

THE  
**University of Vermont**  
HEALTH NETWORK

*Sent Via Email*

September 20, 2024

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**Re: UVMHN FY2025 Budget Review – Written Objections to September 13, 2024  
Enforcement Vote**

Dear Mark:

The Green Mountain Care Board's (GMCB) hospital budget review process continues to stray far from the procedure envisioned by statute, the GMCB's own rules, and the Vermont Administrative Procedure Act (VAPA).

This letter memorializes the objections<sup>1</sup> of the University of Vermont Health Network's (UVMHN) hospitals (the University of Vermont Medical Center (UVMHC) and Porter Hospital) to the GMCB's September 13, 2024 vote in favor of denying their applications for retroactive adjustment of their FY23 budgets and to enforce UVMHC's deviation from that budget. Although UVMHN is unable to identify all potential objections that may ultimately arise when a final written budget order is issued, this letter reflects its current and anticipated objections to the proceedings to date. To avoid unnecessary repetition, this letter incorporates by reference all of the objections made by UVMHN in its letters to you dated August 30, 2024 and September 10, 2024. UVMHN reserves its right to raise additional objections or clarify the nature of its objections in response to further proceedings and written orders.

In the hearing on September 13, 2024, the GMCB referenced and relied on a March 31, 2021 policy ("2021 Policy"), which it claims justifies its enforcement actions.<sup>2</sup> However, this policy (both on its face and through its implementation here) is unenforceable as a violation of VAPA because the

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<sup>1</sup> The GMCB's agreement with the Vermont Association of Hospital and Health Systems to this effect is memorialized in Shireen Hart's August 6, 2024, letter to you on behalf of VAHHS, providing in relevant part that "[h]ospitals have two full business days to submit post-hearing written objections."

<sup>2</sup> See Policy on Hospital Budget Enforcement (Mar. 31, 2021), <https://gmcboard.vermont.gov/sites/gmcb/files/documents/Enforcement%20Policy%20-%20Final%203%2031%202021.pdf>.

policy, in actuality, constitutes a “rule”, which was not adopted consistent with the requisite VAPA rulemaking procedure.

“Where an administrative agency’s policy is challenged due to a failure to enact that policy pursuant to VAPA, [courts will] discern whether the policy is a ‘rule’ subject to the rulemaking procedures of VAPA or whether that policy is a ‘practice’ that is exempt from those procedures.” *In re Woodford Packers, Inc.*, 2003 VT 60, ¶ 14, 175 Vt. 579, 583, 830 A.2d 100, 105 (2003) (quoting *King v. Gorczyk*, 2003 VT 34, ¶ 15, 175 Vt. 220, 825 A.2d 16). If the policy is a “rule,” then VAPA’s rulemaking procedure must be followed. *See generally* 3 V.S.A. §§ 831, *et seq.* Failure to follow this procedure renders the policy invalid. 3 V.S.A. § 846; *In re Diel*, 158 Vt. 549, 554, 614 A.2d 1223, 1227 (1992) (“[U]nless we conclude that the [agency’s] change of policy did not constitute rulemaking, it is invalid.”).

On its face, the 2021 Policy is a rule, therefore subject to VAPA’s rulemaking procedure. A “rule” is an “agency statement of general applicability that implements, interprets, or prescribes law or policy[.]” 3 V.S.A. § 801(b)(9). In contrast, a “practice” is “a substantive or procedural requirement of an agency, affecting one or more persons who are not employees of the agency, that is used by the agency in the discharge of its powers and duties.” *Id.* § 801(b)(7). The Vermont Supreme Court has noted with approval other jurisdictions’ “persuasive approach” that “agency procedures that do not alter or affect substantive legal rights do not qualify as rules requiring adoption pursuant to statutory requirements.” *King*, 2003 VT 34 (emphasis added).

Where—as here—the agency action “both prescribe[s] and implement[s] a policy intended to apply generally” it constitutes a “rule” under VAPA. *In re Diel*, 158 Vt. 549, 554, 614 A.2d 1223, 1227 (1992); *Parker v. Gorczyk*, 173 Vt. 477, 479, 787 A.2d 494, 497 (2001) (change to prisoner furlough policy deemed a “rule” where it was “meant to apply generally to a class of prisoners and “not making an individualized assessment of each prisoner”). The 2021 Policy prescribes policy with respect to the GMCB’s enforcement duties and is broadly applicable to all hospitals within the GMCB’s purview. Furthermore, the 2021 Policy is neither “a substantive [nor a] procedural requirement” for the GMCB, and thus not a “practice” under VAPA. In other words, the GMCB’s implementation of the 2021 Policy (a VAPA “rule”) is invalid due to the GMCB’s failure to follow the rulemaking procedure. As a result, the 2021 Policy is invalid under VAPA and the GMCB’s reliance on it during the enforcement proceeding was impermissible and invalidates that proceeding.

Please do not hesitate to contact me before a written order is issued if the GMCB needs any additional information about these objections.

Very truly yours,



Eric S. Miller  
SVP and General Counsel  
The University of Vermont Health Network

Cc: Office of the Health Care Advocate