STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

UNIVERSITY HOSPITAL, LTD., operating as UNIVERSITY HOSPITAL and UNIVERSITY PAVILION HOSPITAL,	)	
Petitioner,	)	
vs.	)	CASE NO. 94-0906RX
AGENCY FOR HEALTH CARE ADMINISTRATION,	)	
Respondent.	)	
WINTER HAVEN HOSPITAL, INC.	)	
Petitioner,	)	
vs.	)	CASE NO. 94-0957RX
AGENCY FOR HEALTH CARE ADMINISTRATION,	)	
Respondent.	)	
FLORIDA HOSPITAL ASSOCIATION, INC.	)	
Petitioner,	)	
vs.	)	CASE NO. 94-1164RX
AGENCY FOR HEALTH CARE ADMINISTRATION,	)	
Respondent.	)	

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Mary Clark, held a formal hearing in the above-styled cases on March 29, 1994, in Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

The issue for resolution in this case is whether rule 59C-1.004(2)(i), F.A.C. constitutes an invalid exercise of delegated legislative authority as asserted by petitioners.

PRELIMINARY STATEMENT

University Hospital, Ltd. (University), on February 21, 1994, filed a Petition to Determine Invalidity of a Rule with Division of Administrative Hearings (DOAH) challenging rule 59C-1.004(2)(i), F.A.C., as an invalid exercise of delegated legislative authority. The case is designated as DOAH Case No. 94-0906RX.

Winter Haven Hospital, Inc. (Winter Haven), on February 24, 1994, filed a Petition for Determination of Invalidity of Adopted Rule with DOAH challenging rule 59C-1.004(2)(i), F.A.C., as an invalid exercise of delegated legislative authority. The case is designated as DOAH Case No. 94-0957RX.

On February 28, 1994, the Hearing Officer issued an Order of Consolidation consolidating the above-styled cases. On March 1, 1994, the Florida Hospital Association (FHA) filed a Petition for Determination of Invalidity of Adopted Rule. The case was designated as DOAH Case No. 94-1164RX and was subsequently consolidated with the above two cases.

The parties' Joint Prehearing Stipulation included the stipulation that petitioners are substantially affected by rule 59C-1.004(2)(i), F.A.C. and have standing to maintain their administrative action.

At the commencement of the hearing, the parties offered joint exhibits numbered 1 through 18 which were admitted into evidence. Petitioners presented the testimony of Michael Jernigan, an expert in health planning. The agency presented the testimony of Elizabeth Dudek, designated as a representative of the agency, and the chief of the certificate of need and budget review sections of the agency. Petitioners, Winter Haven and FHA, presented rebuttal testimony of Linda Kirker, an employee of Flagler Hospital, Inc., in St. Augustine, Florida, and who is also a certified public accountant.

The transcript of the hearing was filed on April 12, 1994, and the parties filed their proposed orders on May 12, 1994, a stipulated deadline. The findings of fact proposed by petitioners are substantially adopted herein. The attached appendix addresses Respondent's proposed findings.

FINDINGS OF FACT

1. Petitioner, University Hospital, Ltd. (University), is a Florida limited partnership and is the licensee of University Hospital and University Pavilion Hospital. University Hospital is licensed as a general acute care hospital located at 7201 North University Drive, Tamarac, Florida. University Pavilion Hospital is licensed as a specialty psychiatric hospital located at 7425 North University Drive, Tamarac, Florida. In its capacity as the licensee of both University Hospital and University Pavilion Hospital, University submitted an application for a Certificate of Need (CON) to consolidate the licenses of the two hospitals. On January 5, 1994, the Agency for Health Care Administration (AHCA) issued a State Agency Action Report (SAAR) noticing its intent to deny University's application. A proceeding on the intended denial of the application is currently pending before DOAH as Case No. 94-1048.

2. Petitioner, Winter Haven Hospital, Inc. (Winter Haven), owns and is licensed to operate a 579-bed acute care hospital located at 200 Avenue F N.E., Winter Haven, Florida; and a 40-bed acute care hospital located at 105 Arneson Avenue, Auburndale, Florida. Winter Haven submitted an application for a CON to consolidate the licenses of these two existing health care facilities. On September 7, 1993, AHCA issued a SAAR denying Winter Haven Hospital, Inc.'s application.

3. Florida Hospital Association, Inc. (FHA), is a not-for-profit voluntary association of Florida hospitals.

4. AHCA promulgated and administers rule 59C-1.004(2)(i), F.A.C. (the challenged rule), and is the state agency charged with the duty and responsibility of administering chapters 395 and 408, F.S.

5. Rule 59C-1.004(2)(i), F.A.C. provides that projects subject to expedited CON review (as opposed to batched review) by AHCA include:

> (i) Consolidation of the licenses of two existing health care facilities pursua subsection 395.003(1)(d), F.S., both of have the same license and are the same licensee of licensed health care faci provided that the consolidation doe result in a change in licensed bed cap at either of the premises.

It is undisputed that the "law implemented" by the challenged rule is section 408.036(1)(e), F.S. Section 408.036(1) makes reviewable and requires a CON application for "all health-care-related projects, as described in paragraphs (a)-(n)." Subparagraph (e) refers to "any change in licensed bed capacity."

6. The challenged rule specifically provides that it applies to consolidation of licenses of two existing health care facilities pursuant to subsection 395.003(1)(d), F.S. There is no subsection 395.003(1)(d), F.S. This is clearly a scrivener's error, and the reference should be to subsection 395.003(2)(d), F.S., which provides as follows:

> (d) The agency shall, at the request of a licensee, issue a single license to a licensee for facilities located on separate premises. Such a license shall specifically state the

> location of the facilities, the services, and the licensed beds available on each separate premises. If a license requests a single license, the licensee shall designate which facility or office is responsible for receipt of information, payment of fees, service of process, and all other activities necessary for the agency to carry out the provisions of this party. (Emphasis supplied.)

7. No other provision of section 395.003, or of chapter 395, addresses issuance of a single license for facilities on separate premises.

8. The rule adopted to implement subsection 395.003(2)(d) is rule 59A-3.153(10), F.A.C., which provides as follows:

> When the applicant and hospital are in compliance with chapter 395, F.S., Part I and rules 59A-3.077 - 3.093 and 59A-3.151 - 3.176, and have received all approvals required by law, the department shall issue a license. The department shall, at the request of a licensee, issue a single license to a licensee for facilities located on separate premises. When a licensee requests a single license, the licensee shall be responsible for receipt of information, payment of fees, service of process, and all other activities necessary for the department to carry out the provisions of chapter 395, F.S., Part I and rules 59A-3.151 - 59A-3.192 and 59A-3.100 - 59A-3.111.

9. The evidence presented at hearing included 17 SAARs issued by AHCA since December 1990, concerning license consolidation applications. All such applications were approved by the agency until the September 1993 denial of Winter Haven's application. In December 1993, two other applicants were denied: University, and Charter Glade Hospital.

10. In each instance in which a single license has actually been granted to a licensee owning more than one license, the single license does not increase beds or bed capacity at any facility, but instead breaks down the number of beds at each of the premises. (See, Exh. 6, consolidated licenses attached to CON files 6740, 7047, 7065, 7303, 7311, 7395 and 7401.)

11. Also shown on the license is the premises designated in compliance with the subsection 395.003(2)(d) requirement that the licensee show which facility is responsible for receipt of information, payment of fees, and related matters.

12. At hearing, the AHCA's representative, Elizabeth Dudek, asserted that there are two kinds of license consolidations for premises owned by the same licensee, the kind under section 395.003, F.S., and something else. However, this assertion was not supported by reference to any other provision of law which expressly addresses licenses, and no such reference has been found. Further, Ms. Dudek admitted that section 395.003 was the only reference they had when the rule was promulgated. (transcript, p. 67)

13. Ms. Dudek further testified several times at hearing that the challenged rule's reference to section 395.003 was a mistake.

14. The CONs for license consolidation which the AHCA has previously issued result in single licenses as set forth in section 395.003, and rule 59A-3.153(10).

15. There is no change in licensed bed capacity as a result of the consolidation of licenses. The licensee owns two facilities before obtaining license consolidation, with one total number of beds. After consolidation, the same licensee owns the same premises with the same total licensed beds. The licensee has the same number of licensed beds both before and after license consolidation. No additional beds or "capacity" result.

16. In its SAARs on CON applications to obtain single licenses, AHCA's statements indicate there would be no change in beds or services as a result of license consolidation. See, e.g., Exhibit 6; CON 7310, SAAR p. 1, para. B.: "As a result of the proposed consolidation, each hospital will continue to operate as two separate hospital locations under a single license"; CON 7395, p. 1, para. B, "As a result of the proposed consolidation, each hospital will continue to operate as two separate hospital locations under a single license." If there were to be any changes in services or location of beds "these issues will require another separate certificate of need review . . . ." (Emphasis supplied); CON #7399, p. 1., para. B: "This request does not involve any change to the services nor beds at either hospital"; CON #7401, p. 1, para. B: "This request does not involve any construction costs, nor any change to the licensed bed capacity nor services presently being provided at these hospital." (Emphasis supplied) CON #7440, p. 2, para. 1b(2), "The proposed project is not for new beds." The language in these SAARs appears after supervisory review by the agency's highest decision makers on the applications, Alberta Granger and Elizabeth Dudek.

17. At hearing, Ms. Dudek attempted to explain how bed capacity could change when a licensee still has the same number of beds after consolidation:

> HEARING OFFICER: You argue then that the sum is greater than the--the whole is greater than the sum of its parts?
>
> THE WITNESS: Not to the extent that you have--you still have the same number of total beds. You still have the same services.
>
> However, how they show up is different. They don't show up as 100 of yours and 100 of mine. It will end up being 200 of yours but still at our separate premises.
>
> And I think that that is different because what you have in total has changed. [T. 86-87]

18. As the agency acknowledged, if an applicant requested approval for additional bed capacity at either of its premises, the applicant would not be entitled to proceed under the challenged rule. The text of the rule reflects this.

19. AHCA's only claim to CON review jurisdiction for license consolidations is pursuant to its authority to review "health-care-related projects" which involve "any change in licensed bed capacity," section 408.036(1)(e), F.S. However, there is no factual basis nor logical basis to support the agency's assertion of the existence of a change in licensed bed capacity, and the rule precludes a change in capacity.

20. AHCA construes "licensed bed capacity" to mean the number of licensed beds. A consolidated license is a new license certificate, and not the same license number as either of the licensee's prior separate licenses. Facilities covered by a single license cannot exchange beds or services because they are tied to separate premises, and transfer of beds or services requires separate CON review.

21. Consolidation of licenses, since it does not change the number of beds at any facility, would not change the number of beds in the bed need inventory for a planning district and would not result in increased bed capacity in a district or subdistrict.

22. Consolidation of licenses is not addressed in the state health plan or in local health plans. The consolidation of licenses of existing hospitals held by the same licensee in the same agency district, with no new beds or services at either premises does not result in a new health care facility or new health service or a new hospice, and does not involve the conversion or expansion or significant modification of a health care facility, health service or hospice.

23. The agency interprets consolidations pursuant to section 395.003, F.S. to not require any CON review.

24. Section 408.036(1)(e), F.S. requiring CON review for any change in licensed bed capacity is the provision under which the agency asserts that it reviewed consolidations prior to adoption of the challenged rule.

25. Ms. Dudek's opinion is that the challenged rule is necessary to effectively implement the CON statute because the rule allows the agency to review those applications on an expedited rather than batched basis. It also allows the agency to determine whether statutory CON review criteria are met as to any impacts on quality of care, Medicaid, and costs. As a result of a license consolidation, it is possible that the filing of certain reports and data could be done differently and it is possible that Medicaid reimbursement would be available for patients in a facility formerly ineligible for such reimbursement as a specialty hospital.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the subject matter of, and the parties to, this proceeding pursuant to sections 120.56 and 120.57(1), F.S.

27. As stipulated by the parties, petitioners are substantially affected by the challenged rule and each has standing to seek an administrative determination of the invalidity of the rule as provided in section 120.56(1), F.S.

28. Section 120.52(8), F.S., defines "invalid exercise of delegated legislative authority" as:

> . . . action which goes beyond the powers, functions and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one or more of the following apply:
>
> (a) The agency has materially failed to follow the applicable rule making procedure set forth in s. 120.54;
>
> (b) The agency has exceeded its grant of rulemaking authority , citation to which is required by s. 120.54(7);
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(7);
>
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency; or
>
> (e) The rule is arbitrary or capricious.

29. The Challenged Rule. Rule 59C-1.004(2)(i), the challenged rule, adopted 9/10/92, states:

> (2) Projects subject to Expedited Review. Projects are subject to Expedited Review pursuant to subsection 408.036(2), F.S. In addition, the following types of projects shall be subject to Expedited Review, which shall be conducted in accordance with procedures set forth in subsection 59C-1.010(3), F.A.C.:
>
> * * *
>
> (i) Consolidation of the licenses of two existing health care facilities pursuant to subsection 395.003(1)(d), F.S., both of which have the same licensee and are the same type of licensed health care facility, provided that the consolidation does not result in a change in licensed bed capacity at either of the premises.

Specific Authority 408.15, 408.034(5), F.S. Law Implemented 408.036(1)(e), F.S.

30. Specific Authority and Law Implemented. The challenged rule cites only section 408.036(1)(e), as the law implemented, and the agency's testimony at final hearing acknowledges that this is the only law being implemented. Section 408.036(1)(e) states:

> (1) APPLICABILITY - Unless exempt pursuant to subsection (3), all health-care-related projects, as described in paragraphs (a)-(n), are subject to review and must file an application for a certificate of need with the department. The department is exclusively responsible for determining

> whether a health-care-related project is subject to review under ss. 381.701-381.715.
>
> * * *
>
> (e) Any change in licensed bed capacity.

31. As required, the challenged rule cites as specific authority sections 408.034(5) and 408.15, F.S. Section 408.034, in relevant part, provides:

> (5) The department may adopt rules necessary to implement ss. 381.708 - 381.715. [transferred to ss. 408.031 - 408.045 by s. 15. ch. 92-33]

Section 408.15, in relevant part, provides:

> In addition to the powers granted to the agency elsewhere in this chapter, the agency is authorized to:
> (8) Adopt, amend, and repeal all rules necessary to carry out the provisions of this chapter.

32. Sections 408.034(5) and 408.15 are typical general legislative grants of rulemaking power which are of little help in determining an agency's specific jurisdiction or authority. "It is of little legal significance because it is generally a restatement of the common law concerning agency powers." Cataract Surgery Center v. Health Care Cost Containment Board, 581 So.2d 1359, 1361 (Fla. 1st DCA 1991).

33. The rule is invalid because it enlarges, modifies, or contravenes section 395.003(2)(d), F.S. The challenged rule does not cite as "law implemented" section 395.003(2)(d), F.S. However, the challenged rule by its plain terms purports to provide a procedure for CON review when the consolidation of licenses is sought pursuant to that statute. Section 395.003(2)(d) states:

> 395.003 Licensure; issuance, renewal, denial, and revocation.
> (2)(d) The agency shall, at the request of a licensee, issue a single license to a licensee for facilities located on separate premises. Such a license shall specifically state the location of the facilities, the services, and the licensed beds available on each separate premises. If a licensee requests a single license, the licensee shall designate which facility or office is responsible for receipt of information, payment of fees, service of process, and all other activities necessary for the agency to carry out the provisions of this part. [Emphasis supplied]

34. In clear, unambiguous, and mandatory terms the agency is directed that it shall, at the request of the licensee, issue a single license to the licensee for facilities located on separate premises. If the Legislature had desired to place conditions or restrictions on such a request (such as requiring an

application and approval), it would have included such in the statute. Compare, Mayo Clinic Jacksonville v. Dept. of Professional Regulation, Board of Medicine, 625 So.2d 918, 920 (Fla. 1st DCA 1993). By requiring the filing and agency approval of a CON application prior to issuance of a single license to a licensee for facilities located on separate premises, the challenged rule imposes additional unauthorized requirements upon a license holder, and directly enlarges, modifies, and contravenes the express provisions of section 395.003(2)(d).

35. The rule is invalid because it extends the agency's jurisdiction beyond that authorized by law. Notwithstanding the mandatory provisions of section 395.003(2)(d), F.S., and the citation to this statute in the challenged rule, the agency attempts to avoid any consideration of these provisions with the assertion that the challenged rule's reference to section 395.003 was, in hindsight, erroneous or mistaken.

36. An agency's interpretation of its own rules, or the construction of a statute by an agency charged with its administration is entitled to great weight.

> However, the statutory construction must be a permissible one and the agency cannot implement `any conceivable construction of a statute . . . irrespective of how strained or ingenuously reliant on implied authority it might be.' State, Board of Optometry v. Florida Society of Ophthalmology, 538 So.2d 878, 885 (Fla. 1st DCA 1988), review denied, 542 So.2d 1333 (Fla. 1989). The deference granted an agency's interpretation is not absolute. `When the agency's construction clearly contradicts the unambiguous language of the rule, the construction cannot stand.' Woodley v. Dept. of Health and Rehabilitative Services, 505 So.2d 676, 678 (Fla. 1st DCA 1987).

Department of Natural Resources v. Wingfield Development Company, 581 So.2d at 193, 197 (Fla. 1st DCA 1991).

37. As the court stated in Prospective Tenant Report, Inc., v. Dept. of State, Division of Licensing, 629 So.2d 894, 895 (Fla. 2d DCA 1993):

> Generally, an administrative agency's construction of the statute under which it operates is given great deference. Ball v. Florida Podiatrist Trust, 620 So.2d 1018 (Fla. 1st DCA 1993). However, whether the statute at issue here confers jurisdiction to the Department at all is purely a matter of law.

38. An agency cannot confer jurisdiction upon itself. Saddlebrook Resorts, Inc. v. Wire Grass Ranch and Southwest Florida Water Management District, 630 So.2d 1123, 1128 (Fla. 2d DCA 1993). Regulatory jurisdiction by an agency may only be exercised when authorized by law. Any rule which extends

or enlarges an agency's jurisdiction beyond its statutory authority is invalid. Cataract Surgery Center v. Health Care, 581 So.2d 1359 (Fla. 1st DCA 1991).

39. The agency asserts jurisdiction to require a CON for issuance of a single license to a licensee for hospital facilities located on separate premises; i.e., license consolidation. The asserted jurisdiction applies even though the mere license consolidation does not involve a change in the number of licensed beds or bed capacity at any of the separate premises. Neither section 408.036(1)(e), F.S. nor any other provision of chapter 408 expressly addresses the agency's issuance of hospital licenses. Licensing is addressed in chapter 395. Section 395.003(2)(d) unequivocally mandates the issuance of a single license to a licensee for facilities located on separate premises on request of a licensee. Where a statute is clear and unambiguous it must be given its plain, ordinary, and obvious meeting. Holly v. Auld, 450 So.2d 217, 219 (Fla. 1984).

40. The AHCA's assertion that there is a type or kind of licensing procedure or "consolidation" other than as addressed in chapter 395 finds no support or authority expressed in any other statute or rule. The challenged rule expressly refers to license consolidations pursuant to chapter 395. As a matter of law, there is only one kind of license "consolidation" and it is expressed in section 395.003.

41. The agency acknowledges the mandatory language of section 395.003(2)(d), F.S. and the agency agrees it does not have authority to require CON review pursuant to that provision. Therefore, there is no lawful basis, and no jurisdiction, for the agency to require a CON for mere license consolidation.

42. Although Ms. Dudek articulated some valid health care planning issues related to license consolidations, unless such consolidations are included within the several projects listed in section 408.036, they are not subject to CON review.

43. The rule is invalid because it is in direct conflict with the statute implemented. A rule may not enlarge, modify, or contravene the provisions of the law it implements. Section 120.52(8)(c), F.S.; Department of Natural Resources v. Wingfield Development Company, 581 So.2d 193 (Fla. 1st DCA 1991); State, Dept. of Business Regulation v. Salvation Limited, Inc., 452 So.2d 65 (Fla. 1st DCA 1984).

44. Certain, but not all, health care related projects are subject to prior approval by AHCA through a CON review process, and section 408.036, F.S. describes those projects. The only provision of section 408.036 which the challenged rule purports to implement addresses a health related project described as "any change in licensed bed capacity." Section 408.036(1)(e), F.S.

45. The challenged rule purports to implement section 408.306(1)(e) by requiring a CON application and agency approval to consolidate the licenses of two existing health care facilities who have the same licensee "provided that the consolidation does not result in a change in licensed bed capacity." The authority for CON review granted by section 408.036(1)(e) is predicated upon the existence of "a change in licensed bed capacity." The challenged rule, on its face, expressly does not apply to any circumstance that does involve "a change in licensed bed capacity." Both the challenged rule and the statute use the identical phrase, "change in licensed bed capacity," with absurdly opposite purposes. Because the challenged rule clearly modifies, enlarges, or contravenes the law it purports to implement, it is invalid.

ORDER

Based on the foregoing, it is hereby,

ORDERED:

The petitions for determination of invalidity of rule 59C-1.004(2)(i), F.A.C. are GRANTED.

DONE AND ORDERED this 22nd day of July, 1994, in Tallahassee, Leon County, Florida.

MARY CLARK
Hearing Officer
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of July, 1994.

APPENDIX TO FINAL ORDER, DOAH CASE NO. 94-0906

The following are specific rulings on the findings of fact proposed by the Respondent. (Petitioners' findings are substantially adopted in the body of this order.

1. - 4. Addressed in preliminary statement.
5. Adopted in paragraph 5.
6. Adopted in paragraph 6.
7. Adopted in paragraph 23.
8. Rejected as contrary to the evidence and to common sense.
9. Adopted in paragraph 5.
10. Adopted in part in paragraph 23, except for the implication that the rule distinguishes consolidation of "hospitals" from consolidation of "licenses".
11. Rejected as unnecessary.
12. Adopted in paragraph 19.
13. Adopted in part in paragraph 19 (as to Dudek's testimony); otherwise rejected as contrary to the evidence.
14. - 15. Rejected as irrelevant. The necessity of the rule is immaterial when the rule is not supported by the law. If the rule is truly necessary, the law needs to be amended.
16. Rejected as contrary to the evidence and logic.
17. - 21. Rejected as immaterial. See paragraphs 14-15 above.
22. - 23. Except for the purpose, which is uncontested, these findings are rejected as contrary to the evidence and law.
24. - 25. Rejected as unnecessary.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida 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.