

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NAPLES COMMUNITY HOSPITAL, INC.,)
)
Petitioner,)
)
vs.) CASE NO. 93-4888
)
AGENCY FOR HEALTH CARE)
ADMINISTRATION and NAPLES RESEARCH)
AND COUNSELING CENTER, INC., d/b/a)
THE WILLOUGH AT NAPLES,)
)
Respondents.)
_____)
CMSF, INC., d/b/a CHARTER GLADE)
HOSPITAL,)
)
Petitioner,)
)
vs.) CASE NO. 93-4889
)
AGENCY FOR HEALTH CARE)
ADMINISTRATION and NAPLES RESEARCH)
AND COUNSELING CENTER, INC., d/b/a)
THE WILLOUGH AT NAPLES,)
)
Respondents.)
_____)

RECOMMENDED ORDER

A formal hearing was held in this case on January 3-5, 1994, before Eleanor M. Hunter, the Hearing Officer designated for the Division of Administrative Hearings.

APPEARANCES

For Petitioner Naples Community Hospital, Inc.:	W. David Watkins, Attorney Oertel, Hoffman, Fernandez & Cole 2700 Blair Stone Road, Suite C Post Office Box 6507 Tallahassee, Florida 32314-6507
For Petitioner CMSF, Inc., d/b/a Charter Glade Hospital:	David C. Ashburn, Attorney Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel Post Office Box 1838 Tallahassee, Florida 32302

For Respondent Thomas W. Stahl, Attorney
Naples Research and Newell & Stahl, P.A.
Counseling Center: 817 North Gadsden Street
 Tallahassee, Florida 32303

For Respondent Lesley Mendelson, Attorney
Agency For Health Agency for Health Care Administration
Care Administration: 325 John Knox Road, Suite 301
 Tallahassee, Florida 32303-4131

STATEMENT OF THE ISSUES

1. Whether the proposed changes in the conditions for certificate of need number 3998, initially issued to The Willough in 1986, constitutes a substantial change in health care services.

2. Whether the authority of the Agency for Health Care Administration to modify certificate of need number 3998 is limited by a Stipulation and Settlement Agreement of August 22, 1986.

3. If AHCA has the authority to modify the conditions placed on certificate of need number 3998 and the proposed modification is not a substantial change in health care services, whether there is "good cause" for the modification as defined in Rule 59C-1.019, Florida Administrative Code.

PRELIMINARY STATEMENT

The Agency For Health Care Administration ("AHCA") issued certificate of need ("CON") No. 3998 to Naples Research and Counseling Center, Inc. d/b/a The Willough at Naples ("The Willough") in 1986. Pursuant to the terms of a Stipulation and Settlement Agreement, CON No. 3998 was issued subject to the following conditions:

- (1) limiting treatment to patients suffering with different forms of bulimia,
- (2) limiting patients from AHCA District 8 to 3 percent,
- (3) limiting Florida patients to 39 percent, and
- (4) requiring at least 4 percent indigent care.

In April 1991, AHCA modified the conditions to allow The Willough to treat patients with various eating disorders and up to 20 percent of its patients from District 8. The conditions requiring a maximum of 39 percent Florida patients, and a minimum of 4 percent charity care (with some change in definition from indigent care) was retained.

In May 1991, The Willough requested, but was denied, an additional modification of the conditions for CON 3998. The Willough's request would have allowed the treatment of patients with either a primary or a secondary diagnosis of eating disorders. On May 28, 1991, AHCA denied the proposed modification as "...beyond the limitations of the authorizing agreement and, therefore, a substantial change of such services."

In March 1993, AHCA approved an additional modification of CON No. 3998 to remove all conditions except the minimum 4 percent of total patient days for charity care. By petitions for formal administrative proceedings, the 1993 modification was challenged by Naples Community Hospital, Inc. ("Naples") and CMSF, Inc. d/b/a Charter Glade Hospital ("Charter"). The final hearing was held on January 3-5, 1994.

The Willough presented the testimony of Ronald Myers, the President of the Wilmac Corporation; Alan Axelson, M.D., expert in psychiatry, and reimbursement for psychiatric services; James Brown, former Executive Director of The Willough; Robert A. Biesiegel, expert in health care financial feasibility; and Virginia Condello, M.D., expert in psychiatry. The Willough's exhibits 1-12 were received in evidence.

AHCA presented the testimony of Elizabeth Dudek, expert in health planning and administration of the CON program, and exhibits 1 and 2, which were received in evidence. Official recognition was taken of AHCA's composite exhibit 3.

Naples presented the testimony of Michael Douglas Jernigan, expert in health planning, and Elizabeth Dudek. Naples' exhibits 1-4 and 7 were received in evidence, while exhibits 5, 6 and 8 were not.

Charter presented the testimony of Martin C. Schappel, expert in psychiatric hospital administration, and exhibits 1 and 2, which were received in evidence.

The transcript of the final hearing was received at the Division of Administrative Hearings on January 24, 1994. Proposed findings of fact and conclusions of law were filed on March 7, 1994.

FINDINGS OF FACT

1. Naples Research and Counseling Center, Inc. d/b/a The Willough at Naples ("The Willough") is a 64-bed specialty psychiatric hospital located in Naples, Florida, in Agency for Health Care Administration ("AHCA") District 8. District 8 includes Charlotte, Collier, De Soto, Glades, Hendry, Hardee, Highlands, Lee, Polk and Sarasota Counties.

2. AHCA is authorized to issue, revoke or deny certificates of need (CONs) and, under certain circumstances, to modify the conditions of CONs upon showing of good cause. Subsections 408.034(1) and 408.040(1)(a), Florida Statutes. The authority was transferred to AHCA from the Department of Health and Rehabilitative Services ("HRS") in July, 1992.

3. Naples Community Hospital ("Naples") operates a 23-bed psychiatric unit within its general acute care hospital, located in Naples, Collier County, Florida, in AHCA District 8.

4. CMSF, Inc. d/b/a Charter Glade Hospital ("Charter") owns and operates a 104-bed specialty hospital in Lee County, Florida, in AHCA District 8. Charter has 56 adult psychiatric beds, 24 child or adolescent psychiatric beds, and 24 chemical dependency or substance abuse beds.

5. In 1986, pursuant to a Stipulation and Settlement Agreement entered into by The Willough, HRS (AHCA's predecessor as the agency to administer CON laws) and Charter, The Willough was issued a CON to convert 64 residential treatment facility beds to short term psychiatric beds. The Willough's 1986 CON conditions were:

- (a) the facility could only treat patients suffering from the eating disorders bulimia, bulimia nervosa, and bulimia anorexia;
- (b) no more than 3 percent of the patients could come from AHCA Service District 8;
- (c) no more than 39 percent of the patients could come from the State of Florida, and
- (d) at least 4 percent of the patients had to be "indigent" as defined in the Stipulation Agreement.

As provided by the agreement, The Willough was licensed as an adult psychiatric hospital, but was not included in HRS' inventory of licensed psychiatric beds for District 8, consistent with the CON limitations.

6. In April 1991, AHCA modified several of the conditions on CON number 3998 to allow The Willough to treat additional specified eating disorders and up to 20 percent of its patients from District 8. The conditions were also modified to change the 4 percent indigent care requirement to "charity care" as defined by the Health Care Cost Containment Board. Neither Charter nor Naples challenged the 1991 modification to CON Number 3998.

7. More specifically the April 1991 modifications allowed The Willough (1) to provide psychiatric services to adult patients with primary eating disorder diagnoses as defined in the Diagnostic and Statistical Manual of Mental Disorders, DSM III-R, Codes 307.10, 307.50, 307.51, 307.52, 307.53, 307.54, and 307.59, (2) to accept no more than 20 percent admissions from District 8, (3) to accept up to 39 percent of admissions from Florida, (4) to accept at least 61 percent admissions of non-Florida residents, and to provide a minimum of 4 percent charity care.

8. On May 2, 1991, The Willough requested an additional modification of CON 3998 as follows:

As proposed, The Willough would be allowed to admit only those patients with a primary diagnosis of the listed eating disorders, or those patients with a primary diagnosis of Affective Psychosis when an enumerated eating disorder also exist [sic] as a secondary diagnosis. No patients could be admitted for an Affective Psychosis unless they also meet the diagnostic criteria for the enumerated eating disorders.

9. The Willough also stated in its May 1991 request, that it had no desire to treat patients other than those suffering from eating disorders, but that its request was prompted by "...the fact that certain insurers will not pay for treatment unless the patient can be admitted with a primary diagnosis of depression or other affective psychosis (ICD-9CM Nos. 296.0-296.9)." The

Willough further explained that its financial viability depended on the modification and that its operations would continue to honor the spirit and intent of the original CON conditions.

10. On May 28, 1991, HRS denied the May 2, 1991 modification request, as a substantial change of inpatient institutional health services, which was subject to review under Subsection 381.706(1)(h), Florida Statutes.

11. In a February 10, 1993 request, The Willough sought further modification of CON 3998 to delete the following conditions:

Treatment of those 18-years of age or older, suffering from the sole or principal diagnosis of 307.1 (Anorexia nervosa), 307.50 (Eating disorder, unspecified, 370.51 (Bulimia), 307.52 (Pica), 307.53 (Psychogenis reuminaton), 307.54 (Psychogenic vomiting), and 307.59 (Other, of non-organic origin);

No more than 20 percent of admissions be from District 8;

No more than 39 percent of admissions be from the State of Florida, and

At least 61 percent of the admissions be non-Florida residents.

On March 22, 1993, the modification was granted deleting the requested conditions and leaving The Willough's CON conditioned on the provision of 4 percent charity care.

12. The Willough demonstrated that patients suffering from eating disorders are a subset of psychiatric patients, most of whom also require treatment of several co-morbid psychiatric conditions, and have three or four other concurrent psychiatric diagnoses. Approximately 70-80 percent of all patients with an eating disorder also suffer from a co-occurring depression, major depression, or dysthymia. Approximately one-half to one-third of all eating disorder patients also have co-occurring substance abuse problems. Approximately 10-15 percent of all patients with eating disorders have obsessive compulsive disorders and a very high prevalence of disassociative disorders, generalized anxiety disorders, and post-traumatic stress disorders. It is rare to encounter a patient with a severe eating disorder who does not also have a concomitant general psychiatric disorder. The Willough's staff treats concomitant affective disorders, as well as the diagnosed eating disorders of its patients.

13. As "good cause" for the modification, The Willough also demonstrated the effects of managed care, its declining patient census, and changes in reimbursements for patients from Ontario, Canada, resulting in a steady decline in their admissions from a 1990-91 high of 140 patients. The Willough also pointed to its decrease in net revenue, and loss of \$991,202 in 1992, and expected loss of over \$1.7 million in 1993, despite significant cost saving measures.

14. Since June 1991, The Willough has been licensed as an adult psychiatric hospital. The change in The Willough's underlying license from 1986, when it was initially a short-term inpatient psychiatric hospital to the 1993 adult inpatient psychiatric hospital license, is the result of amendments to the rules governing hospital licensure. Previously, the rules distinguished between short and long term services. As amended, the rules distinguish between adult and child/adolescent services.

15. Since CONs issued under the prior rule did not contain a distinction between child/adolescent and adult beds, the amended rule required HRS to prepare and publish a preliminary inventory showing the number of beds for adults and for children and adolescents included within the licensed total of short-term and long-term psychiatric beds in each district. Consistent with this provision, HRS published the inventory in Volume 16, No. 52, the December 28, 1990 edition of the Florida Administrative Weekly. The inventory included The Willough, which was listed as having 64 adult psychiatric beds. HRS published the final inventory on June 21, 1991, in Vol. 17, No. 26 of the Florida Administrative Weekly, having received no challenge to classification of The Willough.

16. The Willough claims that the modification of its CON has and will cause no adverse impact on Naples and Charter. The testimony of health planners that the full impact of The Willough's proposed modification of March 1993 cannot be fully measured from available data from late 1993 is accepted. Naples demonstrated that its psychiatric medical staff and service areas overlap with those of The Willough, although The Willough pointed out that Naples occupancy rates were 60 percent in 1990 and 1991, 50 percent in 1992, and back up to 60 percent in 1993. The optimal occupancy level under the psychiatric rule is 75 percent. Charter reasonably projects that its existing program will be substantially affected, pointing to the loss of two staff persons to The Willough, and a decrease in its October-November 1993 average daily census, as compared to the same time period in 1992.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the parties and subject of this proceeding pursuant to Subsections 120.57(1) Florida Statutes and 408.039(5), Florida Statutes.

18. AHCA is the state agency authorized to issue, revoke or deny certificates of need, and to issue, revoke, or deny exemptions from certificate of need review, pursuant to Section 408.034 Florida Statutes (1993).

19. The applicant for a modification of its CON conditions has the burden of proof. As distinguished from *Young v. Department of Community Affairs*, 625 So.2d 831 (Fla. 1993), this case is not an appeal of a local government decision, but is a part of the process of formulating state agency action through adjudication.

20. Pursuant to Subsection 408.039(5)(b), Florida Statutes, the Petitioners have standing if they demonstrate that their "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." One of the issues to be decided in this case is whether the modification requested by The Willough constitutes a substantial change in service for which a certificate of

need application must be filed. If the certificate of need review process is required, then Petitioners have standing as existing health care providers whose interests are protected from the modification process.

21. Section 408.040, Florida Statutes, provides, in relevant part, that:

If the holder of a certificate of need demonstrates good cause why the certificate should be modified, the department shall reissue the certificate of need with such modifications as may be appropriate. The department shall by rule define the factors constituting good cause for modification.

AHCA has enacted a rule defining CON modifications and its authority to grant modifications as follows:

A modification is defined as an alteration to an issued, valid certificate of need or to the condition or conditions on the face of a certificate of need for which a license has been issued, where such an alteration does not result in a project subject to review as specified in either subsection 408.036(1) or (2), Florida Statutes. (Emphasis Added.)

22. Subsection 408.036(1)(h), Florida Statutes, provides that a project is not exempt from certificate of need review, if the project constitutes:

The establishment of inpatient institutional health service 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, any such services which entails a capital expenditure in any amount, or 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. (Emphasis Added.)

Substantial change in service is defined in Rule 59C-1.002(63) as follows:

(63) "Substantial change in health services" means:

- (a) The offering by a health care facility, through conversion of beds or other means, of a new institutional health service or a health service which has not been offered on a continuing basis by or on behalf of the health care facility within the 12-month period prior to the time such service would be offered, excluding obstetrical services; or
- (b) The designation of acute care beds in a health care facility as beds regulated under

Rule 59C-1.036, F.A.C., or the redesignation of such beds back to acute care beds; or
(c) The conversion of a general acute care or specialty hospital licensed under Chapter 395, Part 1, F.S., to a long term care hospital.

23. The Willough's argument is as follows: AHCA has defined an "institutional health service" as "health service provided by or through a health care facility, and which entails an annual operating cost of \$500,000 or more." Rule 59C-1.002(38), Florida Administrative Code. Hospital "inpatient general psychiatric services" are defined in Rule 59C-1.040(2)(1), Florida Administrative Code, as those services:

...provided under the direction of a psychiatrist or clinical psychologist to persons whose sole diagnosis, or in the event of more than one diagnosis, the principal diagnosis as defined in the Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R) is a psychiatric disorder defined in paragraph (2)(p) of this rule.

As referenced and further defining such services, Rule 59C-1.040(2)(p), Florida Administrative Code, provides that a "psychiatric disorder" is a disorder:

...coded in any sub-classification of category 290 or coded in any sub-classification of categories 293 through 302 or coded in any sub-classification of categories 306 through 316, in Axis I or Axis II, consistent with the diagnostic categories defined in the Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R), incorporated herein by reference; or equivalent codes in the following sub-classifications in the International Classification of Disease (ICD 9), incorporated herein by reference; category 290, 293 through 302, or 306 through 316.

The regulatory scheme established by the agency provides that in order to constitute a "substantial change" in health care service which rises to the level that would require CON review, the proposed service must be a new "inpatient service," and the establishment of the proposed service must cause the facility to increase its operating costs by at least \$500,000 before it must undergo CON review.

24. The rule defining "institutional health services" relates to the institution of new services and does not, as The Willough's claims, apply to a substantial change in services. A determination of whether a proposal constitutes a substantial change in service by reference to the cost of the change is inconsistent with subsection 408.036(1)(h), Florida Statutes, and the rule defining a substantial change in health services.

25. The Willough also relies on its license as an adult psychiatric facility as the basis for its entitlement to modifications which allow treatment of any psychiatric disorders, as defined by Rule 59C-1.040(2)(1), Florida Administrative Code. The notion that the underlying license establishes the parameters for acceptable modifications cannot be reconciled with the language of the rule defining a modification as a change in conditions on the face of a CON or with existing case law. If the underlying license and distinctions in health care services made by AHCA's rules were determinative of substantial changes and, consequently, of standing, then psychiatric hospitals would not have been granted standing to contest the issuance of certificates of need to substance abuse hospitals. Charter Medical Jacksonville, Inc. v. State Department of Health and Rehabilitative Services, 503 So.2d 381 (Fla. 1st DCA 1987).

26. In Psychiatric Institutes of America, Inc. v. Department of Health and Rehabilitative Services, 491 So.2d 1199 (Fla. 1st DCA 1986), the test established for standing was whether facilities would treat patients who could go to either facility and would compete for the same staff and physicians. Similarly, such competing facilities have standing to contest CON modifications that would place them in the same competitive position. Baptist Hospital, Inc. v. Department of Health and Rehabilitative Services, 500 So.2d 620 (Fla. 1st DCA 1987).

27. The Willoughs argues persuasively that it has, as required by the exception in the rule on substantial change, continuously treated psychiatric disorders incidental to its treatment of eating disorders. In the Baptist case, supra, the therapies proposed to be offered in a comprehensive medical rehabilitation unit were also already offered in various departments of the hospital. The agency, nevertheless, determined that the change in the manner in which the therapies were offered was a substantial change in services. In this case, the change in CON conditions limiting treatment to eating disorders and incidental psychiatric disorders to allowing the treatment of any diagnosed psychiatric disorder constitutes a substantial change in the manner providing health care services.

28. For the reasons given by HRS when it denied The Willough's May 1991 modification request and the decision in Baptist Hospital, supra, the proposed modifications of The Willough's CON conditions constitutes a substantial change in services and the Petitioners have standing to challenge the action of AHCA in approving The Willough's modification request.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered denying The Willough's February 10, 1993 request for further modification of CON 3998.

DONE AND ENTERED this 26th day of July, 1994, in Tallahassee, Leon County, Florida.

ELEANOR M. HUNTER
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of July, 1994.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 93-4888

To comply with the requirements of Section 120.59(2), Fla. Stat. (1991), the following rulings are made on the parties' proposed findings of fact:

Petitioner, Naples Community Hospital's Proposed Findings of Fact

- 1-8. Accepted in or subordinate to Finding of Fact 5.
- 9-11. Accepted in or subordinate to Findings of Fact 6 and 7.
- 11-14. Accepted in or subordinate to Findings of Fact 8 and 9.
- 15. Accepted in Finding of Fact 10.
- 16-17. Accepted in Finding of Fact 11.
- 18-20. Accepted in or subordinate to Findings of Fact 14.
- 19-22. Accepted in or subordinate to Findings of Fact 8, 10, 11 and 14.
- 23. Conclusion of law not reached.
- 24. Accepted in Findings of Fact 6 and 7.
- 25-26. Accepted in or subordinate to Finding of Fact 14.
- 27-28. Issue not reached.
- 29. Conclusion of law not reached.
- 30-35. Rejected or not considered relevant in Finding of Fact 13.
- 36-39. Accepted in or subordinate to Finding of Fact 13.
- 40-44. Issues not reached.
- 45. Accepted in Finding of Fact 5.
- 46. Accepted in Finding of Fact 3.
- 47. Accepted in part in Finding of Fact 12.
- 48-56. Accepted in part in Finding of Fact 16.

Petitioner, Charter Glade Hospital's Proposed Findings of Fact

- 1-3. Accepted.
- 4. Accepted in Finding of Fact 4.
- 5. Accepted in Finding of Fact 3.
- 6. Accepted in Finding of Fact 1.
- 7. Accepted in Finding of Fact 2.
- 8-11. Accepted in Findings of Fact 5-7.
- 12. Accepted in Finding of Fact 11.
- 13-19. Accepted in Preliminary Statement.
- 20-24. Accepted in or subordinate to Finding of Fact 5.
- 25. Accepted in Finding of Fact 7.

- 26-31. Accepted in Findings of Fact 8-10.
- 32. Accepted in Finding of Fact 11.
- 33. Accepted in Findings of Fact 12-13.
- 34. Accepted in Finding of Fact 14.
- 35. Subordinate to Finding of Fact 14.
- 36-49. Accepted in or subordinate to Finding of Fact 16.
- 50-52. Issue not reached.
- 53-66. Facts, but not interpretations of law, accepted in or subordinate to Findings of Fact 6, 7, 11 and 14.
- 67-68. Accepted in part and rejected in part in Findings of Fact 12 and 13.

Respondent, The Willough's, Proposed Findings of Fact

- 1. Accepted in Findings of Fact 1 and 5.
- 2. Accepted in Findings of Fact 13-15.
- 3. Accepted in Finding of Fact 5.
- 4. Accepted in Findings of Fact 6 and 7.
- 5. Accepted in Findings of Fact 7 and 12.
- 6-12. Accepted in Finding of Fact 12.
- 13. Conclusion of law not reached.
- 14-25. Accepted in Findings of Fact 13.
- 26. Accepted in Finding of Fact 16.

Respondent, AHCA's, Proposed Findings of Fact

- 1. Accepted in Finding of Fact 3.
- 2. Accepted in Finding of Fact 4.
- 3. Accepted in Finding of Fact 1.
- 4. Accepted in Finding of Fact 2.
- 5. Accepted in Finding of Fact 11.
- 6-8. Accepted in Finding of Fact 5.
- 9. Accepted in Finding of Fact 14.
- 10. Accepted in Preliminary Statement.
- 11. Accepted in Findings of Fact 7 and 12.
- 12. Accepted in Finding of Fact 14.
- 13-15. Accepted in Finding of Fact 13.
- 16. Accepted in or subordinate to Finding of Fact 12.
- 17-19. Accepted in Finding of Fact 10. Conclusions of law not reached.
- 20. Issue not reached.
- 21. Accepted in Finding of Fact 13.

COPIES FURNISHED:

W. David Watkins, Attorney
Oertel, Hoffman, Fernandez & Cole
2700 Blair Stone Road, Suite C
Post Office Box 6507
Tallahassee, Florida 32314-6507

David C. Ashburn, Attorney
Greenberg, Traurig, Hoffman, Lipoff,
Rosen & Quentel
Post Office Box 1838
Tallahassee, Florida 32302

Thomas W. Stahl, Attorney
Newell & Stahl, P.A.
817 North Gadsden Street
Tallahassee, Florida 32303

Lesley Mendelson, Attorney
Agency for Health Care Administration
325 John Knox Road, Suite 301
Tallahassee, Florida 32303-4131

R. S. Power, Agency Clerk
Agency for Health Care Administration
Atrium Building, Suite 301
325 John Knox Road
Tallahassee, Florida 32303

Harold D. Lewis, Esquire
Agency For Health Care Administration
The Atrium, Suite 301
325 John Knox Road
Tallahassee, Florida 32303

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 ten days in which to submit written exceptions. Some agencies allow a larger period within 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.

=====

AGENCY FINAL ORDER

=====

STATE OF FLORIDA
DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES

NAPLES COMMUNITY HOSPITAL,
INC. AND CMSF, INC. d/b/a
CHARTERGLADE HOSPITAL,

Petitioner,

CASE NO. 93-4888

93-4889

vs.

CON NO. 3998

RENDITION NO. HRS-94-541-FOF-RCE

STATE OF FLORIDA, AGENCY FOR
HEALTH CARE ADMINISTRATION
AND NAPLES RESEARCH AND
CONSELING CENTER, INC. d/b/a
THE WILLOUGH AT NAPLES

Respondent.

_____ /

FINAL ORDER

This cause came on before me for the purpose of issuing a final agency order. The Hearing Officer assigned by the Division of Administrative Hearings (DOAH) in the above styled case submitted a Recommended Order to the Agency for Health Care Administration (AHCA). The Recommended Order entered July 26, 1994, by Hearing Officer Eleanor M. Hunter is incorporated by reference.

RULING ON EXCEPTIONS FILED BY AHCA

Counsel challenges the Hearing Officer's conclusion that the CON modification sought by Willough constitutes a "substantial change in service" which triggers the batched, comparative review process and the requirement of a CON before the new service can be initiated. A "substantial change in service" is the offering of a new health service by a health care facility or the offering of a health service not offered by the facility in the past 12 months. See Rule 59C-1.002(62)(a), Florida Administrative Code.

Willough is a licensed psychiatric hospital. Willough's CON was issued pursuant to a stipulation and settlement agreement executed by Willough and other parties including the agency's predecessor, the Department of Health and Rehabilitative Services, Venice Hospital, Hospital Management Associates, Inc., and Charter Glade. Willough agreed to strictly limit its services to patients diagnosed with eating disorders and to restrictions on the geographic origin of its patients. At issue in this case is the agency's subsequent decision to approve Willough's request that its CON be modified by deleting the patient diagnosis and origin restrictions. I concur with the reasoning of the Hearing Officer and her conclusion that the requested changes constitute a "substantial change in service". The exception is denied.

Counsel also requests comment on whether the rule change abolishing the distinction between short-term and long-term psychiatric beds affects the validity of the settlement agreement under which Willough obtained its CON. The agreement provides that it, "shall remain in full force and effect so long as the certificate of need is or would be required for short-term psychiatric beds in Florida". A certificate of need is still required for psychiatric beds. The rule change does not appear to void the agreement, neither does the publication of the inventory of psychiatric beds in the district. It is noted that construction of the settlement agreement is governed by contract law. See Palm Springs Hospital vs. Hospital Cost Containment Board, 560 So2d 1348 (Fla. 3rd DCA 1990).

RULING ON EXCEPTIONS
FILED BY CHARTER GLADE

Charter Glade excepts to the Hearing Officer's conclusion that Charter Glade's standing is dependent upon whether Willough's modification request constitutes a substantial change in services. As stated above, the requested modification does constitute a substantial change in service. Thus, Charter Glade has standing under Section 408.039(5)(b), Florida Statutes.

In defining "party" the legislature provided in Section 120.52(11)(c), Florida Statutes, that an agency may allow other persons to participate in an administrative proceeding in addition to persons given standing by express statutory or constitutional law. The agency, having entered into a formal settlement imposing certain conditions on the issuance of CON 3998 to Willough, has in effect conferred standing on the other parties to the settlement to challenge Willough's request that the conditions be eliminated. It violates a fundamental sense of fair play for the agency to materially modify the settlement without the input of the other parties. This is an alternative basis for Charter Glade's standing in this proceeding. A facility seeking modification of conditions placed on a CON pursuant to a settlement should serve the other parties to the settlement with its application and certify such service in its application.

Charter Glade excepts to the Hearing Officer's conclusion that it was not necessary for her to address the impact of the settlement on the agency's consideration of Willough's request for modification. I concur with Charter Glade and the impact is addressed herein.

Charter Glade excepts to the Hearing Officer's rejection of its proposed finding that no factual basis for approval of the modification was established by Willough. It is not necessary to address this issue because Willough has requested a "substantial change in service" which requires batched, comparative review in the appropriate review cycle with the applications of any entity seeking to provide the same service.

RULING ON EXCEPTIONS FILED BY WILLOUGH

Willough excepts to the Hearing Officer's conclusion that the petitioners have standing to participate in this proceeding. For the reasons given above, I conclude that the Petitioners are entitled to party status in this proceeding. Willough's exceptions to the Hearing Officer's conclusion regarding "substantial change in service" are denied.

FINDINGS OF FACT

The agency hereby adopts and incorporates by reference the findings of fact set forth in the Recommended Order.

CONCLUSIONS OF LAW

The agency hereby adopts and incorporates by reference the conclusions of law set forth in the Recommended Order.

Based upon the foregoing, it is

ADJUDGED, that the request of Naples Research and Counseling Center, Incorporated d/b/a The Willough at Naples for modification of CON 3998 be denied.

DONE and ORDERED this 17th day of October, 1994, in Tallahassee, Florida.

Douglas M. Cook, Director
Agency for Health Care
Administration

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO A 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 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 PROCEEDINGS SHALL BE CONDUCTED IN ACCORDANCE WITH THE FLORIDA APPELLATE RULES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

COPIES FURNISHED:

Eleanor M. Hunter
Hearing Officer
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550

W. David Watkins, Esquire
OERTEL, HOFFMAN, FERNANDEZ & COLE, P. A.
Post Office Box 6507
Tallahassee, Florida 32314-6507

David C. Ashburn, Esquire
GREENBERG, TRAUIG, HOFFMAN,
LIPOFF, ROSEN & QUENTEL, P. A.
111 South Monroe Street
Post Office Drawer 1838
Tallahassee, Florida 32301

Thomas W. Stahl, Esquire
NEWELL & STAHL, P. A.
817 North Gadsden Street
Tallahassee, Florida 32303-6313

Lesley Mendelson, Esquire
Senior Attorney, Agency for
Health Care Administration
325 John Knox Road
Atrium Building, Suite 301
Tallahassee, Florida 32303-4131

Elizabeth Dudek (AHCA/CON)

Alberta Granger (AHCA/CON)

Elfie Stamm (AHCA/CON)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the above named addresses by U.S. Mail this 18th day of October, 1994.

,

R. S. Power, Agency Clerk
State of Florida, Agency for
Health Care Administration
325 John Knox Road
The Atrium Building, Suite 301
Tallahassee, Florida 32303
(904)922-3808