

IN THE SUPREME COURT OF MISSISSIPPI

**BRENTWOOD HEALTH MANAGEMENT
OF MISSISSIPPI, LLC D/B/A CHILDREN'S
HOSPITAL OF VICKSBURG**

APPELLANT

V.

NO. 2008-SA-00169

MISSISSIPPI STATE DEPARTMENT OF HEALTH

APPELLEE

**APPEAL FROM THE DECISION OF THE
HINDS CHANCERY COURT, FIRST JUDICIAL DIVISION**

BRIEF FOR APPELLEE

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STATEMENT OF ISSUES

- I. Whether the CONs expired by their own terms and, thus, was any affirmative action by the Mississippi State Department of Health even necessary “to withdraw, revoke or rescind” the CONs pursuant to Mississippi Code Section 41-7-195?
- II. Whether the Mississippi State Department of Health Has Clear Authority to Withdraw, Revoke or Rescind Brentwood’s Certificates of Need (CON).
- III. The Administrative Order Was Sound and Well Founded Based on the Failure of Brentwood Health Management of Mississippi, LLC d/b/a Children's Hospital of Vicksburg To Demonstrate Any Commencement of Construction; Substantial Undertaking of Other Preparation During the Valid Con Period; And/or Good Faith Effort to Obligate the Approved Capital Expenditure.
- IV. Whether the Final Agency Decision Was Founded on Sufficient Evidence to Meet the Due Process Requirements Afforded to Brentwood in this Case.
- V. Whether the Mississippi State Department of Health’s Actions Were Supported by Substantial Evidence, In Accordance with the Manifest Weight of the Evidence; Within its Statutory Authority, and Were Not Arbitrary or Capricious.

STATEMENT OF THE CASE

This Appeal is sought by Brentwood Health Management of Mississippi, LLC d/b/a Children's Hospital of Vicksburg (hereinafter "Brentwood") after the Mississippi State Department of Health's (hereinafter "Department") revocation of two Certificates of Need numbers R-0077 and R-0134 (hereinafter "CONs") previously held by Brentwood that authorize the renovation/establishment of a 20-bed child/adolescent psychiatric facility and establishment of a 60-bed psychiatric residential treatment facility otherwise described as a 60-bed PRTF Unit. These CONs were originally issued to Brentwood's successor on February 23, 1995, and May 30, 1996, respectively, but by order and letter of the State Health Officer (hereinafter "SHO") of September 5, 2001, these CONs were allowed to transfer the site change and increase the capital expenditure from \$636,833 to \$3,868,703. Ex. 5¹. From issuance of the amendment to these CONs, the Department monitored progress, or the lack thereof, on the CONs project and on December 18, 2006, issued its notice and intent to proceed with withdrawal/revocation of the CONs. From the Department's notice and intent, Brentwood requested a hearing challenging the CONs withdrawal/revocation. At the conclusion of the hearing, the appointed Administrative Hearing Officer recommended revocation of the CONs in her Findings of Fact and Conclusions of Law to the SHO. Thereafter, at the next monthly CON meeting, August 30, 2007, the SHO entered his final order revoking the CONs (hereinafter "Revocation"). Brentwood appealed the Revocation to the Hinds Chancery Court, First Judicial District and, subsequently, the Chancery Court affirmed the SHO's Decision. Brentwood now appeals to the Supreme Court.

¹References to hearing transcript are designated as "Tr."; and references to the exhibits introduced at the hearing are designated as "Ex."; and references to Brentwood's Record Excerpts are designated as "R.E."

SUMMARY OF ARGUMENT

Because the amended CONs issued were for a one year period and the Department never extended the CONs, the CONs expired and became automatically void by operation of law. The Mississippi Legislature authorized the Department to issue the CONs, and in the absence of any express waiver of rights and powers conveyed to the Department in such authorization, the Department continues to have its statutory authority and right to withdraw, revoke and/or rescind the CONs. Thus, the SHO's order revoking the CONs is proper and should be affirmed by this Court as the administrative record is void of any evidence of the following:

- "commencement of construction" of the CONs,
- "substantial undertaking" or other preparation during the valid CON period, or
- a "good faith effort to obligate the approved capital expenditure"

Finally, the SHO's order was not contrary to the substantial evidence in this case, nor was it arbitrary or capricious. Instead, it was based on a thorough review of the evidence in this case and supported by an overwhelming amount of evidence sufficient to meet any required administrative burden of proof.

ARGUMENT

I. **The CONs Expired By Their Own Terms and, thus, No Affirmative Action by the Mississippi State Department of Health Was Even Necessary "To Withdraw, Revoke or Rescind" the CONs Pursuant to Mississippi Code Section 41-7-195.**

The Department's statutory authority to extend and withdraw, revoke or rescind a CON is found in Miss. Code Ann. Section 41-7-195 which provides in part:

- (1) A certificate of need **shall be valid only for the defined scope, physical location and person named in the application.** A certificate of need shall not be transferable or assignable nor shall a project or capital expenditure project be transferred from one person to another, except with the approval of the State Department of Health. **A certificate of need shall be valid for the period of time specified therein.**
- (2) A certificate of need shall be issued for a period of twelve (12) months, or such other lesser period as specified by the State Department of Health.
- (3) The State Department of Health may define by regulation, not to exceed six (6) months, the time for which a certificate of need may be extended.
- (4) If commencement of construction or other preparation is **not substantially undertaken** during a valid certificate of need period or the State Department of Health determines the applicant is **not making a good faith effort to obligate such approved expenditure**, the State Department of Health **shall have the right to withdraw, revoke or rescind the certificate.**

Mississippi Code Section 41-7-195 (emphasis added).

The last valid period for the CONs in this case was from the date of the Final Order issued to amend them on September 5, 2001 to its expiration one year later on September 5, 2002. No further extension exists beyond September 5, 2002. This evidence is noted by the Administrative

Hearing Officer in her Findings and Facts and Conclusions of Law:

1. The CONs at issue expired by their own terms on September 5, 2002 - the applicant, as holder of the amended CONs held valid CONs for a one year period beginning on September 5, 2001. The Applicant was never given a[n] extension of time, and in fact only once was an extension sought, by the filing of a six month extension request on March 11, 2005. The requested extension was rejected by the Department because the time period for a six month extension had lapsed.
2. Only two progress reports were filed since September 5, 2001. The applicant, after requests from the Department, filed a progress report on March 11, 2005 and September 12, 2006. Neither report was filed during the valid CON period. [See Hrg. Exhibits 8 and 13, respectively].
3. The Notice of intent to revoke CONs was issued on December 18, 2006 – after the Department evaluated the lack of progress on the project as shown on the progress reports of March 11, 2005 and September 12, 2006.

Administrative Hearing Officer's Findings of Facts and Conclusions of Law, July 31, 2007, p. 2-3
(Hereinafter “H.O. Order”).

As explained by the chancellor in this case, the Attorney General of Mississippi issued two Official Opinions that provide guidance in this case.

- June 15, 2007 Opinion explains that, “ subsection (4) provides that the Department “shall have the right to withdraw, revoke, or rescind the CON if it finds that the holder has not substantially undertaken construction or other preparation during the period of the CON.... [I]t within the Department’s discretion to determine whether the holder has ‘substantially undertaken construction or other preparation.’”
- October 12, 2007 Opinion opines that, (The Department may, by regulation, provide for

criteria to determine whether "commencement of construction or other preparation" has been "substantially undertaken" and or the applicant has made a "good faith effort to obligate such approved expenditure.") However, once the time period stated in the CON has lapsed, the CON is void and no extensions can be granted.

Chancery Court Order at 5, R.E. at 000137. Thus, based on these Official Opinions of Mississippi Code Section 41-7-195, which are "useful in providing guidance" the CON's expired on September 5, 2002 and were automatically void by operation of law.

II. The Department Has Clear Authority to Withdraw, Revoke or Rescind Brentwood's Certificates of Need (CON).

Brentwood continues to argue that the CONs are not under Department's authority to withdraw, revoke or rescind because they were specifically authorized by the Mississippi Legislature. The Department respectfully disagrees as, while Brentwood's CONs were authorized and permitted by statute, the issuance of the CONs in question was still discretionary to the Department. Specifically, Mississippi Code Sections 41-7-191(4)(a)(iii) and 41-7-191(3)(b) provide that the Department "may" issue the CON as described and, as determined by this Court:

Throughout Miss.Code Ann. §41-7-191, the Legislature provided for an increase in supplemental medical services through discretionary ("may") and mandatory ("shall") clauses. Discretionary sections of Miss.Code Ann. § 41-7-193(1) are to be applied by the State Department of Health; however, for mandatory provisions, like Miss.Code Ann. § 41-7-191(16), the Legislature has waived the necessity of satisfying "the specifications and criteria established by the State Department of Health" by directing the issuance of a CON. *Oktibbeha County Hosp. v. Miss. State Dep't of Health*, 956 So.2d 207 (Miss. 2007) (footnote references omitted).

The Mississippi Legislature's use of the discretionary word "may" for each provision, evidences the Department's ultimate discretion in issuing the CON. It logically follows that, if the Department had discretion to issue these CONs, then the Department has authority to withdraw, revoke or rescind the CONs pursuant to Mississippi Code Section 41-7-195. Clearly, as seen by the plain reading of these statutes, the CONs were authorized and permitted, *not* mandated.

Further, Brentwood's flawed interpretation of these provisions encompasses a built-in release from other obligations under the statute which would, in essence, allow them to hoard these CONs, without ever acting upon them. The statute's language in no way contemplated such an expansive waiver of existing CON requirements. The statute did not speak to all the conditions of the CONs², nor did it waive all the requirements set forth by the CON Law and its implementing rules and regulations promulgated by the Department. Instead, Mississippi Code Section 41-7-195 requires that "... [a] certificate of need shall be valid for the period of time specified therein." Pursuant to this requirement, the Department issued these CONs with a mandated twelve month period. Subsequently, the CONs expired according to their own terms; and thus, the Department has the right to withdraw, revoke or rescind the CONs as provided by Mississippi Code Section 41-7-195(4). As stated by the Chancery Court in this case, "The Court hereby finds that the plain meaning of Miss. Code Ann. Section 41-7-195 authorizes the Department to extend, withdraw, revoke or rescind CONs." Chancery Court order at 6, R.E. at 000138.

III. The Administrative Order Was Sound and Well Founded Based on the complete lack of Brentwood Health Management of Mississippi, LLC d/b/a Children's Hospital of Vicksburg To Demonstrate Any Commencement of Construction; Substantial

²The [statutes] did provide some conditions, such as directing that the construction be limited to Warren County, Mississippi, and Medicaid participation.

Undertaking of Other Preparation During the Valid Con Period; And/or Good Faith Effort to Obligate the Approved Capital Expenditure.

Pointing to the record, the Hearing Officer outlines the overwhelming evidence that the Department put forth to prove its case in the hearing. Through Mr. Dawkins testimony, the Department showed Brentwood's lack of progress through its own progress reports which, when compared, show that in one year the percentage of work completed by Brentwood had only increased from 2% to 3% and, thus, "[were] still in the development stage" H.O. Order at 7.

On the other hand, the administrative record is completely void of the necessary evidence of Brentwood's "commenced construction" or that it had made any "substantial undertaking" during the valid CON period, or to date. Further, the record lacks any real evidence showing a "good faith" effort to obligate the approved capital expenditure. Without such evidence, the CONs expire and should be revoked.

First, Brentwood offers no proof of "commencement of construction" which, pursuant to Mississippi Code Section 41-7-173(e), requires that all of the following be "completed with respect to a proposal or project proposing construction, renovating, remodeling or alteration"

(i) A legally binding written contract has been consummated by the proponent and a lawfully licensed contractor to construct and/or complete the intent of the proposal within a specified period of time in accordance with final architectural plans which have been approved by the licensing authority of the State Department of Health;

(ii) Any and all permits and/or approvals deemed lawfully necessary by all authorities with responsibility for such have been secured; and

(iii) Actual bona fide undertaking of the subject proposal has commenced, and a progress payment of at least one percent (1%) of the total cost price of the contract has been paid to the

contractor by the proponent, and the requirements of this paragraph (e) have been certified to in writing by the State Department of Health.

Force account expenditures, such as deposits, securities, bonds, et cetera, may, in the discretion of the State Department of Health, be excluded from any or all of the provisions of defined commencement of construction.

Brentwood had no consummated "legally binding" construction contract and, thus, failed to prove any commencement of construction. In contrast, the Department produced ample proof that Brentwood had made no progress on the project since the CON's amendment on September 5, 2001.

Specifically, the Administrative Hearing Officer found that:

Mr. Dawkins testified that the chronology and his review of the file did not show any good faith effort since the amendment of the CON was issued. [Hrg. Trans. Page 15]. Further that the Department has not granted an extension of the amendment. [Id. at 15]. In contrasting, the two progress reports filed since the amendment of the CONs, Mr. Dawkins testified that the two progress reports show that there is "no significant difference in the two answers" as the percentage of work completed, answers to question 2 on each, 2% in the former and 3% in the latter. [Hrg. Trans. Page 34, see also, Hrg. Exhibits 8 and 13]. In contrasting answers for additional data, question 4, on the progress reports, Mr. Dawkins testified that "well, it's stated differently, but basically they are still in the development stage as far as trying to locate the property or site for the facility." [Hrg. Trans. Page 36, see also, Hrg. Exhibits 8 and 13]. In summary, Mr. Dawkins testified in his opinion that there was no showing of any progress "there's no significant change that we observed, from one progress report to the other." [Hrg. Trans. Page 35].

In summary, the Department's position was clarified through Mr. Dawkins' testimony that the CONs should be withdrawn "primarily because the project has been in existence about four years now, that there's no substantial change in the character or progress on what's been made on the authorized project" [Hrg. Trans. Pages 39-40] and "[b]ased upon the lack of evidence or progress shown over this four year period, yes, it is my testimony that it should be revoked". [TR-83-84].

H.O. Order, p. 6-7 (citations from original).

In fact, Brentwood fails to cite any evidence presented at the hearing, or otherwise in the

record, of any action taken during the valid period of the CONs, September 5, 2001, to September 5, 2002. Instead, as its "proof" of alleged progress prior to December 18, 2006, Brentwood submitted evidence limited to the following: lobbying efforts in the Mississippi Legislature for relocation of the bed authority to its other facilities outside of Warren County, Mississippi; investigation of financial feasibility of project and site investigation. The vast majority of Brentwood's evidence shows it intensified its efforts after the conclusion of the 2007 Regular Session of the Mississippi Legislature, April of 2007, but such evidence was still limited to feasibility study and site investigation. Furthermore, lobbying the legislature to change the statute to allow a CON, which is in essence a different CON, is not the relevant evidence of "good faith effort to obligate the approved capital expenditure."

The amended CONs issued in September 5, 2001, and at issue in this case, were restricted to a specific project with an identified tract of land or site in Warren County on which the facility was to be located, a particular budget, a pro-forma for the first three years of operation, and a specific capital expenditure. Yet, at the conclusion of the administrative hearing, it was apparent that Brentwood no longer even had the specific tract of land or site identified in the amended CONs; instead, it was looking to use this CON for a completely different project. As summarized in the Order and pointed out by the chancellor in her order,

In weighing all the evidence presented, the evidence and testimony suggests that in fact a regression of the project has occurred, because at the time that the amendment of the CONs was approved, the project had an identifiable location, plan, and capital expenditure cost. As of the hearing, it is clear that the project does not have identifiable location, plan and capital expenditure cost. At a hearing of this nature, it would be expected that problems and special issues would be presented by the applicant about why the project is not complete, not issues as to lobbying, feasibility, and site location as presented by the applicant in this case. It appears that the applicant presented good reasons that it

should continue its efforts in lobbying the Mississippi Legislature for authority for beds at its other facilities, but it is also clear that this should be done without the distraction of additional investigation of its options in regards to the CONs it holds that are restricted to a facility that must be located in Warren County, Mississippi.

H.O. Order at 15-16; Chancery Court Order at 7, R.E. 000139.

Brentwood failed to provide any evidence showing commencement of construction, a substantial undertaking on the CONs, or a good faith effort to obligate the approved capital expenditure in the CONs. As this is what is required pursuant to statute and regulations in this instance, Brentwood's attempt to overturn the administrative decision should, likewise, fail. As summarized by the Chancery Court in this case, "[a]lthough the Court commends Brentwood for taking measures to lobby the legislature and locate a site in Warren County, the Court is not persuaded that Brentwood has not 'commenced construction or substantially undertaken a construction project.....[Brentwood's actions] are merely not enough to prevent the revocation of the subject CONs. *Id.*

IV. The Department's Final Decision is Based on an Overwhelming Weight of the Evidence Meeting Even A Heightened Burden of Proof and, Thus, Should Be Affirmed.

On page 19 of its Brief before this Court, the Brentwood asserts a creative, but confusing, argument of undue deference paid by the Administrative Hearing Officer to the Department. Brentwood bases its argument on confusing logic concerning an "interlocutory appeal," however, the ultimate argument is that the hearing officer gave undue deference to the agency because she stated the appellate court's review of agency decisions within the final order. However, even if there is a misstatement of the proper standard by the hearing officer, if the Department met its burden of proof, such a misstatement will not undo the fact that the agency has indeed met its burden (and,

thus, Brentwood was “afforded the constitutional requisite minimum due process ... [b]efore final adverse findings were made against them.”) *Molden v. Mississippi State Department of Health*, 730 So.2d 29, 38 (Miss. 1998). Unlike the instant case, in *Molden*, the Court was reviewing an agency decision concerning a professional license which requires the heightened burden of “clear and convincing evidence.” And, while agency decisions concerning CON are **not** held to this heightened standard, the record is replete with evidence proving that the Department *even met this standard of review*. As this Court has continuously held,

The judicial eye looks to see whether a fair-minded fact finder might have found the evidence clear and convincing that the offense had occurred, and, where that may be said, we will not disturb the [agency’s] decision.

Id. at 37; *see also Hogan v. Mississippi Bd. Of Nursing*, 457 So. 2d, 931, 934 (Miss. 1984); *Nelson v. Mississippi State Bd. Of Veterinary Med.*, 662 So.2d 1058, 1060-61 (Miss. 1995).

Thus, it is undeniable that in the instant case a fair minded fact finder would have found that the preponderance of the evidence showed that an offense had occurred (*i.e.*, no “commencement of construction”); and, thus, the Department’s decision should not be disturbed in this case.

This is not a case where the Hearing Officer blindly accepted “any opinion” of a “mere employee” of the Department to base her opinion, but one where the Department provided significant and overwhelming proof to justify the revocation of these CONs. In fact, as explained earlier under a recent Attorney General opinion, the CON’s were void and expired as a matter of law. Certificates of Need, Op. MS Att’y Gen. (October 12, 2007).

Furthermore, this Brentwood had ample opportunity and was given great latitude to introduce evidence through witnesses and exhibits to refute such proof. During the hearing, the Brentwood introduced a number of exhibits into the record, put on five witnesses and was shown wide latitude

throughout the hearing to ensure it made a complete record. Further, as exemplified in her findings of fact and conclusions of law, the Hearing Officer analyzed all the evidence by both parties, and only after such, found that Brentwood failed to provide any evidence of substantial progress on the relevant project. (e.g., “In weighing all the evidence presented, the evidence and testimony suggests that in fact, a regression of the project has occurred.” ... “I find in summary after considering all the testimony and evidence at the hearing on the intent to withdraw/ revoke the CONs ...” H.O. Order at 15-16. This is even pointed out in the Chancellors orders in this case. Chancery Court Order at 7, R.E. at 000139.

As restated by this Court in *Mississippi Real Estate Com'n v. McCaughan*, 900 So.2d 1169 (Miss.2004) “the fundamental requirement of due process is simply the opportunity to be heard “at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976) (citations omitted).” *Id.* In the instant case, the Hearing Officer, took special care to ensure Brentwood’s opportunity to be heard through a full administrative hearing and a full and exhaustive record. Furthermore, the Hearing Officer conducted an independent and indepth review of the entire record, including the evidence put forth by the Brentwood. She found no evidence rebutting the Department’s proof of no substantial progress on the project. Therefore, the Brentwood’s attempt to taint the Hearing Officer’s Order by suggesting some undue deference is warrantless and should fail.

V. The Final Agency Decision is Supported By Substantial Evidence, In Accordance with the Manifest Weight of the Evidence and Is Within the Statutory Authority of the Department and was not Arbitrary or Capricious.

Finally, the agency’s decision is insulated or from judicial disturbance except for errors of law, “...unless the court finds that the order of the MSDH is not supported by substantial evidence,

is contrary to the manifest weight of the evidence, is in excess of the statutory authority or jurisdiction of the [MSDH] or violates any vested constitutional rights of any party involved in the appeal... “ *Mississippi State Department of Health and Desoto Imaging & Diagnostics, Jackson HMA, Inc. v. Baptist Memorial Hospital -Desoto, Inc. D/b/a/ Baptist Memorial Hospital Imaging-Desoto and Desoto Diagnostic Imaging, LLC d/b/a/ Carvel Imaging*, No. 2007-SA-00035-SCT 10 (2007) (“Desoto Imaging”); *See also, Jackson HMA, Inc. v. Mississippi State Department of Health*, 822 So.2d 968, 970 (Miss. 2005). As explained in detail above, the record overwhelmingly supports the Department’s final decision in this case and, further, there is no breach of established requirements. In its review of the evidence in this case, the Chancery Court concluded that, “Clearly, the Department did not act solely dependent on will or in a whimsical manner. In fact, the Department thoroughly reviewed the record and weighed the testimony when it determined that the CONs should be revoked.” Chancery Ct. Order at 9-10, H.E. at 000142. Thus, as held by this Court,

Given the MSDH’s familiarity with the particularities and nuances of the problems committed to its care, this Court finds that it is obligated to defer to the MSDH’s judgement in the absence of a breach of established requirements.


Desoto Imaging, 2007-SA-00035-SCT at 20.

CONCLUSION

In summary, the Court should find that the SHO order revoking the CONs was not necessary, since the CONs expired and became void by operation of law. Furthermore, the MSDH more than met its due process requirements to Brentwood and the SHO order is supported by substantial evidence and was not arbitrary or capricious, therefore, the MSDH final order should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

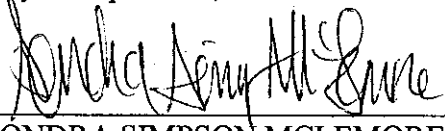
I, Sondra Simpson McLemore, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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