

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
ADJUDICATIVE SERVICE UNIT

In Re:) Master Case No. M2010-1529 (Lead)
) Master Case No. M2011-375
CERTIFICATE OF NEED DECISION)
BY DEPARTMENT OF HEALTH) PREHEARING ORDER NO. 4:
REGARDING KADLEC REGIONAL) ORDER GRANTING
MEDICAL CENTER APPLICATION) MOTION TO DISMISS
TO ADD 114 ACUTE CARE BEDS)
TO EXISTING HOSPITAL,)
)
KADLEC REGIONAL MEDICAL)
CENTER, a Washington non-profit)
Corporation,)
)
Petitioner.)
)
and)
)
EVALUATION OF THE FOLLOWING)
TWO CERTIFICATE OF NEED)
APPLICATIONS PROPOSING TO ADD)
ACUTE CARE BED CAPACITY TO THE)
BENTON/FRANKLIN PLANNING AREA)
KADLEC REGIONAL MEDICAL)
CENTER PROPOSING TO ADD 114)
ACUTE CARE BEDS TO THE)
EXISTING HOSPITAL IN RICHLAND;)
KENNEWICK GENERAL HOSPITAL)
PROPOSING TO ADD 25 ACUTE)
CARE BEDS TO THE AUBURN)
CAMPUS IN KENNEWICK,)
)
KENNEWICK PUBLIC HOSPITAL)
DISTRICT,)
)
Petitioner.)
)

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APPEARANCES:

Petitioner, Kadlec Regional Medical Center (Kadlec), by
Bennett Bigelow & Leedom, P.S., per
Brian W. Grimm, Attorney at Law

Petitioner, Kennewick Public Hospital District, dba
Kennewick General Hospital (Kennewick), by
Foster Pepper PLLC, per
Christopher G. Emch, Attorney at Law

Department of Health Certificate of Need Program (Program), by
Office of the Attorney General, per
Richard A. McCartan, Assistant Attorney General

PRESIDING OFFICER: John F. Kuntz, Review Judge

The Program filed a Motion to Dismiss Request for Adjudicative Proceeding to request an order denying Kadlec's request for adjudicative proceeding because Kadlec was granted Certificate of Need No. 1430 for 55 acute care beds. Kadlec opposed the Program's Motion to Dismiss and appealed that portion of the Program's decision that denied Kadlec's request for 114 beds or 75 beds contained in the same application. Kadlec is not appealing that portion of the Program's decision granting Kadlec's request for an additional 55 acute care beds. Program's Motion to Dismiss is granted.

I. PROCEDURAL HISTORY AND FINDINGS OF FACT

1.1 In November 2009, Kadlec submitted a certificate of need request for additional acute care hospital beds for its Richland, Washington facility. The request contained three alternative plans for expansion: (1) 114 beds on four new floors; (2) 75 beds on four new floors; or (3) 55 beds on one of four new floors.

1.2 On November 3, 2010, the Program approved Kadlec's request for 55 acute care beds and issued Certificate of Need No. 1430. Kadlec then applied to

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license 270 beds (the 215 it was previously licensed for, plus the 55 beds awarded under Certificate of Need No. 1430.) This license request was granted and Kadlec put the 55 beds into service at its facility.

1.3 On December 1, 2010, Kadlec filed a Request for Adjudicative Proceeding with the Adjudicative Service Unit. The agency action at issue that Kadlec identified is the Program's decision denying Kadlec's request to add 114 beds or 75 beds to its existing hospital. Kadlec did not appeal the Program's decision awarding it the 55 additional beds under Certificate of Need No. 1430.

1.4 On May 6, 2011, the Program filed a Motion to Dismiss Request for Adjudicative Proceeding (Program's Motion to Dismiss) with the Adjudicative Service Unit. The Program argued that Kadlec had no right to an adjudicative proceeding to contest the approval of Certificate of Need No. 1430 under RCW 70.38.115(10)(a) and WAC 246-310-610(1). In the alternative, the Program argued that Kadlec lost any right to appeal the approval of the 55 beds when it implemented Certificate of Need No. 1430 by putting the 55 beds into service.

1.5 On May 17, 2011, Kadlec filed its Opposition to Program's Motion to Dismiss Request for Adjudicative Proceeding (Kadlec's Opposition to Motion) with the Adjudicative Service Unit. Kadlec argued:

A. It was necessary to include multiple bed requests in its application because it was unsure which Office of Financial Management "population growth projection" (high series, medium series, or low series) the Program would use in analyzing its application.¹

¹ There is information in the Program's evaluation of Kadlec's application to suggest that Kadlec did, in fact, know the Program used the OFM medium series standard in determining need. See Program's Motion to Dismiss, Appendix 45 (page 8 of 42 of the Program evaluation.)

B. That it did not waive its right to appeal the Program's denial of 114-bed and 75-bed requests when it accepted the 55-bed award in Certificate of Need No. 1430.

C. Partial appeals of agency actions are permitted under the Department's procedural rules and the Administrative Procedure Act, chapter 18.130 RCW. See WAC 246-10-203 and RCW 34.05.419(1)(a).

Kadlec's Opposition to Motion, pages 1-10. In the alternative, Kadlec argues that legal authority exists to commence an adjudicative appeal at any time with respect to a matter within the agency's jurisdiction. See RCW 34.05.413(1).

1.6 On June 1, 2011, the Program filed its Reply Brief Supporting Motion to Dismiss Request for Adjudicative Proceeding with the Adjudicative Service Unit. The Program argued that Kadlec did not dispute that its application for an increase of acute care beds was made in the alternative (that is, for an increase of 114, 75, or 55 beds.) The Program chose one of Kadlec's alternatives and granted a certificate of need. Having granted a certificate of need, Kadlec cannot appeal the remaining alternatives under RCW 70.38.115(10)(a) and WAC 246-310-610(1).

II. CONCLUSIONS OF LAW

2.1 The presiding officer shall rule on motions. WAC 246-10-403(1). The presiding officer shall:

(a) Apply as the first source of law governing the issue those statutes and rules deemed applicable to the issue;

(b) If there is no statute or rule governing the issue, resolve the issue on the basis of the best legal authority and reasoning available, including that found in federal and Washington constitutions, statutes, rules, and court decisions; and

(c) Not declare any statute or rule invalid.

WAC 246-10-602(3).

Does Kadlec Have a Right to a Hearing?

2.2 RCW 70.38.115(10)(a) states:

Any applicant denied a certificate of need or whose certificate of need has been suspended or revoked has the right to an adjudicative proceeding. The proceeding is governed by chapter 34.05 RCW, the Administrative Procedure Act.

RCW 70.38.115(10)(a); *See also* WAC 246-310-610(1). Here Kadlec (the applicant) was awarded Certificate of Need No. 1430 for 55 acute care beds. Kadlec was not denied a certificate of need by the Program's decision. Kadlec has no right to appeal under the clear language of RCW 70.38.115(10)(a) and WAC 246-310-610(1).

2.3 Kadlec argues the Program's partial denial of its application (denying Kadlec's 114-bed or 75-bed request) can be appealed under WAC 246-310-610. Kadlec supports its interpretation by citing to language in the Department's procedural rules. *See* WAC 246-10-203. That regulation states in relevant part:

The application for adjudicative proceeding shall be made either on the Request for Adjudicative Proceeding Form accompanying the initiating document or by a written document containing at least the following information:

..

(iii) Identification of the *portion or portions* of the initiating documents contested;

...

(vi) For matters not under chapter 18.130 RCW [the Uniform Disciplinary Act] and in which the Department proposes to deny, suspend, revoke or modify a license or proposes to impose a civil fine, the application shall include a copy of the initiating document containing the adverse notice.

WAC 246-10-203(1)(b) (emphasis added.) An "initiating document" means a written agency document which initiates action against a license holder or applicant and which creates a right to an adjudicative proceeding. See WAC 246-10-102.

2.4 When Kadlec applied for a certificate of need to increase its bed capacity, it submitted three alternative approaches to the Program for use in calculating need for additional acute care beds (a 114-bed, 75-bed, and a 55-bed alternative). Offering three separate alternatives within an application is not the same as offering three separate applications. Because Kadlec made its application in the alternative, the Program could grant any of the three proposed alternatives. The Program chose one of the offered alternatives (the 55-bed choice) and granted Certificate of Need No. 1430. By choosing the 55-bed alternative, the Program did not deny the remaining alternatives.²

2.5 Even if a right did exist to appeal the discarded alternative approaches, Kadlec has already implemented Certificate of Need No. 1430 by adding the 55 beds to its hospital and requesting a license for 270 beds. Doing so constitutes a waiver of any appeal right that Kadlec might have had for Certificate of Need No. 1430.

² There are sound policy reasons to deny Kadlec's approach. The applicant bears the burden of establishing that it meets all applicable criteria. WAC 246-10-606. By implication, this includes clearly stating what the applicant is applying for (what number of beds is being requested). Doing so avoids unnecessary adjudicative proceedings. Additionally, an applicant should not be permitted to circumvent the language in RCW 70.38.115(10)(a) and WAC 246-310-610(1) by including several alternative approaches in the application process rather than making a clear declaration of its intent.

Should Kadlec be granted a hearing under RCW 34.05.413(1)?

2.6 Arguing in the alternative, Kadlec requests the Presiding Officer commence an adjudicative proceeding under RCW 34.05.413(1), which states:

Within the scope of its authority, an agency *may* commence an adjudicative proceeding at any time with respect to a matter within the agency's jurisdiction.

RCW 34.05.413(1) (emphasis added). Commencing an adjudicative proceeding under RCW 34.05.413(1) is within the agency's discretion. See *Washington Independent Telephone Association, et.al., v. The Washington Utilities and Transportation Commission*, 110 Wn. App. 498, 518 (2002).

2.7 Kadlec argues that the Program does so for affected persons (that is, competitors of the applicant), and it is appropriate to extend that reasoning to Kadlec's request for a hearing.³ See Kadlec's Opposition to Motion, pages 9-10. Kadlec argues that the Program's policy approach has been to give affected persons the ability to bring such challenges in an adjudicative proceeding rather than to go directly to court in a judicial review proceeding. See Kadlec's Opposition to Motion, page 9.

2.8 Contrary to Kadlec's argument, competitors have a right to a hearing under RCW 34.05.422(1)(b) and RCW 34.05.413(2), not a permissive adjudicative proceeding under RCW 34.05.413(1). RCW 34.05.422(1)(b) states:

Unless otherwise provided by law: ... (b) applications for licenses that are contested by a person having standing to contest under the law and review of denials of applications for licenses or rate changes shall be conducted as adjudicative proceedings.

³ See WAC 246-310-010(2).

NOTICE TO PARTIES

This order is subject to the reporting requirements of RCW 18.130.110, Section 1128E of the Social Security Act, and any other applicable interstate or national reporting requirements. If discipline is taken, it must be reported to the Healthcare Integrity Protection Data Bank.

Either party may file a **petition for reconsideration**. RCW 34.05.461(3); 34.05.470. The petition must be filed within 10 days of service of this order with:

Adjudicative Service Unit
P.O. Box 47879
Olympia, WA 98504-7879

and a copy must be sent to:

Department of Health Certificate of Need Program
P.O. Box 40109
Olympia, WA 98504-0109

The petition must state the specific grounds for reconsideration and what relief is requested. WAC 246-11-580. The petition is denied if the Presiding Officer does not respond in writing within 20 days of the filing of the petition.

A **petition for judicial review** must be filed and served within 30 days after service of this order. RCW 34.05.542. The procedures are identified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. A petition for reconsideration is not required before seeking judicial review. If a petition for reconsideration is filed, the above 30-day period does not start until the petition is resolved. RCW 34.05.470(3).

The order is in effect while a petition for reconsideration or review is filed. "Filing" means actual receipt of the document by the Adjudicative Service Unit. RCW 34.05.010(6). This order is "served" the day it is deposited in the United States mail. RCW 34.05.010(19).

For more information, visit our website at <http://www.doh.wa.gov/hearings>

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