STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ORLANDO HEALTH CENTRAL, INC.,

Petitioner,

vs. Case No. 17-1976RX

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent,

and

ADVENTIST HEALTH SYSTEM/SUNBELT, INC., d/b/a FLORIDA HOSPITAL; AND CENTRAL FLORIDA HEALTH SERVICES, LLC,

Intervenors.
_____/

SUMMARY FINAL ORDER

This case was considered by Yolonda Y. Green, a duly-designated Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("Division") on Petitioner, Respondent, and Intervenors' respective Motions for Summary Final Order regarding the original Petition for Determination of Invalidity of Existing Rule, pursuant to section 120.57(1)(h), Florida Statutes (2016).[1/] Oral argument on the parties' motions for summary final order was held on May 3, 2017, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Karen Ann Putnal, Esquire
John C. Moyle, Esquire
Moyle Law Firm, P.A.
118 North Gadsden Street
Tallahassee, Florida 32301

For Respondent: Richard Joseph Saliba, Esquire
Agency for Health Care Administration
Fort Knox Building III, Mail Stop 3
2727 Mahan Drive
Tallahassee, Florida 32308

For Intervenor Adventist Health System/Sunbelt, Inc., d/b/a Florida Hospital:

Stephen K. Boone, Esquire
Boone, Boone, Boone, and Koda, P.A.
1001 Avenida Del Circo
Post Office Box 1596
Venice, Florida 34284

For Intervenor Central Florida Health Services, LLC:

Stephen A. Ecenia, Esquire
Jennifer F. Hinson, Esquire
Craig D. Miller, Esquire
Rutledge, Ecenia, & Purnell, P.A.
Suite 202
119 South Monroe Street
Tallahassee, Florida 32302-0551

STATEMENT OF THE ISSUES

1. Whether Florida Administrative Code Rule 59C-1.012(2)(a) is an invalid exercise of delegated legislative authority in violation of section 120.52(8) because the rule exceeds the Agency for Health Care Administration's ("AHCA") grant of rulemaking authority;

2. Whether rule 59C-1.012(2)(a) is an invalid exercise of delegated legislative authority under section 120.52(8), because the rule enlarges, modifies, or contravenes the law purported to be implemented; and

3. Whether section 408.0455, Florida Statutes, prevents a determination that rule 59C-1.012(2)(a) is invalid.

PRELIMINARY STATEMENT

On March 30, 2017, Petitioner, Orlando Health Central, Inc. ("Orlando Health"), filed a Petition to Determine Invalidity of Existing Rule with AHCA. Orlando Health challenges rule 59C-1.012(2)(a), which governs administrative procedures related to certificates of need, more specifically, the time frame for a granted applicant to request a comparative hearing, as an invalid exercise of delegated legislative authority.

On April 3, 2017, the petition was referred to the Division and was assigned to the undersigned to conduct the proceedings in this matter. On April 5, 2017, Adventist Health System/Sunbelt, Inc., d/b/a Florida Hospital ("Florida Hospital"), and Central Florida Health Services, LLC ("CFHS") filed petitions to intervene in this proceeding. On April 5, 2017, the undersigned granted both petitions for intervention. On April 6, 2017, the undersigned conducted a scheduling hearing

with all parties represented by counsel and issued a Notice of Hearing scheduling the final hearing for May 3, 2017, in Tallahassee, Florida.

On April 12, 2017, the parties filed a Joint Motion to Set Briefing Schedule and Joint Stipulated Preliminary Statement and Facts, asserting that there were no genuine disputed issues of material fact. The stipulated facts, to the extent relevant, are incorporated in the Findings of Fact below.

The parties stipulated to an oral argument rather than a full evidentiary hearing. On May 3, 2017, the oral argument convened as scheduled. The parties did not present any witnesses. Pursuant to the joint stipulation, the parties offered Joint Exhibits A through K, which were admitted.

The parties agreed that proposed final orders were not necessary. The parties ordered a transcript of the proceeding. The one-volume Transcript was filed on May 4, 2017.

FINDINGS OF FACT

1. Respondent, AHCA, is the state agency responsible for administering the Certificate of Need ("CON") laws and rules as codified at sections 408.031 through 408.045, and chapter 59C-1.

2. The CON program is the method AHCA uses to determine whether there is a community need for regulated health care facilities as a prerequisite for licensure and operation in Florida.

3. Petitioner, Orlando Health, holds the license for Health Central Hospital, a not-for-profit, full-service, Class I general hospital located in Ocoee, Orange County, Florida.

4. Intervenor, Florida Hospital, is a not-for-profit, full-service, Class I general hospital with seven campuses located throughout the greater Orlando area and various outpatient locations, including a free-standing emergency department and outpatient facility located in Winter Garden, Florida.

5. Intervenor, CFHS, is a developmental stage entity affiliated with Hospital Corporation of America, North Florida Division.

6. On or about September 7, 2016, Florida Hospital submitted CON Application No. 10450 to establish a new hospital in Orange County, Florida, State Health Services Planning District 7, Acute Care Subdistrict 7-2.

7. On or about September 7, 2016, CFHS submitted CON Application No. 10451 to establish a new hospital in Orange County, Florida, State Health Services Planning District 7, Acute Care Subdistrict 7-2.

8. On September 7, 2016, Orlando Health submitted CON Application No. 10454 to establish a new hospital in Orange County, Florida, State Health Services Planning District 7, Acute Care Subdistrict 7-2.

9. Under section 408.039(1), all three CON applications, i.e., the Orlando Health, Florida Hospital, and CFHS CON applications, were comparatively reviewed by AHCA as a part of the August 2016 co-batching cycle.

10. On December 2, 2016, AHCA issued its State Agency Action Report ("SAAR") and Notice of Intent to simultaneously approve: 1) Florida Hospital's CON Application No. 10450; 2) CFHS' CON Application No. 10451; and 3) Orlando Health's CON Application No. 10454.

Challenged Rule

11. Rule 59C-1.012, the challenged rule, states in paragraph (a) of subsection (2):

> If a valid request for administrative hearing is timely filed challenging the noticed intended award of any certificate of need application in the batch, that challenged granted applicant shall have ten days from the date the notice of litigation is published in the Florida Administrative Weekly to file a petition challenging any or all other cobatched applications.

12. Rule 59C-1.012 is entitled "Administrative Hearing Procedures." It is one of two chapters of AHCA rules in Volume 59C of the Florida Administrative Code that appear under the caption, "CERTIFICATE OF NEED." The first chapter, 59C-1, which includes the challenged rule, is entitled: "Procedures for the Administration of Sections 408.031 -- 408.045, Florida Statutes, Health Facility and Services Development Act."

13. The purpose of rule 59C-2.012(2)(a) is to provide the process for a party to exercise its right to a comparative review. Thus, it is commonly known as the "comparative review rule."

14. Rule 59C-1.012 was originally adopted on January 1, 1977, as Florida Administrative Code Rule 10-5.12, and was amended four times including: September 1, 1978; June 4, 1979; October 24, 1979; and April 24, 1980.

15. Rule 10-5.12 was amended and renumbered as rule 10-5.012, on November 24, 1986.

16. Rule 10-5.012 was amended on November 17, 1987. The rule was amended and renumbered as rule 59C-1.012, on November 24, 1992. The challenged rule 59C-1.012(2)(a) was adopted as part of the November 24, 1992, amendments to rule 10-5.012.

17. Although parts of rule 59C-1.012 were amended on April 21, 2010, the language of rule 59C-1.012(2)(a) has not been amended since its inclusion in rule 59C-1.012, on November 24, 1992.

18. "Rulemaking Authority" for rule 59C-1.012 is listed as sections 408.15(8) and 408.34(8). "Law Implemented" for the challenged rule is listed as section 408.039(5).

Substantial Interests

19. Orlando Health is substantially affected by rule 59C-1.012(2)(a), and has standing to seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.

20. Specifically as it relates to Orlando Health, Florida Hospital seeks to prevent issuance of Orlando Health's CON No. 10454 and to contest Orlando Health's entitlement to issuance of its CON. Orlando Health's substantial interests are affected by the delay in issuance of its CON.

21. Intervenors Florida Hospital and CFHS (collectively "Intervenors") are substantially affected by the implementation of rule 59C-1.012(2)(a), and have standing to intervene in this rule challenge proceeding.

22. Florida Hospital's substantial interests are affected by rule 59C-1.012(2)(a) in that, if rule 59C-1.012(2)(a) is determined to be invalid, then Florida Hospital's challenge to Orlando Health's CON may also be determined to be invalid. Florida Hospital is an existing provider in the same district and subdistrict as that applied for by Orlando Health. Thus, without the rule in effect, Florida Hospital would be faced with potentially harmful competition with no meaningful avenue of redress. Finally, Florida Hospital was also a competing,

cobatched applicant in the same batching cycle for the same service in the same service area as that applied for by Orlando Health.

23. Regarding CFHS's substantial interests affected by rule 59C-1.012(2)(a), if rule 59C-1.012(2)(a) is determined to be invalid, Florida Hospital will likely use that ruling as a basis for seeking dismissal of CFHS's petition contesting AHCA's approval of Florida Hospital's CON application. CFHS was also a competing cobatched applicant, and thus, without the rule in effect, CFHS would also be faced with potentially harmful competition with no meaningful avenue of redress.

24. On December 5, 2016, AHCA's Notice of Intent was published in the Florida Administrative Register.

25. Florida Hospital timely filed, within the 21-day period established by section 408.039(5)(a), a request for hearing to contest AHCA's intended approval of CFHS' CON application.

26. Orlando Health timely filed, within the 21-day period established by section 408.039(5)(a), a request for an administrative hearing to contest AHCA's intended approval of Florida Hospital's CON application.

27. No request for an administrative hearing to contest AHCA's intended approval of Orlando Health's CON application was

filed within the 21-day period established by section 408.039(5)(a).

28. On January 5, 2017, CFHS, as a challenged granted applicant and within the 10-day period established by rule 59C-1.012(2)(a), filed a petition contesting AHCA's approval of Florida Hospital's CON Application No. 10450.

29. On January 11, 2017, Florida Hospital, as a challenged granted applicant and within the 10-day period established by rule 59C-1.012(2)(a), filed a petition challenging Orlando Health's CON Application No. 10454.

30. All parties to this stipulation have sufficient substantial interests affected that standing is established in this case and for appellate purposes.

Comparative Review/Law Implemented

31. Under the statutory scheme for administration of the CON program, a CON is required for the establishment of certain types of health care facilities (such as a hospital or nursing home), for the establishment of additional beds at an existing facility, and for the establishment of certain services.

32. Persons seeking a CON must file an application in what is known as a "batching cycle." In a "batching cycle," all applications seeking approval for the same type of facility, beds, or services undergo "comparative review" by AHCA.

Applications submitted within the same batching cycle are commonly referred to as "cobatched" applications.

33. "Comparative review" is defined as follows:

> "Comparative review" means the process by which CON applications, submitted in the same batching cycle for beds, services or programs for the same planning area, as defined by applicable rules, are competitively evaluated by the agency through final agency action for purposes of awarding a Certificate of Need.

34. AHCA proposes a decision to approve or deny a CON application and then approved and denied applicants are afforded rights to further administrative proceedings pursuant to section 408.039.

35. Specifically, section 408.039(5) contains the statutory provisions related to a request for administrative hearings regarding CON decisions:

> (a) Within 21 days after publication of notice of the State Agency Action Report and Notice of Intent, any person authorized under paragraph (c) to participate in a hearing may file a request for an administrative hearing; failure to file a request for hearing within 21 days of publication of notice shall constitute a waiver of any right to a hearing and a waiver of the right to contest the final decision of the agency. A copy of the request for hearing shall be served on the applicant.

36. The right to a comparative hearing related to CONs is set forth in paragraph (c), which states:

> (c) In administrative proceedings challenging the issuance or denial of a

> certificate of need, only applicants considered by the agency in the same batching cycle are entitled to a comparative hearing on their applications. Existing health care facilities may initiate or intervene in an administrative hearing upon a showing that an established program will be substantially affected by the issuance of any certificate of need, whether reviewed under s. 408.036(1) or (2), to a competing proposed facility or program within the same district.

37. Pursuant to rule 59C-1.002(10), comparative hearing is defined to mean:

> (10) "Comparative hearing" means a single hearing, conducted pursuant to s. 120.57, F.S., and s. 59C-1.012, F.A.C., held to review all pending applications in the same batching cycle and comparatively reviewed by the agency.

Comparative Review Proceedings

38. Approved applicants in a batched cycle may challenge other applicants as an approved applicant. Once a cobatched applicant has challenged an approved application, the proceedings related to the comparative hearing commence. But under the rule, if each challenge to an approval is subsequently voluntarily dismissed, the approved applicant would be severed from the batch. The severed applicant then receives a CON separately from action with regard to its cobatched applicants by final agency action. (This was the scenario with regard to Orlando Health prior to CFHS's request for a comparative hearing.) Likewise, an approved unchallenged applicant is severed from the batch and

receives the CON awarded by the SAAR by separate final agency action. These processes are not at issue in this matter, but are codified in subparagraphs (b) and (c) of section (2) of the rule.

Savings Statute

39. In 1997, the Florida Legislature recognized all of AHCA's rules, including the CON Administrative Hearings Procedure rule, declaring the rules implementing CON statutes effective and enforceable.

40. In 1997, section 408.0455 provided:

> The rules of the agency in effect on June 30, 1997 shall remain in effect and shall be enforceable by the agency with respect to ss. 408.031-408.045 until such rules are repealed or amended by the agency, ...

41. In 2004, section 408.0455 was amended to state:

> The rules of the agency in effect on June 30, 2004 shall remain in effect and shall be enforceable by the agency with respect to ss. 408.031-408.045 until such rules are repealed or amended by the agency.

Section 408.0455 has not been amended since 2004.

CONCLUSIONS OF LAW

42. The Division has jurisdiction over the parties and subject matter of this proceeding. §§ 120.56(1), (3); 120.569; and 120.57(1), Fla. Stat.

43. Petitioner initiated this proceeding pursuant to section 120.56, to challenge the validity of existing rule 59C-1.012(2)(a).

44. Pursuant to section 120.56(1)(a), "Any person substantially affected by a rule . . . may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority." For challenges to existing rules, section 120.56(3)(a) provides:

> A substantially affected person may seek an administrative determination of the invalidity of an existing rule at any time during the existence of the rule. The petitioner has a burden of proving by a preponderance of the evidence that the existing rule is an invalid exercise of delegated legislative authority as to the objections raised.

45. Thus, the basis upon which the comparative review rule may be invalidated in this proceeding is "on the ground that the rule is an invalid exercise of delegated legislative authority." § 120.56(1)(a), Fla. Stat.

46. An existing rule challenge pursuant to section 120.56 is directed to the facial validity of the challenged rule, and not to its validity as interpreted or applied in specific factual scenarios. See Fairfield Communities v. Fla. Land & Water Adj. Comm'n, 522 So. 2d 1012, 1014 (Fla. 1st DCA 1988).

47. Petitioner has the burden of proving that the challenged comparative review rule, facially, is an "invalid exercise of delegated legislative authority." § 120.56(3)(a), Fla. Stat.

48. The Petition contends that the comparative review rule is an invalid exercise of delegated legislative authority as defined in section 120.52(8)(b) and (c), and the flush-left paragraph, which provides, in pertinent part, as follows:

> A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by section 120.54(3)(a)1.;
>
> * * *
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by section 120.54(3)(a)1.;
>
> * * *
>
> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general

> legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

49. An agency may adopt rules "only where the Legislature has enacted a specific statute, and authorized the agency to implement it, and then only if the rule implements or interprets specific powers or duties[.]" State, Bd. of Trs. of the Int. Imp. Trust Fund v. Day Cruise Ass'n, 794 So. 2d 696, 700 (Fla. 1st DCA 2001). In considering an agency's statutory authority to adopt a rule, "[t]he question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific enough." SW Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc., 773 So. 2d 594, 599 (Fla. 1st DCA 2000).

50. Petitioner argues that the comparative review rule does not implement or interpret specific powers or duties granted by the enabling statute; instead, the comparative review rule: 1) exceeds AHCA's grant of rulemaking authority; and 2) enlarges, modifies, or contravenes the specific laws implemented.

Whether Rule 59C-1.012(2)(a) Exceeds AHCA's Rulemaking Authority.

51. Rule 59C-1.012(2)(a) cites sections 408.034(8) and 408.15(8) as the sources of AHCA's rulemaking authority.

52. Section 408.034(8) provides that the agency may adopt rules necessary to implement ss. 408.031-408.045.

53. Section 408.039(5) is cited as the law implemented. However, that subsection does not provide AHCA with the authority to adopt rules necessary to implement the statute.

54. Section 408.15(8) provides that in addition to other powers granted elsewhere in chapter 408, AHCA is authorized to: "Adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of this chapter."

55. Both sections 408.034(8) and 408.15(8) provide general rulemaking authority. However, as the flush-left paragraph makes clear, this general grant of rulemaking authority is, alone, insufficient to authorize the adoption of the comparative review rule.

56. The next inquiry required by the flush-left paragraph is whether the challenged rule provisions "implement or interpret the specific powers and duties granted by the enabling statute." § 120.52(8), Fla. Stat.

57. To further examine the merits of Petitioner's challenge of rule 59C-1.012(2)(a), it is necessary to examine appellate cases that have interpreted sections 120.52(8) and 120.536 in other administrative rule challenge cases. In Hennessey v. Department of Business & Professional Regulation, 818 So. 2d 697 (Fla. 1st DCA 2002), several horse trainers

challenged the "absolute insurer rule" which makes race-animal trainers the absolute insurers of the condition of the animals entered into races at Florida pari-mutuel facilities. The authorizing statutes for the rule were sections 550.0251(3) and 550.2415(2) and (13). Section 550.0251(3) required the Division of Pari-Mutuel Wagering to adopt reasonable rules for the control, supervision, and direction of all licensees, and for the holding, conducting and operating of all races. Subsections 550.2415(2) and (13) provided as follows:

> (2) Administrative action may be taken by the division against an occupational licensee responsible pursuant to rule of the division for the condition of the animal that has been impermissibly medication or drugged in violation of this section.
>
> * * *
>
> (13) The division shall adopt rules to implement this section. The rules may include a classification system for prohibited substances and a corresponding penalty schedule for violations.

58. The court held that a plain reading of the authorizing statutes demonstrates that the Legislature granted the department the specific authority to hold a trainer responsible for the condition of the horses he or she trains and races, should drugs be found in their system. Id. at 701.

59. In another case, similar to the rule in this case, Petitioner challenged a rule involving the right to challenge an

agency's decision in a proceeding. In Department of Children & Family Services v. I.B., 891 So. 2d 1168 (Fla. 1st DCA 2005), Petitioners challenged a rule providing that adoptive applicants did not have the right to appeal the Department's decision on the selection of an adoptive home for a particular child. The court affirmed the ALJ's conclusion that there were no statutes, collectively or individually, that provide to the Department the necessary specific legislative authority to exempt the selection of adoptive homes from chapter 120. Moreover, the court specifically stated that after adoption of a rule, the Department may not rely on statutory provisions not cited in the proposed rule as statutory authority. Id. at 1172.

60. Finally, in Smith v. Fla. Dep't of Corr., 920 So. 2d 638 (Fla. 1st DCA 2005), the court considered a rule of the Department of Corrections which allowed the Department to charge inmates for copying services and found it to be invalid for lack of a specific grant of authority. The following portions of the First District's decision are pertinent to the examination here:

> "[A]n administrative rule must certainly fall within the class of powers and duties delegated to the agency, but that alone will not make the rule a valid exercise of legislative power." [Save the Manatee Club] at 599. "The question is whether the statute contains a specific grant of authority for the rule, not whether the grant of authority is specific enough." Id. (emphasis in original). "Either the enabling statute authorizes the rule at

> issue or it does not." Id. In addition, under the standard set forth in section 120.52(8), the Department's arguments as to the wisdom of the challenged portions of the rule in light of past experience . . . cannot save the challenged portions of the rule in the absence of specific statutory authority for those provisions.

61. On the other hand, Respondent and CFHS argue that AHCA adopted rule 59C-1.012(2)(a) to ensure that parties have a meaningful opportunity to exercise their right to a comparative hearing, which implements section 408.039(5)(c). Respondent and CFHS also argue that the right to a comparative hearing in CON proceedings is based on due process considerations as addressed in Ashbacker Radio Corp. v. FCC, 326 U.S. 327, 66 S. Ct. 148, 90 L. Ed. 108 (1945).

62. In a rule challenge to invalidate the same rule challenged here, Southern Baptist v. Agency for Health Care Administration, DOAH Case No. 02-0575RX (Fla. DOAH April 30, 2002), appeal dismissed, No. 1D02-2146 (Fla. 1st DCA Feb. 11, 2004), the ALJ examined a CON applicant's right to a comparative hearing. The relevant portions of the Final Order are referenced below:

> 1. Section (2) of the CON Administrative Procedures Rule provides a method by which a co-batched applicant whose CON application has been approved in a proposed decision by AHCA and then challenged by another party may invoke the right to a comparative hearing.

2. The right to a comparative hearing in CON proceedings has as its source due process considerations found by the United States Supreme Court in a federal case that did not involve CONs but in a context that shared with the CON arena the need for comparative review: Ashbacker Radio Corp. v. FCC, 326 U.S. 327, 66 S. Ct. 148, 90 L.ED. 108 (1945).

3. These due process considerations have been described as follows:

The so-called Ashbacker doctrine, enunciated by the Court has been adopted in Florida. When the decision on one application will substantially prejudice other simultaneously pending applications because all applicants are competing for a franchise to serve a market that only one of them in practical effect will be given authorization to serve the applications are mutually exclusive. In this situation, any of the applicants may request a comparative hearing in which the merits of all applications will be tried together and against each other.

Section 2.32, Boyd, Overview of the Administrative Procedure Act, Florida Administrative Practice, Florida Bar, 6th Ed. (2001), p. 2-38.

4. The Ashbacker doctrine has been applied by Florida Courts to CON proceedings involving cobatched applicants. See Bio-Medical Applications of Clearwater, Inc. v. Dept. of Health & Rehabilitative Services, 370 So. 2d 19 (Fla. 2d DCA 1979); Bio-Medical Applications of Ocala, Inc. v. Dept. of Health & Rehabilitative Services, 374 So. 2d 88 (Fla. 1st DCA 1979); and South Broward Hospital District v. Dept. of Health & Rehabilitative Services, 385 So. 2d 1094 (Fla. 4th DCA 1980).

> 5. In the Second DCA's Bio-Medical decision, above, the Court found a due process right in cobatched applicants to comparative hearings involving the other cobatched applicants and recognized the flexibility of the Agency's predecessor, HRS to devise "administrative procedures [that] will be promulgated to deal with administrative problems in affording comparative hearings, if any such problems are anticipated." Bio-Medical Applications of Clearwater, Inc., above, at 25, e.s.

Southern Baptist, FO at 6-7.

63. There is no question that cobatched CON applicants are entitled to a comparative hearing. This right to a comparative hearing has been codified in section 408.039(5)(c), which states "only applicants considered by the agency in the same batching cycle are entitled to a comparative hearing on their applications."

64. Section 408.039(5)(a) states, in pertinent part, that "Within 21 days after publication of notice of the [SAAR] and Notice of Intent, any person authorized under paragraph (c) to participate in a hearing may file a request for an administrative hearing." Subsection (c) of the same statute provides, in pertinent part, "In administrative hearings challenging the issuance or denial of a certificate of need, only applicants considered by the agency in the same batching cycle are entitled to a comparative hearing on their applications."

65. The plain language of the statutes established a 21-day time frame in which applicants who have been issued or denied a CON are authorized to participate in the hearing. That entitlement is not determined by whether there is a challenge to the applicant. To the contrary, an applicant may request a hearing anytime within the 21 days after the triggering event, i.e., in this instance, issuance of the CON. While a party may decide that it is not necessary to seek a hearing until there is a challenge to its CON, the time frame established for the party to exercise and preserve the right to a comparative hearing is within the 21-day period provided in section 408.039(5)(a).

66. In the instant case, the Legislature did not provide AHCA rulemaking authority to develop a separate 10-day time frame beyond the 21 days allowed by statute, for a "granted applicant" to request a comparative hearing. Therefore, AHCA appears to have exceeded its rulemaking authority in developing rule 59C-1.012(2)(a) in violation of section 120.52(8)(b).

Whether Rule 59C-1.012(2)(a) Enlarges, Modifies, or Contravenes the Law Implemented.

67. Section 408.039(5) is identified as the law implemented by the rule. That section provides, in pertinent part, that:

> (a) Within 21 days after publication of notice of the State Agency Action Report and Notice of Intent, any person authorized under paragraph (c) to participate in a

hearing may file a request for an administrative hearing; failure to file a request for hearing within 21 days of publication of notice shall constitute a waiver of any right to a hearing and a waiver of the right to contest the final decision of the agency. A copy of the request for hearing shall be served on the applicant.

(b) Hearings shall be held in Tallahassee unless the administrative law judge determines that changing the location will facilitate the proceedings. The agency shall assign proceedings requiring hearings to the Division of Administrative Hearings of the Department of Management Services within 10 days after the time has expired for requesting a hearing . . . .

(c) In administrative proceedings challenging the issuance or denial of a certificate of need, only applicants considered by the agency in the same batching cycle are entitled to a comparative hearing on their applications. Existing health care facilities may initiate or intervene in an administrative hearing upon a showing that an established program will be substantially affected by the issuance of any certificate of need, whether reviewed under s. 408.036(1) or (2), to a competing proposed facility or program within the same district. With respect to an application for a general hospital, competing applicants and only those existing hospitals that submitted a detailed written statement of opposition to an application as provided in this paragraph may initiate or intervene in an administrative hearing. Such challenges to a general hospital application shall be limited in scope to the issues raised in the detailed written statement of opposition that was provided to the agency. The administrative law judge may, upon a motion showing good cause, expand the scope of the issues to be heard at the hearing. Such

> motion shall include substantial and detailed facts and reasons for failure to include such issues in the original written statement of opposition.

68. Petitioner also argues that rule 59C-1.012(2)(a) is an invalid exercise of delegated legislative authority because it modifies, enlarges, or contravenes AHCA's statutory authority. In support of this argument, Petitioner asserts that the rule adds 10 or more days to the 21-day period for CON applicants to request a comparative hearing. Petitioner's argument rests on a comparison of the time period established in the statute compared to the language of rule 59C-1.012(2)(a).

69. Under the explicit terms of the rule, a "granted applicant" may file a petition seeking a comparative hearing within 10 days of the filing of the notice of litigation, despite the statutory 21 days for an applicant who has been issued (or denied) a CON to request a hearing. It is clear that rule 59C-1.012(2)(a) extends the time frame to request a comparative hearing beyond the time frame provided by section 408.039(5)(a) and thus, enlarges, modifies, and contravenes the time period for which a granted (approved) applicant may request a comparative hearing.

70. Respondent and CFHS argue that the 10-day time frame is simply a separate time period which does not extend the time period to file a petition. Accepting, Respondent and CFHS'

argument as true, the rule creates a different 10-day time period separate from the 21-day period established by section 408.039(5)(a), which also exceeds AHCA's rule making authority. Thus, this argument is rejected.

71. Furthermore, comparing the rule and statute closely, section 408.039(5)(a) and (c) require that an applicant who has been issued a CON request a hearing within 21 days. By contrast, rule 59C-1.012 allows the approved applicant 10 days "from the notice of litigation" to file a petition if challenged. It thus allows a granted applicant a different time frame to request a comparative hearing.

72. The different time frame whether characterized as "additional time" or "separate timeframe" enlarges the specific provisions of law implemented, in violation of section 120.52(8)(c). While there are logistical concerns regarding a granted applicant's request for a comparative review hearing, there is no statutory authority for an agency such as AHCA to create rulemaking authority where none exists. For this reason and those referenced above, rule 59C-1.012(2)(a) appears to have exceeded AHCA's legislative authority in violation of section 120.52(8)(b).[2/]

Whether Section 408.0455 Precludes a Determination that Rule 59C-1.012(2)(a) is Invalid.

73. Respondent and CFHS argue that section 408.0455 ("savings statute") precludes a determination that rule 59C-1.012(2)(a) is invalid. Respondent and CFHS assert that the 10-day time frame set forth in rule 59C-1.012(2)(a) has not been amended or repealed by AHCA at any time since 1992, meaning it was in effect at the time the savings statute was enacted in 1997.

74. Section 408.0455, Florida Statutes (1997), provided:

> The rules of the agency in effect on June 30, 1997 shall remain in effect and shall be enforceable by the agency with respect to ss. 408.031-408.045 until such rules are repealed or amended by the agency, ...

75. In Southern Baptist, the ALJ considered the impact of section 408.0455 on rule 59C-1.012(2)(a). Southern Baptist clearly indicated that rule 59C-1.012(2)(a) is a mechanism to effectuate the Ashbacker doctrine's comparative review principle, applied to the CON proceedings in Bio-Medical.

76. In his conclusions of law, in Southern Baptist addressing contravention of statutory authority, the ALJ stated:

> 66. Baptist maintains that the [r]ule modifies, enlarges or contravenes statutory authority and so is an invalid exercise of delegated legislative authority. Whatever value its argument might have had prior to July 1, 1997, the effective date of [s]ection 408.0455, Florida Statutes (the "Savings

> Statute"), the argument loses all validity with the passage of the Savings Statute. Through its recognition of the rules of AHCA in effect on June 30, 1997 and its declaration that they "shall remain in effect and shall be enforceable by the agency with respect to [CON law] until such rules are repealed or amended by the agency . . . ," Section 120.4055, Florida Statutes, the Legislature, in essence, ratified, validated and declared saved the Rule and its Section (2) as of July 1, 1997.

77. As further observed in Southern Baptist:

> 91. A determination that section 408.0455,Florida Statutes [1997], did not save [the challenged rule] from the legislative repeal worked by section 120.54(5) produces the undesirable consequence of the loss of a sensible method for invoking the constitutional and statutorily-recognized right to comparative review.

78. After Southern Baptist, section 408.0455 was amended in 2004 to provide:

> The rules of the agency in effect on June 30, 2004, shall remain in effect and shall be enforceable by the agency with respect to ss. 408.031-408.045 until such rules are repealed or amended by the agency.

79. A recent administrative case involved Petitioner's challenge of a CON rule that is subject to section 408.0455. In The Hospice of the Florida Suncoast, Inc., d/b/a Suncoast Hospice v. Agency for Health Care Administration, Case No. 15-3656RX (Fla. DOAH Sept. 28, 2015), aff'd, 1D15-4847 (Fla. 1st DCA 2016), the ALJ considered the Fixed-Need-Pool

("FNP") rule which allows 10 days to file a petition for hearing following determination of a number for the pool. The ALJ concluded, among other things, that under section 408.0455, the substantively unchanged FNP rule provisions in effect on July 1, 2004 (the amendment effective date), remain valid and enforceable.

80. The legislative acknowledgement that AHCA's CON rules in effect in 1997 and in 2004 were valid and enforceable until the agency acted to amend or repeal them necessarily means that to the extent rule language is not amended by the agency, it remains valid and enforceable.

81. Petitioner argues that the savings statute does not preempt a challenge regarding the rule's invalidity. However, as Respondent and CFHS contend, when a statute mandates that existing rules remain in effect and are enforceable, the effect of the statutory mandate is irrefutable. Manatee Hosps. & Health Sys, Inc., d/b/a Manatee Mem'l Hosp. v. AHCA, Case No. 93-7094RX (Fla. DOAH Feb. 21, 1994). The savings statute in Manatee Hospitals was the original version of section 408.0455 and is substantially identical to the amended version of the savings statute under consideration here. It provided that the rules cited therein "shall remain in effect and shall be enforceable by the Agency for Health Care Administration." Id. at 4. As indicated in Manatee Hospitals, when the Legislature

reenacts a law, it is presumed to know and approve of prior administrative construction and interpretation of that law. Szabo Food Servs., Inc. of N.C. v. Dickinson, 286 So. 2d 529 (Fla. 1973); Cole Vision Corp. v. Dep't of Bus. and Prof'l Reg., Bd. of Optometry, 688 So. 2d 404 (Fla. 1st DCA 1997). Most relevant here, the ALJ in Manatee Hospitals, stated "the legislature is presumed to have authorized and adopted the agency's administrative interpretation of applicable statutes through rulemaking pertaining to Rules . . . ." Id.

82. Since rule 59C-1.012(2)(a) was in effect on June 30, 2004, pursuant to section 408.0455, it must remain in effect and enforceable by the agency until the rule is repealed or amended. See also NME Hosps., Inc., d/b/a Seven Rivers Comm. Hosp. v. Dep't of Health & Rehab. Servs., Case No. 90-1869RX (Fla. DOAH July 18, 1990)(finding administrative rules valid based, in part, on the existence of the rules prior to passage of a savings statute).

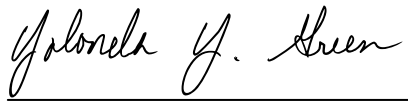
83. Since 1992, the Legislature has amended section 408.0455 twice, each time codifying the effect and enforceability of the rule. In reenacting the savings statute, the Legislature authorized and adopted AHCA's administrative interpretation of the applicable statutes.

84. Based on the foregoing, the Legislature declared that the CON rules in effect on July 1, 1997, and as amended on June 30, 2004, including the comparative review rule, shall remain in effect and are enforceable until amended or repealed by AHCA. § 408.0455, Fla. Stat.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition to Determine Invalidity of Existing Rule 59C-1.012(2)(a) is hereby Dismissed.

DONE AND ORDERED this 9th day of June, 2017, in Tallahassee, Leon County, Florida.



YOLONDA Y. GREEN
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of June, 2017.

ENDNOTES

[1/] Unless otherwise indicated, all statutory references are to Florida Statutes (2016).

[2/] It should be noted that the ability of the approved applicant to participate in a proceeding is not dependent on the rule, as section 408.039(5)(c) provides specific rights of participation in a proceeding affecting their interests, subject to conditions established by the Legislature.

COPIES FURNISHED:

Karen Ann Putnal, Esquire
Moyle Law Firm, P.A.
118 North Gadsden Street
Tallahassee, Florida 32301
(eServed)

Richard Joseph Saliba, Esquire
Agency for Health Care Administration
Fort Knox Building III, Mail Stop 3
2727 Mahan Drive
Tallahassee, Florida 32308
(eServed)

Stephen K. Boone, Esquire
Boone, Boone, Boone, and Koda, P.A.
1001 Avenida Del Circo
Post Office Box 1596
Venice, Florida 34284
(eServed)

Jon C. Moyle, Esquire
Moyle Law Firm, P.A.
118 North Gadsden Street
Tallahassee, Florida 32301
(eServed)

Stephen A. Ecenia, Esquire
Rutledge, Ecenia, & Purnell, P.A.
Suite 202
119 South Monroe Street
Tallahassee, Florida 32302-0551
(eServed)

Jennifer F. Hinson, Esquire
Rutledge, Ecenia, & Purnell, P.A.
Suite 202
119 South Monroe Street
Tallahassee, Florida 32302-0551
(eServed)

Craig D. Miller, Esquire
Rutledge, Ecenia, & Purnell, P.A.
Suite 202
119 South Monroe Street
Tallahassee, Florida 32302-0551
(eServed)

Justin Senior, Secretary
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 1
Tallahassee, Florida 32308
(eServed)

Stuart Williams, General Counsel
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308
(eServed)

Ernest Reddick, Chief
Anya Grosenbaugh
Department of State
R. A. Gray Building
500 South Bronough Street
Tallahassee, Florida 32399-0250
(eServed)

Ken Plante, Coordinator
Joint Administrative Procedures Committee
Room 680, Pepper Building
111 West Madison Street
Tallahassee, Florida 32399-1400
(eServed)

Shena L. Grantham, Esquire
Agency for Health Care Administration
Mail Stop 3
2727 Mahan Drive
Tallahassee, Florida 32308
(eServed)

Thomas M. Hoeler, Esquire
Agency for Health Care Administration
Mail Stop 3
2727 Mahan Drive
Tallahassee, Florida 32308
(eServed)

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 the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.