STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NATIONAL HEALTH CORPORATION, Petitioner, vs. STATE OF FLORIDA, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, Respondent.	)	CASE NO. 85-4250RX

FINAL ORDER

This matter came on for final hearing in Tallahassee, Florida, before Robert T. Benton, II, Hearing Officer of the Division of Administrative Hearings on January 16, 1986. The record closed on January 30, 1986, with the filing of the transcript of the deposition of Sharon Gordon-Girvin. The parties waived the time for entry of a final order. Petitioner filed his recommended order on February 24, 1986, and respondent's memorandum in lieu of closing argument and proposed findings of fact, conclusions of law and final order were filed on February 21, 1986. The parties' proposed findings of fact are dealt with by number in the attached appendix. The parties are represented by counsel:

APPEARANCES

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For Respondent: R. Bruce McKibben, Jr., Esquire
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By petition for determination of invalidity of agency rule filed December 2, 1985, in accordance with Section 120.56, Florida

Statutes (1985), petitioner calls into question the validity of Rule 10-17.015, Florida Administrative Code.

ISSUE

Whether Rule 10-17.015, Florida Administrative Code, is an invalid exercise of delegated legislative authority.

FINDINGS OF FACT

1. Petitioner, National Health Corporation (NHC), a Tennessee corporation doing business in Florida, applied in January 1985 for certificates of need to construct nursing homes in Alachua, Lake and Suwannee counties. When the Department of Health and Rehabilitative Services (HRS) proposed to deny its applications, NHC filed petitions for formal proceedings with HRS, which transmitted the petitions to the Division of Administrative Hearings, where they were docketed in cases Nos. 85-2855 (Alachua), 85-2900 (Lake), and 85-2883 (Suwannee), which have now been consolidated for hearing. Alachua, Lake and Suwannee Counties all lie within HRS District III.

2. At a prehearing conference in the substantial interest proceeding, HRS announced its reliance on Rule 10-17.105, Florida Administrative Code, among other things, as a basis for proposing to turn down NHC's applications. The parties stipulated that NHC

> is now, and will continue to be, substantially, immediately and adversely impacted by the use of Rule 10-17.015 as the basis for the Department's allocation of beds to competing applicants in District III, since each priority assigned by the local health council is a function of the number of beds awarded in all other planning areas.

Petitioner has standing to challenge Rule 10-17.015, Florida Administrative Code, and the parties so stipulated.

3. Prior to its most recent amendment, Rule 10-17.015, Florida Administrative Code, provided:

> 10-17.015 Local Health Plan Elements Against Which Applications for Nursing Homes Beds Shall Be Evaluated in Local Health Council District 3.

(1) Nursing Home Subdistrict Designation. Local Health Council District 3 has been divided into seven subdistricts for the purpose of planning for community nursing home bed need.

(a) Subdistrict 1 consists of Lafayette, Suwannee, Hamilton, Columbia, Union, and Bradford Counties.

(b) Subdistrict 2 consists of Dixie, Gilchrist, Alachua, and Levy Counties.

(c) Subdistrict 3 consists of Putnam County.

(d) Subdistrict 4 consists of Marion County.

(e) Subdistrict 5 consists of Citrus County.

(f) Subdistrict 6 consists of Hernando County.

(g) Subdistrict 7 consists of Lake and Sumter counties.

(2) Local Policies and Priorities. In addition to the statewide criteria against which community nursing home applications are evaluated, applications from District 3 will be evaluated against the following local criteria:

(a) Special consideration should be given to proposals to establish a nursing home to serve residents who are more than 25 miles from an existing or approved nursing home.

The designated subdistricts were used for "purposes of allocating nursing home beds in the district by applying uniform statewide methodology," (T. 74) set out in Rule 10-5.11(21), Florida Administrative Code. "When . . . [the uniform statewide] methodology was revised, . . . (by an amendment to Rule 10-5.11(21), Florida Administrative Code, effective December 25, 1984] it had the effect of allocating beds to areas of. [District III] which already had the largest share of the nursing home bed supply for the district . . . [even though] there existed a pattern of maldistribution" (T. 74) to begin with.

4. Under the uniform state methodology, embodied in Rule 10-5.11(21), Florida Administrative Code, the allocation of nursing home beds to subdistricts is "simply supply-based," (T. 75) so that once the need for the district as a whole is determined, nursing home beds are distributed to subdistricts based only on how many nursing home beds are already there. Before Rule 10-17.015, Florida Administrative Code, was amended, a quarter of the nursing home beds in District III were in Subdistrict 2, where only 15 percent of District III's population 75 and older lived, while Subdistrict 4, with 15 percent of the District III population 75 and over, had only 13 percent of the nursing home beds in District III. Since the amendment, District III, like HRS District X, comprises a "subdistrict of the whole." Use of such subdistricts of the whole rarely results in a difference in the number of beds added to a district, and "it's not generally greater than 2 percent if there is difference." (T. 103)

5. Betty Roberts, who works in HRS's Office of Community Health Planning, drafted the current version of Rule 10-17.015, Florida Administrative Code, in consultation with Carol Gormley, Executive Director of the North Central Florida Health Planning Council, and under the supervision of Sharon Gordon-Girvin. Those involved had earlier considered and rejected the idea of simply repealing Rule 10-17.015, Florida Administrative Code, without

replacing it. The amendment, in fact adopted and here challenged, provides:

> 10.17.015. Local Health Plan Elements Against which Applications for Nursing Home Beds Be Evaluated In Local Health Council District 3.

(1) Nursing Home Subdistrict Designation. Local Health Council District 3 has divided into seven subdistricts for the purpose of planning for community nursing home bed need.

a. Subdistrict 1 consists of Lafayette, Suwannee, Hamilton, Columbia, Union and Bradford Counties.

b. Subdistrict 2 consists of Dixie, Gilchrist, Alachua, and Levy County.

c. Subdistrict 3 consists of Putnam County.

d. Subdistrict 4 consists of Marion County.

e. Subdistrict 5 consists Citrus County.

f. Subdistrict 6 consists of Hernando County.

g. Subdistrict 7 consists of Lake and Sumter Counties. Decided not to designate any nursing home subdistricts. The allocation of new nursing home beds to locations within the district shall proceed according to policies established in the local health plan.

(2) Local Policies and Priorities. In addition to the statewide criteria against which community nursing home applications are evaluated, applications from District 3 will be evaluated against the following local criteria. Special consideration should be given to proposals to establish who are more 25 miles from an existing or approved nursing home local health plan policies and priorities contained in the approved plan.

The effect of current Rule 10-17.015, Florida Administrative Code, is to make allocation of nursing home beds within District III wholly dependent on "policies and priorities established in the local health plan." Rule 10-17.015(1), Florida Administrative Code. Deposition of Sharon Gordon-Girvin, pages 8-10. (T. 62). HRS "specifically advised that . . . [the Health Planning Council] should develop policies as a component of the plan, which were not for rule promulgation." (T. 80). See Gormley deposition, Exhibit No. 38.

6. The local health plan in effect when the challenged rule was promulgated and still in effect at the time of hearing, sets out a method for assigning priorities for nursing home bed allocation to each of seven planning areas within District III. These planning areas correspond to the subdistricts enumerated in prior Rule 10-17.015, Florida Administrative Code. In pertinent part, District III's local health plan provides:

1. Priority for allocation of nursing home beds in District III will be established by applying the policies set forth below. These policy statements are presented in an established order of importance.

a. No nursing home beds should be added in an area until the occupancy rate of existing and approved beds has sustained an average of 80 percent or greater for six months or more.

b. Nursing home beds should be added in an area with sufficiently high utilization of existing beds when that area's share of the District bed supply is less than the proportion of the District's population age 75+ who reside in that area.

c. The first step in establishing relative priority standing of planning areas in District III compares the population characteristics to the bed distribution. The percent of the District's bed supply in the area is subtracted from the percent of the District's 75+ population residing in the area.

(1) High need is defined as a difference greater than or equal to 3.50;

(2) Moderate need is defined as a difference greater than or equal to 2.00 but less than 3.50;

(3) Low need is defined as a difference less than 2.00.

(d) The priority order of areas in need established under statement C will be adjusted by a consideration of occupancy levels of existing and approved facilities in each planning area during the last six months:

(1) High occupancy is defined as an average of 90 percent or greater;

(2) Moderate occupancy is defined as an average greater than or equal to 80 percent but less than 90 percent;

(3) Low Occupancy is defined as an average less than 80 percent.

e. Final priority status is determined as follows:

(1) Areas with high need and high occupancy receive first priority;

(2) Areas with high need and moderate occupancy receive second priority;

(3) Areas with moderate need and high occupancy receive third priority;

(4) Areas with low need and high occupancy receive fourth priority;

(5) Areas with moderate or low need and

moderate or low occupancy receive no priority.

f. To the extent possible, all areas ranked in one of the four categories of priority established above should be approved to add some new beds. Relative allocation of available beds should be determined in the following manner:

(1) First priority areas should be allowed add at least 120 and no more than 240 beds;
(2) Second priority areas should be allowed to add at least 120 and no more than 180 beds;
(3) Third priority areas should be allowed to add at least 60 beds and no more than 120 beds;
(4) Fourth priority areas should be allowed to add up to 60 beds;
(5) Areas with no priority should not be allowed to add beds.

The local health plan was not filed with the Secretary of State at the time present Rule 10-17.015, Florida Administrative Code, was adopted.

7. The prioritization element of the local health plan above quoted is the basis for semiannual calculations by the North Central Florida Health Planning Council which are set out for the benefit of HRS employees reviewing certificate of need applications in tables like the following for the six-month period ending in May of 1985:

PRIORITY RANK	PLANNING AREA	APPROVAL BEDS	BEDS APPROVED 1	NET NEED 2
1	IV	120-240	60	60-180
	VII		149	91 3
2	--	120-180	--	--
3	III	60-120	--	60-120
4	I	60 111		--
Unranked	II	--	120	--
	V	--	9	--
	VI	--	--	--
District	III	597 2	449	--

1 Approvals between December 1, 1984 and March 30, 1985.
2 Calculation of district-wide need as of January, 1984, using DHRS bed need rule (10.5.11(21).
3 The minimum number of approval beds (120) for this priority rank has already been awarded. Approval of an additional 91 beds would bring the bed allocation up to the maximum number (240). Exhibit No. 37 to the Deposition of Carol Gormley.

The numbering of planning areas is the same as the numbering of the subdistricts which they replaced. As between competing applications for nursing home certificates of need for planning areas with difference priorities, the local health plan might well be dispositive; and would, in any event, be essential to review of the applications in accordance with 1018 rules. Deposition of Gordon-Girvin.

8. In explaining the putative difference between subdistricts and planning areas, Ms. Gormley stated:

> We understand a subdistrict to be a geographic area specifically designated for use in a mathematical formula in a methodology, like the statewide methodology or, for example, in the case of acute care, perhaps in a methodology promulgated as rule after being developed by a local health council.
>
> The difference in our looking at planning areas is that we don't in fact apply a methodology, a mathematical calculation for need. We accept the need as determined solely by the statewide methodology, but we use those smaller geographic areas as a tool for determining whether or not any part of the district should have priority over any other part of the district when applications for additional beds are considered. (T-84).

The need methodology set out in Rule 10-5.11(21), Florida Administrative Code, determines how many nursing home beds, if any, may be added to District III as a whole. Only when the state methodology indicates a need for additional beds in District III, does the question of allocation within the district arise, and only then do the local health plan policies and priorities come into play.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over challenges to existing administrative rules on grounds that

they amount to "an invalid exercise of delegated legislative authority." Section 120.56, Florida Statutes (1985).

10. The present challenge to Rule 10-17.015, Florida Administrative Code, proceeds on several fronts. Petitioner contends that the rule is invalid because its purported incorporation of the local health plan by reference was ineffective; because it is inconsistent with another HRS rule, Rule 10-5.11(21), Florida Administrative; and because it is inconsistent with Section 20.19(3)(b)9, Florida Statutes (1985).

11. Whatever the precise relationship between federally mandated state and local health plans and Florida's Administrative Procedure Act may be in other contexts, the statute is clear in requiring that the "elements of an approved district plan which are necessary to the review of any certificate-of-need application shall be adopted by the department as a part of its rules." Section 381.494(7)(b)1, Florida Statutes (1985). Petitioner does not assail the rationality of District III's local health plan or otherwise question its merit in arguing that HRS failed to follow the procedures required for adopting the plan "as a part of its rules," Section 381.494(7)(b)1, Florida Statutes (1985), in promulgating Rule 10-17.015, Florida Administrative Code.

12. Nothing in the statutes forbids resort to incorporation by reference in adopting as rules pertinent elements of a local plan (or the whole of the plan.) The governing statute states:

> Pursuant to rule of the Department of State, a rule may incorporate material by reference but only as such material exists on the date the rule is adopted for purposes of such rule, changes in such material shall have no effect with respect to the rule unless the rule is amended to incorporate such material as changed. Section 120.54(8), Florida Statutes (1985).

The pertinent rule of the Department of State is Rule 15-1.005 Florida Administrative Code, which provides:

> (1) Any ordinance, standard, specification or similar material may be published by reference in a rule subject to the following conditions:
>
> (a) The material shall be generally available to affected persons.

> (b) The material shall be published by a governmental agency or a generally recognized professional organization.
>
> (2) The agency publishing material by reference shall file with the Department of State a correct and complete copy of the referenced material with an attached certification page which shall state a description of the referenced material and specify the rule to which the referenced material relates.
>
> (3) Any amendments to material published by reference must be promulgated under the rulemaking provisions of Section 120.54, Florida Statutes, in order for the amended portions to be validly incorporated.

By Rule 10-2.11, Florida Administrative Code, HRS has adopted as its own the model rules on rulemaking, including Rule 28-3.35, Florida Administrative Code, which also refers to the Department of State's rule:

> Any rule, standard, specification or similar material which is generally available to affected persons may be incorporated in a rule, by reference, in the manner adopted by rule by the Department of State.

The rule requirement that an agency "file with the Department of State a correct and complete copy of the referenced material," Rule 15-1.005(2), Florida Administrative Code, has the salutary effect of making it a matter of public record just what "material exists on the date the rule is adopted." Section 120.54(8), Florida Statutes (1985).

13. The importance of such a requirement is underscored by respondent's argument in this case that "policies and priorities in the local health plan are dynamic in nature." Respondent's Proposed Findings of Fact, Conclusions of Law & Final Order, p. 7. Because the filing requirement was not met in the present case, the purported incorporation by reference fails. Balsam v. Department of Health and Rehabilitative Services, No. 84-0173R (DOAH; March 27, 1984), 6 FALR 2592 aff'd sub nom. Department of Health and Rehabilitative Services v. Balsam, 4626 So.2d 1109 (Fla. 1st DCA 1984).

14. Because the local plan includes elements "necessary to the review of any certificate-of-need application," Section 381.494(7), Florida Statutes (1985), which are not incorporated in the rule, the rule is at variance with the statute it implements. The present case is readily distinguishable from Humhosco, Inc. v. Department of Health and Rehabilitative Services, 476 So.2d 258 (Fla. 1st DCA 1985), where another applicant for a certificate of need challenged similar HRS rules on grounds that "the rules do not include all elements of the approved district plan necessary to review of a CON application." 476 So.2d at 261. Unlike petitioner here, the challenger in the Humhosco case "ha[d] not presented evidence to prove that the alleged `missing' elements of the district's plan [we]re necessary or essential to review of CON applications." 476 So.2d at 261. It was established in the Humhosco case, moreover, that "HRS intended, at the time the rules were adopted, to adopt additional elements of the district plans as they were submitted and evaluated, apparently because it was impractical to delay adoption until all elements of the plan were developed." 476 So.2d at 261.

15. Here the prioritization clement of the local health plan has already been submitted and evaluated by HRS, and has been shown to be necessary in the comparative review of applications for nursing home certificates of need relating to planning area assigned different priorities. HRS concedes that it "allocat[es] the beds, using the priorities established within the local health plan as guidance." Respondent's Proposed Finding of Fact No. 15. HRS adopted the rule under challenge here precisely in order to remove a perceived impediment to the use of the local plan's priority policy.

16. HRS personnel advised the health planning council's director that the council should adopt as part of the plan the priority formula policies "which were not for rule promulgation." (T. 80). The same HRS personnel who failed to adopt the local health plan bed allocation element as part of its rules viewed the element as inconsistent with Rule 10-5.11(21), Florida Administrative Code, and feared its adoption (in the absence of an amendment to Rule 10-5.11(21), Florida Administrative Code) would have created inconsistent rule provisions, even though they did not object to District III's approach in practice. HRS adopted Rule 10-17.015, Florida Administrative Code, in its present form in an effort to permit allocation of nursing home beds in District III on the basis an element of the local health plan, an element which the rule fails to incorporate.

17. Petitioner contends that Rule 10-17.015, Florida Administrative Code, is invalid on account of inconsistency with Rule 10-5.11(21), Florida Administrative Code. But where language in one rule cannot be reconciled with coequal provisions of another rule, deciding which language to disregard is a question of interpretation; and is not, in legal contemplation, a question of invalidating one or the other. It is, therefore, unnecessary to decide in the present case whether, as petitioner contends, Rules 10-5.11(21) and 10-17.015, Florida Administrative code, are mutually repugnant or, as respondent contends, they meld into a harmonious whole, when read in pari materia.

18. Finally, petitioner contends that Rule 10-17.015, Florida Administrative Code, runs afoul of Section 20.19(3)(b)6., Florida Statutes (1985), which assigns comprehensive health planning to HRS' Deputy Assistant Secretary for Health Planning and Development and states:

> The functions of this office relating to Pub. L. No. 93-641 shall not be decentralized to the districts.

Petitioner's theory is that the health planning council would be free to alter the local health plan under Rule 10-17.015, Florida Administrative Code, as it is currently written, without the imprimatur of HRS' Deputy Secretary for Health Planning and Development. Whether or not this argument is meritorious, compliance with the clear statutory requirement that plan elements "necessary to the review of any certificate of need application," Section 381.494(7)(b)1., Florida Statutes (1985), be promulgated as administrative rules ensures control by the HRS hierarchy.

It is, accordingly,

ORDERED:

Rule 10-17.015, Florida Administrative Code, is an invalid exercise of delegated legislative authority.

DONE and ENTERED this 28th day of March 1986, in Tallahassee, Florida.

ROBERT T. BENTON II, Hearing Officer
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FILED with the Clerk of the
Division of Administrative Hearings
this 28th day of March 1986.

APPENDIX

Petitioners Proposed findings of fact 1 through 7 have been adopted in substance.

Respondent's proposed findings of fact 1 through 4, the first sentence of 5, the first four sentences of 6, 7, the first two sentences of 8, the first sentence of 9, the first paragraph and final sentence of 10, 12, the third sentence in the second paragraph of 15, 16, and the first and final sentences of 17 have been adopted in substance.

The witnesses Gormley and Rond testified in the manner recited in the second and third sentences of respondents proposed finding of fact 13, and the record did establish that need (but not allocation within the district) was determined under Rule 10-5.11(21), Florida Administrative Code.

The second sentence of respondent's proposed findings of fact 5, the final sentence of 6, the final sentence of 8, the final sentence of 9, the first sentence of the second paragraph of 10, the first sentence of 13, the second and third sentences of 17, and 18 have been rejected as unsupported by the weight of the evidence. The record developed in this case did not establish that the rule under challenge was the "only feasible, logical,

rational" step to take, did show that the bed allocation element of the plan played an essential part in nursing home certificate of need application review, did show that use of the local health plan element generated specific numbers, and did show that the plan element was skeptical of adoption as a rule.

Respondent's Proposed findings of fact 14 and 15, except for the third sentence of 15, are proposed conclusions of law.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this final order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules Of Appellate Procedure. Such proceedings are commenced by filing one copy of a notice of appeal with the Agency Clerk Of The Division Of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court Of Appeal, First District, or with the District Court Of Appeal in the appellate

district where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.