STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

RENDITION NO._____
CON NO. 9757

SELECT SPECIALTY HOSPITAL – MARION, INC.,

Petitioner,

v.

DOAH CASE NO. 04-3150CON
AHCA NO. 2004006629

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.

_____/

FINAL ORDER

This case was referred to the Division of Administrative Hearings (DOAH) where the assigned Administrative Law Judge (ALJ), Charles A. Stampelos, conducted a formal administrative hearing. At issue in this proceeding is whether Select Specialty Hospital – Marion, Inc.'s ("Select – Marion") Certificate of Need ("CON") Application No. 9757 for the establishment of a 44-bed free standing Long-Term Care Hospital (LTCH) in Polk County, AHCA Health Care Planning District 6, should be approved. The Recommended Order dated July 11, 2006, is incorporated herein by reference, except where noted infra.

RULINGS ON EXCEPTIONS

Select – Marion filed exceptions to which the Agency did not file a response. The Agency did not file any exceptions.

In Exception 1, Select – Marion took exception to the findings of fact in Paragraph 24 of the Recommended Order, arguing that there was no record evidence to support the ALJ's finding in Endnote 6 that "[t]he Agency uses a two-hour travel time standard within the service district (here District 6) for LTCHs." According to Select – Marion, the Agency does not have such a standard, and, at best, agrees that a drive time of two hours is a reasonable time to access LTCH services. Select – Marion's argument is correct. As the Agency has stated previously, it has not adopted any standards for geographic accessibility. See University Community Hospital, Inc. v. State of Florida, Agency for Health Care Administration, et.al., 28 FALR 1740, 1744 (AHCA 2006). However, the ALJ's use of the word "standard" in Endnote 6 does not mean that it is official Agency policy. Indeed, the Agency's witness, Jeffrey Gregg, used the same term during his testimony at hearing. See Transcript, Volume III, Page 372, wherein Mr. Gregg stated "districts have two-hour travel time standards." The use of the term in this instance meant that the Agency used it as a model or example, not that it was an official Agency policy. Since the findings of fact in Endnote 6 of the Recommended Order are based on competent, substantial evidence, the Agency cannot disturb them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz v. Department of Bus. Regulation, 475 So.2d 1277, 1281 (Fla. 1985) (holding that an agency "may not reject the hearing officer's finding [of fact] unless there is no competent, substantial evidence from which the finding could reasonably be inferred"). Therefore, Select – Marion's Exception 1 is denied.

In Exception 2, Select – Marion took exception to the finding of fact in Paragraph 34 of the Recommended Order, arguing that the finding should be modified to reflect that the four methodologies listed were utilized by Select – Marion to access need on a district level, county level, and for Select – Marion's determined service area (Polk County). However, the finding of

fact in Paragraph 34 of the Recommended Order was based on competent, substantial evidence. See Transcript, Volume II, Pages 138-156; Select – Marion Composite Exhibit 6, Pages 9-14. Thus, the Agency cannot disturb it. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Furthermore, Select – Marion's suggested modification is already incorporated in Paragraph 33 of the Recommended Order. Therefore, Select – Marion's Exception 2 is denied.

In Exception 3, Select – Marion took exception to the findings of fact in Paragraph 44 of the Recommended Order, arguing that the ALJ's finding that Select – Marion's net bed need projections for District 6 and Hillsborough County were overstated was not supported by any record evidence. However, the ALJ's finding was a reasonable inference based on competent, substantial evidence. See Transcript, Volume III, Pages 351-353. Thus, the Agency cannot disturb the ALJ's findings. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, Select – Marion's Exception 3 is denied.

In Exception 4, Select – Marion took exception to the findings of fact in Paragraph 50 of the Recommended Order, arguing that the findings of fact were not supported by competent, substantial evidence and contradicted the findings of fact in Paragraphs 46 and 47 of the Recommended Order. However, the findings of fact in Paragraph 50 of the Recommended Order were reasonable inferences based on competent, substantial evidence. See Transcript, Volume II, Pages 175, 217-220, 224; and Transcript, Volume III, Pages 361-362. Thus, the Agency cannot disturb them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, Select – Marion's Exception 4 is denied.

In Exception 5, Select – Marion took exception to the findings of fact in Paragraph 51 of the Recommended Order, arguing that adverse impact was not an issue in this case and that these findings should therefore be stricken. Select – Marion also argued that the findings of fact were

not based on any competent, substantial evidence. First, the findings in Paragraph 51 of the Recommended Order do not deal with any adverse impact Select – Marion's proposed LTCH would have on existing facilities. Rather, the findings indicate that there is not a need for a new LTCH in District 6. Second, contrary to Select – Marion's assertion, the findings of fact in Paragraph 51 of the Recommended Order were based on competent, substantial evidence. See Transcript, Volume III, Pages 374-375. Thus, the Agency cannot disturb them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, Select – Marion's Exception 5 is denied.

In Exception 6, Select – Marion took exception to the findings of fact in Paragraph 60 of the Recommended Order, arguing that the findings were not based on competent, substantial evidence. However, the findings of fact in Paragraph 60 of the Recommended Order were based on competent, substantial evidence. See Transcript, Volume II, Pages 195-196 and 223; and Transcript, Volume III, Pages 370-373, 391-392 and 404-407. Thus, the Agency cannot disturb the ALJ's findings. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, Select – Marion's Exception 6 is denied.

In Exception 7, Select – Marion took exception to the finding of fact in Paragraph 62 of the Recommended Order, arguing that it was not supported by any underlying factual evidence. However, contrary to Select – Marion's argument, the ALJ's finding in Paragraph 62 of the Recommended Order was a reasonable inference based on competent, substantial evidence. See Transcript, Volume III, Pages 351-354; and AHCA Exhibit 4. Thus, the Agency cannot disturb the ALJ's finding. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, Select – Marion's Exception 7 is denied.

In Exception 8, Select – Marion took exception to the conclusions of law in Paragraph 75 of the Recommended Order, arguing that it must be replaced with a conclusion of law that

supports the administrative code that allows for applicants to substantiate need on a subdistrict level. Section 120.57(1)(*l*), Florida Statutes, limits the Agency's ability to reject a conclusion of law. It states that

> The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified.

The ALJ's conclusions of law in Paragraph 75 are in line with prior agency precedent. See, e.g., Select Specialty Hospital – Palm Beach v. Agency for Health Care Administration, 27 FALR 2928, 2942 (AHCA 2005). Thus, the Agency finds that, while it does have substantive jurisdiction over the conclusions of law in Paragraph 75 of the Recommended Order, it could not substitute conclusions of law as or more reasonable than those of the ALJ. Therefore, Select – Marion's Exception 8 is denied.

In Exception 9, Select – Marion took exception to the conclusion of law in Paragraph 76 of the Recommended Order, arguing that it was not supported by competent, substantial evidence. However, Select – Marion's Exception 9 is based on its Exception 7, which was denied. Therefore, based upon the ruling on Select – Marion's Exception 7 supra, Select – Marion's Exception 9 is also denied.

In Exception 10, Select – Marion took exception to the conclusion of law in Paragraph 77 of the Recommended Order, arguing that it was not supported by any competent, substantial evidence. Select – Marion's Exception 10 is based on its Exception 6, which was denied.

Therefore, based upon the ruling on Select – Marion's Exception 6 supra, Select – Marion's Exception 10 is also denied.

In Exception 11, Select – Marion took exception to the conclusion of law in Paragraph 78 of the Recommended Order. However, Select – Marion's Exception 11 is based on its Exceptions 1-10, which were all denied. Therefore, based upon the rulings on Select – Marion's Exceptions 1-10 supra, Select – Marion's Exception 11 is also denied.

FINDINGS OF FACT

The Agency hereby adopts the findings of fact set forth in the Recommended Order.

CONCLUSIONS OF LAW

The Agency adopts the conclusions of law set forth in the Recommended Order.

ORDER

Based upon the foregoing, Select - Marion's CON application no. 9757 is denied.

DONE and **ORDERED** this 13th day of September, 2006, in Tallahassee, Florida.

Christa Calamas

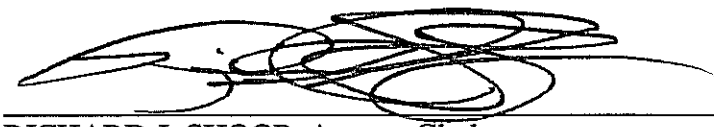
CHRISTA CALAMAS, SECRETARY
AGENCY FOR HEALTH CARE ADMINISTRATION

NOTICE OF RIGHT TO JUDICIAL REVIEW

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 THE 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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been furnished by U.S. Mail, or by the method indicated, to the persons named below on this 26th day of September, 2006.



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