

MEMORANDUM

TO: TCCOG
FROM: Hancock & Estabrook, LLP
SUBJECT: Legality of Union Voting Authority on Municipal Cooperative Boards

June 2, 2009

INTRODUCTION

We have acted as counsel to the Tompkins County Council of Governments ("TCCOG") in connection with the formation of the Greater Tompkins County Municipal Health Insurance Consortium (the "Consortium"), a self-insured health insurance municipal cooperative that will be seek certification under Article 47 of the New York Insurance Law ("Article 47"). In that capacity, we have drafted a certain Municipal Cooperation Agreement (the "Agreement"), which will serve as the Consortium's governing document. In the course of drafting the Agreement, we have researched whether the Consortium may grant labor unions (the "Unions") voting authority as part of their participation on the Consortium's governing board of directors (the "Board"). The following is a discussion of our research.

QUESTION PRESENTED

Where the governing board of a Municipal Cooperative Health Insurance Plan will necessarily make decisions impacting the assessment and expenditure of municipal public monies, is it legally permissible to grant a private organization, such as a union, voting authority on that governing board?

SHORT ANSWER

No.

ANALYSIS

A. The legal authority governing the formation of municipal cooperatives

Article VIII, Section 1 of the New York State Constitution authorizes two or more municipalities to join together to provide any municipal service that each municipality has the authority to provide individually. *See* N.Y. CONST., ART VIII, § 1. Since Section 92-a of the New York General Municipal Law authorizes municipalities to individually purchase health insurance policies and enter into health insurance plans on behalf of their employees, *see* N.Y. GEN. MUN. L. § 92-a (McKinney 2009), Article VIII of the New York State Constitution permits those municipalities to join together to jointly provide that service.

Article 5-G of the New York State General Municipal Law provides the enabling legislation for the formation of municipal cooperatives contemplated by Article VIII of the State Constitution. Thus, Section 119-o of Article 5-G authorizes municipal corporations to "enter into, amend, cancel and terminate agreements for the performance among themselves or one for the other of their respective functions, powers and duties on a cooperative or contract basis or for the provision of a joint service..." *Id.* at § 119-o(1).

Article 47 of the New York State Insurance Law sets forth the specific requirements governing certain self-insured municipal cooperative health insurance plans. *See* N.Y. INS. L. §§ 4701-4714 (McKinney 2009). Article 47 places additional requirements on municipal cooperatives beyond those contained in Article 5-G. Article 47, is not however, read separately from Article 5-G, but rather the two statutory provisions must be read together. *See, e.g.*, N.Y. INS. L. § 4702 (defining a "municipal cooperative agreement" as that "authorized by article five-G of the general municipal law"). Taken together, these sections authorize multiple municipal

corporations to enter into a cooperative health benefit plan, and establish a joint governing board to administer such a plan.

Although the Article 5-G and Article 47 authorize municipalities to form self-insurance cooperatives, these cooperatives themselves do not constitute separate legal entities. *See Rice v. Cayuga-Onondaga Healthcare Plan*, 190 A.D.2d 330, 332 (4th Dep't 1993). But rather a municipal cooperative and its governing board are merely “an extension or part of each of the participants and subject to their control.” *See Op. St. Compt.* 85-67 at 100 (1985).

B. Governance of a municipal cooperative through a governing board

Section 4705 of Article 47 grants broad powers to a cooperative's governing board to take all necessary actions regarding the operation of the municipal cooperative and the administration of the health benefit plan. *See N.Y. INS. L. § 4705*. These powers include the authority to: (i) design the benefits plan; (ii) enter into an agreement with a contract administrator; (iii) purchase stop-loss insurance; (iv) establish joint reserve funds; (v) prepare the cooperative's annual budget; (vi) assess participants for additional contributions; and (vii) refund surpluses to the participants. *See id.* at § 4705(d)(1)-(7). Under Article 47, and as also authorized under Article 5-G, a governing board has near plenary power over the administration of a municipal cooperative, including, most importantly, discretion regarding the collective expenditure and allocation of public funds for the purpose of funding the joint service.

With respect to the make-up of the governing board, Article 47 requires that the cooperative agreement include a provision:

describing the composition, number and procedures under which governing board members are chosen, provided that, for those agreements entered into after the effective date of this article, the governing board shall include representation by unions which are the exclusive collective bargaining representatives of employees covered by the plan, and that such unions shall establish and agree to the procedures by which the member or members of the governing board which represent unions are selected. . . .

Id. at § 4705(c)(1). Because a municipal cooperative is merely extension of all the participating municipalities, the governing board must fully represent all of the participating municipalities in its decision making. *See American Re-Fuel Co. of Niagara, L.P. v. N.E. Southtowns Solid Waste Mgmt. Bd.*, 291 A.D.2d 861, 861 (4th Dep't 2002).

C. The scope of union representation on the governing board

While Article 47 indicates that the governing board of an Article 47 municipal cooperative must include some form of union representation, the statute does not elaborate upon the scope of the term "representation." *See* N.Y. INS. L. §§ 4705(a)(8), 4705(c)(1) (McKinney 2009). The original Assembly Bill 11724, which would become 1994 N.Y. Laws Article 698, originally provided that § 4705(a)(8) would simply let the municipal cooperative agreement dictate the means for selecting the governing body. *See* Op. Ins. Dep. 03-08-08 at 4 (2003). Subsequently, at the request of a number of municipal unions, the current language was inserted as part of the legislative process. *See id.* While our research has uncovered no direct authority interpreting the term "representation" or otherwise clarifying the exact scope of union participation, existing legal principles regarding the legal authority of a municipal cooperative and its governing board place distinct limitations on the ability of non-municipal actors to influence the expenditure of public funds. Indeed, it well settled that a statute may not be construed in a manner that would render its effect unconstitutional. *See, e.g., Lavalley v. Hayden*, 98 N.Y.2d 155, 161 (2002).

As a general matter, labor unions and other private entities cannot be participants in a municipal cooperative. *See* Op. St. Compt. 81-390 at 427-28 (1981). This limitation is confirmed by the plain language of both the constitutional authorization contained in Article VIII of the New York Constitution and the statutory authorization contained in Article 5-G of the

General Municipal law, each of which specify that only municipal corporations¹ may join to form a municipal cooperative. Article 47 is no different in this regard as Section 4702(e) defines a "municipal cooperative health benefit plan" as "any plan established or maintained by two or more *municipal corporations*..." See N.Y. INS. L. § 4702(e)(McKinney 2009). Moreover, Article 47 does not impose financial or other obligations upon the unions that would be indicative of full participation. See, e.g., *id.* at § 4705(a)(2) (providing that participating *municipal corporations* must "agree to share the costs and assume the liabilities for [the benefits] provided under the municipal cooperative health insurance plan."). The Comptroller has opined that private actors are precluded from participating in municipal cooperatives by statute. See Op. St. Compt. 81-390 at 427-28; *c.f.*, Op. St. Compt. 81-214 at 228-29. Likewise, the plain language of Article VIII, Section 1 of the New York Constitution, which limits such cooperatives to governmental units, indicates that there is no constitutional authorization for such an arrangement.² See N.Y. CONST. ART. VIII, § 1.

In addition, this limitation must be considered together conceptually with premises that: (i) a municipal cooperative is no more than an extension of its individual municipal participants, *see Rice, supra*; (ii) municipal participants necessarily act jointly through the decisions of their governing board, and (iii) public entities may not delegate decisions that impact the expenditure of public funds to private actors. See, e.g., Op. St. Compt. 88-46 at 92-93 (decisions regarding

¹ GML § 119-n defines a "municipal corporation" as "a county outside the city of New York, a city, a town, a village, a board of cooperative educational services, fire district or a school district." See N.Y. Gen. Mun. L. § 119-n(1) (McKinney 2009). Insurance Law § 4702 defines a "municipal corporation" as "a city with a population of less than one million or a county outside the city of New York, town, village, board of cooperative educational services, school district, a public library, as defined in section two hundred fifty-three of the education law, or district, as defined in section one hundred nineteen-n of the general municipal law." See N.Y. INS. L. § 4702 (McKinney 2009).

² In addition, such an arrangement would likely be unconstitutional to the extent a private actor could direct payment of cooperative funds for its own benefit. See N.Y. CONST. ART. VIII, § 1; *cf.* Op. St. Compt. 81-214 at 228-29 (1981).

the investment of public funds may not be delegated to private actors but rather must be made by the body or officer legally charged with that responsibility); Op. St. Compt. 85-67 at 99-101 (a municipal cooperative may not cede authority over any statutory function – including custody of municipal funds – to a private actor). Indeed, municipalities may not “vest in private associations or corporations authority and power affecting the life, liberty, and property of the citizens...” See *Fox v. Mohawk & H.R. Humane Soc.*, 165 N.Y. 517, 524 (1901); see also N.Y. CONST. ART. IX, § 2; *Fink v. Cole*, 302 N.Y. 216, 224 (1951); *Johnstown Cemetery Ass'n v. Parker*, 45 A.D. 55, 55 (3 Dep't 1899); *Fifty Park Central West Corp. v. Bastien*, 60 Misc.2d 195, 198 (N.Y. Civ. Ct. 1969).

In light of these considerations, Section § 4705 may not be construed as allowing a private actor – namely a union – to be permitted voting authority regarding the decisions of a municipal cooperative that impact the expenditure of public funds. This makes practical sense as well given that voting authority in a municipal cooperative may be tied to the quantity of revenue contributed for the services purchased by the Consortium. Indeed, under the weighted voting procedures in the draft cooperative agreement, voting strength is tied directly to the amount of revenue generated from – i.e., the amount of contracts held by – each individual participant. This voting provision is in harmony with the municipal cooperative statutes which require *pro rata* distribution of any financial obligation. Since a private actor, like a union, contributes no revenue to the municipal cooperative and assumes no risk for the debts and financial obligations of the organization, it makes little sense that the same private actor would have voting rights to bind the collective whole as to those same matters.

CONCLUSION

As a matter of statutory construction and constitutional law, it would be improper to interpret Article 47 of the New York as permitting a private organization, like a union, to have voting authority with respect the governing body of a municipal cooperative. Article 47's requirement of union "representation" on the governing board is satisfied by union membership and participation on the governing board as a non-voting board member.

While this memorandum, and the analysis contained herein, is the result of significant research, it should not be deemed a "formal" opinion of counsel. This memorandum is intended to facilitate discussion of these matters, and should not be considered to be a formal opinion letter.