STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

MARION COMMUNITY HOSPITAL, INC.
d/b/a WEST MARION COMMUNITY
HOSPITAL AND OCALA REGIONAL
MEDICAL CENTER,

Petitioners,

v.

STATE OF FLORIDA, AGENCY FOR
HEALTH CARE ADMINISTRATION and
FLORIDA HOSPITAL WATERMAN, INC.
d/b/a FLORIDA HOSPITAL WATERMAN,

Respondents.
_____/

CASE NOS. 18-0068CON
18-0075CON
AHCA NOS. 2017015684
2017015873
RENDITION NO.: AHCA-19 -0227 -FOI-CON

FINAL ORDER

This case was referred to the Division of Administrative Hearings (DOAH) where the assigned Administrative Law Judge (ALJ), John D. C. Newton II, conducted a formal administrative hearing. At issue in this proceeding is whether the Agency for Health Care Administration ("AHCA" or "Agency") should approve the Certificate of Need ("CON") Application No. 10499 filed by Marion Community Hospital, Inc. ("Marion Community") to add 12 comprehensive medical rehabilitation ("CMR") beds to its facility; and whether the Agency should approve CON Application No. 10496 filed by Florida Hospital Waterman, Inc. ("Waterman") to add 12 CMR beds to its facility. The Recommended Order entered on February 6, 2019 is attached to this final order and incorporated herein by reference.

RULINGS ON EXCEPTIONS

Both Marion Community and the Agency filed exceptions to the Recommended Order, and responses to each other's exceptions.

In determining how to rule upon Marion Community and the Agency's exceptions and whether to adopt the ALJ's Recommended Order in whole or in part, the Agency must follow Section 120.57(1)(*l*), Florida Statutes, which provides in pertinent part:

> The agency may adopt the recommended order as the final order of the agency. 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. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. . . .

§ 120.57(1)(*l*), Fla. Stat. Additionally, "[t]he final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." § 120.57(1)(k), Fla. Stat. In accordance with these legal standards, the Agency makes the following rulings on Marion Community and the Agency's exceptions:

Marion Community's Exceptions

In Exception 1, Marion Community takes exception to the last sentence of Paragraph 42 of the Recommended Order, arguing the finding contained therein is not based on competent, substantial evidence. The findings of fact in Paragraph 42 of the Recommended Order are all based on competent, substantial record evidence. See Transcript, Volume 3, Pages 348-349; Transcript, Volume 4, Pages 520-523, 548; Transcript, Volume 5, Pages 679-686; AHCA

Exhibit 1; Florida Hospital Waterman Exhibit 1. Thus, the Agency is not at liberty to reject or modify them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz v. Department of Business Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 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, the Agency denies Exception 1.

In Exception 2, Marion Community takes exception to Paragraph 53 of the Recommended Order, arguing the ALJ did not balance this criteria in the Recommended Order. However, Marion Community's argument does not constitute a valid basis for the Agency to reject or modify the findings of fact in Paragraph 53 of the Recommended Order. Since the findings of fact in Paragraph 53 of the Recommended Order are based on competent, substantial record evidence (See Transcript, Volume 5, Pages 601-604), the Agency denies Exception 2. See § 120.57(1)(l), Fla. Stat.; Heifetz, 475 So. 2d at 1281.

In Exception 3, Marion Community takes exception to Paragraphs 112-115 of the Recommended Order, arguing the paragraphs are unnecessary and that the ALJ did not conduct an appropriate balancing of the relative merits of the applications based upon all applicable criteria. The Agency disagrees. The Agency finds that the ALJ's conclusions of law in these paragraphs are reasonable.[1] Therefore, the Agency denies Exception 3.

Agency's Exceptions

In its First Exception, the Agency takes exception to Paragraphs 51, 52, 113, 124 and 125 of the Recommended Order, arguing the ALJ's interpretation of rules 59C-1.008 and 59C-1.039, Florida Administrative Code, are erroneous. Specifically, the Agency argues the ALJ erred by approving more beds than the Fixed Need Pool concluded were needed. The Agency's argument

[1] The Agency further addresses the conclusions of law in Paragraph 113 of the Recommended Order in its ruling on the Agency's First Exception infra.

is in direct opposition to the holding in Balsam v. Department of Health and Rehabilitative Services, 486 So. 2d 1341, (Fla. 1st DCA 1986), where the court held:

> The bed-need formula is part of a rule having general statewide application and should be viewed merely as the beginning point for determining need. The formula is so broad in scope that it cannot be treated as taking into consideration all the peculiar conditions found in a particular area sought to be served by the applicant. While the bed-need formula shifts the burden from HRS to the applicant to show a need where none is shown by calculations under the formula, HRS should not simply stand on these calculations and abandon its responsibility to consider and weigh the other criteria.

It would be impermissible for the Agency to conclusively presume that it can only approve the exact number of beds determined by the fixed need pool without weighing and balancing all the relevant statutory and rule criteria. See, generally, Department of Health & Rehabilitative Services v. Johnson and Johnson, 447 So. 2d 361 (Fla. 1st DCA 1984). Indeed, as the ALJ concluded, the plain language of the rules indicates that the Agency need not adhere to the fixed need pool calculation results when determining whether to grant or deny a CON application. See rules 59C-1.008(2)(d)3 and 59C-1.039(3)(d), Florida Administrative Code. Furthermore, as the ALJ pointed out in Paragraph 126 of the Recommended Order, the Agency has, in the past, approved more CMR beds than the fixed need pool calculations have shown were needed. The Agency did not offer any rational explanation of why it should not do the same in this matter. Thus, the Agency finds the conclusions of law reached by the ALJ in Paragraphs 51, 52, 113, 124 and 125 of the Recommended Order are reasonable, and that it cannot substitute conclusions of law that are as or more reasonable. Therefore, the Agency denies its First Exception.

In its Second Exception, the Agency takes exception to Paragraph 116 of the Recommended Order, arguing the conclusions of law in that paragraph are erroneous. Paragraph 116 of the Recommended Order is nothing more than a mere resuscitation of the Agency's legal

arguments made in its August 28, 2018 Memorandum of Law that was filed with DOAH in this matter. Therefore, the Agency denies its Second Exception.

In its Third Exception, the Agency takes exception to Paragraphs 117-127 of the Recommended Order, arguing the applicants' not normal circumstances arguments constituted impermissible amendments to their respective applications. First, the Agency's argument overlooks the ALJ's findings of fact in Paragraphs 56-66 of the Recommended Order, where the ALJ expressly found both applicants raised "not normal" circumstances in their respective applications and cited to the competent, substantial record evidence that supported these findings. Second, the Agency is essentially re-arguing its First Exception, by stating again that it cannot approve more beds than what the fixed need pool calculations arrived at. As the Agency explained in the ruling on the Agency's First Exception supra (which is hereby incorporated by reference), the Agency's argument is erroneous. Therefore, for all the reasons stated above, the Agency denies its Third Exception.

In its Fourth Exception, the Agency takes exception to Paragraphs 123-126 of the Recommended Order, arguing they set forth an erroneous legal interpretation of "not normal" circumstances. While the Agency is correct that there is a difference between "special circumstances" and "not normal" circumstances for purposes of CON law[2], the ALJ does not make any conclusions of law confusing the two terms in these paragraphs. In addition, the Agency finds that the ALJ's conclusions of law in these paragraphs are reasonable and should not be rejected or modified. Therefore, the Agency denies its Fourth Exception.

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[2] See, e.g., The Hospice of the Florida Suncoast, Inc., et. al v. Agency for Health Care Admin., 2008 WL 2259050 at *7 ("Under the hospice need methodology, "special circumstances" are distinguishable from "not normal" circumstances, in part, because the three "special circumstances" are comprised of three delineated criteria rather than generally referencing what has been characterized as "free form" need arguments. Also, "not normal"

FINDINGS OF FACT

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

CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing, both Marion Community's CON Application No. 10499 and Waterman's CON Application No. 10496 are hereby granted. The parties shall govern themselves accordingly.

DONE and **ORDERED** this 11 day of March, 2019, in Tallahassee, Florida.

MARY C. MAYHEW, 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.

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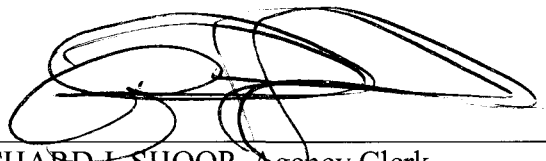
circumstances may be presented when the Agency's numeric fixed need pool calculation produces a positive numeric need.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been furnished by the method indicated to the persons named below on this 11th day of March, 2019.



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