

Janet T. Mills
Governor

Jeanne M. Lambrew, Ph.D.
Commissioner



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IN THE MATTER OF:

Maine Veteran's Home)
c/o William Stiles, Esq.)
Verrill & Dana) **FINAL DECISION**
1 Portland Square)
Portland, ME 04112)

This is the Department of Health and Human Services' Final Decision.

The Recommended Decision of Hearing Officer Benedict, mailed May 2, 2019 and the responses and exceptions filed on behalf of the Maine Veteran's Home have been reviewed.

I hereby adopt the findings of fact and I accept the Recommendation of the Hearing Officer that the Department was correct when it denied Maine Veterans Homes' (MVH) request for an extraordinary circumstance allowance for its fiscal years that ended 6/30/2015 and 6/30/2016, based upon an increase in employer contribution rates payable to the Maine Public Employees Retirement System that were allegedly unforeseen and uncontrollable events.

DATED: 6-6-19 SIGNED: Jeanne M. Lambrew
JEANNE M. LAMBREW, Ph.D., COMMISSIONER
DEPARTMENT OF HEALTH & HUMAN SERVICES

YOU HAVE THE RIGHT TO JUDICIAL REVIEW UNDER THE MAINE RULES OF CIVIL PROCEDURE, RULE 80C. TO TAKE ADVANTAGE OF THIS RIGHT, A PETITION FOR REVIEW MUST BE FILED WITH THE APPROPRIATE SUPERIOR COURT WITHIN 30 DAYS OF THE RECEIPT OF THIS DECISION.

WITH SOME EXCEPTIONS, THE PARTY FILING AN APPEAL (80B OR 80C) OF A DECISION SHALL BE REQUIRED TO PAY THE COSTS TO THE DIVISION OF ADMINISTRATIVE HEARINGS FOR PROVIDING THE COURT WITH A CERTIFIED HEARING RECORD. THIS INCLUDES COSTS RELATED TO THE PROVISION OF A TRANSCRIPT OF THE HEARING RECORDING.

cc: Christopher Leighton, AAG, Office of the Attorney General

Janet T. Mills
Governor

Jeanne M. Lambrew, Ph.D.
Commissioner



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MAY 2 - 2019

Date Mailed: _____

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Department of Health and Human Services
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Augusta, ME 04333

In the Matter of: Maine Veterans' Home

ADMINISTRATIVE HEARING RECOMMENDED DECISION

An administrative hearing in the above-captioned matter was held on December 4, 2018, before Hearing Officer Miranda Benedict, Esq., at Augusta, Maine. The Hearing Officer's jurisdiction was conferred by special appointment from the Commissioner of the Maine Department of Health and Human Services. The hearing was originally scheduled to be held on September 8, 2018. The Department requested a continuance and Maine Veterans' Home did not object. The hearing was rescheduled.

The hearing record was left open until December 21, 2018, to allow submission of written closing arguments. See, HO-7. The written arguments were received, and the record was closed.

Pursuant to an Order of Reference dated May 17, 2018, the issue presented *de novo* for hearing,

Was the Department correct when it denied Maine Veterans Homes' (MVH) request for an extraordinary circumstance allowance for its fiscal years that ended 6/30/2015 and 6/30/2016, based upon an increase in employer contribution rates payable to the Maine Public Employees Retirement System that were allegedly unforeseen and uncontrollable events? See, HO-2.

APPEARING ON BEHALF OF THE APPELLANT

William Stiles, Esq.
Kevine Brooks, CFO, Maine Veteran's Home

APPEARING ON BEHALF OF THE DEPARTMENT

Christopher Leighton AAG
David Hellmuth, Division of Audit

ITEMS INTRODUCED INTO EVIDENCE

Hearing Officer Exhibits

- HO-1 Scheduling Notices
- HO-2 Order of Reference dated May 17, 2018
- HO-3 Fair Hearing Report Form dated May 11, 2018
- HO-4 Request for Hearing dated April 5, 2018
- HO-5 Final Informal Review dated March 1, 2018
- HO-6 Entry of Appearance submitted by AAG Leighton
- HO-7 Letter from hearing officer to parties dated December 6, 2018

Department Exhibits

- DHHS-1 Various Rules
- DHHS-2 ECA Request dated November 30, 2016
- DHHS-3 Departmental Denial dated May 4, 2017
- DHHS-4 FIRD Request dated June 26, 2017
- DHHS-5 FIRD dated March 1, 2018
- DHHS-6 Request for Hearing dated April 5, 2018
- DHHS-7 2011 Rate Letter dated June 7, 2011
- DHHS-8 2015 Rate Letter dated July 21, 2014
- DHHS-9 2016 Rate Letter dated July 16, 2015
- DHHS-10 Barron Center ECA Request dated July 20, 2005
- DHHS-11 First Atlantic ECA Request dated February 9, 2012
- DHHS-12 Seaside Healthcare ECA Request dated October 24, 2014
- DHHS-13 Caribou Rehab Decisions dated December 21, 2016 and August 1, 2017
- DHHS-14 ECA Request by MHCA dated November 2, 2017
- DHHS-15 Minimum Wage ECA Requests dated 2017-2018
- DHHS-16 Closing Argument

Appellant Exhibits

- MVH-1 Audited Cost Reports – MVH FY 2011
- MVH-2 Final audit Report Transmittals – MVH FY 2015
- MVH-3 As-Filed MaineCare Cost Reports – MVH FY 2016
- MVH-4 MaineCare Rate Letters – MVH SFY 2015
- MVH-5 MaineCare Rate Letters - MVH SFY 2016
- MVH-6 MVH's Extraordinary Circumstance Request
- MVH-7 Department's Decision
- MVH-8 MVH Request for Informal Review
- MVH-9 Final Informal Review Decision
- MVH-10 Applicable State Laws Re: NF and RCF
- MVH-11 Summary of MaineCare Shortfall
- MVH-12 Applicable NF Regulations
- MVH-13 Closing Argument

RECOMMENDED DECISION

The hearing officer recommends that the Commissioner determine that the Department was correct when it denied Maine Veterans Homes' (MVH) request for an extraordinary circumstance allowance for its fiscal years that ended 6/30/2015 and 6/30/2016, based upon an increase in employer contribution rates payable to the Maine Public Employees Retirement System that were allegedly unforeseen and uncontrollable events.

RECOMMENDED FINDINGS OF FACT

1. Maine Veteran's Home (MVH) was created by an act of the 108th Maine Legislature in July of 1977.
2. MVH operates six facilities which provide nursing facility services, residential care facility services, and/or various rehabilitation therapy to eligible Maine veterans and spouse, widow or widowers and gold star parents of eligible veterans.
3. As a quasi-governmental agency, MVH participates in the Maine Public Employees Retirement System (MePERS) in lieu of Social Security.
4. The MePERS Board of Trustees set the retirement contribution rate.
5. Contributions to MePERS are an allowable cost under MaineCare.
6. Retirement plan contributions are paid as part of the rates established for Routine and Direct Care costs.
7. The Department sets a prospective per diem rate to be paid to each nursing facility until the end of its fiscal year.
8. At the time of MVH's request, the base year was 2011, which was used to set the prospective per diem rate to be paid to each nursing facility that participated in MaineCare.
9. For FY 2011, the MePERS contribution rate for MVH was 3.5%.
10. For FY 2015 the MePERS contribution rate for MVH was 7.8 %.
11. For FY 2016, the MePERS contribution rate for MVH was 8.9%.
12. On November 30, 2016, MVH requested an Extraordinary Circumstance Allowance based upon the 'significant' increase in retirement contributions to MePERS.
13. On May 4, 2017, Alec Porteous, Deputy Commissioner of Finance, DHHS, denied the request because the Department determined the request did not meet the criteria necessary for an Extraordinary Circumstance Allowance.
14. On June 26, 2017 MVH requested an Informal Review.
15. On March 1, 2018, the Department issued its Final Informal Review Decision, upholding the denial of MVH's request.
16. MVH requested an administrative hearing on April 5, 2018.

REASONS FOR RECOMMENDATION

The Principles of Reimbursement for Nursing Facilities contains a provision which grants a facility an allowance or adjustment when a facility experiences an unforeseen and uncontrollable event.

Titled 'Extraordinary Circumstance Allowance', this provision provides that,

Facilities which experience unforeseen and uncontrollable events during a year that result in unforeseen or uncontrollable increases in expenses may request an adjustment to a prospective rate in the form of an extraordinary circumstance allowance. Extraordinary circumstances include, but are not limited to:

- * **events of a catastrophic nature (fire, flood, etc.)**
- * **unforeseen increase in minimum wage, Social Security, or employee retirement contribution expenses in lieu of social security expenses**
- * **changes in the number of licensed beds**
- * **changes in licensure or accreditation requirements**

If the Department concludes that an extraordinary circumstance existed, an adjustment will be made by the Department in the form of a supplemental allowance.

The Department will determine from the nature of the extraordinary circumstance whether it would have a continuing impact and therefore whether the allowance should be included in the computation of the base rate for the succeeding year. See Principle 34, §67, Chapter III, MaineCare Benefits Manual

According to the MVH's request, it was asking for the ECA because of a significant increase in its MePERS contributions,

"Comparing the contributions in FYE June 30, 2015 and June 30, 2016 to the MaineCare base year of June 30, 2011, MVH's pension contributions for its nursing facilities have increased by \$1.18 million and \$1.55 million respectively. MaineCare shares of the increase are \$506,000 and \$686,000 respectively.

Given MVH's status as a quasi-governmental organization and related participation in the MEPERS retirement system, we believe an extraordinary circumstance allowance is warranted based on the significant increase in retirement contributions noted above." See, DHHS-2.

MVH noted in its request that it has no discretion as to the retirement contributions, which are set by the MePERS Board of Trustees.

The initial denial from the Department was based upon the Department's determination that the increase in the employer contribution rates did not meet the criteria for an Extraordinary Circumstance Allowance.

According to the denial,

"The increase in the employer contribution rates required by the PLD plan is not an unforeseen event, as the employer contribution rates have increased each year since FY 2011. Rather, given the historical upward trend, yearly rate

increases were foreseeable, and employers could reasonably anticipate that rates would likely continue to increase each year.” See, DHHS-3.

In its response to the denial, MVH argues that that The ECA was designed to provide a remedy when ‘base period rates are insufficient to address extraordinary increases to employee retirement contributions.’ See, DHHS-4. MVH argues,

“MVH cannot possible avoid paying this expense (MePERS) and the MaineCare rates set by the Department do not include reimbursement for this required expense beyond the assumed 3.5% rate. The Department’s refusal to reimburse the Facility for this extraordinary circumstance renders the Department’s reimbursement unreasonable and inadequate and effectively requires MVH to subsidize the MaineCare program.” See, DHHS-4.

ECA vs. Rate Setting

The parties had fundamentally different approaches to the issue of the ECA. According to MVH, the ECA was established, in part, to cure or ameliorate insufficient prospectively determined rates established by the Department. See, MVH-13. As MVH argued,

“the Department’s prospective rates for Direct Care and Routine Costs must satisfy the general standards set forth in the Manual, Section 67.1.1 and state and federal law. See 22 M.R.S.A. § 1708; 42 U.S.C. § 1396 et seq. Here, MaineCare’s prospective system used MVH’s MaineCare allowable cost in a base year to set rates for subsequent fiscal years, and there was a four or five-year lag between the base year used to set the prospective rates (2011) and the actual rate years (2015 and 2016). Recognizing that a multi-year time lag may cause prospectively determined rates to fall short of the standards required by Manual, Section 67.1.1, the Department adopted the ECA regulation as a means to adjust prospective rates in certain circumstances, including increases in “employee retirement contribution expenses in lieu of social security expenses.” Manual, Section 67.34, second bullet point. Indeed, each of the items specified in this example (minimum wage, social security, expenses in lieu of social security) consist of items over which a facility has no reasonable control, and which conceivably could change between a base year and a rate year”. See, MVH-13.

The Department argued that the issue of the ECA was completely separate from the issue of rate setting. According to the Department,

“This administrative appeal can be summed up by the argument of counsel that took place during the middle of the hearing. Counsel for Maine Veterans’ Homes (“MVH”) asked its witness, Kevin Brooks, Chief Financial Officer for MVH about the increase in MePERS rates between 2011 and 2015-16. Counsel asked Mr. Brooks whether the rates were “inadequate” to pay for the increase. The Department’s counsel objected, arguing that counsel for MVH was forcing a question about the adequacy of rates into the appeal. The Department’s counsel

explained that the Extraordinary Circumstances Allowance (“ECA”), through its plain language, was not meant to deal with claims regarding the adequacy of rates, but rather with much rarer extraordinary circumstances.

Counsel for MVH responded by stating that the purpose of his question was to demonstrate there was a rate increase and that the rates are not meeting the cost. Counsel for MVH noted that his argument was not a rate-making argument. He went on to explain that the language of the ECA is governed by both state and federal law, and that “you cannot just pull the ECA language out” and say that it is not governed by the principal that rates must be reasonable and adequate to meet the costs incurred.

This back-and-forth between counsel established the central battleground in this case – is the increase in MePERS contributions just one of the many costs that needed to be managed by an “efficiently and economically operated facility”? Or was it an “unforeseen and uncontrollable event during a year that result[s] in unforeseen or uncontrollable increases in expense”? The Department submits that it is the former.” See, DHHS-16.

The hearing officer has determined that the issue of the ECA is, as argued by the Department, a separate issue from rate setting. As advanced by the Department, and not disputed by MVH, the rate setting process is not designed to pay, dollar for dollar, all the costs and expenses of a nursing home. As the Department explained,

“That is not the purpose of rate-setting. Rather, the rate-setting system is a prospective case mix system in which the payment rate for services is set in advance of the actual provision of services by nursing facilities. In order to do this the Department engages in a two-step process:

In the first step, a facility's base year cost report is reviewed to extract those costs that are allowable costs. A facility's costs may fall into an allowable cost category, but be determined unallowable because they exceed certain limitations. Once allowable costs have been determined and separated into three (3) components - direct, routine and fixed costs, the second step is accomplished in which the costs which must be incurred by an efficiently and economically operated facility are identified. Dept. Exhibit #1, Principles of Reimbursement, Sec. 1.3 (p. 1).” See, DHHS-16.

According to Principle 22.1, the Department establishes a prospective per diem rate to be paid to each facility until the end of its fiscal year. Such cost components are premised on a base year. At the time that MVH requested the ECA, the base year was 2011. See, §1.4, Chapter III, §67.

The hearing officer rejects MVH’s argument that the ECA allowance ‘is intended to address the disparity between a rate calculated using a facility’s base year costs and the facility’s actual costs in the applicable rate year.’ See, MVH-13. There is no dispute that during the base year of 2011 MVH’s MePERS contribution rate was 3.5%. and that it increased substantially in 2015

to 7.8% and in 2016 to 8.9%. However, as testified to by Mr. Hellmuth, the reimbursement principles are not designed to reimburse a facility for all its expenses. According to his testimony,

Q: Do the principles of reimbursement provide for payment of all of the expenses of the facility, dollar for dollar? In other words, do they just submit a bill and you pay it?

A: No.

Q: Not the case? Big picture, how does it work?

A: Well, the principles set payment rates for facilities under the MaineCare protocol. It sets up payment rates to meet the costs of an economically and efficiently operated facility and then the principles set forth how those rates are established and the rate setting establishment of the prospective rate in the rate setting process, the providers are segregated into peer groups. The median cost per day is calculated. Their direct care upper limit and routine upper limit is set. There's inflation applied. And so for facilities that are at or below the direct and/or routine upper limit, they'll receive... their costs will be covered and they would be efficiently and economically run facilities. For facilities that are above the routine . . . the direct and routine caps, they would not have all their costs covered and would not be efficiently and economically operated.

Q: Would that become the challenge, in your view, the challenge of managing these costs, if they go above these limits?

**Q: Yes, business decisions have to be made to get within the caps."
Recording of hearing, at 34:30.**

The hearing officer agrees with the Department's assessment that the ECA is not a 'relief valve for increases in contribution costs' and is a separate entity from rate making,

**"It is also important to consider a logical extension of MVH's claim that any costs that rise over time can form the basis for a request for relief under the ECA for so long as the base year is deemed inadequate to cover the actual rise in cost. Under this theory a facility might claim multiple increasing cost components form the basis for a claim under the ECA. For example, a facility could be challenged by steady increases in not only its retirement costs but also its health care costs, and the increases are not being covered due to a low rate utilized in the base year. It should be plain that the ECA was not designed to act as a relief valve for rising costs. Rather, it is intended to address extraordinary, one-time events."
See, DHHS-16.**

"The ECA, by its very language, is meant to capture "extraordinary" circumstances that are not the normal subject of the rate-making process. There should be no argument that the rate-making process was not designed to anticipate cataclysmic events such as floods and fires. The obvious purpose of the ECA is to provide a mechanism outside of the rate-making process to deal with extraordinary circumstances. In this way it is different and removed from rate-making. Attempts to argue that it is a vehicle to deal with rates deemed

inadequate by facilities would eviscerate its meaning and turn it into a substitute for a challenge to rate-making . Nor should it be a vehicle to avoid the caps placed on direct and routine costs.” See, DHHS-16.

Rule of Construction

The initial paragraph of the ECA reads,

Facilities which experience unforeseen and uncontrollable events during a year that result in unforeseen or uncontrollable increases in expenses may request an adjustment to a prospective rate in the form of an extraordinary circumstance allowance. (emphasis added).

According to MVH, the Department’s insistence that the event given rise to an ECA must be both unforeseen and uncontrollable, is not supported by the rules of construction.

According to the MVH,

“As a threshold matter, MVH disputes the Department’s contention that the event giving rise to an ECA allowance must be both “unforeseen” and “uncontrollable.” First, the ECA regulation uses “and” between the words “unforeseen” and “uncontrollable” in the first part of the sentence, and then uses “or” between these same words in second part of the same sentence. Manual, Section 67.34. MVH 12, p. 71. Maine law provides that “the words ‘and’ and ‘or’ are convertible as the sense of a statute may require.” 1 M.R.S.A. § 71(2). MVH contends that, to make sense of this particular ECA allowance example, the word “and” may be converted to “or” to avoid an absurd result. In addition, MVH notes that the Maine Legislature recently required that the Department adopt a similar ECA provision for residential care facilities, and in doing so, required similar language to Section 67.34, but left out the word “unforeseen” in the specific example that addresses “employee retirement contribution expenses in lieu of social security expenses.” 22 M.R.S.A. § 7863(2). MVH Exhibit 10, p. 4. Clearly, the legislature did not intend to include “unforeseen” in this example.” See, MVH-13.

The hearing officer does not find MVH’s argument persuasive that rules of construction require that the word ‘and’ in this rule must be converted to ‘or’ in order ‘to avoid an absurd result’. In this case, the hearing officer finds that the plain language of the rule is clear. The rules of construction are well settled in Maine case law,

“We review statutory interpretation de novo as a question of law. State v. Thongsavanh, 2007 ME 20, ¶ 27, 915 A.2d 421, 427. The “primary purpose in statutory interpretation is to give effect to the intent of the Legislature.” Arsenault v. Sec’y of State, 2006 ME 111, ¶ 11, 905 A.2d 285, 288. We “first examine the plain meaning of the statutory language seeking to give effect to the legislative intent, and we construe the statutory language to avoid absurd, illogical, or inconsistent results.” Nasberg v. City of Augusta, 662 A.2d 227, 229 (Me.1995). “We also

construe the whole statutory scheme of which the section at issue forms a part so that a harmonious result, presumably the intent of the Legislature, may be achieved.” York Mut. Ins. Co. v. Bowman, 2000 ME 27, ¶ 5, 746 A.2d 906, 908.” See, Liberty Ins. Underwriters, Inc. v. Estate of Faulkner, 2008 ME 149, ¶ 15, 957 A.2d 94, 99

The plain meaning of the regulatory language is that the event that gives rise to the increase in costs must be unforeseen and uncontrollable. The rule is also clear that the resulting increase may be unforeseen or uncontrollable.

Past ECA requests

Both parties reviewed past examples of ECA requests to bolster their individual arguments. One case, in particular, is relevant to the instant proceeding. On June 24, 2004 the Barron Center requested an ECA based on the rising costs of their benefit pension plan operated by the Maine State Retirement System. The Barron Center’s circumstance is relevant, not only because it is the only other nursing facility in Maine to participate in MePERS, but its request is similar to the request made by MVH. In addition, the rule explicitly mentions the rising cost of ‘unforeseen increase in minimum wage, Social Security, or employee retirement contribution expenses in lieu of social security expenses’, as an example of an ECA.

MVH argues that the circumstances of the Barron Center mirror the circumstances of MVH, and therefore, since the Department granted the ECA to the Barron Center, it must follow suit in this case,

“In Barron Center case, the City of Portland (of which the Barron Center is a part) joined the same MEPERS plan as MVH effective July 1, 1995. Id, p. 5. As a result of this change, it was required to fund its remaining unfunded unpooled actuarial liability within 27 year.¹ Id. On July 19, 2001, bonds were issued to extinguish this liability. Id. For FY 2004, \$380,091 of this ongoing bond payment was allocated to the Barron Center. However, because this additional amount was not contemplated in the Barron Center’s prospective rates, the Barron Center requested an ECA allowance. The Department approved the ECA allowance. DHSS Exhibit 10, p. 1.

Just as in the MVH appeal, the Barron Center requested an ECA allowance with respect to its “employee retirement contribution expenses in lieu of social security.” DHSS Exhibit 10, pp. 3-4. Just like the MVH appeal, the Barron Center participated in the MEPERS system in lieu of social security. Indeed, according to the David Hellmuth, MVH and the Barron Center are the only nursing facilities in Maine would participate in MEPERS. Although the Barron Center was clearly aware of this additional payment obligation at least as early as July 2001, the Department implicitly concluded that this additional expense was “unforeseen” for the purposes of an ECA allowance.

In both the Barron Center and MVH cases, the additional employee retirement contribution expenses at issue were not contemplated by the prospective rates. In both cases, the facilities learned only after the base year that these costs would increase (and therefore would not be reflected in the applicable rate year(s)). Although the material facts of both cases are the same, the Department approved the Barron Center's ECA allowance, but denied MVH's. Because the Department applied the exact same regulatory language, the only explanation for these irreconcilable decisions is that the Department is now applying a new, and unexplained, interpretation. Indeed, the Department's suggestion that the MVH increase was not "unforeseen" cannot be reconciled with the Barron Center's approval under nearly identical circumstances. " See, MVH-13 (footnote omitted)

The Department sought to distinguish Barron Center from MVH because of the circumstances of its municipal funding,

"In 2005 there was a request that dealt with retirement contributions. See Department Exhibit 10. In that request the Barron Center explained that the City of Portland was making payments on both an unfunded actuarial accrued liability (which began in 1995) and an unfunded accounting liability (which began in FY 2001). For FY 2004, the City allocated to the Barron Center \$380,091.81 of the interest payment due that year (which totaled \$5,577,702). The Department's decision to grant the ECA cited the Principle, but offered no specific analysis. Based upon the testimony of David Hellmuth (sic) , and the information contained in the Barron Center's request letter dated June 24, 2004, it appears that the City of Portland's decision to allocate \$380,091.81 in FY 2004 was a particular hardship for the Barron Center in that year, and for which it sought relief through the ECA." See, DHHS-16.

The hearing officer has determined that the case of the Barron Center is qualitatively different than the circumstance of MVH, and cannot serve as evidence that would compel an approval of ECA to MVH.

First, the Barron Center is the only municipally supported nursing home in the state of Maine. It depends on tax generated financial contributions from the City of Portland. In 2001, the City of Portland issued taxable general obligation bonds for the purpose of extinguishing its un-pooled unfunded actuarial liability (IUUAL). According to the Barron Center's request, the City of Portland was then responsible for monthly payments on a Multi-Modal Taxable General Obligation Pension Bonds. In 2004, the interest for the City of Portland was \$5,577,702.00. The City of Portland allocated \$380,091.81 of that interest payment to the Barron Center. According to the Barron Center's request, this amount represented 6.8% of the total City of Portland's interest obligation for fiscal year 2004. See, DHHS-10.

The request by Barron Center was in part based upon the City of Portland's decision to issue taxable general obligation bonds. There is no evidence that the Barron Center had any involvement in that decision. In addition, the Barron Center argued that continued economic support of the Barron Center from the City of Portland was at increased risk. In its summary,

the Barron Center provided an economic snapshot of the City of Portland to buttress its request,

“Federal/State healthcare cutbacks, the loss of federal and state dollars to the City of Portland, increasing direct nursing labor and routine labor costs and associated unfunded pension liability expenses, and the City’s inability to generate increased revenues from property taxes, could force the City to very quickly reevaluate its long standing commitment and Mission (sic) to the sick and frail elderly citizens of Portland.” See DHHS-10.

The Department was correct when it denied MVH’s request for ECA based upon the increase in MePERS contributions.

Pursuant to Principle §14.1, a nursing facility has an obligation to manage itself ‘efficiently and economically’,

Nursing care facilities will be reimbursed for services provided to members based on a rate which the Department establishes on a prospective basis and determines is reasonable and adequate to meet the costs which must be incurred by an efficiently and economically operated facility in order to provide care and services in conformity with applicable State and Federal laws, regulations and quality and safety standards. See, Principle §14.1, Chapter III, §67, MCBM.

The ECA is a mechanism that provides for such a facility if it experiences an uncontrollable and unforeseeable event. In addition, the rule contemplates that the qualifying event occurs within the past year and not over the course of four years, as is the case with MVH. The hearing officer agrees with the Department, that, in this case, the rise in the pension contributions was not unforeseen,

The Department first submits that the run-up in the cost of retirement contributions was not “unforeseen”. As private consumers we have all experienced the inflationary march of prices upwards, whether it be in fuel prices, the cost of electricity, cable TV, local property taxes, etc. Kevin Brooks testified regarding the challenge of dealing with rising costs for health care coverage. Recording of hearing, at 2:37. MVH, as a large, competent and sophisticated business entity, was likely disappointed or frustrated in the continuing rise in the cost of providing retirement benefits, but had in front of it evidence of a trend in increasing cost. MVH’s argument appears to be that what was unforeseen was the jump from the base year, 2011, where the Department used the 3.5% rate, to FYE 2015 and FYE 2016, where the rate paid by MVH increased to 7.8% and 8.9% respectively. However, the increase from 3.5% to 7.8% did not occur overnight, or within a year as required by the language of the ECA, but rather over the course of four years, at roughly one percentage point per year. It is impossible to square the requirement of the ECA that the “events” occur “during a year”, with a

four year gradual increase in the cost of retirement plan contributions.” See, DHHS-16.

MVH rejects the Department’s argument, and argues that there was no way that MVH could have ‘foreseen’ the increases, and asserts that the Department is ‘pretending’ that MVH is paying at the contribution rate in 2011, rather than the current contribution rate,

“Reading these provisions as a whole and in light of the stated purpose of MaineCare rates, it becomes clear that if an increase must be “unforeseen,” it must be measured based on what the facility could foresee in the base year. Indeed, this is the year on which its prospective rates are based. Moreover, with respect to the example at issue, the ECA allowance is intended to address the disparity between a rate calculated using a facility’s base year costs and the facility’s actual costs in the applicable rate year. The Department’s use of the intervening years to measure “foreseeability” makes no sense, and essentially guarantees that a facility can never obtain an ECA allowance for increases in “employee retirement contribution expenses in lieu of social security expenses.”

Finally, the Department’s suggestion that MVH could have, or should have, foreseen the MEPERS increases finds no support in the administrative record. Indeed, the Department, when setting rates for FY 2015 and FY 2016 did not “foresee” the increases, and include adequate amounts in MVH’s prospective rates. Testimony of David Helmuth. If the Department did not “foresee” the increases, it cannot pretend that MVH should have. The bottom line is that the MEPERS contribution rate used by the Department to set MVH’s rates for FY 2015 and FY 2016 was 3.5%. The actual MEPERS contribution rates paid by MVH for FY 2015 and FY 2016 were 7.8% and 8.9%, respectively. This represents an increase to employee retirement contribution expenses of 123% for FY 2015, and 154% for FY 2016. There is no dispute that employee wages represent the single largest expense for nursing facilities. Testimony of David Hellmuth; Testimony of Kevin Brooks. MVH had no choice but to pay the increased MEPERS contribution rates for 2015 and 2016, but the rates adopted by the Department still pretend that MVH only had to pay the 2011 contribution rate. The ECA allowance was designed to address this exact situation. The Department’s application of the ECA allowance in this case must be rejected.” See, MVH-13.

Contrary to MVH’s argument, the ECA is not a tool to address the inadequacy of rate setting, but rather the rare occurrence of an unforeseen and uncontrollable event.

In conclusion, the hearing officer recommends that the Commissioner determine that the Department was correct when it denied Maine Veterans Homes’ (MVH) request for an extraordinary circumstance allowance for its fiscal years that ended 6/30/2015 and 6/30/2016, based upon an increase in employer contribution rates payable to the Maine Public Employees Retirement System that were allegedly unforeseen and uncontrollable events.

MANUAL CITATIONS

Chapter III, §67, MCBM

RIGHT TO FILE RESPONSES AND EXCEPTIONS

THE PARTIES MAY FILE WRITTEN RESPONSES AND EXCEPTIONS TO THE ABOVE RECOMMENDATIONS. ANY WRITTEN RESPONSES AND EXCEPTIONS MUST BE RECEIVED BY THE DIVISION OF ADMINISTRATIVE HEARINGS WITHIN FIFTEEN (15) CALENDAR DAYS OF THE DATE OF MAILING OF THIS RECOMMENDED DECISION.

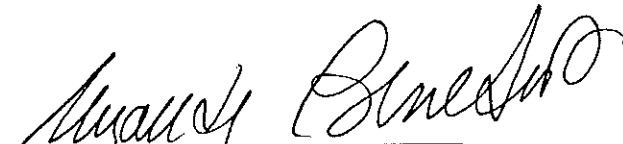
A REASONABLE EXTENSION OF TIME TO FILE EXCEPTIONS AND RESPONSES MAY BE GRANTED BY THE CHIEF ADMINISTRATIVE HEARING OFFICER FOR GOOD CAUSE SHOWN OR IF ALL PARTIES ARE IN AGREEMENT. RESPONSES AND EXCEPTIONS SHOULD BE FILED WITH THE DIVISION OF ADMINISTRATIVE HEARINGS, 11 STATE HOUSE STATION, AUGUSTA, ME 04333-0011. COPIES OF WRITTEN RESPONSES AND EXCEPTIONS MUST BE PROVIDED TO ALL PARTIES. THE COMMISSIONER WILL MAKE THE FINAL DECISION IN THIS MATTER.

CONFIDENTIALITY

THE INFORMATION CONTAINED IN THIS DECISION IS CONFIDENTIAL. See 42 U.S.C. § 1396a (a)(7); 22 M.R.S. § 42 (2); 22 M.R.S. § 1828 (1)(A); 42 C.F.R. § 431.304; 10-144 C.M.R. Ch. 101 (I), § 1.03-5. ANY UNAUTHORIZED DISCLOSURE OR DISTRIBUTION IS PROHIBITED.

Dated:

April 30 2019


Miranda Benedict, Esq.
Administrative Hearing Officer

cc: William Stiles, Esq., Verrill & Dana, 1 Portland Square, Portland, ME 04112
Christopher Leighton AAG