

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MARTIN MEMORIAL MEDICAL )  
CENTER, INC., )  
 )  
 Petitioner, )  
 )  
vs. ) Case No. 97-5020  
 )  
 AGENCY FOR HEALTH CARE )  
ADMINISTRATION, )  
 )  
 Respondent, )  
 )  
and )  
 )  
HEALTHSOUTH OF TREASURE COAST, )  
INC., d/b/a HEALTHSOUTH TREASURE )  
COAST REHABILITATION HOSPITAL, )  
 )  
 Intervenor. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on January 12-14, 1998, at the Division of Administrative Hearings, the DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida, before Administrative Law Judge Eleanor M. Hunter, of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUES

Whether the application of Martin Memorial Medical Center, Inc., to establish a 15-bed hospital-based skilled nursing unit meets the criteria for the issuance of a certificate of need.

PRELIMINARY STATEMENT

In April 1997, the Agency for Health Care Administration (AHCA) published a need for 15 hospital-based skilled nursing beds in District 9, Subdistrict 2, for Martin County. In response, Martin Memorial Medical Center (Martin Memorial), the only acute care hospital in the County, filed certificate of need (CON) application number 8847. If issued the CON, Martin Memorial will establish the 15-bed SNU at its northern and larger campus in the City of Stuart.

AHCA preliminarily denied the issuance of CON 8847 because Martin Memorial failed to include in its proposal the conversion of at least the same number of acute care beds to accommodate the SNU beds. After reviewing Martin Memorial's occupancy data by department, AHCA filed a notice that it had changed its position and, at the final hearing, supported the approval of Martin Memorial's CON application.

In two separate proceedings, Integrated Health Services of Central Florida, Inc., d/b/a Integrated Health Services of Vero

Beach (IHS) and Healthsouth of Treasure Coast, Inc., d/b/a Healthsouth Treasure Coast Rehabilitation Hospital (Healthsouth), filed petitions supporting the preliminary action of AHCA, the denial of CON 8847. Martin Memorial filed a Motion in Opposition to the petitions and a Motion to Consolidate the separate cases into one proceeding. After a hearing on the motions, the cases were consolidated, and the Petitions for Formal Administrative Hearings were treated as petitions to intervene and were both granted on December 16, 1997. Prior to the final hearing, IHS voluntarily dismissed its petition.

In the Prehearing Stipulation, Martin Memorial withdrew its Motion to Dismiss IHS, and its Request for Official Recognition and Notice of Intention to Seek Sanctions against IHS, but not against Healthsouth. Martin Memorial requested official recognition of various petitions filed by Healthsouth in other DOAH Cases. Martin Memorial also argued that Healthsouth has no standing because it is licensed as a comprehensive medical rehabilitation (CMR) hospital, not a SNU. Martin Memorial noted that the need methodology applicable to CMR beds is different from that for SNU beds. Martin Memorial also denied Healthsouth's claim that it will suffer a substantial injury-in-fact if Martin Memorial establishes a 15-bed SNU. In a response filed on January 12, 1998, Healthsouth argued that differences in licensure and need methodology are not determinative of standing, and that it will suffer an injury-in-fact if CON 8847 is issued.

AHCA agreed with Healthsouth that it should have an opportunity, despite licensure and need methodology differences, to demonstrate at hearing that it has standing. Therefore, ruling was reserved on Martin Memorial's Motion to Dismiss Healthsouth for lack of standing until factual issues related to an injury-in-fact were resolved, and on Martin Memorial's Request for Official Recognition and Notice of Intention to Seek Sanctions.

Healthsouth also filed, on January 12, 1998, a Motion for Summary Recommended Order dismissing Martin Memorial, alleging that AHCA's publication of a 15-bed fixed need pool was invalid and should have been zero. According to Healthsouth, AHCA used a proposed rule which included a provision that it would not apply to a batching cycle until after the effective date of the rule. The proposed rule was also apparently being challenged by National Healthcare, L.D., according to Healthsouth, and it was expected that Healthsouth would file a Motion to Consolidate that case with this one, but it did not.

Healthsouth filed a Motion for Official Recognition of the following cases and Florida Administrative Weekly publications:

Health Care & Retirement Corp. v. Tarpon Springs Hospital Foundation, 671 So. 2d 217 (Fla. 1st DCA 1996);

Agency for Health Care Administration v. Mt. Sinai Medical Center, 690 So. 2d 689 (Fla. 1st DCA 1997);

Tarpon Springs v. Agency for Health Care Administration, et al., (F.O. DOAH Case No. 94-0958, 94-1165RU;

The proposed rule relating to certificate of need review criteria for nursing home beds published in the Florida Administrative Weekly, Vol. 22, No. 39, September 27, 1996;

The proposed rule relating to certificate of need review criteria for nursing home beds published in the Florida Administrative Weekly, Vol. 23, No. 6, February 7, 1997; and

The proposed Notice of Change relating to certificate of need review criteria for nursing home beds published in the Florida Administrative Weekly, Vol. 23, No. 47, November 21, 1997.

Healthsouth's Motion for Official Recognition presented disputed legal but not factual issues, and based on the case law, the motion is granted. See e.g. Department of Legal Affairs v. District Court of Appeal, 5th District, 434 So. 2d 310 (Fla.Sup.Ct. 1983), and Daoud v. Matz, 73 So. 2d 51 (Fla.Sup.Ct. 1954).

In the Prehearing Stipulation, the parties agreed that the disputed issues of fact in this proceeding are those in the following statutory and rule criteria: Subsections 408.035(1)(a), (b), (d), and (l), and (2)(a)-(c), all generally related to need, alternatives and adverse impact; Subsections 408.035(1)(h) and (n) -- related to accessibility for all residents and past and proposed Medicaid services; Subsections 408.035(1)(m) and Chapter 59A-3 -- on construction methods and code requirements; and Subsection 408.035(1)(o) -- on a multilevel continuum of care.

At the final hearing, Martin Memorial presented the

testimony of Gary Uber, who is responsible for social services and discharge planning at Martin Memorial; Joseph Edward Witek, expert in health care finance; Edward L. Hengtgen, Jr., expert in health care architecture; Christopher Coffey, expert in health care planning; and Judith L. Horowitz, expert in health care planning and health care finance. Martin Memorial's Exhibits 1 through 30 were received into evidence.

AHCA presented the testimony of Elfie Stamm, expert in health care planning. AHCA Exhibits 1 through 3 were received in evidence. By deposition, submitted after the formal hearing, AHCA also presented the testimony of Charles L. Alby, an architect. With the agreement of the parties, the Alby deposition was accepted as AHCA Exhibit 4.

Healthsouth presented the testimony of Denise McGrath, expert in nursing and rehabilitation hospital administration; Armand Balsano, expert in health care planning and health care finance; and Rick Knapp, expert in health care finance and health care accounting. Healthsouth proffered, in view of the objection by Martin Memorial, the testimony and resume (as its Exhibit 10) of Luis Vivar, an expert in health care architecture, who was not listed on Healthsouth's witness list. Ruling was reserved on the admissibility of the proffered testimony. Healthsouth's Exhibits 1 through 18, 20, and 21 were received into evidence.

The transcript of the final hearing was filed on February 2, 1998. Proposed recommended orders were filed on February 12, 1998.

#### FINDINGS OF FACT

1. The Agency for Healthcare Administration (AHCA) is the state agency which administers the certificate of need (CON) program for health care services and facilities in Florida. On April 18, 1997, AHCA published a need for a 15-bed hospital-based skilled nursing unit (SNU) in District 9, Subdistrict 2, for

Martin County. Because the beds will be in a hospital, they will be licensed under Chapter 395, Florida Statutes. By contrast, freestanding, nursing facilities are licensed, pursuant to the provisions in Chapter 400, Florida Statutes.

2. Since it is the only acute care hospital in the County, Martin Memorial Medical Center, Inc., d/b/a Martin Memorial Medical Center (Martin Memorial) applied for the CON to establish the 15-bed hospital-based SNU. Martin Memorial has 336 beds located on two separate campuses in Martin County. A satellite facility which has 100 beds, Martin Memorial South, is located in Port Salerno. Port Salerno is approximately 10 to 12 miles south of the City of Stuart. Martin Memorial also owns a 120-bed nursing home on the Port Salerno campus, Martin Nursing and Restorative Care Center (Martin Nursing Center). The facility includes a 40-bed subacute unit. Martin Nursing Center is operated by a long-term care company, Eden Park Management, Inc. Martin Memorial North, the larger, 236-bed hospital in Stuart, is the proposed location of the SNU. The SNU renovation project will cost approximately \$242,000, and will occupy space which is currently used for outpatient services.

3. AHCA preliminarily denied the CON application due to Martin Memorial's failure to propose to delicense and convert acute care beds to establish the SNU. AHCA withdrew its objection to the issuance of CON 8847 after reviewing occupancy levels by department at Martin Memorial.



4. AHCA published the applicable fixed need pool in April 1997<sup>1</sup>, which was calculated using proposed Rule 59C-1.036, published on February 7, 1997.<sup>2</sup> Notice was given of the only challenge to the proposed rule which was filed by National Healthcare, L.P.<sup>3</sup> and subsequently dismissed. No motion to consolidate that case with this one was ever filed.

5. Healthsouth of Treasure Coast, Inc., d/b/a Healthsouth Treasure Coast Rehabilitation Hospital (Healthsouth) is a 90-bed rehabilitation hospital in Vero Beach, Indian River County, approximately 60 miles north of Martin Memorial North. Healthsouth is also in AHCA, District 9, but not in Subdistrict 2. In District 9, St. Lucie County is on the east coast, adjacent to Indian River County to the north, Martin County to the south, and Okeechobee County to the west. The four counties in District 9 are north of Palm Beach County, the only other county in the District.

6. The hospital-based SNUs in the four northern counties in District 9 are:

Port St. Lucie Hospital, in St. Lucie County, which has 150 beds and a 15-bed SNU, with CON approval for 9 more SNU beds;

Lawnwood Regional Medical Center, also in St. Lucie County, which has 260 beds and a 33-bed SNU;

Indian River Memorial Hospital, located within a mile of Healthsouth in Indian River County which has approximately 320 beds and a 20-bed SNU and approval for 8 more SNU beds;

Sebastian Hospital, in Indian River County,

which has between 100 and 150 beds and has recently been approved for 9 SNU beds; and

Raulerson Hospital, in Okeechobee County, which has 101 beds including SNU.

7. Healthsouth identifies its primary service areas as Indian River, St. Lucie, and Martin Counties. Healthsouth generally attracts 60 percent of its patients from Indian River County, 20 percent from St. Lucie, and 15 percent from Martin County. Patients are referred from both Martin Memorial North and South. Healthsouth asserted that a 15-bed SNU at Martin Memorial will compete with Healthsouth, resulting in a loss of patients in sufficient numbers to cause a substantial adverse impact on Healthsouth.

8. Healthsouth's expert in health care planning and finance examined national acute care discharges as compared to the percentage of those cases which typically have follow-up subacute care. Using discharge data by Diagnostic Related Group (DRG), the expert quantified the percentages of subacute cases which can receive services in either a CMR hospital or a skilled nursing facility. Based on an estimate that 75 to 90 percent of the overlapping DRGs would be redirected to Martin Memorial, Healthsouth projected a loss ranging from 55 to 66 cases when applied to 1997 annualized data.

9. The three largest categories of referrals from Martin Memorial are stroke, orthopedics, and rehabilitation, which account for 85 percent of total admissions to Healthsouth. The

payer group from the three categories was used to determine the financial impact, using the midpoint of the projected loss of 60 cases or 900 patient days. The financial loss per case is the difference between net revenue per patient day of \$458 and the variable expenses per patient day of \$295, or \$163. Given an incremental net income per adjusted patient day of approximately \$163, the projected loss of 900 patient days a year, and an assumed 15-day average length of stay, Healthsouth projects a loss of approximately \$150,000 a year in revenues if a 15-bed SNU is established at Martin Memorial.

10. In 1995, the only hospital-based SNU in Healthsouth's service area was at Lawnwood. The SNU at Raulerson opened in April 1996, followed by Port St. Lucie in November 1996, and Indian River Memorial in May 1997. In addition, the new CMR program was developed at Lawnwood, while the unit at St. Mary's Hospital in West Palm Beach was expanded during 1997. By January 1998, Healthsouth reached full capacity, or an average daily census in the range of 84 to 89 patients in 90 beds. Healthsouth's medical director believes that it would have reached full capacity much sooner after its 20-bed expansion in mid-August 1997, but for the competition from the hospital-based SNUs. The expansion of Healthsouth has accomplished the objective of eliminating a 15-to-20 person waiting list which existed when it was a 70-bed facility.

11. The average daily census (ADC) at Lawnwood, in 1995,

was 31.1 patients in 33 beds. By the end of 1995, the average daily census at Healthsouth was 69.9 patients in 70 beds. From January 1996 to July 1997, the ADC in Raulerson's 12-bed SNU increased from 5.6 patients to 8.1. After Raulerson's SNU beds became available, the ADC of Healthsouth continued in the 68 to 69 range in 70 beds, indicating that Healthsouth was full. When Port St. Lucie's 15 SNU beds opened during the last two months of 1996, its ADC of 3.9 patients in 1996 increased to 13.5 for the first seven months of 1997. From the time Port St. Lucie's SNU became operational through the end of 1997, the ADC at Healthsouth ranged from a low of 67.2 in 70 beds in June 1997, to a high of 81.9 in 90 beds in November 1997, approximately three months after its expansion. Indian River Memorial, the largest referral source and the closest SNU to Healthsouth, opened a 20-bed SNU, in May 1997. Healthsouth failed to show any adverse impact as a result of the opening of any of existing SNUs in the District. All of the SNUs in the four-county area have filled relatively quickly when opened. At the same time, utilization of CMR services has also steadily increased.

12. In 1996, Martin Memorial North referred 181 patients to Healthsouth; 134 were actually admitted. For the first eleven months of 1997, Martin Memorial North referred 147 patients (160 annualized) resulting in 109 admissions (119 annualized). The percentage of referrals which became admissions was the same, 74 percent, for both years. Martin Memorial South referred

27 patients with 22 of those admitted in 1996, and referred 33 of which 25 were admitted, based on actual data for the first eleven months of 1997 annualized for the entire year. Healthsouth notes that Martin Memorial North's referrals declined 12 percent, and the admissions declined by 11 percent comparing 1996 to 1997. Martin Memorial reported total discharges to Healthsouth of 155 patients in 1995, 155 in 1996 and 149 in 1997. Healthsouth's total admissions for 1996 and 1997, respectively, were 1463 and 1455.

13. Assuming, that Healthsouth reasonably expects to lose \$150,000 a year in pre-tax revenues as a result of the establishment of Martin Memorial's 15-bed SNU, that level of impact is not substantial, as compared to Healthsouth's revenues in excess of expenses, or profits of approximately \$3.8 million in 1996.

14. Considering the distance between Healthsouth and Martin Memorial, the differences in the intensity of the services they offer, and the historical absence of any substantial adverse impact on Healthsouth when closer referral hospitals established SNUs, Healthsouth has failed to establish that it will suffer an injury-in-fact if Martin Memorial initiates skilled nursing services in a 15-bed unit.

15. Healthsouth failed to establish the reasonableness of the loss it projects, given the evidence that the average length of stay and number of cases likely to be redirected are

overestimated. Assuming, nevertheless, the accuracy of Healthsouth's projections, the projected loss does not constitute a substantial adverse impact. Therefore, Healthsouth has failed to establish the facts necessary to support its claim of standing in this proceeding.

#### CONCLUSIONS OF LAW

16. Pursuant to Subsections 408.039(5) and 120.57(1), Florida Statutes, the Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding.

17. Healthsouth, the Intervenor, must demonstrate standing by meeting the requirements of Subsection 408.039(5), Florida Statutes, and the two prong test of Agrico Chemical Company v.

Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2nd DCA 1981), rev. denied, 415 So. 2d 1361 (Fla. 1982).

18. As required by Subsection 408.039(5), Healthsouth alleges that it has standing to intervene because its

. . . established program will be substantially affected by the issuance of any certificate of need to a competing proposed facility or program within the same district.

Healthsouth contends that a hospital-based SNU will compete with CMR services. Healthsouth has a specific CON licensed program as required by the decision in St. Joseph Hospital of Charlotte, Florida, Inc. v. DHRS, 559 So. 2d 595 (Fla. 1st DCA 1990).

Healthsouth also demonstrated a potential adverse impact on the provision of the CON regulated health service due to an overlap in the services provided by CMR hospitals and hospital-based SNUs, despite the differences in rule methodologies and licenses. See e.g. Charter Medical-Jacksonville, Inc. v. State, DHRS, 503 So. 2d 381 (Fla. 1st DCA 1987), relying on Psychiatric Institute of America, Inc. v. DHRS, 491 So. 2d 1199 (Fla. 1st DCA 1986). The claims asserted by Healthsouth are, therefore, cognizable within the zone of interest protected by Subsection 408.039(5), Florida Statutes, and meet the first prong of the Agrico test.

19. Healthsouth failed to demonstrate that it will suffer an injury-in-fact and therefore, failed to meet the second prong of the Agrico test. The injury alleged by Healthsouth is not supported by the facts adduced at hearing. Assuming, arguendo,

that Healthsouth will suffer the injury it alleged, Healthsouth



failed to show that the impact on Healthsouth is reasonably expected to be substantial.

20. Healthsouth failed to establish its standing to initiate or intervene in opposition to Martin Memorial's proposal to establish a 15-bed SNU.

21. Because it is unnecessary to the disposition of this proceeding, no ruling is made on Martin Memorial's Motion for Official Recognition of various petitions filed by Healthsouth in various cases, and Notice of Intention to Seek Sanctions. No ruling is made on Healthsouth's Motion for Summary Recommended Order Dismissing Martin Memorial because Healthsouth lacks standing to participate as a party to this proceeding.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Agency for Health Care Administration enter a final order granting Martin Memorial's Motion to Dismiss the Petition to Intervene, filed by Healthsouth of Treasure Coast, Inc., d/b/a Healthsouth Treasure Coast Rehabilitation, and granting Certificate of Need No. 8847 to establish a 15-bed skilled nursing unit at Martin Memorial Medical Center, Stuart, Florida.

DONE AND ENTERED this 1st day of July, 1998, in Tallahassee,  
Leon County, Florida.

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ELEANOR M. HUNTER  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 1st day of July, 1998.

ENDNOTES

<sup>1/</sup> Volume 23, Florida Administrative Weekly, November 16  
(April 18, 1997)

<sup>2/</sup> Volume 23, Florida Administrative Weekly, November 6  
(February 7, 1997)

<sup>3/</sup> Volume 23, Florida Administrative Weekly, November 28  
(July 11, 1998)

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.