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October 7, 2005

Via mail & email

Alessandro A. Iuppa, Superintendent  
Attn: Vanessa J. Leon, Docket No. INS-05-700  
Bureau of Insurance  
Maine Department of Professional and Financial Regulation  
34 State House Station  
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[vanessa.j.leon@maine.gov](mailto:vanessa.j.leon@maine.gov)

Re: Review of Aggregate Measurable Cost Savings Determined by Dirigo Health for the First Assessment Year, Docket No. INS-05-700

Dear Superintendent Iuppa:

Please find enclosed the following:

1. Filing Cover Sheet.
2. Two hard copies of Memorandum of Dirigo Health on Standard of Review.

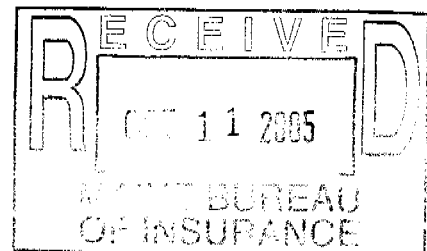
Thank you for your assistance with this matter.

Yours very truly,

A handwritten signature in cursive script, appearing to read 'William H. Laubenstein, III'.

William H. Laubenstein, III  
Assistant Attorney General

cc: (Via mail and email)  
William H. Stiles, Esq.  
Thomas C. Sturtevant, Jr., AAG  
Roy T. Pierce, Esq.  
Christopher T. Roach, Esq.  
Rufus E. Brown, Esq.  
D. Michael Frink, Esq.  
John Kelly, Esq.  
Karynlee Harrington  
Trish Riley



STATE OF MAINE  
DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION  
BUREAU OF INSURANCE

IN RE: REVIEW OF AGGREGATE )  
MEASURABLE COST SAVINGS )  
DETERMINED BY DIRIGO ) FILING COVER SHEET  
HEALTH FOR THE FIRST )  
ASSESSMENT YEAR )  
)  
)  
Docket No. INS-05-700 )

TO: Alessandro Iuppa, Superintendent of Insurance  
Attn: Vanessa J. Leon

Date Filed: October 7, 2005

Name of Party: Dirigo Health Board of Directors

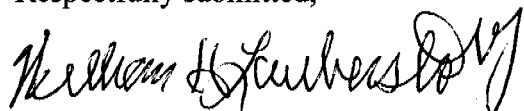
Document Title: Memorandum of Dirigo Health on Standard of Review

Document Type: Memorandum on the Standard of Review

Confidential: No

Dated: October 7, 2005

Respectfully submitted,



William H. Laubenstein, III  
Assistant Attorney General

STATE OF MAINE  
DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION  
BUREAU OF INSURANCE

IN RE: REVIEW OF AGGREGATE	)	MEMORANDUM OF DIRIGO
MEASURABLE COST SAVINGS	)	HEALTH ON STANDARD OF
DETERMINED BY DIRIGO	)	REVIEW
HEALTH FOR THE FIRST	)	
ASSESSMENT YEAR	)	
	)	
Docket No. INS-05-700	)	

By procedural order entered on October 5, 2005, the Superintendent of Insurance (“Superintendent”) directed the parties to submit memoranda on the standard of review to be used by the Superintendent pursuant to P.L. 2005, ch. 400 (“Chapter 400”), Part B, § B-2(2) (B) in determining whether the aggregate measurable cost savings filed by the Dirigo Health Agency Board of Directors (“Dirigo”) are reasonably supported by the evidence in the record. Under relevant Maine case law, this standard requires that the Superintendent approve the Dirigo filing unless he concludes that it is without any rational support in the record.

The statutory language upon which this issue focuses reads as follows:

The superintendent shall approve the filing upon a determination that the aggregate measurable cost savings filed by the board are reasonably supported in the record.

Chapter 400, Part B, § B (2) (B).

All that is required of the superintendent is to determine whether the Board’s aggregate cost savings determination is “reasonably” supported by the record. Guidance concerning the meaning of this standard is provided by Maine cases construing the grounds for review of administrative action in 5 M.R.S.A. § 11007 (2002), particularly

the provision in subsection 6 that an administrative decision may be reversed or modified if arbitrary, capricious or characterized by an abuse of discretion. Maine's Law Court has said that an agency decision is arbitrary or capricious only if it is unreasonable, meaning without any rational factual basis to support it.

Arbitrary or capricious action on the part of an administrative agency occurs when it can be said that such action is unreasonable, has no rational factual basis justifying the conclusion or lacks substantial support in the evidence. Hollon v. Pierce, 1968, 257 Cal.App.2d 468, 64 Cal.Rptr. 808, 815; Olson v. Rothwell, 1965, 28 Wis.2d 233, 137 N.W.2d 86, 89.

The party asserting arbitrariness and unreasonableness of action in the exercise by administrative officials of the police power of the State under a statute valid on its face has the burden of establishing the invalidity of the administrative action. Regularity is presumed. All legal intendments are in its favor. Its decision will be assumed to have been taken with full knowledge of material facts and in justification thereof. Milwaukie Company of Jehovah's Witnesses v. Mullen, 1958, 214 Or. 281, 330 P.2d 5, 11.

*Central Maine Power Company v. Waterville Urban Renewal Authority*, 281 A.2d 233, 242 (Me. 1971); cited with approval in *Help-U-Sell, Inc. v. Maine Real Estate Commission*, 611 A.2d 981 (Me. 1992).

Under the holdings in these cases, the threshold for satisfying a "reasonableness" standard is quite low, and the burden on parties seeking to persuade the Superintendent that the Dirigo determination is unreasonable is, conversely, quite high. This standard is not met by a demonstration that the Board could have reached a different conclusion; it is satisfied only if it can be shown that the Board's determination has no rational factual basis in the record.

The only remaining issue is whether the record against which this standard is to be applied should be limited to the record before the Board, or whether new evidence can

be considered. It is clear from the terms of Section B-2 of Chapter 400 that the Legislature did not intend the Superintendent to make an independent determination as to the methodology for determining aggregate cost savings. Clearly, the material attributes of a hearing were provided to the payors in the proceedings before the Board: notice of the issues, as spelled out in Chapter 400; an opportunity to review the supporting information for the Dirigo group's proposed methodology and to question both the facts and the experts supporting the methodology; and an opportunity to submit evidence and expert opinion in support of its own method. Under these circumstances, it could be argued that the Superintendent's review of the Board's determination should be limited to the record that was available to the Board. This is particularly true in light of the fact that none of the payors even made a written request for a hearing by the Board until September 13, at a point when it was logistically impossible to conduct a hearing before the statutory deadline for making this filing with the Superintendent, a deadline that was, at that point, only days away.

However, Dirigo does not object to the position that has been articulated informally by the Superintendent to date: that new evidence can be introduced provided that it is relevant to demonstrating that the Dirigo filing is not reasonably supported by the record, but not for the purpose of attempting to persuade the Superintendent that a different methodology should have been used to determine aggregate measurable cost savings.<sup>1</sup> See *Dodd v. Secretary of State*, 526 A. 2d 583, 584 (Me. 1987) (court may not substitute its judgment for that of the agency merely because the evidence could give rise

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<sup>1</sup> Dirigo waives its objection only for purposes of this proceeding, and reserves the right to object to the introduction of additional evidence not incorporated in the record before the Board in subsequent assessment year proceedings.

to a more than one result). Chapter 400 assigns a single task to the Superintendent in reviewing the Dirigo filing, and that is to determine whether “the aggregate measurable cost savings filed by the board are reasonably supported in the record.” Section B (2) (B).

Dated: October 7, 2005

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "William H. Laubenstein, III". The signature is written in dark ink and is positioned above the printed name.

William H. Laubenstein, III  
Assistant Attorney General

**CERTIFICATE OF SERVICE**

I, William H. Laubenstein, III, Assistant Attorney General for DIRIGO Health, do hereby certify that on this date the foregoing document was served on all counsel of record via U.S. first class mail, postage prepaid, and electronic mail as follows:

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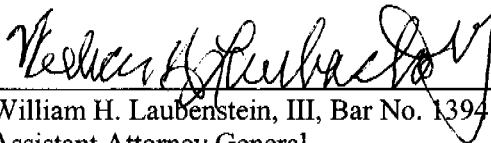
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Dated: October 7, 2005

  
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