


 Department of
Veterans Affairs
O.G.C. Advisory 57-89

4-8

SEP 15 1989

In Reply Refer To: 023

VA District Counsel (327/02)
600 Federal Place, Room 479
Louisville, KY 40202

SUBJ: Sharing Agreement between VA Research Corporation and VA

QUESTION PRESENTED:

Whether a research corporation, established pursuant to 38 U.S.C. §§ 4161 to 4168, may enter into sharing agreements with the VA?

Comments:

1. A draft sharing agreement has been proposed under which the VA Medical Center, Louisville and the Clinical Research Foundation, Inc., a research corporation established under Subchapter IV of chapter 73 of title 38, United States Code (38 U.S.C. §§ 4161 to 4168), would furnish certain services to one another. We previously furnished technical comments on the draft agreement without having been aware that the corporation was established by VA. Under the draft agreement, the Foundation would provide the Medical Center with technical and clerical support in exchange for the medical center's providing photocopying, animal care, laboratory work, pharmacy and related services. As discussed below, the contract is not authorized by law.

2. Established pursuant to sections 4161 to 4168, the Foundation can exercise only those powers provided by law. Section 4164 describes those general powers: "(a) A corporation established under this subchapter may -- (1) accept gifts and grants from, and enter into contracts with, individuals and public and private entities solely to carry out the purposes of this subchapter." Id. section 4164(a) (emphasis added). Clearly, the law only provides authority to enter into contracts with "public or private entities."

3. The law cannot, however, reasonably be interpreted to include VA facilities within the meaning of "public or private entities" for several reasons. Subchapter IV does not, of course, specifically mention VA facilities as "entities" for purposes of section 4164. Rather, the law clearly distinguishes the role of the VA from that of "entities" which may serve as funding sources for corporations established pursuant to sections 4161 to 4168. See 38 U.S.C. § 4163(c) ("An individual appointed . . . to the board of directors of a

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Signatures

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corporation established under this subchapter may not . . . have any . . . financial relationship with any entity that is a source of funding for research by the Veterans' Administration . . . "). These corporations were established to obtain and administer gifts, grants and other than VA appropriated monies to facilitate the conduct of research at VA medical centers. Id. 4161(a), 4162. The law specifically provides that "[a]ny funds received by the [Secretary] for the conduct of research at the medical center other than funds appropriated to the Veterans' Administration may be transferred to and administered by the corporation for that purpose." Id. section 4162. (emphasis added). This clear distinction in the statutory scheme regarding the use of VA and non-VA funds in the operation of the corporation (as opposed to its initial establishment) demonstrates that Congress did not anticipate or provide that VA would be executing contracts with those corporations. Indeed, such contracts would defeat that statutory scheme because they would require the use of appropriated funds.

4. In light of our comments above, we believe the proposed agreement would have the effect of distorting the corporation's purposes. Rather than functioning as a funding mechanism to facilitate the Medical Center's conduct of approved research, see 38 U.S.C. § 4161(a), the corporation would be procuring research support and related services from the Medical Center (as though it is the Foundation's rather than VA's role to conduct research). And rather than providing the Medical Center the means to carry out the center's research program -- through the employment of technicians, for example, to work at the VA as without compensation employees -- it proposes to charge VA for such support services. While we cannot discern from the agreement precisely how it was intended to operate or why it was so structured, we cannot concur in the proposal for the reasons outlined above.

5. We note that the Foundation received a corporate charter under State law. And State law may permit non-profit corporations to engage in a wide-range of activities. Nonetheless, Federal law clearly limits the nonprofit corporations authorized by sections 4161 to 4168 to the powers provided by Federal law. Id. section 4165. Consequently, State law would not operate to provide authority to the Foundation to enter into the draft sharing agreement, given that contracting with VA is beyond its general powers, as provided in section 4164.

3.

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6. Moreover, the draft agreement would not be authorized by Federal law on sharing agreements. Sharing agreements for specialized medical resources may only be executed "between [VA] hospitals and other hospitals (or other medical installations having hospital facilities or organ banks, blood banks, or similar institutions) or medical schools or clinics." Id. section 5053(a). As an entity created solely for research, the Foundation would not fall within the category of hospital, medical school or similar institution with which VA could execute a sharing agreement.

HELD:

Nonprofit research corporations established pursuant to 38 U.S.C. §§ 4161 to 4168 are not authorized to enter into sharing agreements with VA medical facilities and VA medical facilities have no authority to execute such agreements.

Donald L. Ivers

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| PRECEDENT OPINION | _____ |
| CONCLUSIVE OPINION | _____ |
| ADVISORY OPINION | 6-11 |
| INDEX | YES _____ NO 9/1 |

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