

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PUBLIC HEALTH TRUST OF MIAMI-DADE)
COUNTY, FLORIDA,)
)
Petitioner,)
)
vs.) Case No. 98-4020
)
AGENCY FOR HEALTH CARE)
ADMINISTRATION and CLEVELAND)
CLINIC FLORIDA HOSPITAL,)
)
Respondents.)
_____)

RECOMMENDED ORDER OF DISMISSAL

Pursuant to notice, Cleveland Clinic Florida Hospital's Motion to Dismiss Petition for Formal Administrative Hearing was heard by the Division of Administrative Hearings, through its Administrative Law Judge David M. Maloney, on September 28, 1998.

APPEARANCES

For Petitioner: Jack P. Hartog, Esquire
Assistant County Attorney
Jackson Memorial Hospital
West Wing 109
1611 N.W. 12th Avenue
Miami, Florida 33136

For Respondent
Cleveland Clinic
Florida Hospital: Robert A. Weiss, Esquire
Karen A. Putnal, Esquire
Parker, Hudson, Rainer & Dobbs LLP
118 North Gadsden Street, 2nd Floor
Tallahassee, Florida 32301

For Respondent Agency
for Health Care
Administration: Richard A. Patterson, Esquire
Agency for Health Care

Administration
2727 Mahan Drive, Building 3
Tallahassee, Florida 32308

STATEMENT OF THE ISSUE

Whether Respondent Cleveland Clinic Florida Hospital's Motion to Dismiss the Petition in this case, for lack of standing, should be granted.

PRELIMINARY STATEMENT

On September 10, 1998, the Division of Administrative Hearings received a notice from R.S. Power, Agency Clerk for the Agency for Health Care Administration ("AHCA" or the "Agency"). The notice advised that AHCA had received a request for formal administrative hearing from Public Health Trust of Miami-Dade County, Florida (the "Trust"). By the notice, the Agency requested that the Division conduct the proceedings required by law. Attached to the notice were copies of pleadings and papers already filed in the case.

Among the pleadings and papers attached was a motion denominated "Cleveland Clinic Florida Hospital's Motion to Dismiss Petition for Formal Administrative Hearing." Also attached, among other papers, were the petition itself, the Trust's response to the motion, and an amended petition.

Following designation of the undersigned to conduct the proceedings, the motion to dismiss was set for oral argument. At the conclusion of argument (in which the Agency supported the Petitioner in opposing the Motion to Dismiss) the motion was

taken under advisement. The parties were given one week to submit post-hearing filings in favor of or opposed to the Motion.

Cleveland Clinic Florida Hospital ("CCFH") and the Trust filed post-hearing documents; the Agency did not. CCFH's Proposed Recommended Order and the Trust's Post-hearing Memorandum were both timely filed on October 5, 1998.

FINDINGS OF FACT

1. The facts necessary for disposition of the Motion to Dismiss are not in dispute.

2. The Public Health Trust of Miami-Dade County operates Jackson Memorial Hospital ("JMH") in Dade County (AHCA District 11). In its Petition for Formal Administrative Hearing, certified to have been served on August 19, 1998, the Trust alleged that JMH is the only provider of adult kidney transplantation services within Florida Transplant Service Planning Area 4, which includes AHCA Districts 8, 9, 10 and 11. The Trust described itself in both the Petition and an amended Petition which followed as:

[A]n agency and instrumentality of Miami-Dade County, which is organized and operated pursuant to Chapter 154, Part II, Florida Statutes, and Chapter 25A of the Code of Miami-Dade County. It governs and operates Jackson Memorial Hospital and other designated health care facilities. Its address is 1611 N.W. 12th Avenue, Miami, Florida 33136.

Amended Petition, paragraph 2, p. 2. The Trust and Jackson Memorial Hospital are both in Dade County, AHCA District 11.

3. With regard to CCFH, the Petition alleged the following. CCFH is located in Fort Lauderdale, Broward County (AHCA District 10). CCFH has CON approval to construct a new facility in Weston, also in Broward County. It submitted an application for an adult kidney transplantation program at the new Broward County facility which was awarded preliminary CON approval as noticed in the Florida Administrative Weekly on July 31, 1998.

4. It is the application for the adult kidney transplantation program at the Weston facility in AHCA District 10 which the petition seeks to have denied contrary to AHCA's preliminary approval.

5. The Petition's allegations with regard to standing are contained in paragraphs seven and eight:

7. As the sole provider of adult transplantation services in Transplant Area 4, Petitioner has standing to file this petition because its substantial interests will be directly affected by the Agency action for which this petition seeks review.

8. The adverse affects to the PHT if the preliminary approval of CON No. 9026 is upheld include but are not limited to:

a. A decrease in the number of procedures performed at JMH, which may impair research objectives and medical proficiency;

b. A loss of needed revenue to JMH, the largest provider of indigent hospital care in Florida;

c. An increase in the competition for professional staffing, thereby driving up the costs of performing these hospital services; and

d. An increase in the cost to the health care system for performing transplant services through the unnecessary duplication of services.

Petition for Formal Administrative Hearing, p. 3 and 4.

6. CCFH moved to dismiss the Petition on the basis that the Trust had not alleged facts sufficient to meet the standing requirement in CON proceedings found in Section 408.039(5), Florida Statutes. In essence, CCFH asserted that the Trust had failed to allege that its adult kidney transplantation program in District 11 was within the same district as the challenged kidney transplant program of CCFH approved by AHCA for District 10.

7. In response, the Trust informed the Agency that it had on the same date filed an Amended Petition which,

differs substantively from the original petition only in paragraphs 4 and 8, concerning the issue of standing. By filing its Amended Petition, the Trust adds an additional basis for standing, and does not in any manner retreat from the basis for standing asserted in its original Petition.

Public Health Trust's Response to Cleveland Clinic Florida Hospital's Motion to Dismiss, p. 2, paragraph 2.

8. The new paragraphs four and eight in the Amended Petition, state:

4. PHT's medical staff (including its transplantation physicians) is provided by the University of Miami School of Medicine, doing business as the University of Miami Medical Group (UMMG), under an affiliation agreement between the PHT and the University of Miami. Through the UMMG, JMH conducts various activities in Broward County as part

of its adult kidney transplantation program, including but not limited to the following:

a. UMMG sees approximately one third of all its post transplant patients at two satellite clinics in Fort Lauderdale; and

b. UMMG through the University of Miami's Organ Procurement Organization maintains agreements with various Broward donor hospitals and provides in-service training to hospital personnel involved in organ procurement, including kidney procurement.

* * *

8. As the sole provider of adult transplantation services in Transplant Area 4, as an existing health care facility with an established adult kidney transplant program operating in both Districts 10 and 11, Petitioner has standing to file this petition because its substantial interests will be directly affected by the Agency action for which this petition seeks review.

Amended Petition, pages 2 and 3.

9. The Amended Petition was filed with the Department Clerk for AHCA on September 4, 1998, prior to the case's referral by AHCA to DOAH.

10. Argument on the Motion to Dismiss was heard on September 28, 1998. Ruling was reserved until entry of this order.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of cases initiated in order to challenge decisions of the Agency for Health Care Administration on applications for certificates of

need (CON) issued pursuant to the Health Facility and Services Development Act," Sections 408.031-408.045, Florida Statutes. Section 408.039(5), Florida Statutes. This is such a case. In this case, however, the Petition must be dismissed because the Petitioner does not have standing to initiate the proceeding under the terms of the standing provision in CON law, which states in pertinent part:

Existing health care facilities may initiate . . . an administrative hearing upon a showing that an established program will be substantially affected by the issuance of any certificate of need to a competing proposed . . . program within the same district.

Section 408.039(5)(c), Florida Statutes (emphasis supplied).

12. As the Trust pointed out in its response to the Motion to Dismiss, filing of the Amended Petition was permitted by Rule 28-106.202, Florida Administrative Code. The question, then, is whether the allegations in the Amended Petition (both those retained from the original petition and those added in the new paragraphs 4 and 8, quoted above) were sufficient to withstand CCFH's Motion to Dismiss.

13. While not agreeing the allegations are correct, the Motion to Dismiss does not take issue with the sufficiency of the allegations with regard to the Trust's claim that it will be substantially affected by approval of CCFH's kidney transplantation program in District 10. Rather, the Motion to Dismiss, reduced to its essence, maintains that the Trust has failed to allege that its established kidney transplantation program is "within the same district" as CCFH's putative program.

14. An allegation that the programs are "within the same district," is clearly necessary under the plain meaning of Section 408.039(5), Florida Statutes. The Trust argues that its Amended Petition's allegations satisfy the "same district" requirement on two independent bases: first, (despite its admissions that it is located in District 11, operates through Jackson Memorial Hospital which is located in District 11 and has an address in District 11) the Trust alleges that "through its satellite clinics in Broward County [it] provides post-

transplantation services to JMH transplantation patients" (the Trust's post-hearing memorandum, p. 2) in District 10; second, the Trust argues that "rules of statutory construction compel deference to AHCA's wholly consistent and repeated interpretation of the word 'district' to mean regional service planning area when AHCA conducts regional planning for tertiary services, not only in the standing provision, but also Section 408.035(1)(b) (requiring CON review of 'like and existing health care facilities and health services in the service district of the applicant')." Id.

i. Satellite Clinic Allegations

15. For purposes of the Motion to Dismiss, the facts alleged in the Trust's Amended Petition must be taken as true. Alvarez vs. E.A. Produce Corp., 708 So. 2d 999 (Fla. 3rd DCA 1998).

16. CCFH argues that the allegations concerning two satellite clinics in Broward County (as well as allegations concerning "organ procurement" agreements with Broward County donor hospitals) are not sufficient to confer standing (if shown by evidence) because, on their own, they do not amount to an "established program" in District 10 that is "within the same district." Indeed, the CON standing provision requires that the Petitioner have an established program in the same district as the program of the approved applicant: "[e]xisting health care facilities may initiate . . . an administrative hearing upon a

showing that an established program will be substantially affected by the issuance of [a CON to a competing proposed program] within the same district." Section 408.039(5)(c), Florida Statutes, emphasis supplied.

17. CCFH is right.

18. The definition of a "transplantation program" is found in Rule 59C-1.044(2)(h), Florida Administrative Code: "The offering of surgical services by a hospital through which one or more types of organ transplants are provided to nor or more patients . . .".

19. There is logic in the Trust's response that the term "surgical service" cannot be limited to "surgery" or even "surgical services," and, in the context of this case, must be construed to include post-transplantation services because "[t]ransplantation surgery necessarily involves extensive post-transplantation services as an integral part of the surgical services." The Trust's post-hearing memorandum, p. 5.

20. But the definition also contains the words "by a hospital." Although not perfectly analagous, the definition of "open heart program" found in a rule of AHCA's predecessor was considered by the First District Court of Appeal in justification of its affirmance of denying standing in a case to a Petitioner in one district challenging the standing of a granted-applicant in another. The court wrote,

We also note that [the rule] defines 'open heart program,' in part, as 'rooms in a

hospital equipped for open heart surgical procedures' (emphasis supplied). Therefore, North Ridge cannot successfully argue the facility/program distinction in this area of specialization.

Amisub vs. Department of Health and Rehabilitation Services, 577 So. 2d 648, 650 (Fla. 1st DCA 1991).

21. Amisub was recently cited in a per curiam affirmance of an award of a CON for a liver transplantation program in which a competitor in another district was not allowed to participate in the hearing which led to the award because of lack of standing. See Shands Teaching Hospital vs. St. Luke's Hospital Association, 695 So. 2d 793 (Fla. 1st DCA 1997).

22. These two cases, Amisub and Shands, one in the area of open heart surgery programs, the other in the area of organ transplantation programs, stand for another proposition that relates to CON standing: "The legislature intended by creating section 381.709(5)(b) [the substantially similar predecessor to the current standing provision] to restrict standing in CON cases." Amisub, above at 649 (emphasis supplied).

23. Ultimately, it is this long-lasting, clear intention of the Legislature that CON standing be restricted in cases of doubt rather than expanded, coupled with the Legislature's insistence that executive branch agencies express and act out policies by rule rather than reliance in one case on an adjudicated decision reached in another that finally defeats the Trust's arguments

based on both the amendments to its Petition and its reliance on AHCA's interpretation in other case of the term "district."

ii. AHCA's Interpretation of the Term "District"

24. As the Trust is quick to point out, AHCA has interpreted the word "district" in the context of organ transplant cases to mean "service planning area." In its final order in Public Health Trust of Dade County, Florida vs. AHCA, 17 F.A.L.R. 2330 (AHCA May 30, 1995) the agency defined "district" to mean "service planning area . . . where a CON for a transplant program is at issue." This approach was again taken by the Agency in St. Luke's Hospital Association vs. AHCA, 18 F.A.L.R. 3551 (AHCA Sept. 9, 1996), affirmed Shands Teaching Hospital vs. St. Luke's Hospital Association, 695 So. 2d 793 (Fla. 1st DCA 1997). The Agency has maintained the same position in this proceeding, that the term "district" in a case involving an organ transplant program means "service area." If the Agency's equation of the term "district" with "service area" is correct, then the Motion to Dismiss fails because the Trust alleged that its established program is in the same service planning area as the newly-approved program of CCFH, as, the parties concede they are.

25. First, the term "district," as used in Section 408.039(5)(c), Florida Statutes, is not ambiguous. No matter how much sense it makes in the broader context of CON law to equate the term "district" with "service planning area" in tertiary care

cases including organ transplantation cases, "district" does not mean "service planning area." As counsel for the Agency conceded at argument on the Motion, AHCA has attempted to persuade the legislature to amend Section 408.095(5)(c) to expand standing in tertiary cases consistent with its interpretation, but has not been successful in the attempt.

26. Second, when the First District Court of Appeal affirmed the St. Luke's final order in Shands Teaching Hospital, it did so by a per curiam affirmance but with citation to Amisub, above. The only reasonable interpretation of the Court's reliance on Amisub in Shands Teaching Hospital, is that the Court agreed with the decision of the Division of Administrative Hearings to deny Shands' petition to intervene because it was not in the same district as St. Luke's.

27. Finally, the Agency's reliance on final orders in other cases to support its statement of general applicability interpreting Section 408.039(5), Florida Statutes, (in other words, its rule; see Section 120 52(15), Florida Statutes) and applying that statement to this case does not square with its obligations under the Administrative Procedure Act. Not only has the legislature not seen fit to amend the statute, the Agency has not promulgated a rule in which it defines the standing provision's term "district" in transplant cases to mean "service planning area." The legislature made very clear in its 1996 revision of the Administrative Procedure Act that "[r]ulemaking

is not a matter of agency discretion." Section 120.54(1)(a), Florida Statutes. "Each agency statement as defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by [Section 120.54] as soon as feasible and practicable." Id. The agency's failure to adopt in rule its interpretation of the word "district" in the standing provision to mean "service planning area" prevents it from substituting final orders in other cases for a rule to sustain the standing of the Trust in this case.

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 dismissing the amended petition in this case of the Public Health Trust of Miami-Dade County, Florida.

DONE AND ENTERED this 14th day of October, 1998, in Tallahassee, Leon County, Florida.

DAVID M. MALONEY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847

Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of October, 1998.

COPIES FURNISHED:

Jack P. Hartog, Esquire
Assistant County Attorney
Jackson Memorial Hospital
West Wing 109
1611 Northwest 12th Avenue
Miami, Florida 33136

Robert A. Weiss, Esquire
Karen A. Putnal, Esquire
Parker, Hudson, Rainer & Dobbs LLP
118 North Gadsden Street, 2nd Floor
Tallahassee, Florida 32301

Richard A. Patterson, Esquire
Agency for Health Care
Administration
2727 Mahan Drive, Building 3
Tallahassee, Florida 32308

Sam Power, Agency Clerk
Agency for Health Care
Administration
2727 Mahan Drive
Fort Knox Building 3
Suite 3431
Tallahassee, Florida 32308

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.