

March 23, 2009 Acute Care Hospital & Critical Access Hospital

Mr. Albino Martinez, Interim CEO
Miners' Colfax Medical Center
200 Hospital Drive
Raton, NM 87740

Re: Opinion Request - Acute Care Hospital & Critical Access Hospital

Dear Mr. Martinez::

You have requested our advice whether the Miners' Colfax Medical Center ("MCMC") may change its operational status from a licensed and certified Acute Care Hospital ("ACH") to a licensed and certified Critical Access Hospital ("CAH") without violating United States & Antonucci v. State of New Mexico, 536 F.2d 1324 (10th Cir. 1976) ("Antonucci"). According to your letter, MCMC is considering this option because a licensed and certified Critical Access Hospital may be eligible to receive a greater distribution of Medicare funding than a licensed and certified Acute Care Hospital.[1] Based on our examination of the relevant New Mexico constitutional, statutory and case law authorities, and on the information available to us at this time, we conclude that Antonucci requires that MCMC remain as a *licensed and certified* hospital and therefore it may change its operational status from an licensed and certified Acute Care Hospital to an licensed and certified Critical Access Hospital.

MCMC's operational status originates in the late nineteenth century. The United States Congress in the Ferguson Act of 1898, and in subsequent legislation, granted approximately 100,000 acres of land in trust to the Territory of New Mexico to produce the income necessary to fund a hospital for miners to treat their illnesses and injuries. See Antonucci, 536 F.2d at 1325. In 1903, New Mexico's territorial legislature enacted a law that the Miners' Hospital was "intended and meant to be for the free treatment and care of resident miners of the Territory of New Mexico, who may become sick or injured in the line of their occupation." 1903 N.M. Laws, ch. 2, §§ 4, 9. The 1903 law was amended in 1907 to include a provision that the hospital could "take in other patients for treatment and care, upon payment of all expenses therefore, by said patients, when the same may be so received and treated without excluding any miners from said hospital." 1907 N.M. Laws, ch. 48, § 2; see also 7.7.4.6 NMAC ("The miners' hospital is a ... hospital and is intended and meant to be for the free treatment and care of resident miners of the state of New Mexico who may become sick or injured in the line of their occupation ... and also provides health care services for non-miners and miners...").

In the late 1960s, the New Mexico Department of Health's Hospitals and Institutions Department ("HID") implemented an effort to streamline health care delivery in New Mexico. See Antonucci, 536 P.2d at 1326. "In 1971 HID changed Miners' Hospital from a 'General and Special Chronic Hospital' to an *intermediate care facility*, the basic distinguishing characteristic ... being that the latter ... does not provide surgical care." Id. (emphasis added). HID then "ceased to acquire hospital equipment and make capital

improvements which were necessary in order for Miners' Hospital to retain its accreditation....” Id. MCMC lost its certification and licensure status as a hospital and “eligible miners who were in need of health services not available at Miners' Hospital were admitted at other licensed and certified general hospitals” and “payment for such care being charged to the income from Miners' Hospital's trust funds.” Id.

The United States Justice Department and a series of citizen plaintiffs sued New Mexico and HID on grounds that New Mexico had violated the Ferguson trust fund requirements. The Federal Court ruled for the plaintiffs and noted that “the specific purpose of the trust [funds] was the establishment and maintenance of a ‘miners’ hospital.” Id. at 1327. The court ruled that New Mexico had violated the trust by changing the operational status from a licensed and certified hospital to an immediate care facility and then using the trust funds to fund other licensed and certified hospital operations. See id. at 1328. Simply put, New Mexico was required to operate the MCMC as a licensed and certified hospital. See id. In 1979, the MCMC's operational status was restored and it reopened as a licensed and certified hospital.

There are several different forms of licensed and certified hospitals, including but not limited to, general hospitals, critical access hospitals, acute care hospitals, long-term acute care hospitals, limited hospitals and special hospitals. See NMSA 1978, § 24-1-3(D) (2007), 7.7.2.7 NMAC. While Antonucci noted that the “distinguishing characteristic” between hospitals and other health facilities as the availability of surgical care, the New Mexico legislature and Department of Health have also emphasized the “distinguishing characteristics” of the presence of an emergency room and maternity care. See NMSA 1978, § 24-1-5.8 (C) (2003); 7.7.2.7 NMAC.

A licensed and certified “**Hospital**,” in relevant part, means:

[A] facility offering in-patient services, nursing, overnight care on a 24-hour basis for diagnosing, treating, and providing medical, psychological or surgical care for three or more separate individuals who have a physical or mental illness, disease, injury, a rehabilitative condition or are pregnant....

7.7.2.7.Z NMAC. A licensed and certified “**Critical access hospital**” (“CAH”) hospital, in relevant part, means:

[A] hospital with special characteristics, duly certified as such by centers for medicare and medicaid services (CMS) and is in compliance with the conditions of participation for such facilities; such critical access hospitals are deemed as meeting the intent of these requirements and may be licensed accordingly by the licensing authority.

7.7.2.7.M. NMAC. In contrast, the New Mexico legislature and Department of Health have provided a list of other health care facilities, including but not limited to, community health centers, Adult Residential Care Facilities, Rehabilitation Facilities nursing home, and intermediate care facilities. See NMSA 1978, § 24-1-3(D) (2007).

An 'intermediate care facility' is defined as: an institution which ... provide ... health-related care and services to individuals who do not require the degree of care and treatment which a hospital or skilled nursing facility is designed ... but who because of their ... condition require care ... above the level of room and board...."

Antonucci, 536 F.2d at 1326 n. 3

According to your letter, "Currently MCMC operates a 33 bed Licensed and certified ... Hospital and a 47 bed Long Term Care Facility for the care of miners with occupational illnesses or injuries." According to your letter, "In order to receive [the Federal Centers for Medicare and Medicaid's] approval for designation as CAH, MCMC would have to drop its licensed bed capacity to 25." Based on conversations with your office, it is our understanding that MCMC's proposed deletion of eight hospital beds will be the only proposed change to MCMC and that this change will have no effect on its operational status as a licensed and certified hospital.

Thus, we conclude that Antonucci requires that MCMC remain as a *licensed and certified* hospital. Accordingly, Antonucci does not preclude MCMC from changing its operational status from a licensed and certified Acute Care Hospital to a licensed and certified Critical Access Hospital.[2]

You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Although we are providing you with our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,

ZACHARY A. SHANDLER
Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General

[1] The "[l]icensing of hospitals is the procedure by which New Mexico grants its authorization for a health institution to operate within the state." Antonucci, 536 F.2d at 1328 n. 3. The certification (a/k/a accreditation) of hospitals "is an approval of quality of care provided at an institution which is awarded by the Joint Commission on Accreditation of Hospitals" and a necessary requirement in order to be eligible to receive federal funding. *Id.*

[2] However, if a conflict ever arose between the purpose and obligations of the MCMC and the requirements for designation as a CAH, the conflict must always be resolved in

accordance with the MCMC's obligations, even if fulfilling its obligation would result in the forfeiture of its CAH status and return to ACH status.