Department of Human Services ("DHS") has promulgated "Regulations Governing the Licensing and Functioning of Intermediate Care Facilities for the Mentally Retarded" ("DHS Reg.").^{3/} The regulations provide, in pertinent part, that:

The governing body of the Home shall establish a Human Rights Committee to ensure the protection of the resident and the resident's rights. The committee shall be composed minimally of at least one governing board member, one direct contact staff member, one relative of a resident and two impartial community citizens with no personal involvement in the operation of the home. The committee may be increased in size by adding additional community members. This committee shall establish procedures to investigate and resolve problems involving a resident's rights. The committee will be responsible to the governing body.

DHS Reg. 6(E). State and federal regulations, therefore, require the establishment of the HRC at the Center.

^{1/} The Center is an ICF/MR, as defined by 42 U.S.C. § 1905 (1976), and therefore, it is subject to the federal regulations.

^{2/} Cf. Griffith and Henning, What Is a Human Rights Committee?, 19 Mental Retardation 61 (1981) ("While there is no federal mandate for HRC's, their role is loosely defined in regulations governing the Medicaid program for Intermediate Care Facilities for the Mentally Retarded.") (citation omitted).

^{3/} The Center is licensed by DHS, see 22 M.R.S.A. § 1811 (1980), and therefore, it is subject to the DHS regulations.

The Center was established by the State and is maintained by the State. See 34 M.R.S.A. § 2634(1) (1978).^{4/} By state law, as well as by state and federal regulation, the governing body of the Center is the Commissioner of Mental Health and Mental Retardation ("Commissioner"). See 34 M.R.S.A. § 2634(2) (1978), replaced by P.L. 1983, ch. 459, § 7, enacting 34-B M.R.S.A. § 5404(2); DHS Regs. 6(L), 6(M); 42 C.F.R. §§ 442.409, 442.410 (1982). The HRC at the Center therefore is "establish[ed]" by the Commissioner, and is "responsible" to the Commissioner. See DHS Reg. 6(E)

In addition to its status as a state-created body, the HRC performs several important public functions. The HRC's general responsibility is to "ensure the protection of the resident and the resident's rights." Id. Moreover, the HRC has been given explicit authority to investigate allegations of mistreatment, neglect, or abuse of any resident at the Center. See DHS Reg. 6(D)(19). The HRC also may review periodically the drug regimen of each resident at the Center, see 34 M.R.S.A. § 2143(8)(C) (1978), replaced by P.L. 1983, ch. 459, § 7, enacting 34-B M.R.S.A. § 5605(8)(D), as well as monitor the administration of psychotropic drugs. See 42 C.F.R. § 442.441(b) (1982). If the HRC learns of any violations of a client's rights at the Center, it is required by state law to report those allegations to the Office of Advocacy of the Department of Mental Health and Mental Retardation and to the Attorney General. See 34 M.R.S.A. § 2144(1) (1978), replaced by P.L. 1983, ch. 459, § 7, enacting 34-B M.R.S.A. § 5606(1). Thus, the HRC at the Center is not only a state-created body, but it should also be assumed that it performs an important governmental function.

II

The issue presented, therefore, is whether a State body which also performs a governmental function may establish itself independently from the State, and appoint its own members. This Department concludes that the HRC at the Center may not appoint its own members because to do so would be an unconstitutional delegation of State power.

^{4/} This statute was repealed in 1983 as part of the recodification of the mental health and mental retardation statutes. See P.L. 1983, ch. 459, § 5, repealing Title 34. An identical provision was enacted simultaneously by P.L. 1983, ch. 459, § 7, enacting 34-B M.R.S.A. § 5404(1) (effective January 16 1983).

We begin with the recognition that the State cannot delegate its sovereign powers. State v. Boynton, 379 A.2d 994, 995 (Me. 1977).^{5/} "The purpose of the non-delegation doctrine . . . is to protect the citizen against arbitrary discrimination actions by public officials." Id. The non-delegation doctrine, therefore, is founded upon a concept of accountability. "Fundamental principles embodied in our constitution dictate that the people control their government." Rogers v. Medical Association of Georgia, 244 Ga. 151, 153, 259 S.E.2d 85, 87 (1979).^{6/} Likewise, the Pennsylvania Supreme Court has held that "[a] fundamental precept of the democratic form of government embedded in our Constitution is that the people are to be governed only by their elected representatives." Hetherington v. McHale, 458 Pa. 479, 483, 329 A.2d 250, 253 (1974). Because the HRC at the Center is a State body performing a governmental function, the only remaining issue is whether the appointment of the members is a sovereign power of the State.

^{5/} The Maine Supreme Judicial Court has not had an opportunity to address the specific issue of the delegation of the governmental power of appointment to private persons or organizations. The cases concerning the delegation doctrine and private parties have involved other governmental powers, such as arbitration, see Superintending School Committee of City of Bangor v. Bangor Education Association, 433 A.2d 383, 386-87 (Me. 1981), or other constitutional provisions, such as taxation. See Boston Milk Producers, Inc. v. Halperin, 446 A.2d 33, 41 (Me. 1982). Most Maine cases, however, concern the delegation of power from one branch of government to another, see, e.g., State v. Boynton, 379 A.2d at 995 (legislative to executive), or from one level of government to another. See, e.g., State v. Gauthier, 121 Me. 522, 524, 118 A. 380, 381 (1920) (state to federal). Unlike the instant case, limited delegation between governmental branches or levels is permitted when sufficient standards are provided. See, e.g., State v. Pickering, 462 A.2d 1151, 1162-63 (Me. 1983) (plurality opinion) (prosecutorial discretion to charge civil or criminal OUI); Opinion of the Justices, 460 A.2d 1341, 1347-49 (Me. 1983) (use of Consumer Price Index to determine rate of tax indexing).

^{6/} In Rogers, the Georgia Supreme Court, interpreting similar constitutional provisions, declared unconstitutional a statute that required the Governor to appoint persons nominated by a private organization, the Medical Association of Georgia, to the State Board of Medical Examiners. See id. at 153-54, 259 S.E.2d at 87.

Although the Law Court has not had an opportunity to address this specific question, see note 5 supra, there can be little dispute elsewhere that "[t]he power to appoint public officers is the sovereign power of the State." People ex rel. Rudman v. Rini, 64 Ill.2d 321, 326, 256 A.2d 4, 7, 1 Ill.Dec. 4, 7 (1976).^{7/} Accordingly, "the power to appoint persons to conduct governmental functions cannot be delegated to private organizations." Commonwealth ex rel. Kane v. McKechnie, 467 Pa. 430, ___, 358 A.2d 419, 420 (1976),^{8/} quoting Heatherington v. McHale, 458 Pa. 479, 481, 329 A.2d 250, 251 (1974) (unconstitutional delegation to permit agriculture-oriented organizations to select certain members for committee which allocated agricultural research funds).^{9/}

^{7/} In Rini, the Illinois Supreme Court declared unconstitutional a statute that permitted political parties to make interim appointments to voter registration boards. See id. at 326-27, 356 A.2d at 7, 1 Ill. Dec. at 7.

^{8/} In McKechnie, the Pennsylvania Attorney General successfully brought a quo warranto action to remove the President of the Dental Society from the Board of Dental Examiners on the grounds that the statute which appointed the President to the Board was an unconstitutional delegation of State power.

^{9/} See also Gold v. South Carolina Board of Chiropractic Examiners, 271 S.C. 74, 245 S.E.2d 117 (1978) (professional society selects nominees for state board); United Chiropractors of Washington, Inc. v. State, 90 Wash.2d 1, 578 P.2d 38 (1978) (en banc) (same). Cf. See Gamel v. Veterans Memorial Auditorium Commission, 272 N.W.2d 472, 476 (Iowa 1978), citing State v. Schorr, 6 Terry (45 Del.) 18, 65 A.2d 810 (1948); Tucker v. State, 218 Ind. 614, 35 N.E.2d 270 (1941); Opinion of the Justices, 337 Mass. 777, 150 N.E.2d 693 (1958) (public bodies which spend state funds cannot be appointed by private organizations). Some courts, however, have upheld statutes that permitted private organizations to nominate persons for appointment to public boards. See, e.g., Commission on Medical Discipline v. Stillman, 291 Md. 390, 435 A.2d 747 (1981); Clark v. State ex rel. Mississippi State Medical Association, 381 So.2d 1046 (Miss. 1980); Hartzell v. State Board of Examiners in Psychology, 274 S.C. 502, 265 S.E.2d 265 (1980).

The Pennsylvania Supreme Court has explained the rationale for this constitutional limitation:

We are equally concerned with the preservation of the "essential concepts of a democratic society" when the power delegated is the authority to make appointments to a committee exercising governmental functions. The power to select those who make public decisions is too vital a part of our scheme of government to be delegated to private groups.

Hetherington v. McHale, 458 Pa. at 484, 329 A.2d at 250. Likewise, the Georgia Supreme Court has observed that it would be unconstitutional to "delegate the appointive power to a private organization. Such an organization, no matter how responsible, is not in the public domain and is not accountable to the people as our constitution requires." Rogers v. Medical Association of Georgia, 244 Ga. at 154, 259 S.E.2d at 87. The Court reached this conclusion because "[a]s important as any other governmental power is the power to appoint public officials. They are the persons who control so much of our lives." Id. at 253, 259 S.E.2d at 87.^{10/}

By applying this analysis to the instant case, it must be concluded that the Commissioner is required to appoint the members of the HRC. The role of the HRC -- investigating allegations of abuse, monitoring the administration of drugs, reviewing certain behavior medication programs, and reporting allegations of abuse to the proper authorities -- cannot be underestimated. Because the role being performed by the HRC is a governmental function, it would be unconstitutional to delegate the power of appointment to the HRC.

^{10/} The Court then observed that "[t]he importance of this power is emphasized by the constitutional provision by which the people initially granted to their chief Executive, the Governor, the power to fill vacancies in public offices 'unless otherwise provided by law. . . .' In our opinion, it is clear that the constitutional provisions cited above demand that the power to appoint public officers remain in the public domain." Id. (citation omitted). The Maine Constitution has a similar grant of power to the chief executive, the Governor. See Me.Const. art. V, pt. 1, § 8.

As noted above, the "governing body" of the Center "establish[es]" the HRC, and the HRC "is responsible to the governing body." Id. The Commissioner is the governing body of the Center. See 34 M.R.S.A. § 2634(2) (1978), replaced by P.L. 1983, ch. 459, § 7, enacting 34-B M.R.S.A. § 5404(2); DHS Regs. 6(L), 6(M); 42 C.F.R. §§ 442.409, 442.410 (1982). It may be concluded from these statutes and regulations alone that the Commissioner is required to appoint the members of the HRC at the Center. That conclusion is inescapable when the non-delegation doctrine is also taken into account.

III

The conclusion that members of a governmental body which perform an important governmental function, such as the HRC at the Center, must be appointed by a state official is the standard for all Maine government. Indeed, examination of Human Rights Committees in Maine and elsewhere, as well as other State government boards, committees and commissions, illustrates that the appointment power cannot be delegated.

In 1978, the State signed a consent decree which outlined the procedures that would be employed to protect the rights of the mentally retarded who reside at the state-run Pineland Center. See Wuori v. Concannon, No. 75-80-P (D.Me. July 14, 1978). As part of that consent decree, a Consumer Advisory Board, which performs essentially the same function as the HRC at the Center, was established. See id. at Appendix A(T)(1). By Court order, the members of the Consumer Advisory Board are appointed by the Commissioner. See id. at Appendix A(T)(2).

The requirement that State officials appoint members of State governmental bodies is not unique to Maine law. In a study of all Human Rights committees nationwide, commentators discovered that in all states where the appointing authority was known, the appointing authority was either the agency director or a public official with statewide administrative authority or responsibility. Griffith, Baker-Botts, and Henning, What a Human Rights Committee Is, at 4 (1983) (unpublished manuscript on file at the Attorney General's Office).^{11/} Therefore, every Human Rights Committee member, in Maine and elsewhere, of which this Department is aware, is appointed by a state official.

^{11/} Of the twenty-four respondents to the survey, six states did not specify the appointing authority. Id.

The conclusion that the power of appointment cannot be delegated is further supported by an examination of other Maine boards, committees, and commissions. There are literally dozens of boards, committees, and commissions in Maine. Some are well known and have extensive responsibilities, such as the Public Utilities Commission and the Board of Environmental Protection. Others are virtually unknown and have only advisory responsibilities, such as the Cruelty to Animals Advisory Board and the State Government Internship Program Advisory Committee. But all of these boards, commissions, and committees have in common one feature: their members are appointed by state or local officials who are directly or indirectly accountable to the people, such as the Governor, the Speaker of the House, the President of the Senate, or members of the Governor's cabinet.^{12/}

^{12/} For example, one or more members of the following boards are appointed by persons who themselves are appointed by the Governor, such as the Commissioner: Board of Boiler Rules, 26 M.R.S.A. § 171 (Supp. 1983); Maine Dairy Promotion Board, 36 M.R.S.A. § 4503 (Supp. 1983); Maine Athletic Commission, 8 M.R.S.A. § 141 (Supp. 1983); Auctioneers Advisory Board, 32 M.R.S.A. § 271 (Supp. 1983); Electricians' Examining Board, 32 M.R.S.A. § 1151 (Supp. 1983); Arborist Examining Board, 32 M.R.S.A. § 2001 (Supp. 1983); State Board of Certification for Geologists and Soil Scientists, 32 M.R.S.A. § 4907 (Supp. 1983); Board of Visitors for the Military and Naval Children's Home, 34 M.R.S.A. § 2954(2) (Supp. 1983); Commission to Study the Matter of Child Custody in Domestic Relations Cases, P.L. 1983, ch. 564, § 4; Seed Potato Board, 7 M.R.S.A. § 2151 (Supp. 1983); State Soil and Water Commission, 12 M.R.S.A. § 51 (1981); Maine Aeronautical Advisory Board, 6 M.R.S.A. § 302(2) (Supp. 1983); Banking Advisory Board, 9-B M.R.S.A. § 216(1) (1980); Computer Services Advisory Board, 5 M.R.S.A. § 1855 (Supp. 1983); Cruelty to Animals Advisory Board, 17 M.R.S.A. § 1216 (1983); Environmental Health Advisory Committee, 22 M.R.S.A. § 1693 (Supp. 1983); Maine State Ferry Advisory Board, 23 M.R.S.A. § 4302 (1980); Advisory Committee on State Telecommunications, 5 M.R.S.A. § 351 (1979); Free Drugs to the Elderly Advisory Committee, 22 M.R.S.A. § 254(6) (Supp. 1983); Public Transportation Advisory Committee, 23 M.R.S.A. § 4209(7) (1980); Advisory Council on Employment Security, 26 M.R.S.A. § 1082(5) (Supp. 1983).

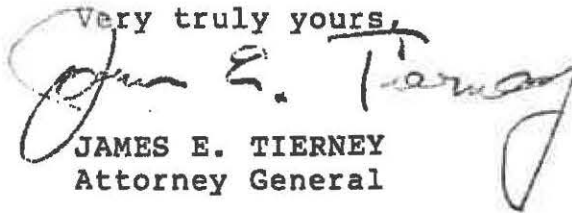
IV

The applicable state and federal regulations, the non-delegation doctrine, the structure of other Human Rights committees in Maine and elsewhere, and the structure of other Maine boards, committees, and commissions, all point inexorably to the same conclusion: the members of the Human Rights Committee at the Elizabeth Levinson Center must be appointed by the Commissioner of Mental Health and Mental Retardation, and not by the current members of that committee.

This conclusion should not be seen as a reflection upon that committee, or an attempt to undermine the importance of volunteerism in Maine by concerned, private Maine citizens. On the contrary, like many Maine boards composed of private citizens, the Human Rights Committee at the Elizabeth Levinson Center performs an important public service. Its statutory structure ensures both its competence and its independence. The constitutional requirement that the Commissioner appoint its members will also ensure its constitutionality.

I hope you find this information helpful.

Very truly yours,


JAMES E. TIERNEY
Attorney General