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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPELLATE CASE NO. 2020-001610

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III
Chief Administrative Law Judge

Case No: 20-ALJ-07-0108-CC

Lexington County Health Services
District Inc., d/b/a Lexington Medical Center .....Petitioner/Respondent,

v.

South Carolina Department of Health and
Environmental Control, Prisma Health - Midlands,
Providence Hospital, LLC d/b/a Providence Health,
Providence Health Northeast, Providence Health
Fairfield, and Kershaw Hospital, LLC d/b/a
Kershaw Health Medical Center..... Respondents,

OF WHICH
Prisma Health - Midlands is the Appellant-Respondent and
Providence Hospital, LLC d/b/a Providence Health, Providence
Health Northeast, Providence Health Fairfield, and Kershaw
Hospital, LLC d/b/a Kershaw Health Medical Center are the
Respondents-Appellants.

INITIAL BRIEF OF THE RESPONDENTS-APPELLANTS

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II. DID THE ADMINISTRATIVE LAW COURT ERR AS A MATTER OF LAW IN FAILING TO GIVE DEFERENCE TO THE DEPARTMENT'S INTERPRETATION OF COPA REGULATION 61-31, § 508 TO ALLOW MODIFICATION OF COPA-97-01, GIVEN THAT SUCH INTERPRETATION WAS REASONABLE AND IN ACCORDANCE WITH THE RULES OF STATUTORY CONSTRUCTION?

III. DID THE ALC ERR AS A MATTER OF LAW AND EXCEED ITS STATUTORY AUTHORITY IN MISAPPREHENDING THE PURPOSE OF THE COPA LAW AND IN REVERSING THE DEPARTMENT'S DECISION TO ALLOW MODIFICATION OF COPA-97-01 ON GROUNDS NOT RAISED BY THE PARTIES?

STATEMENT OF THE CASE

The Respondents-Appellants, Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast, Providence Health Fairfield ("Providence") and Kershaw Hospital, LLC d/b/a Kershaw Health Medical Center ("Kershaw") hereby adopt by reference the Statement of the Case set forth at pages 2 through 5 in the Brief of the Appellant-Respondent Prisma Health-Midlands ("PHM Brief) and would add the following statements.

On August 28, 2020, PHM filed its Motion for Summary Judgment in its favor on the grounds that the Department acted within its statutory authority to amend the conditions of COPA 97-01 to cover PHM's purchase of the LPNT Assets. (**PHM Motion for Summary Judgment**). On September 14, 2020, LMC filed its Response to PHM's Motion for Summary Judgment and asserted its own Cross Motion for Summary Judgment. (**LMC Response in Opposition to Motion for Summary Judgment and Notice of Motion and Cross-Motion for Summary Judgment**).

On November 2, 2020, the ALC issued its Order Denying Cross-Motions for Summary Judgment ("Order Denying Summary Judgment"). (**R., ___**). In response to the parties' various motions seeking reconsideration and clarification of the ALC's November 2, 2020 Order, the ALC issued its December 7, 2020 Order on Motion to Clarify and Motions to Reconsider ("Clarification Order" and together with the Order Denying Summary Judgment, the "Final Orders"). (**R. ___**). Thereafter, Providence and Kershaw timely filed their Notice of Appeal of the ALC's Final Orders with this Court on December 17, 2020.

STANDARD OF REVIEW

The Respondents-Appellants Providence and Kershaw hereby adopt by reference the Standard of Review discussion set forth in PHM's Brief at pages 12 through 13.

STATEMENT OF THE FACTS

The Respondents-Appellants Providence and Kershaw hereby adopt by reference the Statement of Facts set forth in PHM's Brief at pages 5 through 12, including the discussion of PHM's existing COPA-97-01 and the Department's monitoring and oversight thereof since its issuance in 1997 (PHM Brief, pp. 5-6), the discussion of the pending transaction pursuant to which Providence and Kershaw will sell substantially all of their assets to PHM (PHM Brief, pp. 6-8) and the discussion of the proceedings before the ALC (PHM Brief, pp. 8-9). Providence and Kershaw also incorporate by reference and adopt PHM's discussion of the regulatory framework of the Health Care Cooperation Act (COPA Act), found at S.C. Code Ann. §§ 44-7-500, *et seq.* (2018), and of S.C. Code Ann. Regs. 61-31 (2011), which are applicable to the issues before the Court in this case. (PHM Brief, pp. 9-12). In addition, the Respondents-Appellants state the following.

This case comes to the Court in a unique posture. That is, the determinative issue discussed and decided by the ALC in its Final Orders is not the dispositive issue raised by the parties in the pleadings and in the cross motions for summary judgment and argued before the ALC.

In its Request for Contested Case Review, the Respondent LMC asserted that the APA governing the sale of the LPNT Assets is a cooperative agreement between PHM and the sellers that requires the filing of a new COPA application and a review by the Department and the Attorney General and the opportunity for a public hearing after notice pursuant to §§ 44-7-540 and -560. (**R., ___**). LMC further asserted that, in the alternative, should the ALC hold that the existing PHM COPA conditions could be amended to include the LPNT Assets, the Department should nevertheless be required to conduct a full review to include participation by the public and the advice of the Attorney General. (**R., __**). The issue raised by LMC with regard to amendment of COPA-97-01 concerns whether the Department correctly interpreted Regulation 61-31, § 508's requirement of "another review" for amendments to an existing COPA. LMC's Prehearing Statement restates these same issues as its grounds for contested case review. (**R., ___**).

In its Motion for Summary Judgment, PHM asserted the following grounds as being dispositive of the case: (i) the Department has the statutory authority to amend the conditions of PHM's existing COPA and to determine if, and what type of review is appropriate for such amendment; and (ii) the Department, in exercising its authority to amend the conditions of

COPA-97-01, is not required to follow the provisions in S.C. Code Ann. Reg. 61-31 that are applicable only to new applications.[1] (**PHM Motion for Summary Judgment, p. 1**).

In its Cross-Motion, LMC raised the following issues that it considered to be dispositive of the case: (i)whether DHEC has the authority to approve a proposed transaction involving two health care providers, in which the assets of one health care provider are acquired by a competing health care provider in the same market, without requiring the health care providers to first submit an application for a COPA and engage in the public review process set forth in the COPA Act and Regulation 61-31; and (ii) whether DHEC has the authority to amend an existing COPA previously issued to a health care provider by adding conditions purportedly to approve a new agreement to acquire the assets of a competing health care provider in the same market without engaging in the full review process set forth in the COPA Act and Regulation 61-31.[2] (**LMC Response and Cross-Motion, p. 11**).

Thus, the parties asserted reciprocal issues in their respective motions for summary judgment: (i) whether the transaction in question requires a new COPA application, which was subject to the full review process set forth in the COPA Act and Regulations; or (ii) whether the Department had the authority to amend the conditions of COPA-97-01 and conduct whatever review it deemed necessary to bring PHM's operation of the LPNT Assets, post-sale, under the coverage of the COPA.

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[1] PHM also raised the ALC's lack of authority to decide LMC's claim that Reg. 61-31, § 508 is constitutionally vague in requiring "another review" for certain material amendments to existing COPAs. (**PHM Motion for Summary Judgment,** p. 1).

[2] LMC also raised the constitutionality of Reg. 61-31, § 508's requirement for "another review." (**LMC Response and Cross Motion, p. 11**).

In its Final Orders, the ALC answered the first question raised by the parties when it determined that the APA governing the sale of the LPNT Assets is not a "cooperative agreement" under the COPA Act because, post-sale, PHM would be the sole entity owning and operating the assets. (*See* Argument I, below). Therefore, PHM and the sellers were not required to file a new COPA application and participate in the new COPA review process. (**R., pp.**). No party contests this finding of the ALC. The remaining issue, whether the Department had the authority under Reg. 61-31, § 508 to conduct another review and amend the conditions of COPA-97-01 to cover the LPNT Assets, was not answered by the ALC. The Respondents-Appellants contend that, because the amendment issue is purely one of law, this Court has the authority to resolve it.

ARGUMENT

I. THE ADMINISTRATIVE LAW COURT ERRED AS A MATTER OF LAW IN FAILING TO FIND THAT THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL ("DEPARTMENT") HAS THE STATUTORY AND REGULATORY AUTHORITY TO REVIEW THE ACQUISITION OF ASSETS BY PRISMA HEALTH – MIDLANDS ("PHM") AND TO MAKE MODIFICATIONS TO PHM'S EXISTING CERTIFICATE OF PUBLIC ADVANTAGE ("COPA-97-01") TO ALLOW OPERATION OF THOSE ASSETS SUBJECT TO COPA-97-01 AND ITS CONDITIONS, AS AMENDED.

The Respondents-Appellants Providence and Kershaw hereby adopt by reference the issues and argument set forth in PHM's Brief at pages 13 through 20, including PHM's arguments regarding LMC's claims that Regulation 61-31, § 508 is unconstitutionally vague. In addition, Providence and Kershaw offer the following arguments in favor of the proposition that the ALC erred as a matter of law in failing to address and find that the Department has the statutory and regulatory authority to modify COPA-97-01 to cover PHM's operation of the LPNT Assets.

In its Order Denying Summary Judgment, the Court reduced the arguments made by the parties in their cross-motions for summary judgment to a single two-part question: whether the transaction in this case requires a new COPA application or an amendment to the existing COPA, and, if an amendment is sufficient, what kind of review is the Department required to undertake when approving an amendment? (**Order, p. 6**). In answering the questions identified by it, the Court made two dispositive legal conclusions in support of the denial of the parties' cross-motions for summary judgment.

First, the Court concluded, as a matter of law, that the APA, which governs the purchase of the LPNT Assets by PHM, does not qualify as a "cooperative agreement" under the COPA Act and, therefore, the acquisition of such assets does not qualify for a new COPA for which a new application would be required. (**Order, pp. 7-10**). Providence and Kershaw agree with this conclusion. The COPA Act and Regulation 61-31 define "cooperative agreement" as:

> an agreement between two health providers, health provider networks, or purchasers or among more than two health care providers, health provider networks, or purchasers for the sharing, allocation, or referral of patients or the sharing or allocation of personnel , instructional programs, support services and facilities, medical, diagnostic or laboratory facilities, procedures, equipment, or other health care services traditionally offered by health care facilities or other health care providers or the acquisition or merger of assets among or by two or more health providers, health provider networks, or health care purchasers, provided the agreement does not involve price-fixing or predatory pricing or illegal tying arrangements.

S.C. Code Ann.§ 44-7-510(3) and S.C. Code Ann. Regs. 61-31 § 102(3). The proposed transaction is a simple sale or transfer of assets from one entity to another entity, not an acquisition of assets among or by two or more health care providers. After the transaction's closing, the operation of the purchased assets will be in the sole control of PHM, the entity that was formed as a result of the approved cooperative agreement between Baptist Healthcare System of South Carolina, Inc. and Richland Memorial Hospital. Furthermore, PHM is the entity

that is the holder of COPA-97-01 under the Department's original decision granting COPA-97-01.

Thus, although the purchase and operation of assets by a single purchaser (PHM) does not support a new COPA application, such transaction can readily support amended COPA conditions that extend COPA coverage to the assets while preserving the balance between the public benefits conferred and the potential reduction in competition. Rather than addressing this issue, however, the ALC concluded that PHM's December 13, 2019 request that the conditions of the existing COPA be amended, as determined by the Department, to cover the LPNT Assets post-sale did not involve the original cooperative agreement between Richland Memorial Hospital and Baptist Hospital and, therefore, as a matter of law, could not be brought within the scope of the original cooperative agreement "by amendment or additional conditions, or otherwise subsumed under the existing COPA." (**Order, pp. 10-12**). Hence, although the ALC in its Order Denying Summary Judgment generally recognized the Department's right to modify existing COPAs (**Order, p. 7, n. 5**), it nevertheless concluded that the Department lacked the authority in this case to amend COPA-97-01 because the LPNT Assets were not part of the original COPA proceeding.

As argued by PHM extensively in its brief, this conclusion by the ALC concerned an issue that was not raised by any party but was raised *sua sponte* by the ALC for the first time in its Final Orders. Moreover, the ALC's rejection of the modification of the conditions of COPA-97-01 arises from the ALC's misapprehension of the purposes and framework of the COPA law and its misapprehension of the Department's authority under Reg. 61-31, § 508 to determine whether proposed modifications to an existing COPA can be made without violating the intent and conditions of the COPA.

In this case, the ALC interprets the COPA law as being stagnant, frozen in time, such that PHM can never add assets to its healthcare system and have the protection of its existing COPA even if the Department determines that the imposition of additional conditions will protect the balance in public benefit and competition that the COPA Act provides. By refusing to consider the amendment issue as raised by the parties, the ALC has reached a ludicrous result that places PHM in stasis, unable to respond to growing population and changing healthcare conditions in its community.

The Court should address the issue ignored by the ALC and determine that the Department had the authority under Reg. 61-31, § 508 to conduct a review and to amend the conditions of COPA-97-01 as it did in this case. As argued below, the Department's interpretation of the regulation and its conduct in reviewing and determining whether to amend the conditions of COPA-97-01 in this case were reasonable and supported by the applicable law. In addition to the above argument, Providence and Kershaw incorporate by reference and adopt the issues and arguments of PHM set forth in the PHM Brief on the ALC's findings and conclusions concerning amendment of the existing COPA. (**PHM Brief, pp. 27-46**).

II. THE ADMINISTRATIVE LAW COURT ERRED AS A MATTER OF LAW IN FAILING TO GIVE DEFERENCE TO THE DEPARTMENT'S INTERPRETATION OF COPA REGULATION 61-31, § 508 TO ALLOW MODIFICATION OF COPA-97-01, GIVEN THAT SUCH INTERPRETATION WAS REASONABLE AND IN ACCORDANCE WITH THE RULES OF STATUTORY CONSTRUCTION.

The Respondents-Appellants Providence and Kershaw hereby adopt by reference the issues and argument set forth in PHM's Brief at pages 20 through 23 that the ALC erred as a matter of law in failing to give deference to the Department's interpretation of Regulation 61-31, including § 508, that the Department was allowed to determine the type of review to give PHM's December 13, 2019 request that the conditions of COPA-97-01 be amended to cover PHM's

acquisition and operation of the LPNT Assets. As argued by PHM, in rejecting the Department's interpretation of its own regulations, the ALC makes no finding that such interpretation is unreasonable or arbitrary or capricious or manifestly contrary to a statute because that is not the case.[3] To the contrary, as affirmed by the Opinion of the Attorney General, the Department's interpretation is reasonable and in accordance with the rules of statutory construction. [4] Op. S.C. Att'y Gen., 2020 WL 1068931 at *7 (Feb. 25, 2020). Providence and Kershaw, as the sellers of the LPNT Assets reasonably relied upon the review process established by the COPA Regulations, as interpreted and administered by the Department, and this reliance was reinforced by the South Carolina Attorney General's Opinion.

Rather than following the law and deferring to the Department's reasonable interpretations of its own regulations, however, the ALC discounted those interpretations in favor of its own *sua sponte* conclusions that COPA-97-01 cannot be amended to cover assets that were not part of the original transaction that gave rise to the COPA. (**Order Denying Summary**

[3] "The delegation of authority to an administrative agency is construed liberally when the agency is concerned with the protection of the health and welfare of the public." *City of Columbia v. Board of Health & Envtl. Control,* 292 S.C. 199, 202, 355 S.E. 2d 526, 538 (1987). *See also*, *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 34-35, 766 S.E.2d 707, 718 (2014) ("[T]he deference doctrine properly stated provides that where an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts, including the ALC, will defer to the agency's interpretation absent compelling reasons. We defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'").

[4] In construing Regulation 61-31, § 508,which provides for the amendment of a COPA after issuance, the Opinion of the Attorney General compares the language of § 308 of the Regulation that provides for the amendment of a COPA application before approval. As found in the Opinion, "There is no parallel requirement in Section 508 (post-issuance of a Certificate) to recommence the extensive review process required in Section 308 (pre-issuance of a Certificate). Instead, Section 508 refers simply to 'another review.' The absence of express requirements like those in Section 308 is a strong indicator that DHEC can conduct the review it deems appropriate at the post-issuance stage." (2020 WL 1068931, at *3 (Feb. 25, 2020)).

Judgment, pp. 10-12). For all of the reasons stated in PHM's Brief, this conclusion of the ALC constitutes error of law and must be reversed.

III. THE ALC ERRED AS A MATTER OF LAW AND EXCEEDED ITS STATUTORY AUTHORITY IN REVERSING, ON GROUNDS NOT RAISED BY THE PARTIES, THE DEPARTMENT'S DECISION TO MODIFY COPA-97-01.

The Respondents-Appellants Providence and Kershaw hereby adopt by reference the issues and arguments set forth in PHM's Brief at pages 24 through 46, in which PHM catalogues the many instances in which the ALC in its Final Orders misconstrues the arguments of the parties at best, and, at worst, ignores the arguments of the parties and asserts its own issues. In all of these cases, as detailed by PHM in its Brief, the ALC misapprehends the COPA Act and Regulations and commits errors of law.

CONCLUSION

For the reasons discussed above, Respondents-Appellants respectfully request that this Court reverse the Final Orders of the ALC and uphold the decision of the Department to amend the conditions of COPA-97-01 to cover the acquisition and operation of the LPNT Assets by the Appellant-Respondent Prisma Health-Midlands.

Respectfully submitted,

s/David B. Summer, Jr.
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Health Northeast, Providence Health Fairfield, and Kershaw
Hospital, LLC d/b/a Kershaw Health Medical Center are the
Respondents-Appellants.

PROOF OF SERVICE

The undersigned hereby certifies that on January 19, 2020 he caused a copy of the foregoing **INITIAL BRIEF OF THE RESPONDENTS-APPELLANTS** to be served upon all counsel of record via electronic mail to each counsel's individual AIS email address pursuant to SC Supreme Court COVID Order 2020-05-29-02 addressed as follows:

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January 19, 2021

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Re: Appellate Case No: 2020-001610

Lexington County Health Services District, Inc. d/b/a Lexington Medical Center v. South Carolina Department of Health and Environmental Control, Prisma Health - Midlands, Providence Hospital, LLC d/b/a Providence Health, Providence Health Northeast, Providence Health Fairfield, and Kershaw Hospital, LLC d/b/a Kershaw Health Medical Center

Dear Ms. Kitchings:

Enclosed for filing in connection with the above-referenced matter, please find **Respondents-Appellants' Initial Brief, Designation of Matter and Proofs of Service.**

By copy of this letter and pursuant to the Court's standing Order, we are serving copies of same to all counsel of record via email.

With best regards, I am

Sincerely,

s/David B. Summer, Jr.

David B. Summer, Jr.

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