STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| WINTER PARK HEALTHCARE GROUP, LTD. and FLORIDA HOSPITAL ASSOCIATION, INC., | ) | |
| Petitioners, | ) | |
| vs. | ) | CASE NO. 95-3335RU |
| AGENCY FOR HEALTH CARE ADMINISTRATION, | ) | |
| Respondent. | ) | |
| SOUTH DADE HEALTHCARE GROUP, LTD. and FLORIDA HOSPITAL ASSOCIATION, INC., | ) | |
| Petitioners, | ) | |
| vs. | ) | CASE NO. 95-3336RU |
| AGENCY FOR HEALTH CARE ADMINISTRATION, | ) | |
| Respondent. | ) | |

FINAL ORDER OF DISMISSAL

1. These two consolidated proceedings are presently pending on the Respondent's Supplemental Motion To Dismiss or, Alternatively Motion For Summary Final Order and for Summary Recommended Order filed on May 3, 1996, which supplements an earlier similar motion filed on March 14, 1996. 1/ Extensive responses, replies, and memorandums of law have been filed in support of and in opposition to the pending motion. Two lengthy sessions have been devoted to oral argument for and against the motion.

2. The petitions in these two consolidated cases are identical, with the exception of allegations describing the Petitioners in each case. Both petitioners seek relief under Section 120.535, Florida Statutes (1995). 2/ Both petitions seek relief based on the same alleged agency statement. Both

petitions make the same factual assertions and both rely on the same legal arguments.

3. For purposes of the pending motion, all of the factual allegations set forth in the two petitions have been taken as true. Those allegations need not all be repeated here. For purposes of the pending motion it is sufficient to direct attention to a few of the more salient of the facts alleged. 3/ In each case one of the Petitioners currently holds a single license for the operation of two hospital facilities each located on separate premises. In each case one of the hospitals is a general acute care hospital and the other is a psychiatric specialty hospital. Among the several alleged benefits of such a single license for two separate facilities has been the ability to seek Medicaid reimbursement for care rendered to Medicaid eligible psychiatric and substance abuse patients treated at the psychiatric specially hospital. On June 8, 1995, the Agency for Health Care Administration ("AHCA") wrote a letter to the administrators of the Petitioner hospitals advising them of a "procedural change" in the issuance of single licenses for multiple hospitals. The letter to the administrator of Winter Park Memorial Hospital read as follows, in pertinent part:

> This is to advise you of a procedural change in the issuance of single licenses for multiple hospitals. Winter Park Memorial Hospital is currently licensed as a Class I General Hospital with two separate premises. Upon the next biennial renewal of Winter Park Memorial Hospital's license, or issuance of a new license for any other purpose, whichever may occur sooner, the face of the license will be amended as follows:
>
> Section 395.003(2)(d), Florida Statutes, requires that a single license issued to a licensee for hospitals located on separate premises shall specifically state the location of the hospitals, the services, and the licensed beds available on each separate premise. In order to comply with this requirement, if Winter Park Memorial Hospital desires to retain a single license for the two separate premises, the next license issued to Winter Park Memorial Hospital will identify each separate hospital by the "class" of services that the hospital provides. The "class" of service designates the statutory categorization of general versus specialty hospitals. Therefore

Winter Park Memorial Hospital will be identified as a Class I General Hospital, and Winter Park Pavilion will be identified as a Class III Special Psychiatric Hospital. As an alternative to a single license, the

> agency will issue separate licenses to the two hospitals, upon request of the hospital licensee.
>
> This revision in the hospitals' single license will not affect the hospitals' Medicare certification. However, there will be an impact on Medicaid reimbursement for services provided at Winter Park Pavilion. Medicaid reimbursement policy prohibits reimbursement for hospital inpatient services that are provided in a facility primarily restricted to the care and treatment of patients having mental disorders or mental diseases, as evidenced by 50 percent or more psychiatric primary admission diagnoses. Therefore, upon the effective date of the next license issued to Winter Park Memorial Hospital, services provided at Winter Park Pavilion may not be billed to Medicaid, if Winter Park Pavilion meets the criteria stated above.

A letter of identical effect was sent to the administrator of Deering Hospital, the only changes being the names of the affected hospitals.

4. The language quoted immediately above is the "agency statement" these Petitioners are challenging as constituting an unadopted "agency statement defined as a Rule" by Section 120.52, Florida Statutes (1995), as amended. The challenge fails for several reasons, the most significant of which is that the primary legal precedents upon which the Petitioners relied at the time of filing their petitions have since been reversed. Those legal precedents consisted of a Final Order of the Division of Administrative Hearings invalidating proposed rules related to single hospital licenses for multiple hospitals and two writs of mandamus issued by the Circuit Court in and for Leon County requiring AHCA to issue hospital licenses different in effect from those described in the above-quoted letters of June 8, 1995. In Agency for Health Care Administration v. Sebastian Hospital, Inc., 21 Fla. L. Weekly D649 (1st DCA 1996), and in Agency for Health Care Administration v. University Hospital, Ltd., 21 Fla. L. Weekly D650 (1st DCA 1996), the Final Order invalidating proposed rules and the two writs of mandamus were all reversed.

5. The court in University Hospital, supra, directed attention to two statutory provisions which are also relevant to the disposition of these proceedings. The first of these is Section 395.003(2)(d), Florida Statutes, which provides, in part:

> (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.

The other is Section 409.905(5), Florida Statutes, which provides, in part:

> A licensed hospital maintained primarily for the care and treatment of patients having mental disorders or mental diseases is not eligible to participate in the hospital inpatient portion of the Medicaid program except as provided in federal law.

6. The court in University Hospital, supra, also directed attention to two rule provisions which are also relevant to the disposition of these proceedings. The first of these is proposed Rule (now existing Rule) 4/ 59A-3.203(2)(i), Florida Administrative Code, which provides:

> (i) A single license will be issued to a licensee for facilities located on separate premises, upon request of the applicant. The license will specifically state the location of the facilities, their services, and the licensed beds available on each separate premises. Such a license shall also specifically identify the general or specialty classification of hospitals located on separate premises.

The other is proposed Rule (now existing Rule) 59A-3.203(6), Florida Administrative Code, which provides:

> (6) Each license shall specifically state the name of the licensed operator of the hospital, the class of hospital, and the name and location of the hospital. Any beds in the hospital which are regulated under the certificate of need program, as specified in Chapter 59C-1, F.A.C., shall be listed, including the number of licensed beds by type. The license for hospitals having facilities on more than one premises shall specifically state the location of each facility, their general or specialty classi-

> fication, their services, and the licensed beds available on each separate premises.

7. The court in Sebastian Hospital, supra, concluded its opinion with the following observations:

> We agree with the Agency that the trial judges improperly issued writs of mandamus. In each instance, the Agency issued a single license for facilities located on separate premises, specifically stating the location of the premises, the services, and the licensed beds available on each separate premises, in accordance with section 395.003(2)(d). Nothing in the language of section 395.003(2)(d) requires that the license consolidate each facility under the same classification of hospital. The appellees are actually arguing not about whether the Agency performed its ministerial duty to issue single licenses, but instead about the form of a single license and the effect of a single license for separate facilities, particularly upon eligibility for Medicaid reimbursement. The form and effect of issuance of a single license in these instances are not appropriate subjects for a writ of mandamus. Accordingly, the orders on appeal are quashed.

8. The court in University Hospital, supra, said, "We agree with the Agency that the proposed rules constitute a permissible interpretation of section 395.003," and then concluded its opinion with the following observations:

> Section 395.003(2)(d) requires the license to specifically state the location, the services, and the licensed beds available on each separate premises. As noted in Agency for Health Care Administration v. Sebastian Hospital, Inc., Case No. 95-586/ 95-1231 [21 Fla. L. Weekly D649], nothing in the language of section 395.003(2)(d) requires that the license consolidate each facility under the same classification of hospital. Section 395.003(4) provides that the agency shall issue a license which specifies the services categories and the number of hospital beds in each category for which a license is issued. Section 395.003(6)

> provides that no specialty hospital shall provide any service or regularly serve any population group beyond those services or groups specified in its license.
>
> The Agency indicated that section 395.003 was one of the statutory provisions implemented by the proposed rules. Any entity that has or wants a single license for facilities located on separate premises would be on notice that issuance of a single license would be affected by the proposed rule. Any entity that wanted to receive Medicaid reimbursement for a Class III specialty psychiatric hospital would be aware that a single license setting forth only a Class I general hospital classification was required in order to do so.

9. An additional rule provision which bears on this matter is AHCA's Rule 59G-4.150, Florida Administrative Code. On May 20, 1996, AHCA filed for adoption an amendment to Rule 59G-4.150 which adds the following to the itemization of "procedures and services excluded from reimbursement within the Inpatient Hospital Services Program:"

> 4. Inpatient hospital services that are provided in any hospital that is maintained primarily for the care and treatment of patients having mental disorders or mental diseases, as evidenced by fifty percent or more admissions resulting from primary diagnoses that are psychiatric in nature, and treatment of patients having mental disorders or diseases.

10. Since the filing of the petitions in these two proceedings, Section 120.535, Florida Statutes, has been repealed. The current statutory provisions applicable to proceedings like these challenging agency statements defined as rules are found at Sections 120.54(1) and 120.56(4), Florida Statutes (1995), as amended by Chapter 96-159, Laws of Florida. The relevant portions of Section 120.54(1), as amended, read as follows:

> (1) GENERAL PROVISIONS APPLICABLE TO ALL RULES OTHER THAN EMERGENCY RULES.--
>
> (a) Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this

section as soon as feasible and practicable.

1. Rulemaking shall be presumed feasible unless the agency proves that:

a. The agency has not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking;

b. Related matters are not sufficiently resolved to enable the agency to address a statement by rulemaking; or

c. The agency is currently using the rulemaking procedure expeditiously and in good faith to adopt rules which address the statement.

2. Rulemaking shall be presumed practicable to the extent necessary to provide fair notice to affected persons of relevant agency procedures and applicable principles, criteria, or standards for agency decisions unless the agency proves that:

a. Detail or precision in the establishment of principles, criteria, or standards for agency decisions is not reasonable under the circumstances; or

b. The particular questions addressed are of such a narrow scope that more specific resolution of the matter is impractical outside of an adjudication to determine the substantial interests of a party based on individual circumstances.

11. The relevant portions of Section 120.56(4), as amended, read as follows:

(4) CHALLENGING AGENCY STATEMENTS DEFINED AS RULES; SPECIAL PROVISIONS.--

(a) Any person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1)(a). The petition shall include the text of the statement or a description of the statement and shall state with particularity facts sufficient to show that the statement constitutes a rule under s. 120.52 and that the agency has not adopted the statement by the rulemaking procedure provided by s. 120.54.

(b) The administrative law judge may extend the hearing date beyond 30 days after assignment of the case for good cause. If

a hearing is held and the petitioner proves the allegations of the petition, the agency shall have the burden of proving that rule-making is not feasible and practicable under s. 120.54(1)(a).

(c) The administrative law judge may determine whether all or part of a statement violates s. 120.54(1)(a). The decision of the administrative law judge shall constitute a final order. The division shall transmit a copy of the final order to the Department of State and the committee. The Department of State shall publish notice of the final order in the first available issue of the Florida Administrative Weekly.

(d) When an administrative law judge enters a final order that all or part of an agency statement violates s. 120.54(1)(a), the agency shall immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action.

(e) Prior to entry of a final order that all or part of an agency statement violates s. 120.54(1)(a), if an agency publishes, pursuant to s. 120.54(3)(a), proposed rules which address the statement and proceeds expeditiously and in good faith to adopt rules which address the statement, the agency shall be permitted to rely upon the statement or a substantially similar statement as a basis for agency action if the statement meets the requirements of s. 120.57(1)(e). If an agency fails to adopt rules which address the statement within 180 days after publishing proposed rules, for purposes of this subsection, a presumption is created that the agency is not acting expeditiously and in good faith to adopt rules. If the agency's proposed rules are challenged pursuant to subsection (2), the 180-day period for adoption of rules is tolled until a final order is entered in that proceeding.

12. Although there are some differences between the statutory language quoted above and the language of former Section 120.535, Florida Statutes (1995), the current statutory provisions are substantially similar to the prior provisions in most respects. The similarity is such that many Final Orders

determining issues under the provisions of the prior statutory language are still relevant to the determination of issues raised under the current statute.

13. Also relevant to the disposition of these proceedings is the definition of the term "rule," which now appears at Section 120.52(15), Florida Statutes (1995), as amended by Chapter 96-159, Laws of Florida, 5/ and reads as follows, in pertinent part:

> (15) "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule.

14. Upon consideration of all the statutory provisions and rule provisions, especially in view of their interpretation in the two appellate court opinions mentioned above, it is clear that the allegations of the Petitioners in these consolidated proceedings are insufficient to show that the challenged statement is an unadopted statement that constitutes a rule under Section 120.52(15), Florida Statutes (1995), as amended. The insufficiencies in the Petitioners' positions are succinctly described as follows in AHCA's supplemental motion:

> 3. The decision of the First District Court of Appeal in Agency for Health Care Administration v. University Hospital, Ltd. et al., 1st DCA Case No. 95-1530, reverses the May 1, 1995 decision of the Division of Administrative Hearings in University Hospital, Ltd. et al. vs. Agency for Health Care Administration, DOAH Cases No. 95-0632RP and 95-0634RP. The DOAH decision, which is now reversed, had invalidated the Agency's proposed Rules 59A-3.203(2)(i) [and] 59A- 3.203(6). Those proposed Rules were originally published, pursuant to Section 120.54(1), F.S., in the January 20, 1995 Florida Administrative Weekly. ***
>
> 4. The "invalid non-rule policy" which is complained of by petitioners in instant DOAH Cases No. 95-3318RU, 95-3335RU, and 95-3336RU is in fact the policy clearly stated in the proposed Rules which were

wrongly invalidated. That policy, i.e., that hospitals on separate premises are to be separately identified and classified if listed on a single hospital license, has been the Agency's policy at all times material herein. The policy remained unchanged through the time during which the appeal of DOAH Cases No. 95-0632RP and 95-0634 was pending. The Agency's correspondence of June 8, 1995 to petitioners, which is attached as an exhibit to each of the petitions herein, merely reflects the said policy--to repeat, the policy which is embodied in the proposed Rules which have now been upheld on appeal.

5. The First District Court of Appeal's reversal of University Hospital, Ltd. et al. vs. Agency for Health Care Administration, DOAH Cases No. 95-0632RP and 95-0634RP, establishes the validity of the Agency's proposed Rules 59A-3.203(2)(i) and 59A- 3.203(6). ***

6. The Agency's June 8, 1995 correspondence which is alleged to be an "invalid non-rule policy" by petitioners is merely in accord with the policy already set out in proposed Rules 59A-3.203(2)(i) and 59A-3.203(6); that is, that hospitals located on separate premises will be separately identified and separately classified if listed on a single hospital license. At this point in these proceedings, it is utterly specious to argue that the policy embodied in the said correspondence must, under Section 120.535, F.S., be promulgated as a rule in accord with Section 120.54, F.S.: the policy has already been promulgated as a rule in accord with Section 120.54, F.S.; and the rules in question have now been upheld by the First District Court of Appeal. In sum, the "invalid non-rule policy" complained of in the petitioners' pleadings is neither a "non- rule," nor is it "invalid."

7. The decision of the First District Court of Appeal in Agency for Health Care Administration v. Sebastian Hospital, Inc. et al., 1st DCA Cases No. 95-586 and 95-1230, quashed two writs of mandamus issued by the Circuit Court, Leon County,

> which writs had wrongly been issued against the Agency in the belief that hospitals have an "entitlement" to a certain form of hospital licensure and, consequently, to Medicaid reimbursement. With the quashal of the writs issued in the Circuit Court cases, and the reversal of DOAH's decision invalidating the Agency's proposed Rules 59A-2.203(2)(i) and 59A-3.203(6), petitioners have lost the entirety of the legal authority on which they rely in instant DOAH Cases. . . . Petitioners' construction of Section 395.003(2)(d), F.S., now has no ground whatever in law.

15. Contrary to the arguments asserted by the Petitioners, the statutory and duly promulgated rules heretofore discussed provide ample authority for the AHCA action proposed in the June 8, 1995, letters that are the subjects of these proceedings. The Petitioners have failed to allege any facts which would show that AHCA is applying any criteria that is not apparent from an application or reading of such statutes and rules, especially in view of the recent appellate court construction of such statutes and rules. For all of the foregoing reasons, the allegations of the petitions in these consolidated cases, taken as true, are insufficient to demonstrate that AHCA has violated Section 120.54(1)(a), Florida Statutes (1995), as amended. Such being the case, it would serve no useful purpose to conduct an evidentiary hearing in these cases and they should be dismissed. 6/

Accordingly, it is ORDERED that the petitions in both of these consolidated cases are hereby DISMISSED and all relief requested in both petitions is hereby DENIED.

DONE AND ORDERED this 31st day of October, 1996, in Tallahassee, Florida.

MICHAEL M. PARRISH
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(904) 488-9675 SUNCOM 278-9675
Fax Filing (904) 921-6847

Filed with the Clerk of the

Division of Administrative Hearings
this 31st day of October, 1996.

ENDNOTES

1/ The March 14, 1996, motion was denied as premature because it relied in large part on appellate court decisions in which motions for rehearing were still pending. The order denying the motion as premature provided: "The motion may be refiled once the subject appellate court orders have become final."

2/ Chapter 120, Florida Statutes (1995), was extensively amended by Chapter 96-159, Laws of Florida. Section 120.535, Florida Statutes (1995) was repealed by Section 8 of Chapter 96- 159, Laws of Florida. However, the substance of those repealed provisions was reenacted by other provisions of Chapter 96-159, Laws of Florida, and now appears in other sections of Chapter 120, Florida Statutes.

3/ Many of the historical details alleged in the petitions add interesting context to the matters at hand, but are not relevant or necessary to the disposition of these proceedings. The significance of a number of the historical details has also been overtaken by subsequent events, most significantly by the two appellate court decisions that reversed the lower decisions on which the Petitioners were relying.

4/ Following the appellate court decision in University Hospital, supra, proposed rules 59A-3.203(2)(i) and 59A-3.203(6) were filed for adoption and are now existing rules.

5/ The 1996 amendments to the definition of the term "rule" did not make any changes material to the disposition of these proceedings.

6/ Although not argued by any of the parties, and not necessary to the disposition of these proceedings, the petitions in these cases appear to also be subject to dismissal on the grounds that the statements which are challenged in these proceedings are not statements of "general applicability," and, therefore, are not rules within the definition at Section 120.52(15), Florida Statutes (1995), as amended. In this regard attention is directed to the discussion and to the authorities cited at paragraphs 6 through 12 of the Final Order in Citifirst Mortgage Corp. v. Department of Banking and Finance, DOAH Case No. 92-7496RU, Final Order issued April 1, 1993.

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## NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this final order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the Agency Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Appeal must be filed within 30 days of rendition of the order to be reviewed.

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DISTRICT COURT ORDER

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DISTRICT COURT OF APPEAL, FIRST DISTRICT
Tallahassee, Florida 32399-1850
Telephone (904) 488-6151
DATE: March 27, 1997
CASE NO: 96-04567

L.T. CASE NO. 95-3335RU

Winter Park Healthcare Group, LTD., et al.
Appellant(s),

v.

Agency for Health Care Administration
Appellee(s).

BY ORDER OF THIS COURT:

Appeal dismissed pursuant to Rule 9.350(b), Fla.R.App.P.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

John S. Wheeler, Clerk

By: _____ (SEAL)
Leslie Tharp
Deputy Clerk

Copies:

Stephen A. Ecenia
Thomas W. Konrad
R. S. Power, Clerk

R. David Prescott
Richard Ellis