

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable H.W. Funderburk, Jr., Administrative Law Judge

Appellate Case No. 2019-000358
Docket No. 2016-ALJ-07-0386-CC

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SC Court of Appeals

Trident Medical Center, LLC, d/b/a Trident Medical Center Respondent,

v.

South Carolina Department of Health and Environmental Control, and
Roper St. Francis Hospital – Berkeley, Inc. d/b/a Roper St. Francis
Hospital – Berkeley, Respondents below,

Of Which South Carolina Department of Health and Environmental
Control is a Respondent,

And Roper St. Francis Hospital – Berkeley, Inc., d/b/a Roper St. Francis
Hospital – Berkeley is the Appellant.

INITIAL RESPONDENT'S BRIEF

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STATEMENT OF FACTS

DHEC is the state agency charged with the administration of the *State Certificate of Need and Health Facility Licensure Act* (“CON Act”) S.C. Code Ann. §§ 44-7-110, *et seq.* The purpose of the CON Act is to promote cost containment; to prevent unnecessary duplication of health care facilities and services; to guide the establishment of health facilities and services in a way that will best serve public needs; and to ensure that high quality services are provided in health facilities throughout South Carolina. S.C. Code Ann. § 44-7-120. To achieve these purposes, the CON Act requires that a person obtain a CON from the Department prior to undertaking certain healthcare-related projects enumerated in the statute. It also requires the Department to adopt procedures and criteria for submitting and reviewing applications, and to prepare and publish the South Carolina Health Plan to be utilized in administering the CON Act. *Id.*

Pursuant to its statutory mandate, DHEC staff prepare the South Carolina Health Plan for use in the administration of the CON program, with the advice of the health planning committee. S.C. Code Ann. § 44-7-180(B). The South Carolina Health Plan is the Department’s primary health planning document and includes, among other items, projections of need and standards for distribution for additional health care facilities, beds, health services, and equipment which “have a potential to substantially impact health care cost and accessibility.” *Id.* Following an opportunity for public review and comment, and upon approval by the health planning committee, the South Carolina Health Plan is presented to the Board of Health and Environmental Control (“Board”) at least once every two years for final revision and adoption. S.C. Code Ann. § 44-7-180(C).

Appellant Roper St. Francis Hospital – Berkeley, Inc. d/b/a Roper St. Francis Hospital – Berkeley (“Roper Berkeley”) filed a Certificate of Need (“CON”) Application on May 9, 2016 (“CON Application”) to establish a catheterization laboratory and provide diagnostic cardiac

catheterization services at the Roper Berkeley Hospital (“Hospital”) which, at the time, was under construction in Berkeley County¹. The Hospital is located at Carnes Crossroads near Goose Creek in Berkeley County.

At the time Roper Berkeley submitted its CON Application, the South Carolina Health Plan enacted August 13, 2015 (“2015 Health Plan”) was in effect. The 2015 Health Plan contains standards for the provision of diagnostic catheterization services at Chapter VIII. In particular, Standard Three provides:

New diagnostic catheterization services, including mobile services, shall be approved only if all existing labs in the service area have performed a minimum of 500 diagnostic catheterization procedures per laboratory during the most recent year.

(J04-047).

At the time Roper Berkeley submitted its CON Application, the 2015 Health Plan listed the following facilities in the service area as having diagnostic cardiac catheterization laboratories: Trident Medical Center, Roper Hospital, Medical University of South Carolina, and Bon Secours St. Francis Xavier Hospital (“Bon Secours”). All the catheterization laboratories except Bon Secours were comprehensive catheterization laboratories. Joint Annual Report (“JAR”) data showed that Bon Secours did not perform any catheterization procedures in 2007, 2008, and 2009, resuming in 2010 with very low utilization. (Tr. p. 276, lines 11-21). In 2014, Bon Secours’ JAR indicated that it had performed four diagnostic catheterization procedures; its 2015 JAR showed that it had performed two catheterization procedures.

¹ The Hospital has obtained a license from DHEC and begun operating since the time Roper Berkeley filed its Notice of Appeal in this matter.

Roper Berkeley stated in its application that, if the CON Application were approved by the Department, the diagnostic catheterization laboratory at Bon Secours would be permanently closed upon staff's approval.

By decision letter dated July 25, 2016, DHEC approved the CON Application. On August 17, 2016, Bon Secours notified the Department that it permanently closed its diagnostic cardiac catheterization lab effective August 1, 2016.

Respondent Trident Medical Center, LLC, d/b/a Trident Medical Center ("Trident") notified the Department during the review of Roper Berkeley's application that it was an affected person and opposed the CON Application. Trident filed a contested case challenging the Department's decision to approve Roper Berkeley's application. Trident initially challenged many aspects of the CON Application, but decided, with consent of all parties, to withdraw many of its arguments, except for its challenge to Standard Three. The contested case hearing in this matter therefore focused on whether Roper Berkeley's CON Application satisfied Standard Three of the 2015 Health Plan.

STANDARD OF REVIEW

An appellate court may reverse or modify a final decision of the ALC if the petitioner's substantive rights have been prejudiced because the ALC's decision is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or

- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B). Substantial evidence “is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached.” *Converse Power Corp. v. S.C. Dep’t of Health & Env’tl. Control*, 350 S.C. 39, 46, 564 S.E.2d 341, 345 (Ct. App. 2002). Trident, as the party challenging the Department’s decision to approve Roper Berkeley’s CON Application, bore the burden of proof in this contested case to establish that the CON Application should be denied. *See Leventis v. S.C. Dep’t of Health & Env’tl. Control*, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct. App. 2000) (holding that the burden of proof in administrative proceedings generally rests upon the party asserting the affirmative of an issue); *see also* S.C. Code Ann. § 1-23-600(A).

ARGUMENT

THE ALC ERRED IN FAILING TO GIVE DEFERENCE TO THE DEPARTMENT’S INTERPRETATION OF STANDARD THREE OF THE 2015 HEALTH PLAN.

The primary issue in this contested case was whether Roper Berkeley’s CON Application complied with Standard Three of the 2015 Health Plan, and more specifically, whether the Department’s determination that the Bon Secours catheterization laboratory was not an “existing” laboratory for purposes of Standard Three was entitled to deference by the Administrative Law Court (“ALC”).

The South Carolina Health Plan is a Department document, developed by staff and adopted by the Board, utilized in the administration of the CON Act. S.C. Code Ann. § 44-7-180(B) and (C). Though not a statute or a regulation, courts have applied rules of statutory construction in interpreting the South Carolina Health Plan. *See Trident Med. Ctr. v. S.C. Dep’t of Health & Env’tl. Control*, 412 S.C. 341, 772 S.E.2d 177 (Ct. App. 2015). It is well established that “where an

agency is charged with administering a statute or regulation has interpreted the statute or regulation, court, including the ALC, will defer to the agency's interpretation absent compelling reasons.” *Kiawah Dev. Partners v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014). Courts must defer to an agency's interpretation unless the interpretation is “arbitrary, capricious, or manifestly contrary to the statute.” *Id.* at 34-35, 766 S.E.2d at 718 (quoting *Chevron, U.S.A, Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 844 (1984)). See also *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) (“[T]he Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation.”) (citing *Brown v. South Carolina Dep't of Health & Envtl. Control*, 348 S.C. 507, 560 S.E.2d 410 (2002)); *Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control*, 350 S.C. 39, 48, 564 S.E.2d 341, 346 (Ct. App. 2002) (“The construction of a regulation by the agency charged with executing the regulations is entitled to the most respectful consideration and should not be overruled without cogent reasons.”). The interpretation of a regulation by an agency's employee is entitled to deference if that interpretation is reasonable and consistent with the plain language of the regulation. *Murphy v. South Carolina Department of Health and Environmental Control*, 396 S.C. 633, 640-41, 723 S.E.2d 191, 195 (2012) (holding the interpretation of an undefined term by the Department's permit reviewer is entitled to deference because it was reasonable and comported with the plain language of the regulation).

In a contested case arising from a final Department decision, the ALC “shall give consideration to the provisions of Section 1-23-330 regarding the department's specialized knowledge.” S.C. Code Ann. § 44-1-60(F)(2). The Department's “experience, technical competence and specialized knowledge may be utilized in the evaluation of the evidence.” S.C. Code Ann. § 1-23-330(4).

Standard Three of the CON Standards for Diagnostic and Mobile Cardiac Catheterization

Services in the 2015 Health Plan provides:

New diagnostic catheterization services, including mobile services, shall be approved only if all existing labs in the service area have performed a minimum of 500 diagnostic catheterization procedures per laboratory during the most recent year.

(J04-047). The phrase “existing lab” is not defined in the 2015 Health Plan. The ALC concluded that the term “existing” as used in Standard Three means “in existence or operation at a current time.” (Am. Final Order p. 19). The ALC’s conclusion fails to give deference to the Department’s interpretation and is not supported by the substantial evidence in the record.

Louis Eubank, the Chief of the Bureau of Healthcare Planning and Construction at DHEC, reviewed Roper Berkeley’s CON Application and made the decision on behalf of the Department approving the application. (Tr. p. 262, lines 4-7; p. 263, lines 9-14). Mr. Eubank, who holds a Masters Degree in Social Work and Public Health from the University of South Carolina, oversees the CON Program, as well as other programs within the Department. (Tr. p. 262, lines 10-17; p. 263, lines 14-16). In his written decision approving Roper Berkeley’s CON Application, Mr. Eubank made the following finding with respect to Standard Three:

A review of relevant Joint Annual Report (JAR) data for all diagnostic catheterization labs within the 45-minute drive time service area showed that all diagnostic catheterization labs met or exceeded the 500 procedure threshold outlined in the Plan with one notable exception. The diagnostic cardiac catheterization lab located at Roper St. Francis Xavier Hospital In West Ashley performed no more than nine (9) procedures per year in any year from 2010 to 2014, according to available JAR data. The Department explained this inconsistency to the Applicant as an agent for both Roper St. Francis Hospital - Berkeley and Bon Secours St. Francis Xavier Hospital. As such an agent, the Applicant agreed to shutter Its diagnostic catheterization lab upon approval of the instant application, regardless of the timing of the new lab installation or any potential opposition to the Instant application, thus allowing the department to discount the utilization figures of the lab at the Bon Secours St. Francis Xavier location. As such, the Department concludes that other diagnostic catheterization

labs within the service area operate at such an equivalent capacity as to not preclude the addition of the diagnostic catheterization lab contemplated by the Applicant.

(J01-206 through -207). Mr. Eubank testified that he “believe[s] that the existing labs are those labs that exist[] when The Department issues the Certificate of Need for the new lab.” [Tr. P. 288, lines 13-15].

Mr. Eubank further testified that in applying Standard Three to Roper Berkeley’s CON application, he was cognizant of the under-utilized diagnostic catheterization laboratory at Bon Secours. In particular, he was aware of JAR data showing that Bon Secours performed no catheterization procedures in 2007, 2008, and 2009, and after resuming in 2010 performed with very low utilization. (Tr. p. 276, lines 11-21). Mr. Eubank emailed counsel for the Hospital in 2016, a few weeks prior to submission by Roper Berkeley of its CON Application, to inform him that the Department was considering enforcement action against Bon Secours for its failure to obtain a new CON prior to performing diagnostic catheterization procedures beginning in 2010, given the preceding period of time of performing no catheterization procedures. (R02; Tr. p. 275, line 4 – p. 279, line 14). Mr. Eubank’s email cited Section 102.1.e of Regulation 61-15, which requires a person to obtain a CON before offering any health service which was not offered in the preceding 12-month period. (R02; Tr. p. 277, lines 8-14). Mr. Eubank testified that in his opinion, the catheterization laboratory at Bon Secours was not an existing catheterization laboratory for purposes of review of Standard Three in 2016, given the period of not performing catheterization procedures.

At approximately the same time period he was reviewing the Roper Berkeley CON application, Mr. Eubank also reviewed and issued a decision on a CON application submitted by East Cooper Regional Medical Center (“East Cooper”) to provide diagnostic catheterization services at its location in Mt. Pleasant. (Tr. p. 264, lines 15-23; p. 265, lines 2-6). Mr. Eubank

found that the Bon Secours St. Francis Xavier Hospital catheterization laboratory was not an existing catheterization laboratory under Standard Three as to either the Roper Berkeley CON Application or the East Cooper CON application. (Tr. p. 287, lines 1-13; p. 288, lines 1-15).

The Department's interpretation of Standard Three is supported by the testimony of Kathy Platt. Ms. Platt testified on behalf of Roper Berkeley that, in her expert opinion as a health planner, the South Carolina Health Plan is a flexible planning document which allows the Department to examine the situation in the market at the time it makes a decision on a CON application. (Tr. p. 392, line 14 – p. 393, line 18). Ms. Platt testified that Department correctly determined that Bon Secours' catheterization laboratory was not an existing laboratory for purposes of Standard Three of the 2015 Health Plan. (Tr. p. 395, lines 10-18). Ms. Platt further testified that, in her opinion, it is important to consider the fact that the Bon Secours catheterization laboratory was going to be closed if the Roper Berkeley CON application were approved; thus, it would never exist at the same time as Roper Berkeley's proposed catheterization laboratory. (Tr. p. 395, line 23 - p. 396, line 3).

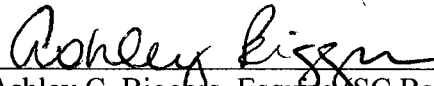
Trident failed to establish that the Department's interpretation of "existing lab" for purposes of Standard Three was arbitrary or capricious. The ALC erred in failing to give the deference due to the Department's interpretation. Moreover, the ALC's conclusion is unsupported by substantial evidence in the record.

CONCLUSION

The Department respectfully requests that the Court conclude the Department's interpretation of "existing labs" as used in the 2015 Health Plan is reasonable and is entitled to deference, and Roper's CON application complies with Standard 3 for diagnostic catheterization services in the 2015 Health Plan. For those reasons, the Department requests the Court to reverse

the ALC's decision and order that a CON be issued to Roper to establish new diagnostic catheterization services at its Berkeley County hospital.

Respectfully submitted,



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November 4, 2019
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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The Honorable H.W. Funderburk, Jr., Administrative Law Judge

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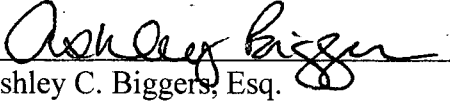
PROOF OF SERVICE

I hereby certify that on November 4, 2019, I served *Respondent's Initial Brief and Designation of Matter to be Included in Record on Appeal* on all parties of record via U.S. Mail, with proper postage affixed and addressed as follows:

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November 4, 2019



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VIA U.S. MAIL

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Re: Trident Medical Center, LLC, d/b/a Trident Medical Center vs. South Carolina
Department of Health and Environmental Control and Roper St. Francis Hospital -
Berkeley, Inc., d/b/a Roper St. Francis Hospital - Berkeley
Appellate Case No.: 2019-000358

Dear Ms. Kitchings:

Enclosed please find the original and one copy of *Respondent's Initial Brief and Designation of Matter to be included in Record on Appeal*, together with the original and one copy of the *Proof of Service*. Please file the originals and return the filed-stamped copies to us via the enclosed self-addressed, stamped envelope.

By copy of this letter and as evidenced in the enclosed Proof of Service, I am hereby serving a copy of the same on all counsel of record. Please contact the undersigned if your office has any questions relating to this filing.

With kindest regards, I am

Sincerely,

Ashley C. Biggers

Enclosures

cc: James G. Long, III, Esquire
Jennifer J. Hollingsworth, Esquire
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