STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MANATEE HOSPITALS & HEALTH SYSTEMS, INC., d/b/a MANATEE MEMORIAL HOSPITAL, Petitioner, vs. AGENCY FOR HEALTH CARE ADMINISTRATION, Respondent.	)	CASE NO. 93-7094RX
MANATEE HOSPITALS & HEALTH SYSTEMS, INC., d/b/a MANATEE MEMORIAL HOSPITAL, Petitioner, vs. AGENCY FOR HEALTH CARE ADMINISTRATION, Respondent.	)	CASE NO. 94-0003

FINAL ORDER (#93-7094RX)

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Mary Clark, held a formal hearing in the above-styled consolidated cases on January 14, 1994, in Tallahassee, Florida.

APPEARANCES

For Petitioner: John M. Knight, Esquire
Robert S. Weiss, Esquire
Parker, Hudson, Rainer & Dobbs
118 North Gadsden Street
Tallahassee, Florida 32301

For Respondent: J. Robert Griffin, Esquire
Agency for Health Care Administration
The Atrium Building, Suite 301
325 John Knox Road
Tallahassee, Florida 32399

STATEMENT OF THE ISSUES

The issue presented for consideration is whether rules 59C-1.008(1)(k)1., and 2., and 59C-1.008(4), F.A.C., constitute an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

On December 16, 1993, Petitioner, Manatee Hospitals and Health Systems, Inc., d/b/a Manatee Memorial Hospital (Manatee) filed its petition pursuant to section 120.56 to contest the validity of the subject rules. (DOAH #93-7094RX) Manatee also filed a petition pursuant to section 120.57(1), F.S., contesting the Respondent's (Agency) decision to reject for review a certificate of need (CON) application submitted by Manatee. (DOAH #94-0003)

Without objection, the two cases were consolidated for hearing in an order dated January 12, 1994. As provided in section 120.57(1), F.S., a separate recommended order is being issued this same date in DOAH #94-0003.

At the hearing the parties presented a thorough stipulation of material facts, and the testimony of Elizabeth Dudek, qualified as an expert in health planning and administration of the certificate of need program. Joint exhibits #1-6 were received in evidence; official recognition was taken of an amendment to former rule 10-5.008, F.A.C., filed on October 28, 1987, and effective November 17, 1987. Official recognition was also taken of rules 10-5.002-.024, F.A.C., as published in the Florida Administrative Weekly, Vol. 16, number 13, on March 30, 1990.

The proposed findings of fact submitted by both parties are substantially adopted here, there being no disputed issues of material fact.

FINDINGS OF FACT

1. Manatee Hospitals and Health Systems, Inc. d/b/a Manatee Memorial Hospital (Manatee) is a nonprofit corporation which operates a short-term general acute care hospital in Manatee County, Florida.

2. On November 1, 1993, Manatee timely and properly submitted a letter of intent to the Agency for Health Care Administration (Agency) seeking authority to convert up to 11 substance abuse beds and/or up to 28 acute care beds to 28 skilled nursing beds for review in the Nursing Home Batch Cycle, 2nd Cycle, 1993.

3. On December 1, 1993, Manatee submitted a CON application to the agency seeking authority to convert up to 11 adult substance abuse beds and/or up to 28 acute care beds to 28 skilled nursing beds for review in the nursing home batch cycle, 2nd cycle, 1993. The application included the appropriate filing fee.

4. Manatee failed to submit a copy of its CON application to the local health council by 5:00 p.m. on the application due date of December 1, 1993. Instead, the application was submitted to the local health council on December 2, 1993.

5. By correspondence from Liz Dudek, Chief, Certificate of Need and Budget Review Section, dated December 7, 1993, the agency advised Manatee that its CON application was not accepted and was being returned to Manatee because Manatee failed to submit a copy of its application to the health council by 5:00 p.m. on the application due date of December 1, 1993, as required by rules 59C-1.008(1)(k)1., and 2., and 59C-1.008(4), F.A.C.

6. Rules 59C-1.008(1)(k)1., and 2., F.A.C. provide:

> (k) Certificate of Need Application Submission. An application for a certificate of need shall be submitted on HRS Form 1455, August 1985, and HRS Form 1460, June 1991 incorporated by reference herein, and shall be provided by the agency upon request.
>
> 1. The application must be actually received by the agency by 5 p.m. local time and a copy must actually be received by the local health council by 5 p.m. local time on or before the application due date.
>
> 2. An application submitted to the agency shall not be accepted by the agency, and the application fee will be returned if a copy of the application is not received by the appropriate local health council as provided above.

7. Rule 59C-1.008(4), F.A.C. provides:

> (4) Submission to Local Health Council. Each applicant shall submit a copy of its application to the applicable local health council at the same time the application is submitted to the agency. Failure to timely file with the local health council as set forth in Rule 59C-1.008(1)(k), F.A.C., will result in the application not being accepted by the agency.

8. Rules 59C-1.008(1)(k)1., and 2., and Rule 59C-1.008(4), F.A.C., became effective January 11, 1991.

9. Rules 59C-1.008(1)(k)1., and 2., and Rule 59C-1.008(4), F.A.C., were promulgated in conformance with all applicable rule promulgation procedures.

10. The agency does not view the requirement of timely filing of a CON application with the local health council as an "omissions" item. Omissions items are addressed in section 408.037, F.S., and in rule 59C-1.010(2)(a), F.A.C. The statute describes the necessary contents of a CON application and the rule provides a process for the agency to identify missing items and notify the applicant of the specific information necessary for the application to be deemed complete. This "omissions" process occurs after the initial application filing deadline. The agency properly did not provide an opportunity for Manatee to cure its deadline defect in this omissions process, as obviously the deadline had already passed.

11. The agency construes section 408.039(3)(a), F.S., (1993), which states in pertinent part: "An applicant shall file an application with the department, and shall furnish a copy of the application to the local health council and the department.", as requiring submission of applications by the application deadline date both to the agency and to the local health council.

12. Manatee has not alleged that rules 59C-1.008(1)(k)1., and 2., and rule 59C-1.008(4), F.A.C., are arbitrary and capricious. Manatee's sole basis for challenge of the subject rules pursuant to section 120.56 is that the rules enlarge, modify, or contravene the statute.

13. There is a rational policy basis for the requirement that an application be filed by the application deadline at both the agency and the local health council. The submission to the local health council provides notice to the individuals within an area. It affords an opportunity for the agency to begin to solicit information from the public. A public hearing can be requested only when an application has been submitted and a request for a public hearing cannot be based on submission of a letter of intent. The local health council is the source that local citizens may consult to find out what, if any, applications have been submitted, and the substance of any which are submitted.

14. Timely submission to the local health council also significantly contributes to an orderly review process, and is therefore rationally related to the enabling statutes creating the certificate of need program. The requirement of filing of applications at the agency and the local health council by the application submission deadline affords consolidation of verification of proper application receipt. It also provides clear and unambiguous notice to applicants and others when applications are due and will be received. The requirement provides the agency a beginning point from which to begin reviewing applications.

15. Unrebutted expert testimony established that the rule is necessary for the effective administration of the certificate of need program.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction in this proceeding pursuant to sections 120.56 and 120.57(1), F.S. Manatee has standing in this proceeding, as it is substantially affected by the subject rules.

17. Rules 59C-1.008(1)(k)1., and 2., and rule 59C-1.008(4), F.A.C., became effective January 11, 1991. Pursuant to section 15 of Chapter 92-33, Laws of Florida, sections 381.701 through 381.715, F.S., governing the certificate of need program, are renumbered as sections 408.031 through 408.045, F.S., (1993), respectively. This recodification of the statutes governing the certificate of need program was consequent to the creation of the Agency for Health Care Administration by chapter 92-33, Laws of Florida, and the concomitant transfer of certain statutory responsibilities to the new agency, including administration of the certificate of need program, effective July 1, 1992.

Section 19 of chapter 92-33, Laws of Florida, renumbered and amended section 381.7155, F.S., as section 408.0455, F.S. (1993), which states in pertinent part:

> (1) Nothing contained in ss. 408.031-408.045 is intended to repeal or modify any of the existing rules of the Department of Health and Rehabilitative Services, which shall remain in effect and shall be enforceable by the Agency for Health Care Administration; the existing composition of the local health councils and the Statewide Health Council; or the state health plan; or any of the local district health plans, unless and only to the extent there is a direct conflict with the provisions of ss. 408.031-408.045. (emphasis added).

18. The effect of this statutory mandate is irrefutable. Since rules 59C-1.008(1)(k)1., and 2., and rule 59C-1.008(4), F.A.C., were in effect prior to July 1, 1992, (the effective date of the savings clause) they must remain in effect and enforceable by the agency until the rules are repealed or amended by the agency, or superseded by passage of statutory language in direct conflict with such rules.

19. Manatee has failed to produce any evidence of conflict between the challenged rules and any provision of sections 408.031 through 408.045, F.S., (1993). Based on this issue alone, Manatee cannot prevail in this proceeding. See, NME Hospitals, Inc., d/b/a Seven Rivers Community Hospital v. Department of Health and Rehabilitative Services, 12 FALR 3115, at 3127 (DOAH 1990), wherein the hearing officer found administrative rules valid based in part upon the existence of the rules prior to passage of the saving clause contained in section 381.7155, F.S., (1989), substantially the same as the saving clause set forth above. Also see, State ex rel. Szabo Food Services, Inc. of North Carolina v. Dickinson, 286 So.2d 529 (Fla. 1973). When the legislature reenacts a law it is presumed to know of and approve of prior administrative construction and interpretation of that law. Here, the legislature is presumed to have authorized and adopted the agency's administrative interpretation of applicable statutes through rulemaking pertaining to rules 59C-1.008(1)(k)1., and 2., and rule 59C-1.008(4), F.A.C. Thus the challenged rules, rather than enlarging, modifying or contravening the requirements of sections 408.031 through 408.045, F.S., (1993), implement those sections in accordance with express legislative intent.

20. As addressed in Finding of Fact 11. above, the agency interprets section 408.039(3)(a), F.S., (1993), as requiring that an applicant for a certificate of need submit applications both to the agency and to the local health council by the same application deadline. Section 408.039(3)(a), F.S. (1993), provides in pertinent part:

> (3) APPLICATION PROCESSING.--
> (a) An applicant shall file an application with the department, and shall furnish a copy of the application to the local health council and the department. Within 15 days after the applicable application filing

> deadline established by department rule, the staff of the department shall determine if the application is complete...
>
> (emphasis added)

Even though the reference is to both "furnish[ing] a copy of the application to the local health council and the department" the word "deadline" is singular. The legislature contemplates a deadline for submission of the copies of the application, not "deadlines" as Manatee would argue. The Agency's interpretation of the statute is consistent with the plain meaning of the statute.

21. Agencies are afforded wide discretion in the interpretation of statutes which they administer. Pan American World Airways, Inc. v Public Service Commission and Florida Power and Light, 427 So.2d 716, 719 (Fla. 1983). This is true even though an interpretation is not the one preferred by the court. Retail Grocers Ass'n of Florida Self Insurer's Fund v. Dept. of Labor and Employment Security, 474 So.2d 379 (Fla. 1st DCA 1985). Moreover, the agency's interpretation of the statute need not be the sole possible interpretation or even the most desirable one. It need only be within the range of possible interpretations. Department of Administration v. Nelson, 424 So.2d 852 (Fla. 1st DCA 1982); General Telephone Company of Florida v. Florida Public Service Commission, 446 So.2d 1063 (Fla. 1984). In Nelson, at 858, the court went on to emphasize that "when the agency so interprets the statute through rulemaking, the presumption of correctness is stronger." Here, the agency has specifically articulated its statutory interpretation through promulgation of rules 59C-1.008(1)(k)1., and 2., and rule 59C-1.008(4), F.A.C.

22. The legislature has specifically and unambiguously delegated authority to the agency to provide for an application submission deadline by rule without reservation. Section 408.034(5), F.S. (1993), specifically authorizes the agency to "adopt rules necessary to implement" the statutory provisions related to the certificate of need program. F.A.C., rules 59C-1.008(1)(k)1., and 2., and rule 59C-1.008(4), F.A.C., are authorized by this general statutory provision as they are necessary to implement the CON program.

The language contained in section 408.034(5), F.S. (1993), is similar to the statutory language reviewed by the Florida Supreme Court in General Telephone Co. of Florida, supra. There the court, at 1067, approved the standard of review adopted in Agrico Chemical Co. v. State, Dept. of Environmental Regulation, 365 So2d 759 (Fla. 1st DCA 1978):

> Where the empowering provision of a statute states simply than (sic) an agency may "make such rules and regulations as may be necessary to carry out the provisions of this Act," the validity of the promulgations thereunder will be sustained as long as they are reasonably related to the purposes of the enabling legislation, and are not arbitrary or capricious.

23. The legislature also specifically delegated the authority to the agency to develop the application deadline by rule. Section 408.039(3)(a), F.S. (1993), provides in pertinent part: "[w]ithin 15 days after the applicable application filing deadline established by department rule..." And again, this language must be considered in context with the preceding sentence which

references furnishing of copies of the application to both the agency and the local health council. The legislature does not restrict or reserve application of this unambiguous language of delegation in any way. Thus, the agency is specifically and expressly delegated authority to promulgate application deadlines by rule, both for submission to the agency and for submission to the local health council.

24. Manatee argues that sections 120.60(2) and 408.039(3)(a), F.S. (1993), require that the agency afford an applicant an opportunity to cure and correct an incomplete CON application, and that it inexorably follows that if the applicant files an application with the Agency but fails to provide the required copy with the local health council the applicant must be afforded notice and an opportunity to correct the defect. This position is without basis in law or logic.

There is a fundamental factual difference between an omission of a required application component and a failure of submission. Section 120.60(2), F.S. (1993), specifically provides that the "...agency shall examine the application, notify the applicant of any apparent errors or omissions, and request any additional information the agency is permitted by law to require." The plain meaning of "additional information" is information which has not previously been submitted. That is, the plain meaning of "additional information" assumes that some information must have been received. But if no information (i.e., no application) is received by the local health council, the submission required by section 408.039(3)(a) to the local health council is not made, and any request would be a request for an initial submission to the local health council, not a request for additional information. Also, it would be a request for duplicate submission of the same information submitted to the agency, not additional information.

25. Likewise, section 408.039(3)(a), F.S. (1993), provides in pertinent part, "the staff shall request specific information from the applicant necessary for the application to be complete." The plain meaning is that some component or element of the application is missing but that the application has been submitted. Thus, the language of rules 59C-1.008(1)(k)1., and 2., and rule 59C-1.008(4), F.A.C., is consistent with the applicable statutory language as discussed above.

26. Manatee also argues that the rule should be invalidated based on the ruling in Inverness Health Care v. Department of Health and Rehabilitative Services, 11 FALR 4470 (DOAH 1989). For a number of reasons, the Inverness case is inapplicable. First, it is presumed that a legislative body knows of, adopts, and authorizes an administrative agency's interpretations of its statutory language where the legislature has met in session subsequent to the promulgation of the rule interpreting the statutory language. In Inverness there is an express finding of a direct contravention with applicable statutory language. (Inverness, at 4478). Also, authority for the rules here under challenge is expressly delegated to the agency, both generally and specifically, as discussed above. In addition, Inverness and the instant case are distinguishable factually. Inverness dealt with a rule which required that minimum content requirements be satisfied at the time of submission of the application. Current rules of the agency allow for omissions review, notice, and an opportunity to correct any and all content deficiencies. Rules 59C-1.008(1)(k)1., and 2., and rule 59C-1.008(4), F.A.C., relate to initial submission of an application, not to omitted content requirements or information. The failure to timely submit an application is simply not factually the same as an error or omission.

27. Prior to 1987, the statute governing the CON process, section 381.494, contained a requirement that the applicant furnish a copy of the application to the local health council at the same time it filed its application with the agency, but such language was omitted during the 1987 rewrite. Manatee argues that it necessarily follows that the legislature specifically intended that no such requirement be imposed. However, there are a number of reasons that the legislature may make any particular editing change. The legislature could have removed the language to add clarity to the statute, or indeed because it otherwise authorizes the agency to set application submission deadlines and requirements. Legislative intent is subject to research and proof, but Manatee has failed to produce any evidence whatever of legislative intent regarding this change. Manatee's argument regarding the reason for elimination from the statute of the particular language is simply conjecture.

28. It is well established that a petitioner attempting to invalidate a rule is held to a stringent burden of proof. The petitioner must factually establish by a preponderance of the evidence that a rule is an invalid exercise of delegated legislative authority. Case law, beginning with Agrico Chemical Co., supra has developed specific criteria to be applied in determining whether the rule or proposed rule complies with the enabling legislation. Manatee has not alleged that rules 59C-1.008(1)(k)1., and 2., and rule 59C-1.008(4), F.A.C., are arbitrary or capricious, and unrebutted expert testimony has shown that the rules are reasonably related to the enabling legislation. The rules afford notice to all potential applicants. The rules are unambiguous with respect to what is required and the precise consequences of failure to comply. Petitioner has produced no evidence whatever of any inconsistency with statutory language or statutory intent.

Petitioner has failed to meet the burden of proving that the rules constitute invalid exercises of delegated legislative authority.

ORDER

Based on the foregoing, it is, hereby,

ORDERED:

The petition for determination of invalidity of rules 59C-1.008(1)(k)1. and 2. and rule 59C-1.008(4), F.A.C. is DENIED.

DONE AND ORDERED this 21st day of February, 1994, in Tallahassee, Leon County, Florida.

MARY CLARK
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 21st day of February, 1994.

COPIES FURNISHED:

John M. Knight, Esquire
The Perkins House, Suite 200
118 North Gadsden Street
Tallahassee, Florida 32301

J. Robert Griffin, Esquire
Agency for Health Care Administration
The Atrium, Suite 301
325 John Knox Road
Tallahassee, Florida 32303

Robert L. Powell, Agency Clerk
Department of Health and
Rehabilitative Services
1323 Winewood Boulevard
Tallahassee, Florida 32399-0700

Kim Tucker, General Counsel
Department of Health and
Rehabilitative Services
1323 Winewood Boulevard
Tallahassee, Florida 32399-0700

Liz Cloud, Chief
Bureau of Administrative Code
Department of State
The Elliot Building
401 South Monroe Street
Tallahassee, Florida 32399-0250

Carroll Webb, Executive Director
Administrative Procedures Committee
120 Holland Building
Tallahassee, Florida 32399-1300

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 Rule 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.