

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SACRED HEART HOSPITAL OF)
PENSACOLA,)
)
Petitioner,)
)
vs.) CASE NO. 90-3576
)
DEPARTMENT OF HEALTH AND)
REHABILITATIVE SERVICES,)
)
Respondent,)
and)
)
BAPTIST HOSPITAL,)
)
Intervenor.)
_____)

RECOMMENDED ORDER

Pursuant to notice this cause came on for formal hearing before P. Michael Ruff duly designated hearing officer of the Division of Administrative Hearings on December 10-11, 1990 in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Karen O. Emmanuel, Esquire
Emmanuel, Sheppard and Condon
30 South Spring Street
Post Office Drawer 1271
Pensacola, Florida 32596

For Respondent: Richard A. Patterson, Esquire
Department of Health and
Rehabilitative Services
Fort Knox Executive Center
2727 Mahan Drive, Room 103
Tallahassee, Florida 32301

For Intervenor: Steven A. Ecenia, Esquire
Katz, Kutter, Haigler, Alderman,
Davis, Marks and Rutledge, P.A.
First Florida Bank Building
215 South Monroe Street, Suite 400
Post Office Box 1877
Tallahassee, Florida 32302-1877

STATEMENT OF THE ISSUES

This is a bifurcated proceeding in which the sole issue before the hearing officer at this present stage of the proceeding concerns whether the construction of a radiation therapy center and the institution of Radiation Therapy Medical Services by Sacred Heart Hospital should be considered a "new institutional health service" pursuant to Section 381.706(1)(h), Florida Statutes, as that relates to the right of Baptist Hospital to intervene in this proceeding. If the project is deemed to be merely a capital expenditure of a million dollars or more and reviewable only for that reason pursuant to Section 381.706(1)(c), Florida Statutes, then the Intervenor would have no standing as stated in Section 381.709(5)(b), Florida Statutes.

PRELIMINARY STATEMENT

This cause arose upon the application by Sacred Heart Hospital of Pensacola for a certificate of need to institute radiation therapy services and construct a radiation therapy facility at its campus in Pensacola, Florida. The proposed radiation center would serve both inpatients and outpatients. The total project costs proposed were estimated to be approximately 3.7 million dollars. In its application Sacred Heart alleged that the radiation therapy center would be an extension of the hospital's existing oncology program and would not constitute a "new service" as defined in Chapter 10-5, Florida Administrative Code. The Department took the position that the project was reviewable under Section 381.706(1)(c), Florida Statutes only as a capital expenditure. It took the position that the institution of radiation oncology services was not the establishment of a new institutional health service or a substantial change in health services but rather the project was reviewable only because the construction cost portion of it exceeded a million dollars as a capital expenditure. Accordingly the cause proceeded to hearing only on the above stated issue with the remainder of the proceeding abated until this issue was decided and the standing of Baptist Hospital to intervene and oppose the application was determined.

The cause came on for hearing as noticed. At the hearing the Petitioner and CON applicant, Sacred Heart Hospital (Sacred Heart) called Nora Bailey, its vice-president for planning, as an expert witness in the area of health planning in which she was accepted. Sacred Heart also called Carlos A. Perez, M.D. who was accepted as an expert witness in the area of radiation oncology. Sacred Heart's exhibits 1, 2, 6, 7, 8, 10, 11, 12, and 15 were accepted into evidence. The Respondent Department called as its witness Elizabeth Dudek, acting director of the Office of Community Medical Facilities. She was accepted as an expert witness in the area of health planning. The Intervenor, Baptist Hospital, called Michael Carroll, accepted as an expert witness in the field of health planning, and L. Rodney Cook, M.D., accepted as an expert witness in radiation oncology. The Intervenor's exhibits 1 through 4 were received into evidence. At the conclusion of the proceedings the parties ordered transcript thereof and requested an extended briefing schedule by agreement. That request was granted and the parties timely filed proposed findings of fact and conclusions of law in the form of proposed recommended orders. Those proposed findings of fact have been treated in this recommended order and are specifically ruled upon in the appendix attached hereto and incorporated by reference herein.

FINDINGS OF FACT

1. Radiation oncology is a therapeutic process in which external radiation beams are utilized to treat cancerous tumors to effect a cure or a palliation. Radiation therapy is provided by board certified radiation oncologists in specialized facilities which house radioactive materials and specialized equipment, such as linear accelerators. The provision of radiation therapy requires specialized medical personnel such as technicians certified to operate linear accelerators to provide radiation treatments, as well as physicians and dosimetrists to calibrate machines and insure that radiation treatments are properly delivered.

2. Radiation therapy is a medical specialty which deals with the utilization of radiation for the treatment of cancerous tumors and sometimes benign diseases. Radiation oncology or radiation therapy involves the use of consultative services, the knowledge of clinical, biological and pathological characteristics of the disease process, the evaluation of patients, the localization of tumors, the planning of radiation, the delivery of radiation treatments, and subsequent evaluation of the effects of treatment on the tumor and the patient.

3. Sacred Heart provides cancer therapy through surgery and medical oncology. The various aspects of those cancer treatment services do not include the provision of radiation therapy, although in the past, in several isolated instances, radiation oncology trained physicians have provided brachytherapy involving the implanting of radioactive materials in the tissues or body cavities of the patients involved. These instances did not involve a regular program of radiation therapy provided by Sacred Heart, however, and in the typical instance, any cancer patients needing radiation therapy, including brachytherapy, are and have been referred out to facilities offering such services, including the Intervenor. The present cancer therapy services offered by Sacred Heart are delineated on pages 55-60 of the transcript of this proceeding.

4. Sacred Heart filed an application for a certificate of need (CON) for a radiation therapy center on its campus to serve inpatients and outpatients. The total project costs for constructing the building and equipping as a radiation therapy center is estimated to be approximately 3.7 million dollars. The applicant proposes that the radiation therapy center would be an adjunct or extension of the hospital's existing oncology program and would not constitute a "new service" as defined in Chapter 10-5, Florida Administrative Code. The Department also takes the position that the initiation of radiation oncology or therapy services is not the establishment of a "new institutional health service" or a "substantial change" in health services. The Department takes the position that the project and application is reviewable only for the construction costs portion of the project as a capital expenditure in excess of one million dollars. HRS maintained at hearing that it has consistently taken the position that radiation therapy is not considered to be a new inpatient institutional health service pursuant to subsections 381.702(8)(13), Florida Statutes (1989). The Department's representative who testified was unable to explicate the reason for the alleged determination by the Department that radiation therapy is not a new institutional health service. She was unable to relate when such a supposed policy of treating radiation therapy only as a capital expenditure was adopted by the Department. It is noteworthy when reviewing her testimony, appearing at page 88 through 126 of the transcript of this proceeding, that repeated references are made by the HRS witness, the overall tenor or theme of which is that the purchase of linear accelerators is

not regarded as the effectuation of a new institutional health service according to her view of the Department's policy regarding radiation therapy. Thus it may be that the Department views the addition of radiation therapy as involving simply the purchase of capital equipment, i.e., a linear accelerator. The evidence reflects otherwise however. The institution of radiation therapy at a hospital involves much more than the mere purchase of a linear accelerator device. It involves the purchase of the accelerator, the construction of a shielded space or building in which to house it and operate it, the employment of physicists, dosimetrists, qualified radiation therapy oncologists, and even the institution of a machine shop to make repairs and repair parts. The institution of radiation therapy at a hospital involves much more than the mere purchase and installation of a linear accelerator and the instant application seeks to institute such a comprehensive therapy service and not merely the capital expenditure required to purchase a linear accelerator solely. Thus, the Department's purported policy of viewing the institution of radiation therapy service as merely a capital expenditure (if, indeed, a policy, which was not proven in this case) is misplaced because the evidence in this record reveals that institution of radiation therapy at a hospital involves much more in the way of equipment and services than the mere purchase and capital expenditure related to acquisition of a linear accelerator.

5. The Department has reserved Rule 10-5.011(1)(g), Florida Administrative Code, for a radiation therapy methodology. The remainder of that rule contains methodologies reserved for other services which HRS regulates as new institutional health services as well. These include such services as medicare, certified home health agencies, cardiac catheterization programs, and open heart surgery services. The reservation of a radiation therapy methodology in the rules is significant because of its indication of what the Department's intent with regard to the regulation of this service is or might be, because the Department has deleted references in its rules to reservations for services it has since chosen to deregulate, such as computerized tomography and chronic renal dialysis (see former Rules 10-5.011(1)(c) and (1)(h)). The elimination of these rule reservations was published in the Florida Administrative Weekly, Vol. 15, No. 27, July 7, 1989.

6. The Department in the past has had a rule governing need methodology for radiation therapy services. That rule was in effect until late in 1985 when it was invalidated in a 120.56 Florida Statutes rule challenge proceeding in South Miami Hospital v. Department of Health and Rehabilitative Services, 7 FALR 5491 (DOAH Nov. 1985). After that rule methodology for radiation therapy services was invalidated, the Department's witness in this proceeding, in her supervisory capacity, signed a memorandum regarding reconsideration of certificate of need #2682 involved in the South Miami Hospital case wherein South Miami Hospital sought to initiate radiation therapy services. That memo stated:

The Department does not currently have a rule in place to determine the need for radiation therapy, as such the reconsideration of CON #2682, utilizing statutory criteria, will consider an applicant's specific justification for the purchase of major medical equipment and the initiation of a new service (emphasis added).

7. The Department subsequently reiterated that the establishment of a radiation therapy service would be reviewed as a new institutional health service in the case of Bayfront Medical Center v. Department of Health and Rehabilitative Services, DOAH Case No. 87-2029 (Final Order entered September 1988). In adopting the hearing officer's conclusions of law from the recommended order in that case concerning the need for review of St. Anthony's Hospital's CON application for a radiation therapy service the Department determined that, as did the hearing officer:

A certificate of need is required when a hospital proposes a capital expenditure over a threshold amount to provide inpatient health services or proposes a substantial change of inpatient institutional health services. Section 381.706(1)(c) and (h), Florida Statutes, (1987). Since the application under consideration in this proceeding proposes radiation therapy services to inpatients, as well as outpatients for a total project cost of almost 4.2 million dollars, a CON is required.

8. The Department failed to explain any reasonable basis for any proposed change in the policy explicated in the May 22, 1986 policy memorandum, quoted above, and in the final order in Bayfront Medical Center supra. The Department's position may be summed up to the effect that its policy has changed from one of considering radiation therapy to be a new institutional health service to the current alleged policy of considering it to be a capital expenditure. It did not explicate why that policy had changed or a rational, factual or legal basis for it however and in view of the totality of Ms. Dudek's testimony it seems that the Department witness was emphasizing the policy of referring to the addition of radiation therapy as reviewable as merely a capital expenditure because of the Department's view, apparent from her testimony, that it in essence involves purchase of a linear accelerator. In the face of the unrefuted evidence to the effect that much more in the way of equipment, services and staff is involved in adding radiation therapy to the range of services offered by a hospital, it is apparent that the Department has failed to explicate a rational basis for the putative policy of regarding the institution of such a health service as merely a capital expenditure.

9. Baptist Hospital operates a radiation therapy center of its own of approximately 10,000 square foot space. This area contains shielded space for linear accelerators, examination rooms, physicians offices, as well as a machine shop for repair and maintenance of the linear accelerators and space for dosimetry computers. This department at Baptist is organized and operated separated from other oncology services. Radiation therapy is primarily used to treat cancer patients and the patients are seen, evaluated, and treated within the confines of the radiation therapy facility. Policies and procedures unique to the radiation therapy department are utilized. Staff members include, physicians, technicians, physicists, and dosimetrists who are dedicated only to the provision of the radiation therapy service at the hospital. Thus from a clinical perspective, therapy is not merely an extension or an adjunct of the existing oncology program but rather is a separate therapeutic service in and of itself to which oncology patients may be referred when the services are deemed needed. Indeed, oncology involves different forms of curative and palliative treatment, including surgery and chemotherapy, with much different protocols, differently trained specialized staff members, differently trained and/or certified physicians with different methods, therapies and protocols for

treating cancer. The commonality between the two types of service is that they have the ultimate goal of treating cancer patients, but the evidence shows that they are clearly two different medical specialties and institutional health services.

10. There is little relationship between radiation oncology and the field of diagnostic radiology. Diagnostic radiology services are utilized almost exclusively to diagnose illnesses, conditions, while radiation oncology or radiation therapy is used to therapeutically treat patients with radiation to effect a cure or palliation. Radiation oncologists consult with and exchange patients with general surgeons, ear, nose and throat specialists, and other specialists as they do with medical oncologists. Therefore medical oncology and radiology are separate and distinct services.

11. Although there is a relationship between radiation oncology and other cancer services such as chemotherapy and surgical therapy, the relationship is different in terms of the unique services, equipment and specially trained personnel required to provide radiation therapy as opposed to differently trained personnel, different equipment, therapy and procedure protocols required for other types of cancer services. Thus from a health planning perspective it does not logically follow that because a hospital provides medical or surgical oncology services, that it should also provide radiation therapy. The issue of the need for the service in terms of patient demand, availability of the specially trained personnel, the costs of providing the service, including the financial feasibility of constructing the facilities and buying the equipment needed, as well as the impact on other providers in terms of diversion of available patient days must be considered. It is noteworthy, as a corroborative aside concerning the evidence that establishes that radiation therapy is a separate and distinct institutional health service, that 29 of the 33 states which have certificate of need programs for the regulation of acute care facilities require a separate certificate of need in order to establish a radiation therapy service program.

12. Sacred Heart does not currently have a radiation therapy service. It does have oncology services and surgical services that includes surgical therapy for cancer patients. Patients who need radiation therapy currently are referred out to other facilities including Baptist Hospital. Sacred Heart attempted, in its case in support of the HRS position treating this as merely a capital expenditure situation, to analogize the provision of radiation therapy services to the acquisition of a lithotripter. Sacred Heart contends that lithotripsy which is a form of treating kidney stones is an extension of the urology program of a hospital and that radiation therapy, a form of treating cancer tumors is merely an extension of an overall integrated cancer treatment program. However, whereas the residency requirement for radiation therapy or oncology is four years, after at least one year of post-doctoral work, the specialized training necessary to perform lithotripsy is a specialty training course of only several weeks duration. Further, hospitals requiring lithotripters typically have urologists treating kidney stones on the hospital staff. Sacred Heart in this instance has no radiation oncologist on its staff acting with admitting privileges who could provide radiation therapy services at the present time. Although it may have medical oncologists and surgeons on staff who treat cancer patients, Sacred Heart lacks the specialized policies and protocols, equipment, shielded physical space, specially trained medical personnel such as radiation oncologists, dosimetrists and physicists necessary to provide radiation therapy absent to the establishment of a new service.

13. The list of institutional health services for which there is a specific need methodology includes, among others, inpatient cardiac catheterization, open heart surgery, neonatal intensive care units and transplant programs. The Department's attempt to distinguish between the establishment of an inpatient cardiac cath service and an inpatient radiation therapy service by stating that HRS had a rule methodology for the establishment of inpatient cardiac cath services whereas it didn't for inpatient radiation therapy services is a distinction without any logical basis. This is because the establishment of a service such as radiation therapy as a distinct and separate institutional health service depends upon the factual uniqueness or differences in the equipment, staff, protocols and policies required to institute such a service, as compared to other existing services at such a hospital, rather than the mere fact that the Department in the past has chosen to have a rule methodology for one type of service and not for another one.

14. This distinction cannot serve as the basis for establishment of HRS's intent or policy in this regard in any event, however, because HRS has at least reserved Rule 10-5.011(1)(g), Florida Administrative Code for a radiation therapy methodology in any event, it simply has not enacted one yet, thus belying any distinction in terms of its body of rules, regarding different institutional health services based upon the mere fact that it has enacted a rule methodology for determining need for one type of institutional health service and not for another as yet.

15. In summary, although the Department and Sacred Heart attempt to distinguish between radiation therapy and other institutional inpatient health services such as open heart surgery and cardiac catheterization by contending that radiation therapy is not a specialized service, in reality it has been established that radiation therapy requires a separate facility with specialized equipment, specially trained medical personnel with different training from personnel devoted to other types of cancer services, different protocols and procedures. It thus cannot be found to merely be an adjunct or extension of other cancer services, but rather is a separate and distinct institutional inpatient health service, just as open heart surgery, cardiac catheterization, diagnostic radiology or medical oncology for instance.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding.

17. Section 120.57(1), Florida Statutes (1989).
Section 381.709(5)(b), Florida Statutes (1989) provides, in pertinent part:

... existing health care facilities may initiate or intervene in such administrative hearing upon a showing that an established program will be substantially affected by the issuance of a certificate of need to a competing proposed facility or program within the same district, provided that existing health care providers, other than the applicant, have no standing or right to initiate or intervene in an administrative hearing involving a health care project which is subject to certificate of need review solely on the basis of s. 381.706(1)(c) ...

18. The Department contends that the Sacred Heart application is reviewable solely on the basis of Section 381.706(1)(c), Florida Statutes and that therefore the Intervenor Baptist Hospital has no standing to participate in the proceeding. Baptist's standing to participate in this proceeding depends upon a determination that the Sacred Heart Hospital application is subject to CON review pursuant to Section 381.706(1)(h), Florida Statutes (1989), which requires full CON review for projects which involve:

The establishment on inpatient institutional health services by a health care facility, or a substantial change in such services, or the obligation of capital expenditures for the offering of, or a substantial change in such services which entails a capital expenditure in any amount, for an annual operating cost of \$500,000 or more. The Department shall, by rule, adjust the annual operating cost threshold annually using an appropriate inflation index.

19. In attempting to determine whether the establishment of a radiation therapy center at Sacred Heart constitutes the addition of an inpatient institutional health service to that facility or a substantial change in such health services by Sacred Heart, reference to the definition of "health services" in Section 381.702(9), and "institutional health service" in Section 381.702(13) are essential. Those sections provide respectively as follows:

'Health services' means diagnostic, curative, or rehabilitative services and includes alcohol treatment, drug abuse treatment, and mental health services.

'Institutional health service' means a health care service which is provided by or through a health care facility and which entails an annual operating cost of \$500,000 or more. The Department shall by rule, adjust the annual operating cost threshold annually using an appropriate inflation index.

20. Since Sacred Heart's proposal involves a curative service, in effect radiation therapy, designed to treat and cure cancer cases, at an annual operating cost in excess of \$500,000 its proposal comes within the definition of "institutional health services".

21. Radiation oncology is a therapeutic process in which external radiation beams are utilized to treat cancerous tumors to affect a cure or palliation. Radiation therapy is provided by board certified radiation oncologists and specialized facilities which house radioactive materials and specialized equipment, such as linear accelerators. The provision of radiation therapy requires specialized medical personnel such as technicians certified to operate linear accelerators, to provide radiation treatments as well as physicists and dosimetrists to calibrate machines and insure that radiation treatments are properly delivered. From both a clinical and health planning perspective, radiation therapy has been demonstrated to be a separate institutional health service and not merely an extension of a hospital's existing oncology program or existing radiology program.

22. Sacred Heart must construct a physical structure to house radioactive materials and linear accelerators in order to provide radiation therapy as shown as above in the Findings of Fact. It must obtain all the specialized equipment necessary to provide this services, must recruit radiation oncologists to its medical staff, as well as physicists and dosimetrists in order to provide radiation therapy to patients. It must develop policies and protocols for the radiation therapy service. Although there is a relationship between the existing oncology service at Sacred Heart and radiation therapy, the radiation therapy will constitute a new inpatient institutional health service at Sacred Heart.

23. Although a few brachytherapy procedures had been performed in the past at Sacred Heart, these procedures are currently not being performed there but rather are being performed at Baptist Hospital. The occasional past provision of brachytherapy at Sacred Heart by practitioners who happen to be trained in such therapy does not constitute the establishment of a radiation therapy service. The Department's contention that the Sacred Heart application should be reviewed merely as a capital expenditure is inconsistent with the prior policy statements on the subject and its final orders regarding the review of CON applications to establish radiation therapy services. The Department has reserved Rule 10-5.011(1)(g), Florida Administrative Code, for the establishment of a radiation therapy need methodology. Further, although the Department has deleted references to other services that it no longer regulates as institutional health services, such as computerized tomography and chronic renal dialysis. It has not repealed any such reference to radiation therapy, however. Additionally, in the May 22, 1986 memorandum referenced in the above findings of fact regarding the reconsideration of certificate of need 2682 for radiation therapy services at South Miami Hospital, HRS determined that it would consider applications for the initiation of radiation therapy services to involve the acquisition of major medical equipment and the initiation of a new service.

24. In its final order in Bayfront Medical Center v. Department of Health and Rehabilitative Services, DOAH Case No. 87-2029 (HRS Final Order entered Sept. 1988), the Department adopted the hearing officer's conclusions of law in which it recognized that the initiation of a radiation therapy service was reviewable as a capital expenditure and also as a new inpatient institutional health service under the provisions of Section 381.706(1)(c) as well as (h), Florida Statutes.

25. HRS has attempted to refute its prior policy of reviewing applications for the establishment of a radiation therapy service as a new institutional health service. The Department's action in the instant case is identical to its actions which were invalidated by the First District Court of Appeal in Health Care and Retirement Corporation of American, Inc. v. Department of Health and Rehabilitative Services, 559 So.2d 665 (Fla. 1st DCA 1990). In that situation the Department had refused to allow the applicant to introduce evidence supporting a grant of 18 nursing home beds, as opposed to the 20 beds originally sought in the application. The hearing officer accepted evidence of the Department's past practice of allowing "down-sizing" at the final hearing, even though the reduced number of beds had not been considered at the time of the application. In that case the HRS witness acknowledged that the Department had in the past allowed CON applicants to seek a smaller number of beds at the final hearing. However, HRS had changed its policy so that only the number of beds applied for would be considered at final hearing. The Department's witness in that case then conceded that no rule to that effect had been proposed or published and that the policy change was not disseminated in any form until it

appeared in a Department planning manual and on a revised application form. Although the hearing officer permitted the down-sizing of the application, the final order rejected the hearing officer's ruling with regard to the down-sizing, finding that the agency did not have to give advanced notice of intent to use a non-rule policy.

26. The First District Court of Appeal held that the Department ignored the principle that:

. . . when an agency seeks to validate its action based upon a policy that is not recorded in rules or discoverable precedents, that policy must be established by expert testimony, documentary opinions, or other evidence appropriate to the nature of the issues involved and the agency must expose and elucidate its reasons for its discretionary action.

The court went on to state:

In other words an agency may apply incipient or developing policy in a Section 120.57 administrative hearing provided the agency explicates, supports, and defends such policy with competent, substantial evidence on the record in such proceedings.

27. The court found that the Department failed to meet the burden in that the Department's witness merely stated that the rule requiring publication of a fixed need pool number mandated the Department to change its established down-sizing policy. The court found that the change was not otherwise supported or defended in any way. Similarly, in the instant case, the Department offered no basis for the explanation of its change in policy of reviewing radiation therapy applications as the establishment of a new institutional health service. Ms. Dudek merely testified that the policy had changed and offered no expert opinion or other evidence to support the change in position or the reason for it. In fact, in spite of her signature on the memo which suggested that radiation therapy would be reviewed as a new service, she testified that it was her recollection that the Department had never reviewed such an application as anything but a request for the acquisition of major medical equipment.

28. The Court of Appeals for the First District stated in *Amos v. Department of Health and Rehabilitative Services*, 440 So.2d 43 (Fla. 1st DCA 1983):

Central to the fairness of administrative proceedings is the right of affected persons to be given the opportunity for adequate and full notice of agency activities. These persons have the right to locate a precedent and have it apply and the right to know the factual basis and policy reasons for agency action. *State ex. rel. Department of General Services v. Willis*, 344 So.2d 580 (Fla. 1st DCA 1977). Inconsistent results based upon similar facts, without a reasonable explana-

tion, violates subsection 120.68(12)(b), Florida Statutes, as well as the equal protection guarantees of both the Florida and United States constitutions. North Miami General Hospital Inc. v. Department of Health and Rehabilitative Services, 355 So.2d 1272, 1278 (Fla. 1st DCA 1978). 444 So. 2d at 47." See also International Medical Centers HMO v. Department of Health and Rehabilitative Services, 417 So.2d 734 (Fla. 1st DCA 1982) and McDonald v. Department of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977).

29. Accordingly, the preponderant evidence of record demonstrates that the establishment of the radiation therapy service at issue will constitute the establishment of a new inpatient, institutional health service by the health care facility, Sacred Heart or at least a substantial change in the services presently offered. Thus the Sacred Heart application is subject to CON review pursuant to Section 381.706(1)(h), Florida Statutes (1989) and therefore Baptist Hospital has standing to participate as a party in this proceeding based upon such review.

RECOMMENDATION

Having considered the foregoing findings of fact, conclusions of law, the candor and demeanor of the witnesses and the pleadings and arguments of the parties it is therefore recommended that the motion to dismiss the petition to intervene filed by Baptist Hospital be denied, that Baptist Hospital be accorded standing in this proceeding and that the case proceed to hearing on the substantive merits of the application.

RECOMMENDED this 3rd day of April, 1991, in Tallahassee, Florida.

P. MICHAEL RUFF
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of April, 1991.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 90-3576

Petitioner's proposed findings of fact:

- 1 Accepted.
- 2 Accepted, but subordinate to the Hearing Officer's findings of fact on the subject matter.
- 3-6 Accepted.

7 Rejected as subordinate to the Hearing Officer's findings of fact on this subject matter.
8 Accepted.
9 Rejected as immaterial in this de novo proceeding.
10-20 Accepted.
21-22 Accepted, but not itself dispositive of material issues.
23-24 Accepted.
25-26 Accepted, but not materially dispositive.
27 Accepted, but subordinate to the Hearing Officer's findings of fact.
28 Accepted, but not materially dispositive.
29 Accepted, but not material.
30 Rejected as subordinate to the Hearing Officer's findings of fact.
31 Rejected as irrelevant.
32 Rejected as immaterial.
33 Rejected as subordinate to the Hearing Officer's findings of fact and as immaterial.
34 Rejected as subordinate to the Hearing Officer's findings of fact on the subject matter.
35 Accepted, but not materially dispositive.
36 Rejected as subordinate to the Hearing Officer's 'findings of fact and as contrary to the preponderant weight of the evidence.
37-41 Rejected as a discussion and recitation of testimony and not fact finding and as subordinate to the Hearing Officer's findings of fact.

Intervenor's proposed findings of fact:

1-18 Accepted.

COPIES FURNISHED:

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Linda Harris, General Counsel
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

ALL PARTIES HAVE THE RIGHT TO SUBMIT WRITTEN EXCEPTIONS TO THIS RECOMMENDED ORDER. ALL AGENCIES ALLOW EACH PARTY AT LEAST 10 DAYS IN WHICH TO SUBMIT WRITTEN EXCEPTIONS. YOU SHOULD CONTACT THE AGENCY THAT WILL ISSUE THE FINAL ORDER IN THIS CASE CONCERNING AGENCY RULES ON THE DEADLINE FOR FILING EXCEPTIONS TO THIS RECOMMENDED ORDER. ANY EXCEPTIONS TO THIS RECOMMENDED ORDER SHOULD BE FILED WITH THE AGENCY THAT WILL ISSUE THE FINAL ORDER IN THIS CASE.

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DOAH ORDER OF VOLUNTARY DISMISSAL

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SACRED HOSPITAL OF)
PENSACOLA,)
)
Petitioner,)
)
vs.) CASE NO. 90-3576
)
DEPARTMENT OF HEALTH AND)
REHABILITATIVE SERVICES,)
)
Respondent,)
)
and)
)
BAPTIST HOSPITAL,)
)
Intervenor.)
_____)

ORDER OF VOLUNTARY DISMISSAL

THIS CAUSE comes before the undersigned upon Petitioner's Notice of Voluntary Dismissal, and the Hearing Officer being advised in the premises, it is, therefore,

ORDERED:

That Case No. 90-3576 is hereby DISMISSED, and the file of the Division of Administrative Hearings is hereby CLOSED.

DONE AND ORDERED this 12th day of January, 1993, in Tallahassee, Leon County, Florida.

P. MICHAEL RUFF
Hearing Officer
Division of Administrative Hearings
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AGENCY FINAL ORDER

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STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

SACRED HEART HOSPITAL
OF PENSACOLA,

Petitioner,

vs.

CASE NO. 90-3576

CON NO. 6158

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent,

and

BAPTIST HOSPITAL,

Intervenor.

_____ /

FINAL ORDER

This cause came on before me for the purpose of issuing a final agency order, upon Order of Hearing Officer Ruff, attached hereto, dismissing the case, it appearing from the Petitioner's Voluntary Dismissal, also attached hereto, that there are no disputed issues of fact.

FINDINGS OF FACT

1. On December 30, 1992, Petitioner filed a Voluntary Dismissal in the above-styled case. On January 12, 1993, the Hearing Officer entered the Order of Voluntary Dismissal.

2. The Agency hereby adopts and incorporates by reference the attached Notice of Voluntary Dismissal and Order of Voluntary Dismissal.

3. There are no remaining disputed issues of fact or law.

CONCLUSIONS OF LAW

The Agency for Health Care Administration has jurisdiction over the parties and subject matter pursuant to Section 120.57, Fla. Stat. (1991).

Based on the foregoing,

IT IS ADJUDGED that:

The above-styled case is DISMISSED.

DONE and ORDERED this 26th day of February, 1993, in Tallahassee, Florida.

Douglas M. Cook
Director
Agency for Health Care
Administration

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW WHICH SHALL BE INSTITUTED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF AHCA, AND A SECOND COPY, ALONG WITH THE FILING-FEE AS PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE AGENCY MAINTAINS ITS HEADQUARTERS OR WHERE A PARTY RESIDES. REVIEW PROCEEDING SHALL BE CONDUCTED IN ACCORDANCE WITH THE FLORIDA RULES OF APPELLATE PROCEDURE.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, this 2nd day of March, 1993, to the above-named people.

R.S. Power, Agency Clerk
Agency for Health Care
Administration
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