STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ALL CHILDREN'S HOSPITAL, INC.,)
)
Petitioner,)
)
vs.)
)
AGENCY FOR HEALTH CARE)
ADMINISTRATION,) CASE NO. 95-3913RU
)
Respondent,)
)
vs.)
)
BAYFRONT MEDICAL CENTER, INC.,)
)
Intervenor.)
______________________________________)

FINAL ORDER

Pursuant to notice the Division of Administrative Hearings, by its duly designated Hearing Officer, Richard Hixson, held a formal hearing in the above-styled case on October 3, 1995 and on October 11, 1995, in Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues for determination in this case are whether the following statement was made by Respondent, AGENCY FOR HEALTH CARE ADMINISTRATION; whether the statement violates the provisions of Section 120.535, Florida Statutes; whether the statement constitutes a declaratory statement under Section 120.565, Florida Statutes; whether Petitioner, ALL CHILDREN'S HOSPITAL, INC., has

standing to maintain this action; and whether Petitioner is entitled to attorney's fees and costs. The alleged agency statement which is at issue in this case is:

The Agency for Health Care Administration takes the position that a shared service agreement may be modified, without prior approval of the Agency, as long as each party continues to contribute something to the program, and the shared service contract remains consistent with the provisions of Rule 59C-1.0085(4), Florida Administrative Code. In addition, the Agency takes the position that modifications to a shared service agreement do not require prior review and approval by the Agency.

PRELIMINARY STATEMENT

On August 7, 1995, Petitioner, ALL CHILDREN'S HOSPITAL, INC., filed a Petition to Challenge Non-Rule Policy, pursuant to Section 120.535, Florida Statutes, and a Petition for Formal Hearing, pursuant to Section 120.57(1), Florida Statutes, with the Division of Administrative Hearings.

On August 24, 1995, BAYFRONT MEDICAL CENTER filed a Petition to Intervene which was granted on August 29, 1995.

On August 24, 1995, Respondent, AGENCY FOR HEALTH CARE ADMINISTRATION, filed a Motion to Strike the allegations of the Petition relating to the Section 120.57(1), Florida Statutes, claims, and a Motion to Hold the case in Abeyance pending resolution of an action between these parties set for trial in Circuit Court in Leon County, Florida. By Order entered September 13, 1995, Respondent's Motion to Strike the allegations brought pursuant to Section 120.57(1), Florida Statutes, was granted, and Respondent's Motion to Hold the case in Abeyance was denied.

In accordance with the Prehearing Stipulation filed on October 3, 1995, Respondent and Intervenor challenge Petitioner's standing to maintain this action. For reasons set forth below, it is determined that Petitioner has standing to maintain this action.

Additionally, Petitioner contends that the agency statement at issue in this proceeding constitutes a declaratory statement under Section 120.565, Florida Statutes. For reasons set forth below, it is determined that this proceeding is inappropriate to resolve Petitioner's claims under Section 120.565, Florida Statutes.

At hearing Petitioner presented the testimony of two witnesses, John Dennis Sexton and Gene Nelson. Petitioner also presented eleven exhibits which were accepted into evidence. Petitioner's Exhibit's 2-4 and 6-8 were initially excluded, but at the conclusion of the hearing were admitted over objection of Respondent and Intervenor.

Respondent and Intervenor presented the testimony of one witness, Elizabeth Dudek. Respondent also presented one exhibit which was admitted into evidence. Intervenor presented four exhibits, 1, 3, and 4, were admitted into evidence. Ruling on Intervenor's Exhibit 2 was reserved pending submission of proposed final orders. After review of the record, Respondent's Exhibit 2 is admitted over objection.

A transcript of the hearing was filed October 26, 1995. Pursuant to consecutive motions for extensions of time, proposed final orders were submitted

by the parties on December 6, 1995. Rulings on the proposed findings submitted by the parties are set forth in the Appendix attached hereto.

FINDINGS OF FACT

1. Petitioner, ALL CHILDREN'S HOSPITAL, INC. (hereinafter ALL CHILDREN'S), is a medical facility located in St. Petersburg, Florida, which provides pediatric hospital care.

2. Respondent, AGENCY FOR HEALTH CARE ADMINISTRATION (AHCA), is the agency of the State of Florida vested with statutory authority to issue, revoke or deny certificates of need in accordance with the statewide and district health plans.

3. Intervenor, BAYFRONT MEDICAL CENTER (BAYFRONT), is an acute care hospital located in St. Petersburg, Florida.

4. ALL CHILDREN'S and BAYFRONT are located adjacent to each other and are connected by a thirty-yard tunnel.

5. In 1969, ALL CHILDREN'S began operation of a pediatric cardiac catheterization program. ALL CHILDREN'S pediatric cardiac catheterization program existed prior to the statutory requirement for a certificate of need to provide such service. Neither AHCA, nor its predecessor agency, Florida Department of Health and Rehabilitative Services, issued a certificate of need for ALL CHILDREN'S cardiac catheterization program.

6. Since 1969, ALL CHILDREN'S has expended at least $500,000 on upgrading the cardiac catheterization program.

7. Since 1970, ALL CHILDREN'S has operated a pediatric open heart surgery program. ALL CHILDREN'S open heart surgery program existed prior to the statutory requirement for issuance of a certificate of need to perform such service. Neither AHCA, nor its predecessor agency, Florida Department of Health and Rehabilitative Services (HRS), issued a certificate of need for ALL CHILDREN'S open heart surgery program. By letter dated May 13, 1974, HRS specifically advised ALL CHILDREN'S that modifications to the ALL CHILDREN'S open heart surgery program were not subject to agency approval.

8. In May of 1973, ALL CHILDREN'S and BAYFRONT entered into a shared service agreement to provide adult cardiac catheterization services. In accordance with the shared service agreement, the actual catheterizations are performed in the physical plant of ALL CHILDREN'S and with equipment located on the ALL CHILDREN'S campus. BAYFRONT contributed to the adult cardiac catheterization shared service program by providing, inter alia, patients, management, medical personnel, and pre- and postoperative care.

9. Beginning in 1975, BAYFRONT has also provided adult open heart surgery services through a joint program with ALL CHILDREN'S with the actual surgeries being performed at the physical plant on ALL CHILDREN'S campus. BAYFRONT contributed to the adult open heart surgery shared service by providing, inter alia, patients, management, medical personnel, and pre- and postoperative care.

10. The shared service agreement between ALL CHILDREN'S and BAYFRONT to provide adult cardiac catheterization and open heart surgical services was in existence prior to the statutory requirement for a certificate of need to perform such services. Neither AHCA, nor its predecessor agency, Florida Department of health and Rehabilitative Services, issued a certificate of need

to provide such services. The cardiac catheterization and open heart surgery program operated by ALL CHILDREN'S and BAYFRONT was "grandfathered" in because the program existed prior to the certificate of need requirement.

11. Because no certificate of need was issued to ALL CHILDREN'S and BAYFRONT for its shared adult cardiac service program, no conditions have been imposed by AHCA on the operation of the program. "Conditions" placed on certificates of need are important predicates to agency approval and typically regulate specific issues relating to the operation of the program and the provision of the service such as access, location, and provision of the service to Medicaid recipients.

12. The ALL CHILDREN'S and BAYFRONT cardiac shared services program is the only "grandfathered in" shared service arrangement in Florida, and is the only shared service arrangement operating without a certificate of need in Florida.

13. An open heart surgery program is shared by Marion Community Hospital and Munroe Regional Medical Center in Ocala, Florida. The Marion/Munroe program operates pursuant to a certificate of need issued by AHCA.

14. On December 22, 1995, AHCA published a notice of its intent to approve a certificate of need for a shared pediatric cardiac catheterization program between Baptist Hospital and University Medical Center in Duval County, Florida.

15. BAYFRONT has applied for, but has not yet been issued, a certificate of need to perform cardiac catheterization services independent of the shared services arrangement with ALL CHILDREN'S.

16. The agency receives hundreds of inquiries each year requesting information and guidance from health care providers regarding the certificate of need application process and other requirements of the certificate of need program. On more than one occasion ALL CHILDREN'S and BAYFRONT have inquired either orally or in letters to the agency regarding whether certain changes in their adult cardiac shared services program would require agency approval through a certificate of need application.

17. In response to a 1990 written inquiry from ALL CHILDREN'S and BAYFRONT regarding modifications to the shared services agreement, the agency (then HRS) by letter dated September 18, 1990, stated in pertinent part that "the alterations you propose still constitute shared services." The agency response went on to state that it is therefore "...determined that they (the proposed changes) have not altered the original intent."

18. On January 31, 1991, Rule 59C-1.0085(4), Florida Administrative Code, governing shared service arrangements in project-specific certificate of need applications was promulgated. The rule provides:

> (4) Shared service arrangement: Any application for a project involving a shared service arrangement is subject to a batched review where the health service being proposed is not currently provided by any of the applicants or an expedited review where the health service being proposed is currently provided by one of the applicants.
> (a) The following factors are considered when reviewing applications for shared

services where none of the applicants are currently authorized to provide the service:

1. Each applicant jointly applying for a new health service must be a party to a formal written legal agreement.

2. Certificate of Need approval for the shared service will authorize the applicants to provide the new health service as specified in the original application.

3. Certificate of Need approval for the shared service shall not be construed as entitling each applicant to independently offer the new health service. Authority for any party to offer the service exists only as long as the parties participate in the provision of the shared service.

4. Any of the parties providing a shared service may seek to dissolve the arrangement. This action is subject to review as a termination of service. If termination is approved by the agency, all parties to the original shared service give up their rights to provide the service.

5. Parties seeking to provide the service independently in the future must submit applications in the next applicable review cycle and compete for the service with all other applicants.

6. All applicable statutory and rule criteria are met.

(b) The following factors are considered when reviewing applications for shared services when one of the applicants has the service:

1. A shared services contract occurs when two or more providers enter into a contractual arrangement to jointly offer an existing or approved health care service. A shared services contract must be written and legal in nature. These include legal partnerships, contractual agreements, recognition of the provision of a shared service by a governmental payor, or a similar documented arrangement.

a. Each of the parties to the shared services contract must contribute something to the agreement including but not limited to facilities, equipment, patients, management or funding.

b. For the duration of a shared services contract, none of the entities involved has the right or authority to offer the service in the absence of the contractual arrangement except the entity which originally was authorized to provide the service.

c. A shared services contract is not transferable. New parties to the original agreement constitute a new contract and require a new Certificate of Need.

d. A shared services contract may encompass any existing or approved health care service. The following items will be evaluated in reviewing shared services contracts:

i. The demonstrated savings in capital equipment and related expenditures;

ii. The health system impact of sharing services, including effects on access and availability, continuity and quality of care; and,

iii. Other applicable statutory review criteria.

e. Dissolution of a shared services contract is subject to review as a termination of service.

i. If termination is approved, the entity(ies) authorized to provide the service prior to the contract retains the right to continue the service.

ii. All other parties to the contract who seek to provide the service in their own right must request the service as a new health service and are subject to full Certificate of Need review as a new health service.

iii. All statutory and rule criteria are met.

19. By letter dated October 22, 1993, ALL CHILDREN'S and BAYFRONT inquired again of the agency regarding modifications of the adult inpatient cardiac shared service program. AHCA did not respond to the 1993 inquiry, and AHCA ultimately considered the inquiry withdrawn.

20. By letter dated February 24, 1995, BAYFRONT made further inquiry of the agency, and requested agency confirmation of the following statement:

> The purpose of this letter is to confirm our understanding that the Agency for Health Care Administration ("Agency") takes the position that the shared services agreement between Bayfront and All Children's may be modified, without prior approval of the Agency, as long as each party continues to contribute something to the program, and that the shared services contract remains consistent with the provisions of Rule 59C-1.0085(4) F.A.C.

21. By letter dated March 16, 1995, the agency made the following reply to BAYFRONT from which this proceeding arose:

> The purpose of this letter is to confirm your understanding of this agency's position with reference to the reviewability of a modification of the shared services agreement between Bayfront Medical Center and All Children's Hospital set forth in your February 24, 1995 letter.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause pursuant to Section 120.535, Florida Statutes.

23. Section 120.535(1), Florida Statutes provides:

> 120.535 Rulemaking required.-
> (1) Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule under s. 120.52(16) shall be adopted by s. 120.54 as soon as feasible and practicable. Rulemaking shall be presumed feasible and practicable to the extent provided by this subsection unless one of the factors provided by this subsection is applicable.
> (a) Rulemaking shall be presumed feasible unless the agency proves that:
> 1. The agency has not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking; or
> 2. Related matters are not sufficiently resolved to enable the agency to address a statement by rulemaking; or
> 3. The agency is currently using the rulemaking procedure expeditiously and in good faith to adopt rules which address the statement.
> (b) 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:
> 1. Detail or precision in the establishment of principles, criteria, or standards for agency decisions is not reasonable under the circumstances; or
> 2. 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.

24. Petitioner ALL CHILDREN'S is substantially affected by the statement made by the agency for purposes of establishing standing under Section 120.535(2)(a), Florida Statutes. The evidence demonstrates that Petitioner has a substantial economic interest invested in the adult inpatient cardiac shared service arrangement with BAYFRONT. The agency's statement of its position with regard to modifications of the adult inpatient cardiac shared service arrangement with BAYFRONT affects those substantial economic interests of ALL CHILDREN'S and is sufficient to establish standing in this proceeding. Florida Medical Center v. Department of Health and Rehabilitative Services, 484 So. 2d 1292 (Fla. 1st DCA 1986).

25. The initial burden of proof in this proceeding is on the Petitioner to establish by a preponderance of the evidence that the agency statements violate the provisions of Section 120.535, Florida Statutes. Agrico Chemical Co. v. State Department of Environmental Regulation, 365 So. 2d 759, 762 (Fla. 1st DCA 1978); Dravo Basic Material Co. v. State Department of Transportation, 602 So. 2d 632 (Fla. 2d DCA 1992).

26. The threshold issue in this case is whether the agency made the statement alleged in the Petition to Challenge Non-Rule Policy. As set forth above, the Petition alleged that the following agency statement violated the provisions of Section 120.535, Florida Statutes:

> The Agency for Health Care Administration takes the position that a shared service agreement may be modified, without prior approval of the Agency, as long as each party continues to contribute something to the program, and the shared service contract remains consistent with the provisions of Rule 59C-1.0085(4), Florida Administrative Code. In addition, the Agency takes the position that modifications to a shared service agreement do not require prior review and approval by the Agency.

27. The evidence fails to establish that the agency made the statement alleged in the Petition. As evidenced in Paragraph 21 above, the statement made by the agency is substantially different from the statement alleged in the Petition, and the actual agency statement is narrowly limited in its application.

28. The actual statement made by the agency does not constitute a rule for purposes of establishing a violation of Section 120.535, Florida Statutes. Section 120.52(16), Florida Statutes in pertinent part defines "rule" to mean:

> (16) "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, 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.

29. The actual statement made by the agency is not a statement of general application. The evidence establishes that the agency statement has no application to any shared service arrangement other than the unique "grandfathered in" shared service arrangement between ALL CHILDREN'S and BAYFRONT. An agency statement which is limited to one set of circumstances should not be considered a rule. Florida League of Cities v. Administration Commission, 586 So. 2d 397 (Fla. 1st DCA 1991).

30. Even if the agency statement were construed as being applicable to the Marion/Munroe shared services arrangement which operates under a certificate of need, or to the recently approved shared service certificate of need in Duval County, the statement at issue merely restates the agency's existing position that modifications to the shared service arrangement are governed by, and must remain consistent with Rule 59C-1.0085(4), Florida Administrative Code. The agency statement does not alter an existing rule, nor does the statement purport to authorize unilateral modifications of the shared service arrangement by BAYFRONT. The statement does not impair any obligations of contract that currently exist between ALL CHILDREN'S and BAYFRONT with regard to the agreement entered into by the parties, and which are the subject of the circuit court

action. For purposes of Section 120.535, Florida Statutes, the agency statement does not purport to create rights or adversely affect rights of the parties to the shared service arrangement, and should not be considered a rule. Balsam v. Department of Health and Rehabilitative Services, 452 So. 2d 976 (Fla. 1st DCA 1984).

31. ALL CHILDREN'S contention that the statement constitutes an improper declaratory statement was not established by the evidence presented and is not appropriately raised in this proceeding under Section 120.535, Florida Statutes. See Christo v. Department of Banking and Finance, 649 So. 2d 318 (Fla. 1st DCA 1995).

FINAL ORDER

Based on the foregoing findings of fact and conclusions of law, it is

ORDERED

That the Petition to Challenge Non-Rule Policy Pursuant to Section 120.535, Florida Statutes, filed in the above-styled case is hereby DISMISSED.

DONE and ENTERED this 10th day of January, 1996, in Tallahassee, Leon County, Florida.

____

Richard Hixson, Hearing Officer
Division of Administrative Hearings
The DeSoto Building
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(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of January, 1996.

APPENDIX

As to Petitioner's Proposed Findings:

1.	Accepted, except that the adult inpatient cardiac catheterization program is a shared service with Intervenor.
2.	Accepted and incorporated.
3.	Accepted, except that the adult inpatient open heart program is a shared service with the Intervenor.
4.	Accepted, except as indicated in Finding 3.
5.	Accepted, except as indicated in Finding 1.
6 - 9.	Accepted and incorporated.
10-11.	Rejected as to agency's recognition of independence of cardiac program.
12.	Accepted to the extent that Petitioner has standing.
13-17.	Accepted to the extent that Petitioner and Intervenor have sought prior modification of the agreement.

18-19. Accepted to the extent that Intervenor made seperate inquiry of the agency.
20. Rejected; agency statement is more limited.
21. Rejected.
22-23. Accepted to the extent that the agency determined modifications to the agreement not subject to approval.
24-25. Rejected.
26. Accepted and incorporated.
27-29. Rejected.
30-32. Accepted and incorporated.
33-34. Rejected.
35-36. Accepted and incorporated.
37. Rejected as not deceptive of agency response.
38. Accepted as not relevant.
39-40. Accepted, except that Marion/Munroe is governed by a CON.
41-44. Accepted, except that the agency has addressed the general application of its policy on shared service arrangements by rule.
45. Rejected.
46-47. Rejected as not relevant.

As to Respondent's Proposed Findings:

1 - 14. Accepted and incorporated.
15. Rejected as not relevant.
16 - 21. Accepted and incorporated.

As to Intervenor's Proposed Findings:

1 - 13. Accepted and Incorporated.
14. Rejected as not relevant.
15. Accepted and incorporated.

COPIES FURNISHED:

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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.