Opinion No. 69-75

July 14, 1969

BY: OPINION OF JAMES A. MALONEY, Attorney General Mark B. Thompson, III, Assistant Attorney General

TO: Julia C. Southerland, Chief Attorney, Health and Social Services, Department P.O. Box 2348, Santa Fe, New Mexico

QUESTIONS

QUESTIONS

1. Does New Mexico Laws of 1969, Ch. 278, an act amending Section 12-5-10, N.M.S.A., 1953 Compilation, and providing for "non-discrimination" between Doctors of Osteopathy and Doctors of Medicine by hospitals, apply to hospitals which have not received federal aid under the Hill-Burton Act?

2. Does Laws of 1969, Ch. 278 apply to hospitals which received Hill-Burton's funds prior to June 20, 1969, the effective date of the act?

CONCLUSION

1. No.

2. Yes, but see analysis.

OPINION

*{*115}* ANALYSIS

Section 12-5-10, N.M.S.A., 1953 Comp., as amended by Laws 1969, Ch. 278, reads in part:

"All facilities which receive federal aid under the provisions of this act shall comply with the following standards of construction, maintenance, and operation:

A. No facilities which shall receive federal aid under the provisions of this act shall be established, conducted or maintained without a license as herein provided.

B. Application for license. An application for a license shall be made to the department upon forms provided by it and shall contain such information as the department reasonably requires, which may include affirmative evidence of ability to comply with such reasonable standards, rules and regulations as are lawfully prescribed hereunder,

but shall include evidence that the by-laws or regulations of the hospital apply equally to osteopathic or medical physicians." (Emphasis added).

This section, without the underlined portion added by Laws 1969, Ch. 278, was originally enacted as part of the general enabling legislation of 1947, making the State of New Mexico eligible to receive federal aid under the Hill-Burton Act 42 U.S.C. §§ 291 (a) to 291 (o). The Hill-Burton Act does not require licensing of hospitals or other facilities, but it does provide that any state desiring to participate in the federal aid must "provide minimum standards (to be fixed in the discretion of the state) for the maintenance and operation of facilities providing inpatient care which receive aid . . ." 42 U.S.C. Section 291 (d) (7).

Prior to June 20, 1969, Section 12-5-10, N.M.S.A., 1953 Compilation did not set forth any requirements for the maintenance and operation of hospitals receiving Hill-Burton funds other than requiring a license. In fact, the Department of Health and Social Services and its predecessor the Department of Public Health, have licensed all hospitals under a general licensing power found in Section 12-1-3 (12), N.M.S.A., 1953 Comp. The regulations promulgated under Section 12-1-3, apply to all hospitals in the State without regard to the source of the funds from which the hospitals were constructed or remodeled. In Attorney General Opinion No. 5271, dated December 28, 1949, this Office recognized the power of the Department to promulgate regulations to cover the licensing of all hospitals, provided that the Department gave due regard to the provisions of Section 12-5-10 for hospitals which are constructed with Federal aid.

Prior to the 1969 amendments the Department had little need to give due regard to Section 12-5-10 because that statute contained no specific rules or regulations or standards which had to be separately enforced in hospitals receiving Federal aid. With the enactment of Laws 1969, Chapter 278, the Department is now faced with the necessity of applying a special rule to hospitals receiving federal aid. It is, therefore, our conclusion that hospitals which have not or *{*116}* will not receive any federal aid under the Hill-Burton Act are not required to meet the so-called non-discrimination provision now contained in Section 12-5-10.

Section 12-5-10 (c) contains a provision for annual renewal of the license issued to hospitals receiving Federal aid. This Section has likewise received little attention due to the fact that the Department of Health and Social Services has been licensing all hospitals annually under the general licensing power. But because Section 12-5-10 (c), N.M.S.A., 1953 Comp., provides for renewals annually we conclude that the answer to your second question is Yes, hospitals which have received Hill-Burton funds in the past must comply with the new non-discrimination requirement.

We note, however, that the special licensing provisions in Section 12-5-10 probably do not extend beyond a 20 year period after completion of construction with Hill-Burton funds. We reach this conclusion on the basis that the Hill-Burton Act provides that any funds which have been paid under the act for construction or modernization of facilities must be paid back to the Federal Government if at any time within 20 years after the

completion of construction the facility ceases to be a "public health center or a public or other non-profit hospital," etc. 42 U.S.C. § 291 (i). In view of the fact that Section 12-5-10 was enacted by the New Mexico Legislature to comply with the Hill-Burton requirement that the State provide minimum standards for facilities receiving federal aid, we seriously doubt that the State could expand its regulation of such hospitals beyond the time provided by the Hill Burton Act itself. We would therefore qualify our conclusion that hospitals which have already received Hill-Burton Funds must comply with the non-discrimination provisions of 12-5-10 by limiting that conclusion to hospitals which are still under the 20 year provisions of the Hill-Burton Act.

In view of the conclusion which we have reached with regard to the questions submitted, we feel that there may be serious questions concerning the wisdom or constitutionality of a law requiring non-discrimination among only those hospitals which still come within the Hill-Burton licensing requirements, but we respectfully leave those questions to the Legislature and judiciary, respectively.