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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 RESPONDENT SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

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STATEMENT OF THE CASE

Lexington County Health Services District, Inc., d/b/a Lexington Medical Center (LMC) filed a Request for Contested Case Hearing with South Carolina Administrative Law Court (ALC) on May 14, 2020, challenging a February 28, 2020 decision by South Carolina Department of Health and Environmental Control (DHEC or Department) updating the conditions of a Certificate of Public Advantage (COPA) held by Prisma Health – Midlands (PHM). LMC and PHM filed cross-motions for Summary Judgment, which were heard by the ALC on October 20, 2020. The ALC issued an Order denying the cross-motions for summary judgment on November 2, 2020. PHM sought clarification and reconsideration of the ALC's order. By order dated December 7, 2020, the ALC clarified that the effect of its order denying the cross-motions for summary judgment was to end the contested case and overturn the Department's decision. This appeal followed.

STATEMENT OF FACTS

The Health Care Cooperation Act (HCCA or Act), S.C. Code Ann. §§ 44-7-500, *et seq.*, is predicated upon Legislative findings, set forth at Section 44-7-505(1)-(4), reflecting the overarching sentiment that cooperative agreements between various health care providers may improve the delivery of health care services in South Carolina, even though such concerted cooperative activity may be in conceptual conflict with federal and state antitrust law. The Act establishes a framework for state involvement in the approval of certain cooperative agreements to receive limited immunity from antitrust regulation enforcement when the State verifies that the likely benefits to the public resulting from the cooperative agreements outweigh any disadvantages that may be caused by their potential adverse effects on competition. Sections 44-7-505(4) and -520.

DHEC is the state agency authorized to enforce and implement the Act and is authorized to promulgate regulations pursuant to the Act. S.C. Code Ann. §§ 44-7-510(4) and -570(D). DHEC promulgated Regulation 61-31, *Health Care Cooperative Agreements*, in 1995. The purpose of the regulation is to "implement the legislative intent that there be a state regulatory program to permit and encourage cooperative agreements between hospitals, health care purchasers, or other health care providers which would otherwise violate federal or state anti-trust laws when the benefits outweigh disadvantages caused by their potential adverse effects on competition." S.C. Code Ann. Regs. 61-31 § 101. A COPA is defined as:

> [T]he formal approval, including any conditions or modifications, by the Department of a contract, business or financial arrangement, or other activities or practices between two or more health providers, health provider networks, or health care purchasers that might be construed to be violations of state of federal laws.

S.C. Code Ann. § 44-7-510(2); S.C. Code Ann. Regs. 61-31 § 102(2). The issuance of a COPA is not required in order for health care providers to negotiate and enter into cooperative agreements with other providers. S.C. Code Ann. Regs. 61-31 § 103. Instead, parties to cooperative agreements may apply to DHEC for a COPA, should they desire. *Id.*

The Act and Regulation 61-31 contain detailed requirements for submission and review of COPA applications. *See* S.C. Code Ann. §§ 44-7-540, -550, and -560; S.C. Code Ann. Regs. 61-31 Chapters 2, 3, and 4. Review of the initial applications includes notice and opportunity for a public hearing, review by the S.C. Attorney General, and review by DHEC. *See, e.g.,* S.C. Code Ann. Regs. 61-31 §§ 303 and 305.

After issuance of a COPA, the Act relies upon DHEC's continuing involvement. For example, DHEC monitors and regulates agreements approved under the Act and may request information whenever necessary to ensure that the agreements remain in compliance with any conditions of approval. *See* S.C. Code Ann. § 44-7-570(A). While the Act provides a detailed

process for review of initial applications and changes to applications prior to issuance of a COPA, the Act is silent regarding any process for reviewing proposed changes to a COPA after issuance. However, Regulation 61-31 Section 508 addresses this scenario:

> SECTION 508. Changes After Receipt of a Certificate of Public Advantage: If an applicant amends, alters, or otherwise changes the agreement after receipt of a Certificate of Public Advantage, the Department will decide whether or not the amendment is substantial and thereby requires ***another review***. A change in the application will be considered substantial if the Department believes that the change materially changes the reasons for approval, might materially impact the benefits or disadvantages to the community to be served, or will change the service area of the original application. The addition or deletion of a party to the agreement does not necessarily constitute a substantial change unless the Department believes that the above mentioned criteria will occur.

(Emphasis added). Therefore, if DHEC finds proposed changes to a cooperative agreement after issuance of a certificate are substantial, "another review" must be performed. The Act and Regulation 61-31 do not provide a definition for "review" or "another review."

PHM[1] received COPA-97-01 from DHEC in 1997. The application was submitted to DHEC in 1996 by Richland Memorial Hospital (RMH) and Baptist Healthcare System of South Carolina, Inc. (BHS), which were the parties to the cooperative agreement for which the COPA was sought. Pursuant to the agreement, RMH and BHS proposed to merge and form a new nonprofit corporation, currently known as PHM, to jointly operate as a single unit their systems and hospitals serving the Midlands area of South Carolina. The application process included public notice, a public hearing, review of the application by the Attorney General, and review by DHEC. DHEC approved the COPA application after determining the likely benefits resulting from the agreement outweighed the likely disadvantages from the agreement, and that the reduction in competition likely to result from the agreement was reasonably necessary to obtain the benefits.

[1] PHM has undergone name changes since its initial incorporation. At the time of the COPA was issued, it was incorporated under the name BR Health System, Inc. (BRHS). It later changed its name to Palmetto Health Alliance (Alliance), and more recently changed its name to PHM.

After final resolution of a legal challenge of DHEC's May 8, 1997 decision approving the COPA application, DHEC issued COPA-97-01 on October 6, 1997. COPA-97-01 provided state approval pursuant to the Act and Regulation 61-31 of a cooperative agreement between RMH and BHS for the merger the two separate entities into a new single healthcare system. Since issuance of the COPA in 1997, DHEC has provided monitoring and oversight of PHM's activities under the COPA conditions, as originally imposed in 1997 and as updated in 2003.

On December 13, 2019, PHM submitted written notification to DHEC of a proposed transaction wherein PHM would acquire certain assets from LifePoint Health (LPNT), including Providence Health hospital in downtown Columbia, Providence Health-Northeast hospital in Columbia, KershawHealth hospital in Camden, and a freestanding emergency department in Fairfield County. PHM asked DHEC to acknowledge that the assets purchased from LPNT would be subject to the conditions of its existing COPA and asked DHEC to make any updates or modifications to the COPA conditions as DHEC deemed necessary.

DHEC reviewed PHM's submissions and determined the changes resulting from the proposed transaction might materially impact the benefits or disadvantages to the community to be served and thereby required "another review" pursuant to Regulation 61-31 Section 508. DHEC submitted a letter to the Attorney General seeking an opinion as to its interpretation of "another review" under Regulation 61-31 Section 508 – specifically, that it is within DHEC's "discretion to conduct the review it deems appropriate based on the facts and circumstances involved including, but not limited to, the significance of the proposed change, and any exigent circumstances as found by DHEC or as represented to DHEC by the parties to the cooperative agreement." The Attorney General's Office, by letter dated February 25, 2020, opined that

DHEC's interpretation "would likely be given considerable deference by the courts as a reasonable interpretation." Op. S.C. Att'y Gen., 2020 WL 1068931 (Feb. 25, 2020).

PHM submitted additional information to DHEC regarding the proposed asset acquisition in February 2020. Information contained in the February 2020 submission was persuasive in conducting its review pursuant to Section 508 without a public notice or comment period, including in particular PHM's representation to DHEC of the possible increase in additional staff layoffs without the transaction as opposed to with the transaction, as well as the potential impact on PHM's ability to provide certain safety net services to the South Carolinians within its service area absent the proposed transaction. After review of the information provided by PHM in light of the existing COPA, DHEC issued a letter dated February 28, 2020, updating COPA-97-01's conditions.

On March 13, 2020, LMC filed a request for final review requesting Board review of the February 28, 2020 update to PHM's COPA conditions. The Board declined to conduct a final review conference on LMC's RFR. LMC then filed its contested case at the ALC. After hearing arguments on the cross-motions for summary judgment below, the ALC disagreed with LMC that the proposed transaction required submission to DHEC of a new COPA application and denied LMC's motion for summary judgment. The ALC further concluded the LPNT assets could not be subsumed into the existing COPA, and therefore denied PHM's motion for summary judgment and overturned the Department's February 28, 2020 decision. PHM and Providence now appeal.

ARGUMENT

I. DHEC has authority to amend and make modifications to a COPA.

Both the Act and Regulation 61-31 explicitly recognize DHEC's authority to make modifications to already issued COPAs. A COPA is defined to mean "the formal approval,

including any conditions or modifications, by the Department . . . ." S.C. Code Ann. § 44-7-510(2); S.C. Code Ann. Regs. 61-31 § 102(2). Regulation 61-31 Section 309 explains that a COPA "is only valid for the project described in the application including the parties involved, services to be offered, mergers or consolidations approved, or other factors as set forth in the application, *except as may be modified in accordance with [Regulation 61-31].*" (Emphasis added). The ALC did not rule that DHEC lacks authority under the Act and Regulation to amend or modify a COPA, including where a COPA-holder adds assets to the COPA's coverage.

II. DHEC's interpretation of Section 508 of Regulation 61-31 is reasonable, and Section 508 should not be deemed void for vagueness.

The ALC did not rule upon the Department's interpretation of "another review" under Regulation 61-31 Section 508 given its ruling. To the extent this is an issue on appeal, however, the Department's interpretation is reasonable.

Further, although the ALC did not make a finding that Section 508 is void for vagueness, to the extent that is an issue on appeal the Department adopts its arguments in its briefs below to the ALC.

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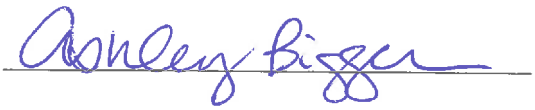
Respectfully submitted,



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