STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

BETHESDA MEMORIAL HOSPITAL, INC.,

Petitioner,

vs.

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

CASE NO.: 96-1029
CON NO.: 8235
RENDITION NO.: AHCA-98-201-FOF-CON

FINAL ORDER

This cause came on before me for the purpose of issuing a final agency order. The Administrative Law Judge assigned by the Division of Administrative Hearings (DOAH) in the above-styled case submitted a Recommended Order to the Agency for Health Care Administration (AHCA). The Recommended Order entered February 24, 1998, by Administrative Law Judge J. D. Parrish is incorporated by reference.

PRELIMINARY STATEMENT

Bethesda, a District 9 hospital, seeks a CON to convert three acute care beds to Level III neonatal intensive care beds. Bethesda presently offers neonatal intensive care in a 12-bed Level II unit. Care of newborns is categorized by Rule 59C-1.042(2)(g) as Level I, II, or III; Level I being "well-baby care", Level II being care for low birth weight babies, and Level III being care for very low birth weight babies. Bethesda's proposal does not comply with the rule's minimum unit size, which is 15 beds for a Level III unit, and there is insufficient numeric need for three new beds. Nevertheless, the ALJ recommends in her conclusions of law that "not normal" circumstances justify approval.

AHCA's long established interpretation has been to consider the minimum size rule as only one of the many review criteria which are weighed in evaluating the merits of a neonatal intensive care (NICU) proposal. A proposal for less than 15 beds has been approved when the agency concluded that approval was justified by "not normal" circumstances. NME Hospitals vs. Department of Health and Rehabilitative Services, 14 F.A.L.R. 1882 QIRS 1992). However, in a recent Final Order, the agency departed from its long-standing

interpretation, and adopted a Recommended Order wherein the presiding ALJ concluded that the proper procedure for consideration of a proposal for less than 15 beds is the new waiver procedure found in the APA at Section 120.542, Florida Statutes (1997). South Miami Hospital vs. Agency for Health Care Administration, Case Numbers 97-1161 and 97-1696 (AHCA 11/24/97).

Upon further reflection, it is concluded that requiring the use of an APA waiver procedure is not only unnecessary in view of the flexibility of the previous approach, it adds a separate, cumbersome process to the already complex procedures in place for consideration of a CON proposal. An APA waiver proceeding would prove cumbersome in the CON context because comparative review of competing CON proposals is required. Gulf Court vs. Department of Health and Rehabilitative Services, 483 So. 2d (Fla. 1st DCA 1985); and see, Meridian vs. Department of Health and Rehabilitative Services, 548 So. 2d 1169 (Fla. 1st DCA 1989). Thus, if a waiver request were granted to a Petitioner in a 5120.542 proceeding, a separate comparative review proceeding would then be required to make a final decision to approve or reject a CON proposal. A further indication that grafting a 5120.542 proceeding on the CON review process is cumbersome, and even superfluous, is that in most instances, no single review criterion is dispositive; instead consideration and weighing of all review criteria are required. Balsam vs. Department of Health and Rehabilitative Services, 486 So. 2d 1341 (Fla. 1st DCA 1986); NorthRidge General Hospital vs. Department of Health and Rehabilitative Services and NME Hospitals, 478 So. 2d 1138 (Fla. 1st DCA 1985). I conclude that the agency should return to its long standing, flexible approach.

RULING ON EXCEPTIONS

Counsel for the agency excepts at length to the ALJ's pervasive blurring of the distinction between Level II and III services, as set forth in Rule 59C-1.042, F.A.C., and the implication that the distinction is merely a bureaucratic obstacle to a well intentioned hospital. I concur with counsel that clarification is necessary. In a lengthy and well reasoned order, challenges to this rule were rejected in St. Mary's Hospital vs. Department of Health and Rehabilitative Services. et al., 12 F.A.L.R. 2727 (DOAH 6/12/90). Early on, the ALJ presiding at the rule challenge proceeding noted that the blurring by providers of distinctions in the three level hierarchy is largely accounted for by competitive pressures. Id. at 2732, 2734, and 2747. Affirmatively, that ALJ concluded in the Final Order that there is a need for a hierarchical classification of services as follows:

> The new definitions the department has proposed to adopt for Level II and Level III use

functional distinctions that are significant indicators of the level or intensity of services provided in a [hospital] nursery. These distinctions reflect the reality that there is a need for a hierarchical clustering of services, in terms of the availability of medical specialists, subspecialists and sub-subspecialists, the intensity of nursing care, and the availability of respiratory therapy technicians and equipment, as hospitals deal

> with smaller and smaller neonates [infants less than one month old], who require prolonged ventilation and other interdisciplinary care.

Id. at 2739.

Counsel excepts to paragraph 15 wherein the ALJ acknowledged Bethesda's offer to allow approval of its proposal to be conditioned by including its existing Level II beds in a commitment to serve Medicaid and indigent patients. Counsel does not challenge the record basis for the finding, but maintains that the agency lacks the authority to accept such an offer and make it a condition of CON approval. The agency does have this authority. The exception is denied. Section 408.040(1)(a), Florida Statutes (1997); Peterson Health Care vs. Agency for Health Care Administration, 19 F.A.L.R. 3861 (AHCA 1997); Beverly et al. vs. Agency for Health Care Administration et al., 17 F.A.L.R. 3569, 3570 (AHCA 1995).

Counsel requests that paragraphs 7 and 8 be clarified to point out that the certificate of need issued to Bethesda in 1985 authorized it to offer Level II services. Official notice is taken of CON 4005 issued to Bethesda on August 28,1985, authorizing 12 Level II beds.

Counsel excepts to paragraphs 38 and 39 maintaining that the ALJ has improperly subdivided the agency's service district that is used for the comparative review of co-batched applications. The challenged findings do not refer or allude to the agency's service district nor do they constitute a de facto sub-dividing of the applicable district. The exception is denied. South Broward Hospital District d/b/a Memorial Hospital West vs. Agency for Health Care Administration and Plantation General Hospital, L. P., 17 F.A.L.R. 3539 (AHCA 1995).

Counsel excepts to paragraph 49 maintaining that quality of care was not at issue in this proceeding. The ALJ is simply recognizing the small, but quantifiable risk in transporting very ill, low birth weight babies. St. Mary's, supra at 2740. The exception is denied.

Counsel excepts to paragraph 63 where the ALJ finds that the agency has never strictly applied the rule's minimum size for a new Level III unit. This exception is granted. South Miami Hospital, supra.

Counsel excepts to paragraph 66 and to the finding and recitation of "not normal" circumstances as being accepted and supporting Bethesda's application for a CON. Counsel correctly points out that whether "not normal" circumstances justify approval

of the CON application is a conclusion of law; in other words, the weight to be given to the "not normal" circumstances in a particular case is a legal conclusion. Health Care and Retirement Corporation vs. Department of Health and Rehabilitative Services, 516 So. 2d 292, 296 (Fla. 1st DCA 1987) (The weighing is a conclusion of law, but not the underlying fact finding). The

challenged findings of fact contained in paragraph 66 as listed circumstances are supported by competent, substantial evidence; therefore, the exceptions are denied. Id. at 296.

FINDINGS OF FACT

The agency hereby adopts and incorporates by reference the findings of fact set forth in the Recommended Order except where inconsistent with the ruling on the exceptions.

CONCLUSIONS OF LAW

The agency hereby adopts and incorporates by reference the conclusions of law set forth in the Recommended Order except where inconsistent with the ruling on the exceptions. As the applicant, Bethesda has the burden of proof to establish its entitlement to the CON sought. More specifically, as stipulated by the parties, Bethesda must establish, upon a weighing of all applicable and statutory rule criteria, whether its application for a CON to convert three general acute care beds for use as Level III NICU beds should be approved. Having weighed such criteria with all the circumstances presented, I find that Bethesda has failed to meet its burden.

Utilizing the methodology contained in Rule 59C-1.042(3)(e), F.A.C., there is insufficient numeric need for the proposed beds sought by Bethesda. Further, this applicant has failed to demonstrate "not normal" circumstances justifying the addition of three Level III NICU beds. The applicant has failed to demonstrate that, when reviewed in the context of availability, past utilization, projected utilization, and the adequacy of other providers to meet the needs for the service district, this proposal will meet the "not normal" circumstances of this district. Further, Bethesda's proposal does not comply with the minimum size of 15 beds for a new Level III NICU as set forth in Rule 59C-1.042(5), F.A.C. The conclusion that CON 8235 should be denied is based on consideration of all applicable review criteria, but one additional observation is appropriate. Accessibility to tertiary health services by patients will always be an important criterion and when the "patient" is a low birth weight baby needing a neonatal intensive care bed, accessibility is of a critical nature. That said, the accessibility of the patient's parents to the place where the services are being provided are, and must be, of a lesser concern than the needs of the patient neonatal infant. Thus, the significance of the findings regarding Bethesda's service to Medicaid patients, Bethesda's geographic location, travel times, accessibility of transportation to indigent persons, and Bethesda's ability to effectively and efficiently offer Level III services in addition to its existing program of Level II services must be lessened when compared to the ultimate issues of the needs of the

patient. In examining any application for a CON to perform tertiary health services, this Agency must necessarily focus on the applicable criteria as they impact the patient, not the patient's family. The record is devoid of any evidence that patients have any trouble accessing the current providers of Level III NICU services nor does it contain any facts that establish any issues as to the quality of the services currently being provided to these neonatal infant patients. Humana. Inc. vs. Department of Health and Rehabilitative Services, 492 So. 2d 388, 392 (Fla. 4th DCA 1986; Humana, Inc. vs. Department of Health and Rehabilitative Services, 469 So. 2d 889, 891 (Fla. 1st DCA 1985).

Having considered the evidence presented and the record of this case in its totality, I conclude that Bethesda has failed to demonstrate by a preponderance of the competent, substantial evidence that the Agency should grant CON application Number 8235. Based upon the foregoing, it is

ADJUDGED, that the application of Bethesda Memorial Hospital, Incorporated, for CON 8235 be DENIED.

DONE and ORDERED this 9th day of June, 1998, in Tallahassee, Florida.

STATE OF FLORIDA, AGENCY FOR
HEALTH CARE ADMINISTRATION

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Douglas M. Cook, Director

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO A JUDICIAL REVIEW WHICH SHALL BE INSTITUTED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF AHCA, AND A SECOND COPY ALONG WITH FILING FEE AS PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE AGENCY MAINTAINS ITS HEADQUARTERS OR WHERE A PARTY RESIDES. REVIEW PROCEEDINGS SHALL BE CONDUCTED IN ACCORDANCE WITH THE FLORIDA APPELLATE RULES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the above named addresses by U. S. Mail this 9th day of June, 1998.

_____

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