RECEIVED
Jan 24 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

H.W. Funderburk, Jr., Administrative Law Court Judge

Docket No. 20-ALJ-07-0235-CC

Appellate Case No.: 2021-000617

MRI at Belfair, LLC d/b/a 3T MRI at Belfair, Appellant,

v.

South Carolina Department of Health and Environmental Control and
Beaufort Memorial Hospital, Respondents.

FINAL BRIEF OF RESPONDENT BEAUFORT MEMORIAL HOSPITAL

Trudy H. Robertson (S.C. Bar No. 64856)
E. Brandon Gaskins (S.C. Bar No. 73274)
Moore & Van Allen PLLC
78 Wentworth Street
Charleston, SC 29401
Telephone: (843) 579-7000
Facsimile: (843) 579-7099
trudyrobertson@mvalaw.com
brandongaskins@mvalaw.com

Attorneys for Respondent
Beaufort Memorial Hospital

TABLE OF CONTENTS

Table of Authorities……………………………………………………………………………….ii

Counterstatement of Issues on Appeal…………………………………………………………1

Counterstatement of the Case……………………………………………………………………...1

Standard of Review…………………………………………………………………………..…2

Counterstatement of the Facts…………………………………………………………………..3

Arguments………………………………………………………………………………………6

I. THE ALC LACKED SUBJECT MATTER JURISDICTION TO REVIEW DHEC'S DECISION BECAUSE DHEC HAD NO LEGAL DUTY TO REVIEW BMH'S RELOCATION REQUEST FOR AN EXISTING MRI SCANNER AND NO LEGAL DUTY TO PROVIDE A WRITTEN CON, EXEMPTION OR NAD…………………………………………………………………6

II. THE ALC CORRECTLY RULED THAT BMH'S RELOCATION OF AN EXISTING MRI SCANNER DID NOT REQUIRE CON REVIEW OR A NAD……12

III. BMH'S RELOCATION OF THE MRI SCANNER WAS NOT AN ACQUISITION OR EXPENDITURE COVERED BY THE CON ACT…………….16

IV. NO FURTHER DISCOVERY IS NEEDED BECAUSE DHEC'S DECISION IS CORRECT AS A MATTER OF LAW AND BECAUSE BELFAIR WAS PROVIDED REASONABLE OPPORTUNITY TO CHALLENGE ANY MATERIALS PRESENTED TO THE ALC…………………………………..19

Conclusion………………………………………………………………………………… 21

TABLE OF AUTHORITIES

CASES

Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461 (2004)……………….......................11

Amisub of S.C., Inc. v. S.C. Dep't of Health, 403 S.C. 576, 743 S.E.2d 786 (2013)...3, 6, 7, 8, 9, 10, 11, 12, 14, 20, 21

Baddourah v. McMaster, 433 S.C. 89, 856 S.E.2d 561 (2021)…………………………………….3

Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003)…………………………………………..18

Hammer v. Hammer, 399 S.C. 100, 730 S.E.2d 874 (Ct. App. 2012)…………………..................3

Johnson v. Dailey, 318 S.C. 318, 457 S.E.2d 613 (1995)…………………………………………20

Lightner v. Hampton Hall Club, 419 S.C. 357, 798 S.E.2d 555 (2017)…………………………17

MRI at Belfair, LLC v. S.C. Dep't of Health & Envtl. Control & Coastal Carolina Med. Ctr., 394 S.C. 567, 716 S.E.2d 111 (Ct. App. 2011) ………………………………………………….3

MRI at Belfair, LLC v. S.C. Dep't Health & Envt'l Control, Docket No. 17-ALJ-07-0144-CC, 2019 SC ENV LEXIS 37 (SCALC Sept. 17, 2019)……………………………………………16

Murphy v. S.C. Dep't of Health & Envtl. Control, 396 S.C. 633, 723 S.E.2d 191 (2012)…………..2

S.C. Coastal Conservation League v. S.C. Dep't of Health and Envtl. Control, 363 S.C. 67, 610 S.E.2d 482 (2005)……………………………………………………………………………….3

S.C. Dep't of Soc. Servs. v. Tran, 418 S.C. 308, 792 S.E.2d 254 (Ct. App. 2016) …………………7

STATUTES

S.C. Code Ann. § 1-23-320(A) ……………………………………………………………………7

S.C. Code Ann. § 1-23-505(4)…………………………………………………………………..…7

S.C. Code Ann. § 1-23-610(B) ………………………………………………………………….2-3

S.C. Code Ann. § 44-7-110, *et seq*…………………………………………………………………1

S.C. Code Ann. § 44-7-120……………………………………………………………………….15

S.C. Code Ann. § 44-7-130(10)…………………………………………………………………..14

S.C. Code Ann. § 44-7-160………………………………………………………………………..8

S.C. Code Ann. § 44-7-160(3) ……………………………………………………………...16

S.C. Code Ann. § 44-7-160(6) ……………………………………………………………...16

S.C. Code Ann. § 44-7-170……………………………………………………………...…4

S.C. Code Ann. § 44-7-170(A)……………………………………………………………….8

S.C. Code Ann. § 44-7-170(B)(1) …………………………………………………………..8

S.C. Code Ann. § 44-7-170(C)……………………………………………………………….8

REGULATIONS

S.C. Code Ann. Regs. 61-15 ..………………………………………………………………..8

S.C. Code Ann. Regs. 61-15, § 102(1) ………………………………………………......8

S.C. Code Ann. Regs. 61-15, § 102(1)(c)……………………………………………...17

S. C. Code Ann. Regs. 61-15, § 102(4)………………………………………………12, 13

S.C. Code Ann. Regs. 61-15, § 103(12)………………………………………………..14

S.C. Code Ann. Regs. 61-15, § 104 ………………………………………………………8

S.C. Code Ann. Regs. 61-15, § 104(1) ……………………………………………………8

S.C. Code Ann. Regs. 61-15, § 105………………………………………………………..4

S.C. Code Ann. Regs. 61-15, § 105(1) ……………………………………………………8

S.C. Code Ann. Regs. 61-15, § 105(1)(a)……………………………………………..16, 17

S.C. Code Ann. Regs. 61-15, § 106(2)……………………………………………………15

S.C. Code Ann. Regs. 61-15, § 802(2)(d)……………………………………………...13

RULES

Rule 19, SCALC…………………………………………………………………………2, 5, 19

Rule 12(b)(1), SCRCP…………………………………………………………………..2, 5

Rule 12(b)(6), SCRCP………………………………………………………………2, 5, 20

Rule 56, SCRCP ……………………………………………………………………………19

Rule 59(e), SCRCP……………………………………………………………………...2, 5

OTHER AUTHORITIES

2020 South Carolina Health Plan…………………………………………………………13, 14, 15

COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Did the ALC lack subject matter jurisdiction to review DHEC's decision because DHEC had no legal duty to review BMH's relocation request for an existing MRI scanner and no legal duty to provide a written CON, exemption or NAD?

2. Did the ALC correctly rule that BMH's relocation of an existing MRI scanner did not require CON review or a NAD?

3. Did the ALC correctly rule that BMH's relocation of the MRI scanner was not an acquisition or expenditure covered by the CON Act?

4. Did the ALC correctly rule that no further discovery is needed because DHEC's decision is correct as a matter of law and because Belfair was provided reasonable opportunity to challenge any materials presented to the ALC?

COUNTERSTATEMENT OF THE CASE

On May 20, 2020, Respondent Beaufort Memorial Hospital ("BMH") requested from Respondent South Carolina Department of Health and Environmental Control ("DHEC") confirmation that the State Certification of Need and Health Facility Licensure Act, S.C. Code Ann. § 44-7-110, *et seq*. (the "CON Act") did not apply to BMH's relocation of its current 1.5 Tesla Magnetic Resonance Imaging ("MRI") scanner located in Port Royal, South Carolina to another location in Beaufort County in Okatie, South Carolina at a total project cost of $125,000. Only July 1, 2020, DHEC issued its determination that the CON Act did not apply to the relocation of the MRI scanner.

On July 7, 2020, Appellant MRI at Belfair, LLC d/b/a 3T MRI at Belfair ("Belfair") requested that DHEC's Board conduct a final review of the DHEC staff decision and then supplemented that request for final review with a second letter dated July 14, 2020. DHEC submitted its staff response to the DHEC Board on July 24, 2020. On August 12, 2020, DHEC's Board declined to hold a final review conference on Belfair's request. On September 9, 2020,

Belfair submitted to the South Carolina Administrative Law Court ("ALC") for a contested case hearing.

In response to the ALC's order to submit pre-hearing statements, the parties submitted their respective pre-hearing statements on October 28, 2020. Thereafter, on January 8, 2021, BMH filed its Motion to Dismiss and Motion to Stay. BMH's motion sought to have Belfair's contested case request dismissed as a matter of law pursuant to SCALC Rule 19 and Rules 12(b)(1) and (6), SCRCP, because the ALC lacked subject matter jurisdiction over the matter and because, as a matter of law, DHEC was correct in its determination that the relocation did not require CON review or a written exemption or a non-applicability determination ("NAD"). The ALC held a hearing on the motion on March 16, 2021, after which the ALC issued a written order granting BMH's motion to dismiss on March 30, 2021.

On April 9, 2021, Belfair filed a Motion to Alter or Amend the Order Granting Judgement in Favor of Respondents under Rule 59(e), SCRCP. Although the ALC granted in part and denied in part Belfair's motion by a written order (the "Order") on May 14, 2021, the ALC did not materially change its analysis and sustained its dismissal of the matter. Belfair filed its notice of appeal on June 11, 2021.

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") governs appeals from the ALC. *Murphy v. S.C. Dep't of Health & Envtl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 194 (2012). "Under § 1-23-610(B) of the APA, an appellate court may reverse or modify the decision of the ALC if the appellant's substantial rights have been prejudiced because the 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 an 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 an abuse of discretion or a clearly unwarranted exercise of discretion." *Amisub of S.C., Inc. v. S.C. Dep't of Health*, 403 S.C. 576, 584-85, 743 S.E.2d 786, 791 (2013); S.C. Code Ann. § 1-23-610(B).

"As to factual issues, judicial review of administrative agency orders is limited to a determination [of] whether the order is supported by substantial evidence." *MRI at Belfair, LLC v. S.C. Dep't of Health & Envtl. Control & Coastal Carolina Med. Ctr.*, 394 S.C. 567, 572, 716 S.E.2d 111, 113 (Ct. App. 2011). "Courts defer to the relevant administrative agency's decisions with respect to its own regulations unless there is a compelling reason to differ." *S.C. Coastal Conservation League v. S.C. Dep't of Health and Envtl. Control*, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005).

"The question of subject matter jurisdiction is a question of law for the court." *Baddourah v. McMaster*, 433 S.C. 89, 96, 856 S.E.2d 561, 565 (2021). An appellate court is free to decide questions of law regarding subject matter jurisdiction with no deference to the lower court. *Hammer v. Hammer*, 399 S.C. 100, 105, 730 S.E.2d 874, 876 (Ct. App. 2012).

COUNTERSTATEMENT OF THE FACTS

I. <u>The Replacement</u>

BMH has a medical office building in Port Royal, South Carolina, where it has conducted imaging utilizing an MRI scanner. (R. p. 82; R. p. 251.) In 2019, BMH submitted a request to DHEC for a NAD to replace its existing MRI scanner with another scanner of similar capabilities at its Port Royal office. (*Id.*; R. pp. 77-78; R. pp. 68-71.) In response, DHEC issued BMH a written NAD on April 4, 2019 (NA-19-09) finding that the Certificate of Need ("CON") Act was not applicable to BMH's request to replace like equipment, thereby allowing BMH to purchase the replacement MRI scanner. (R. p. 84; R. p. 251; R. pp. 261-262; R. p. 365.) No appeal of or

opposition to DHEC's decision was made, and BMH replaced its existing 1.0T MRI with a 1.5T MRI scanner. (*Id.*)

II. <u>The Relocation</u>

In April 2020, a representative of BMH emailed Jennifer J. Hyman, DHEC's Project Coordinator for the CON Program, notifying her that BMH intended to relocate the MRI from its Port Royal office building to its nearby new Okatie office building, both of which are in Beaufort County. (R. p. 264.) Out of concern that other providers would challenge BMH's relocation of the MRI scanner, BMH requested advice on what steps BMH needed to take to secure DHEC's consent for the relocation. (*Id.*) Following this email, BMH submitted a request to DHEC in May 2020, seeking confirmation that the CON Act did not apply to the Project. (R. p. 277; R. p. 84.) In the letter, BMH informed DHEC that the purpose of the relocation was to consolidate its MRI and physician practice in a central location. (*Id.*) BMH also submitted with its letter DHEC's "Determinations for Replacement of Equipment" form; however, BMH did not check either the box for an exemption or the box for a NAD because neither applied to the request. (R. p. 278; R. pp. 86-87; R. pp. 397-398.)

On July 1, 2020, DHEC responded to BMH's request, stating that "it is the decision of the Department that the [CON] Act is not applicable to the project pursuant to S.C. Code § 44-7-170; S.C. Code [Ann.] Regs. 61-15, § 105 (2012); and related authority." (R. pp. 270-271; R. pp. 286-287; R. p. 87.) After DHEC provided notice of its decision, Belfair, who operates a competing MRI imaging center approximately 6 miles from BMH's medical office building in Okatie, submitted a written request on July 7, 2020, for DHEC's Board to conduct a final review of the DHEC staff decision. (R. pp. 275-276.) Belfair supplemented its request for final review with another letter the next week on July 14, 2020. (R. pp. 280-284.)

In its requests for final review, Belfair argued, in sum, that BMH's request to relocate the MRI scanner was "a request to acquire new equipment in excess of the $600,000 threshold, thus requiring a full CON." (R. pp. 280-284.) On August 12, 2020, the DHEC Board provided notice of its decision declining to hold a final review conference on Belfair's request. (R. pp. 224-225.)

Belfair then submitted a request for contested case hearing to the ALC on September 9, 2020. The matter was assigned to Administrative Law Judge H.W. Funderburk, Jr., and the parties subsequently submitted their respective prehearing statements. (R. pp. 68-75; R. pp. 76-81; R. pp. 58-65.) Following submission of the parties' pre-hearing statements, BMH filed a motion to dismiss Belfair's request pursuant to SCALC Rule 19 and Rules 12(b)(1) and 12(b)(6), SCRCP. (R. pp. 82-91.)

In its motion, BMH sought dismissal of the contested case as a matter of law, asserting that the ALC did not have jurisdiction over the matter because DHEC had no legal duty to approve BMH's proposed relocation of the MRI scanner through CON review, a written exemption from CON review, or a written NAD. (*Id.*) For the same reasons, BMH argued that DHEC's decision was correct as a matter of law and that Belfair's contested case should be dismissed even if the ALC had jurisdiction. (R. p. 86; R. pp. 298-299.) DHEC agreed with BMH's position that "the Project does not require a CON, a written exemption, or a written non-applicability determination" and, therefore, supported BMH's motion to dismiss. (R. pp. 252-257.)

Following the hearing on the motion, the ALC granted BMH's motion to dismiss. (R. pp. 357-407; R. pp. 10-20.) Belfair then filed a Motion to Alter or Amend the Order Granting Judgement in Favor of Respondents under Rule 59(e), SCRCP. (R. pp. 305-318.) DHEC and BMH filed opposition to Belfair's Motion to Alter or Amend. (R. pp. 328-334; R. pp. 319-327.) Belfair thereafter filed a Motion for Leave to File a Reply to BMH's Opposition to Belfair's

Motion to Alter or Amend, and BMH filed a Memorandum in Opposition to Belfair's Motion for Leave to File a Reply. (R. pp. 335-345; R. pp. 346-350.) Although the ALC granted in part and denied in part Belfair's motion by the written Order on May 14, 2021, the ALC did not materially change its analysis and sustained its dismissal of the matter. (R. pp. 21-33.)

In the Order, the ALC concluded that, although BMH had not requested a formal NAD, it nevertheless had jurisdiction over the matter because DHEC's letter of July 1, 2020 was a final decision, constituting a quasi-judicial determination. (R. pp. 25-26.) Nevertheless, the ALC concluded that (1) BMH was not required to have a CON to relocate the MRI scanner; (2) BMH was not required to obtain a written exemption from DHEC to relocate the MRI scanner; (3) the acquisition of the replacement scanner had already been approved pursuant to DHEC's previously issued NAD and could not be revisited because Belfair failed to timely appeal the NAD; and (4) the only evidence is that the costs to relocate would be at or below $125,000, which were not acquisition costs. (R. pp. 26-32.) The ALC also rejected Belfair's argument that BMH had split the costs of replacement and relocation to evade CON review because moving equipment from one medical office building to another medical office building in the same service area was not covered by the CON Act. (R. pp. 31-32.) Accordingly, the ALC found that there were no material facts in dispute and granted BMH's motion to dismiss. (*Id.*)

ARGUMENTS

I. The ALC lacked subject matter jurisdiction to review DHEC's decision because DHEC had no legal duty to review BMH's relocation request for the MRI scanner and no legal duty to provide a written CON, exemption or NAD.

The ALC is a court of limited jurisdiction prescribed by the General Assembly. *Amisub of S.C., Inc. v*, 403 S.C. at 585, 743 S.E.2d at 791. "By statute, the General Assembly has authorized the ALC to preside over 'contested case' proceedings." *Id.* A "contested case" is defined as "a

proceeding including, but not restricted to, ratemaking, price fixing, and licensing," in which a party's rights are to be determined by an agency or the ALC. S.C. Code Ann. § 1-23-320(A). In this context, a "license" includes any agency permit, certificate, or approval "*required by law*." *Amisub*, 403 S.C. at 586, 743 S.E.2d at 792 (citing § 1-23-505(4)) (emphasis in original). Thus, for a contested case to arise from an agency decision, the decision must be issued pursuant to a legal duty owed by the agency. *Id.* at 596, 743 S.E.2d at 797. If the agency has no legal duty to issue a decision, then a party purportedly affected by that decision does not have a corresponding right to a contested case. *Id.*

In this case, DHEC's decision at issue could not give rise to a contested case over which the ALC had jurisdiction because DHEC had no legal duty to issue its decision under the applicable CON laws and regulations.[1] The CON Act requires persons or "health care facilities" to obtain a CON from DHEC before undertaking the following activities:

> (1) the construction or other establishment of a new health care facility;
>
> (2) a change in the existing bed complement of a health care facility through the addition of one or more beds or change in the classification of licensure of one or more beds;
>
> (3) an expenditure by or on behalf of a health care facility in excess of an amount to be prescribed by regulation;
>
> (4) a capital expenditure by or on behalf of a health care facility which is associated with the addition or substantial expansion of a health service for which specific standards or criteria are prescribed in the South Carolina Health Plan;
>
> (5) the offering of a health service by or on behalf of a health care facility which has not been offered by the facility in the preceding twelve months and for which specific standards or criteria are prescribed in the South Carolina Health Plan;

---

[1] Although the ALC ruled that it had subject matter jurisdiction over the case and Belfair's appeal does not challenge the ALC's ruling on this issue, lack of subject matter jurisdiction can be raised at any time and *sua sponte* by this Court. *S.C. Dep't of Soc. Servs. v. Tran*, 418 S.C. 308, 314-315, 792 S.E.2d 254, 257 (Ct. App. 2016). Lack of subject matter jurisdiction may not be waived and should be taken notice of by this Court. *Id.*

> (6) the acquisition of medical equipment which is to be used for diagnosis or treatment if the total project cost is in excess of that prescribed by regulation.

S.C. Code Ann. § 44-7-160; *see also* S.C. Code Ann. Regs. 61-15, § 102(1). Significantly, relocation of medical equipment is not an activity requiring a CON from DHEC.

In addition to requiring a CON for certain activities, the CON Act and the CON Regulation (S.C. Code Ann. Regs. 61-15) also include enumerated activities that are exempt from the requirements for a CON, such as the acquisition of medical equipment for research, offices of licensed private practitioners, the replacement of like equipment for which a CON has been issued and which does not constitute a material change in service or a new service, and crisis stabilization unit facilities. § 44-7-170(A); S.C. Code Ann. Regs. 61-15, § 104. A written exemption must be obtained before undertaking any project specifically exempted from the CON requirements. § 44-7-170(C); S.C. Code Ann. Regs. 61-15, § 104(1). No written exemption from DHEC is needed to relocate medical equipment.

The CON Act and the CON Regulation promulgated by DHEC also contain provisions under which a healthcare provider may seek a written determination from DHEC that the CON Act does not apply to a proposed project, which is also known as a NAD. *Amisub*, 403 S.C. at 589, 743 S.E.2d at 794; S.C. Code Ann. § 44-7-170(B)(1); S.C. Code Ann. Regs. 61-15, § 105(1). Under DHEC's CON Regulation, a written NAD is required before a provider may replace like equipment with similar capabilities or acquire medical equipment which is to be used for diagnosis or treatment if the total project costs exceed $600,000. S.C. Code Ann. Regs. 61-15, § 105(1). Relocation of medical equipment is not an action requiring a written NAD.

Under this statutory and regulatory scheme, relocation of existing medical equipment, including an MRI scanner, does not require the issuance of a CON from DHEC. Also, there is no

requirement to obtain a written exemption or a written NAD from DHEC before relocating such equipment. Thus, there is no written decision, certificate, or approval from DHEC "required by law" to relocate an MRI scanner.

Based on these facts, the ALC did not have subject matter jurisdiction to preside over Belfair's request for a contested case under the South Carolina Supreme Court's decision in *Amisub*, in which the court concluded that a contested case could not arise from DHEC's decision not requiring a CON or NAD for an urgent care center. In that case, Carolinas Physicians Network (CPN) planned to construct a medical office building and wrote to DHEC, requesting confirmation that the project did not require CON review. *Amisub*, 403 S.C. at 579, 743 S.E.2d at 788. A DHEC staff member issued a written response confirming that the project did not require CON review. *Id.* Following completion of construction, CPN opened an urgent care center at the medical office building. *Id.* at 580, 743 S.E.2d at 788. Piedmont Hospital, a competing provider, raised objections to DHEC staff about CPN opening the urgent care center without a CON or NAD. *Id.* Although DHEC did not issue a written decision memorializing its decision that neither a CON nor a NAD was required for the project, DHEC's staff purportedly informed Piedmont's lawyer of its decision during a meeting. *Id.* Following that meeting, Piedmont requested that the DHEC Board conduct a final review of the staff's decision not to require a CON or a NAD for the urgent care center. *Id.* at 581, 743 S.E.2d at 789. The DHEC Board denied Piedmont's request for final review, and Piedmont then requested from the ALC a contested case. *Id.* The ALC subsequently granted CPN summary judgment in the contested case because the urgent care center was exempt from CON review as a matter of law. *Id.*

After the ALC granted summary judgment, Piedmont appealed to the Court of Appeals, which reversed summary judgment and remanded the case to the ALC for further discovery and

proceedings. *Id.* at 582-84, 743 S.E.2d at 790-91. However, on *certiorari*, the Supreme Court reversed the Court of Appeals and ruled that the ALC did not have subject matter jurisdiction to conduct a contested case hearing. *Id.* at 596-97, 743 S.E.2d at 797. According to the court, no formal decision could emanate from DHEC for which a contested case proceeding is provided by law because DHEC had no legal duty to provide a written CON, NAD, or exemption for the urgent care center. *Id.* The South Carolina Supreme Court stated, "Since there was no legal duty owed by DHEC to issue a staff decision in this matter, which is the trigger giving rise to a contested case, there was no corresponding obligation that Piedmont be afforded a contested case hearing before the ALC." *Id.*

Amisub dictates that the ALC lacked subject matter jurisdiction over Belfair's request for a contested case hearing because formal written approval from DHEC was not required to relocate the MRI scanner. Just as the CON Act and the CON Regulation did not require a written decision from DHEC approving a CON, a NAD, or an exemption for an urgent care center, as decided in *Amisub*, they similarly do not require formal written approval for the relocation of BMH's MRI scanner. Because DHEC had no legal duty to provide a formal written decision approving a CON, a NAD, or an exemption for such relocation, Belfair cannot utilize the contested case review process to challenge DHEC's informal response to BMH's request.

Although the ALC ruled that it had jurisdiction over Belfair's contested case, its reasoning does not accord with *Amisub*. According to the ALC, it had jurisdiction over the matter because, despite the fact that "BMH did not request a formal NAD," DHEC interpreted BMH's correspondence seeking confirmation that CON approval was not required "as a request for a [NAD]" and issued a NAD. (R. p. 26.) In so doing, the ALC improperly relied on DHEC's interpretation of BMH's request without determining whether DHEC had a legal duty to issue a

NAD in response to BMH's request, as it was required to do under *Amisub*. And because there was no legal obligation for DHEC to issue a written NAD in response to BMH's request, no contested case can arise from DHEC's confirmation, regardless of whether DHEC considered BMH's request as one for a NAD.

In fact, DHEC admitted that a written NAD is not required from DHEC in response to BMH's request to relocate the MRI scanner. The fact that DHEC provided a written confirmation that BMH could proceed with the relocation should be viewed as nothing more than an agency providing responsive information to a healthcare provider for the purpose of clarifying the application of the law and avoiding regulatory uncertainty, both of which should be encouraged as a matter of public policy. *See Alaska Dep't of Envtl. Conservation v. United States*, 540 U.S. 461, 516 (2003) (Kennedy, dissenting) ("Regulated persons and entities should be able to consult an agency staff with certainty and confidence, giving due consideration to agency recommendations and guidance.") However, if merely providing a written response to any request regarding the application of the CON laws and regulations will automatically give rise to a contested case, DHEC will naturally be reluctant to provide such clarity out of fear that it will become mired in unnecessary litigation. Similarly, healthcare providers will be hesitant to seek written guidance from DHEC if doing so will increase the likelihood that DHEC's decision will be reviewed through the ALC contested case process, thereby causing significant legal fees and costs and delays in proceeding with their prospective projects. Neither of those results are desired but will ultimately occur if the ALC's rationale for concluding jurisdiction exists in this case is adopted by the Court.

To avoid this situation, the Court should find that the ALC lacked subject matter jurisdiction over Belfair's request for a contested case. DHEC's mere written confirmation that a project can proceed without a CON can neither expand nor narrow the jurisdiction of the ALC.

Instead, under *Amisub*, whether a contested case exists is determined by whether DHEC had a legal duty to approve a CON, grant a written exemption, or issue a written NAD. In this case, no such legal duty existed, and therefore, the ALC lacked subject matter jurisdiction.

II. The ALC correctly ruled that BMH's relocation of an existing MRI scanner did not require CON review or a NAD.

Belfair mistakenly argues that the ALC erred in ruling that the relocation of the MRI scanner did not require CON review. Specifically, Belfair asserts that the "applicable regulations provide that a CON or NAD is required, as applicable, for a service or equipment that is being relocated, even if it is already in existence, operational and providing services in a particular service area and even if the service or equipment received the approval required when they first came into service." To support this interpretation, Belfair cites S.C. Code Ann. Regs. 61-15, § 102(4), which provides:

> ***These provisions do not apply to acquisitions or changes of ownership of health care facilities, services, and equipment*** that are already in existence, operational, and providing services in a particular service area, and which have undergone review and obtained the approval that was appropriate under the law at the time they first entered the relevant service area, so long as the facility or service is not being relocated. For facilities, services, and equipment which have previously undergone Certificate of Need review, the Certificate of Need must be fulfilled ***prior to a change of ownership***.

(Emphasis added.)

Contrary to Belfair's argument, S.C. Code Ann. Regs. 61-15, § 102(4) does not require a CON or NAD for a relocation. Instead, the regulation by its plain terms merely provides that acquisitions or changes of ownership of health care facilities, services, and equipment do not require a CON so long as the facility or service is not being relocated. Because this case does not involve an acquisition or change of ownership, S.C. Code Ann. Regs. 61-15, § 102(4) has no applicability.

In further support of its argument that relocation of the MRI scanner required CON review, Belfair argues that S.C. Code Ann. Regs. 61-15, § 802(2)(d) requires an applicant to submit to DHEC in its CON proposal specific demographic information justifying "a reduction, relocation, or elimination of a facility or service." According to Belfair, "If a 'relocation' did not require regulatory review, as the ALC erroneously held, then §§ 102(4)'s and 802(2)(d)'s references to relocation would be entirely without meaning." Here, Belfair ignores the obvious interpretation that the requirements of § 802(2)(d) apply only when a relocation requires CON review, but those requirements do not apply if the relocation does not require CON review.

Put another way, the CON Act, the CON Regulation, and the South Carolina Health Plan require CON review for relocation of ***some*** facilities, services, and equipment but not for relocation of ***all*** facilities, services, or equipment. If CON review is required for a relocation, then the applicant must submit to DHEC a CON proposal containing the information identified in S.C. Code Ann. Regs. 61-15, § 802(2)(d). If CON review is not required, then there is no proposal to submit, and hence, no reason to submit the demographic information identified in that regulation. Thus, there is no merit to Belfair's suggestion that the ALC's ruling renders the references to relocation in S.C. Code Ann. Regs. 61-15, § 102(4) and § 802(2)(d) meaningless.

Belfair additionally argues that relocation of services or equipment is required under the South Carolina Health Plan. In making this argument, Belfair refers to the section of the South Carolina Health Plan governing transfers between "affiliated facilities," which is defined as "two or more health care facilities, whether inpatient or outpatient, owned, leased, or who have a formal legal relationship with a central organization and whose relationship has been established for reasons other than for transferring beds, equipment or services."[2] However, Belfair's reliance on

[2] 2020 South Carolina Health Plan, p. 5.

this provision in the South Carolina Health Plan is mistaken because BMH's medical office buildings in Port Royal and Okatie are not "health care facilities," as that term is defined in the CON Act and CON Regulation.

The CON Act and CON Regulation define "health care facility" as:

> acute care hospitals, psychiatric hospitals, alcohol and substance abuse hospitals, nursing homes, ambulatory surgical facilities, rehabilitation facilities, residential treatment facilities for children and adolescents, intermediate care for the persons with intellectual disability, narcotic treatment programs, and any other facility for which Certificate of Need review is required by federal law.

S.C. Code Ann. § 44-7-130(10); S.C. Code Ann. Regs. 61-15, § 103(12). Neither medical office buildings nor imaging centers fall within this definition. *See Amisub*, 403 S.C. at 587, 743 S.E.2d at 792 (declaring that urgent care centers were not among entities listed as constituting a health care facility). Therefore, the Port Royal and Okatie medical office buildings are not "heath care facilities" under the CON Act, as the ALC correctly concluded, and, consequently, they are not affiliated facilities for CON purposes under the South Carolina Health Plan. As a result, the South Carolina Health Plan did not require CON review for the relocation of the MRI scanner.

To be sure, DHEC has consistently interpreted the CON Act, the CON Regulation, and the South Carolina Health Plan as not requiring CON review for the relocation of an MRI scanner. As argued by DHEC on BMH's motion to dismiss, the South Carolina Health Plan does not have standards or criteria for the relocation of MRI scanners. (R. pp. 391-392.) As a result, if this matter is remanded to DHEC for CON review, there would be no standards or criteria for BMH to address in its proposal to relocate the MRI scanner, and there would be no standards or criteria for DHEC to apply in its review, which underscores the absurdity of Belfair's insistence on CON review of the relocation.

Despite Belfair's argument to the contrary, CON review of this relocation is neither necessary nor consistent with the purposes of the CON Act, which are "to promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services which will best serve public needs, and ensure high quality services are provided in health facilities in the state." S.C. Code Ann. § 44-7-120. BMH's challenged action involves nothing more than BMH's relocation of an existing MRI machine from one medical office building to another within the same county. This relocation is not costly[3], will not result in any duplication of health care facilities or services, and has no impact on the quality of imaging services that BMH is presently providing. As a result, Belfair cannot credibly claim that the lack of CON review in this case will adversely impact the public interest.

Nevertheless, Belfair attempts to argue that it should at least be given the opportunity to conduct discovery to establish that Port Royal and Okatie are distinct "service areas" and that the relocation will adversely affect the Port Royal service area. In so doing, Belfair again relies on an incorrect interpretation of the CON Act, the CON Regulation, and the South Carolina Health Plan. Specifically, Belfair is mistaken that communities within the same county can constitute separate service areas. Instead, the South Carolina Health Plan provides that "service areas may be comprised of one or more counties,"[4] which demonstrates that DHEC considers that a "service area" for CON purposes may be larger – but not smaller – than an individual county. Because Port

---

[3] Under S.C. Code Ann. Regs. 61-15, § 106(2), the South Carolina Health Plan "must address and include projections and standards for specified health services and equipment which have a potential to substantially impact health care cost and accessibility." The South Carolina Health Plan's omission of any standards specifically governing the relocation of MRI scanners indicates that DHEC considers that such relocations do not "have a potential to substantially impact health care cost and accessibility."

[4] 2020 South Carolina Health Plan, pp. 4-5.

Royal and Okatie are in the same county, they are in the same service area[5], and no amount of discovery will change that fact.

As a result, Belfair's objections to the relocation of BMH's MRI scanner under the guise of protecting the public interest are disingenuous. Belfair seeks CON review not to protect the residents of Beaufort County but to protect itself from competition. This Court should not be fooled by Belfair's feigned defense of the public interest, and it should reject Belfair's appeal accordingly.

III. BMH's relocation of the MRI scanner was not an acquisition or expenditure covered by the CON Act.

Belfair also argues that the relocation should be subject to CON review because it qualifies as both an acquisition of medical equipment over $600,000 and an expenditure over $2,000,000 under S.C. Code Ann. § 44-7-160(3) and (6). In so doing, Belfair improperly conflates the prior replacement of the MRI scanner, the separate construction of the Okatie medical office building, and relocation of the MRI scanner into one project in an attempt to inflate the costs associated with the relocation to trigger CON review. Ultimately, Belfair's argument fails for several reasons.

First, Belfair mistakenly argues that the relocation qualifies as an "acquisition" or "expenditure" because it involved the prior acquisition of the MRI scanner. However, that purported "acquisition" and "expenditure" is actually a replacement of like equipment that DHEC previously approved with a written NAD under S.C. Code Ann. Regs. § 61-15, § 105(1)(a) in

[5] Belfair recently challenged DHEC's approval of a CON for another provider to add an additional MRI scanner at its existing imaging facility in Bluffton, which was approximately ¼ mile from Belfair's facility. In that case, it appears that it was undisputed that the primary and secondary service areas were Beaufort County and Jasper County, respectively, and not communities within a county as Belfair now contends. *See MRI at Belfair, LLC v. S.C. Dep't Health & Envt'l Control*, Docket No. 17-ALJ-07-0144-CC, 2019 SC ENV LEXIS 37, *49 (SCALC Sept. 17, 2019). Thus, it appears that Belfair's definition of service area depends on what suits its litigation strategy.

2019, which Belfair failed to appeal. And the ALC correctly found that no acquisition was involved in this matter because "BMH previously obtained the MRI scanner in question as replacement equipment pursuant to" the previously issued NAD. Under the CON Regulation, DHEC clearly intended that CON review is not required for a replacement of like equipment. And even if the replacement involves an acquisition of like equipment costing over $600,000 or an expenditure of over $2,000,000, it is nevertheless not subject to CON review. Otherwise, the provision under S.C. Code Ann. Regs. 61-15, § 105(1)(a) allowing NADs would be rendered meaningless because every acquisition of or expenditure for replacement equipment over the monetary thresholds would be subject to CON review. *Lightner v. Hampton Hall Club*, 419 S.C. 357, 364, 798 S.E.2d 555, 558 (2017) (stating rule of statutory construction that statute should be so construed to not render any word, clause, sentence, provision or part superfluous or meaningless).

Second, Belfair's attempt to challenge the relocation of the MRI scanner as an acquisition of and expenditure for the MRI scanner is untimely because it failed to appeal DHEC's prior approval to replace the MRI scanner within the required time period. DHEC issued the written NAD on the replacement of the MRI scanner in April of 2019, which triggered Belfair's opportunity to appeal. It failed to do so, and the ALC correctly concluded that it lacked jurisdiction to entertain Belfair's challenge to the acquisition of the MRI scanner over a year later.

Third, CON review of expenditures over $2,000,000 only applies for expenditures made by or behalf of a "health care facility," and the Okatie medical office building is not a health care facility. *See* S.C. Code Ann. Regs. 61-15, § 102(1)(c) (requiring CON for an "expenditure ***by or behalf of a health care facility*** in excess of two million dollars . . .) (emphasis added). As discussed above, the CON Act's definition of "health care facility" does not include medical office

buildings or imaging centers. Because the Okatie medical office building is not a health care facility under the CON Act, the ALC correctly determined that the relocation does not involve an expenditure subject to CON review, regardless of the amount of the expenditure involved and whether capital costs associated with the design and construction of the medical office building are considered.

Fourth, Belfair's speculative claim that the relocation of the MRI scanner exceeds the $600,000 and $2,000,000 thresholds for CON review of acquisitions and expenditures, respectively, is based on conjecture and no evidence. The only evidence in the record is the relocation will cost no more than $125,000, as the ALC ruled. In questioning this amount, Belfair submitted the conclusory affidavit of a health planning consultant who opined on her understanding of what costs must be included in a CON application under the applicable regulations and her belief that the costs exceeded $2,000,000. (R. pp. 170-172.) Yet this affidavit does not constitute evidence because it consists solely of her legal opinions and speculative estimates of cost. *See Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003) (ruling that trial court properly refused to consider an expert affidavit filed in response summary judgment motion where affidavit contained only legal opinions, conclusions, and no factual support) (R. pp. 321-322; R. pp. 299-300.) And the consultant failed to address the fact that the Okatie medical office building is not a "health care facility" under the CON Act. Therefore, the ALC properly refused to give the consultant's affidavit any weight in its analysis dismissing the contested case, and Belfair's attempt to mischaracterize the relocation of the MRI scanner as an acquisition or expenditure subject to CON review fails.

IV. No further discovery is needed because DHEC's decision is correct as a matter of law and because Belfair was provided reasonable opportunity to challenge any materials presented to the ALC.

Despite presenting to the ALC multiple exhibits consisting of over 120 pages in response to BMH's motion to dismiss, Belfair confusingly claims that the ALC erred by "converting BMH's motion to one for summary judgment without providing the necessary notice and opportunity to respond." (Belfair Initial Br. p. 13.) Not only does this argument mischaracterize the ALC's ruling, it disingenuously suggests that Belfair was deprived of an opportunity to respond to materials considered by the ALC when Belfair, in fact, presented more materials for the ALC to consider on BMH's motion than the other parties combined.

To begin, the ALC did not convert BMH's motion to dismiss to one for summary judgment. Instead, the ALC stated that it considered it as a motion to dismiss as a matter of law under SCALC Rule 19. Although the ALC analogized the motion to one for summary judgment under Rule 56, SCRCP, the ALC made clear that it was ruling on the motion as a matter of law, with the applicable statutes and regulations applied solely to the administrative materials considered by DHEC, which were in all parties' possession. (R. pp. 24, 26-27.) Thus, Belfair incorrectly argues that BMH's motion was converted to one for summary judgment.

Even if the motion was considered as one for summary judgment, Belfair cannot credibly contend that it was prejudiced by any documents submitted to and considered by the ALC with respect to the motion. In fact, BMH presented no documents or materials as exhibits with either its motion to dismiss or its reply to Belfair's response. While DHEC did submit pertinent documents from the administrative record in its supporting response to BMH's motion, all of those documents were in Belfair's possession, and most of them were also submitted as exhibits to Belfair's response.

Belfair's more voluminous submission of documents in response to BMH's motion to dismiss belies its incredible assertion that the ALC improperly converted the motion to one summary judgment and considered documents outside of the pleadings. Also, Belfair had an opportunity to submit any additional documents it desired prior to the hearing, which occurred more than two months after BMH filed its motion and approximately two months after DHEC submitted its response in support of the motion. Therefore, to the extent that the ALC converted the motion to one for summary judgment, it was not improper as Belfair had a reasonable opportunity to introduce evidence in opposition to the motion and, in fact, did so. *See Johnson v. Dailey*, 318 S.C. 318, 321, 457 S.E.2d 613, 615 (1995) (ruling that trial court did not err in considering matters outside of the pleadings as such matters were attached to the Rule 12(b)(6) motion more than 30 days prior to the hearing).

Although Belfair asserts that it should have been afforded the opportunity to conduct discovery, the ALC properly rejected that argument. The ALC concluded:

> [T]he only facts to be developed in discovery would explore the "acquisition" costs associated with the project. However, this discovery would be appropriate only if the relocation of the previously purchased MRI scanner could be characterized, at this point in its history, as an acquisition. The Court concludes that the project in question is not an acquisition in the sense intended by statute and regulation.

(R. p. 24.) Therefore, discovery would serve no useful purpose, and Belfair was not prejudiced by the lack of an opportunity to conduct discovery.

On this point, *Amisub* is again controlling. In that case, Piedmont, as Belfair does here, challenged DHEC's determination that CON review was not required and argued before the ALC on the respondent's motion to dismiss and for summary judgment that further discovery was necessary before the motion could be determined. *Amisub*, 403 S.E.2d at 583, 743 S.E.2d at 790. Rejecting those arguments, the ALC concluded that discovery was not needed because the issues

on which discovery were sought were not determinative of whether CON review was necessary. *Id.* On appeal, the South Carolina Supreme Court ruled that DHEC's determination was not properly the subject of a contested case and, therefore, that the Court of Appeals erred in remanding the case for further discovery. *Id.* at 596-97, 743 S.E.2d at 797.

For the same reasons that the South Carolina Supreme Court and the ALC refused additional discovery in *Amisub*, further discovery is not warranted here. As in *Amisub*, DHEC had no legal duty to issue a CON, written exemption, or written NAD in this case. Thus, no contested case could arise from DHEC's determination that BMH's relocation of the MRI scanner did not require CON review, and consequently, there is no need for discovery. Yet even if the ALC had jurisdiction in this case, it properly determined that discovery was not warranted because it would have no relevance to whether DHEC's determination was correct. As a result, there is no need to remand the case to the ALC for further discovery, and the Court should affirm the ALC's dismissal of Belfair's contested case request.

CONCLUSION

Based on the foregoing discussion and analysis, the ALC correctly granted BMH's motion to dismiss Belfair's contested case, and the Court should affirm the decision below.

s/Trudy H. Robertson
Trudy H. Robertson (S.C. Bar No. 64856)
E. Brandon Gaskins (S.C. Bar No. 73274)
Moore & Van Allen PLLC
78 Wentworth Street
Charleston, SC 29401
Telephone: (843) 579-7000
Facsimile: (843) 579-7099
trudyrobertson@mvalaw.com
brandongaskins@mvalaw.com

Attorneys for Respondent
Beaufort Memorial Hospital

January 21, 2022
Charleston, South Carolina

RECEIVED
Jan 24 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

H.W. Funderburk, Jr., Administrative Law Court Judge

Docket No. 20-ALJ-07-0235-CC

Appellate Case No.: 2021-000617

MRI at Belfair, LLC d/b/a 3T MRI at Belfair, Appellant,

v.

South Carolina Department of Health and Environmental Control and
Beaufort Memorial Hospital, Respondents.

**CERTIFICATE OF RESPONDENT
BEAUFORT MEMORIAL HOSPITAL'S COUNSEL**

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

s/Trudy H. Robertson
Trudy H. Robertson (S.C. Bar No. 64856)
E. Brandon Gaskins (S.C. Bar No. 73274)
Moore & Van Allen PLLC
78 Wentworth Street
Charleston, SC 29401
Telephone: (843) 579-7000
Facsimile: (843) 579-7099
trudyrobertson@mvalaw.com
brandongaskins@mvalaw.com

*Attorneys for Respondent
Beaufort Memorial Hospital*

January 21, 2022

Charleston, South Carolina