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 APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to M.R.A.P. 28(a)(1), the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Brentwood Health Management of Mississippi, LLC d/b/a Children's Hospital of Vicksburg (Appellant).

2. Thomas L. Kirkland, Jr., Allison C. Simpson, and Andy Lowry, of Copeland, Cook, Taylor & Bush, P.A. (counsel for Appellant).

3. Mississippi State Department of Health (Appellee) and F.E. Thompson (State Health Officer).

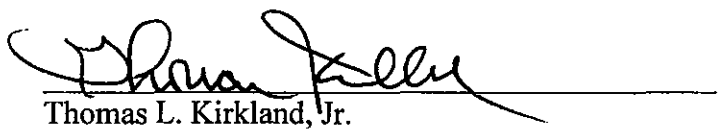
4. Sondra McLemore, Esq. (present counsel for Department) and Donald E. Eicher, III, Esq. (previous counsel for MSDH).

5. Psychiatric Solutions, Inc. (parent company of Appellant).

6. The Honorable Cassandra Walter (hearing officer).

7. The Honorable Denise Owens (chancellor).

Respectfully submitted,



Thomas L. Kirkland, Jr.
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III. Whether the Final Order Erroneously Relied Upon an Inapplicable Attorney General's Opinion.

IV. Whether, Since the CONs at Issue were Granted by the Legislature, the Department Lacks Authority to Revoke the CONs.

STATEMENT OF THE CASE

I. Course of Proceedings Below

On December 18, 2006, the Mississippi State Department of Health ("the Department"), the Appellee in the present case, gave notice to the Appellant, Brentwood Health Management of Mississippi, LLC d/b/a Children's Hospital of Vicksburg ("Brentwood"), of the Department's intent to revoke Certificates of Need ("CONs") No. R-0077 and R-0134. R.E. 4.[1]

On May 10, 2007, at the request of Brentwood, the Department held a revocation hearing (the "Hearing") concerning the revocation of the CONs (R-0077 and R-0134). Both Brentwood and the Department were represented by counsel.

On July 31, 2007, the hearing officer submitted her Findings of Fact and Conclusions of Law ("Findings") to the State Health Officer recommending revocation of the CONs. R.E. 5. Two of the primary foundations of that recommendation were an Attorney General's opinion issued after the Hearing, and the hearing officer's belief that a deferential standard of review was applicable at the Hearing. On August 7, 2007, Brentwood filed a Motion for Reconsideration pointing out its concerns with the hearing officer's Findings, and the hearing officer denied that Motion on August 9, 2007.

At the monthly CON meeting held on August 30, 2007, the State Health Officer issued the final order of the Department revoking the CONs (the "Final Order"), which Brentwood timely appealed on September 17, 2007. R.E.10. During the pendency of the

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[1] References to "T." refer to the Hearing transcript; references to "R.E." refer to the Record Excerpts filed by Appellant; references to "R." refer to the Bates-numbered record of proceedings in the chancery court. Note that all transcript pages referred to are included at R.E. 9.

appeal to chancery court, on October 12, 2007, the Department obtained a "clarification" of the Attorney General's opinion it had incorrectly relied upon in the first place. The Department presented this new opinion to the chancery court, so that the Department was asking the chancery court to rule, not only on the basis of one Attorney General's opinion that was not properly before the hearing officer, but also on another opinion that was issued after the State Health Officer had issued his Final Order.

The Hinds Chancery Court, First Judicial Division affirmed the decision of the State Health Officer, R.E. 2,3, from which decision Brentwood timely appealed.

II. Statement of Relevant Facts

In 1994, the Mississippi Legislature amended the CON statute, Miss. Code Ann. § 41-7-191, for the Department to issue a CON for the establishment of 20 child/adolescent psychiatric beds (§ 41-7-191(4)(a)(iii)) and 30 psychiatric residential treatment facility ("PRTF") beds (§ 41-7-191(3)(b)).[2] T.12. Accordingly, the Department issued CON # R-0077 to the predecessor of Brentwood. T.12. Then in 1995, the Legislature further amended the CON statute for another 30 additional PRTF beds (changing "30" at § 41-7-191(4)(a)(iii) to "60"). T.12. Thus, CON # R-0134 was issued by the Department again to Brentwood's predecessor. T.12.

In 2001, Brentwood filed a CON application to amend both CONs to transfer their ownership to Brentwood and relocate the proposed facility within Warren County.

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[2]A PRTF is a residential treatment facility. While generally patients stay in a psychiatric facility as an acute patient for anywhere between eight and seventeen days, "residential treatment are patients who have continuing problems . . . [T]he average length of stay for residential is usually going to be six months to a year-and-a-half." T.107.

T.12-13. This amendment was approved by the State Health Officer in September 2001. T.12-13.

In March 2004, Psychiatric Solutions, Inc. ("PSI") acquired Brentwood, and in January 2006, PSI exercised an option and acquired the CONs at issue. T.86-7; R.E.17. Ever since PSI acquired the CONs at issue in 2006, it has attempted to find an appropriate location in which to utilize the 20 child/adolescent beds and 60 PRTF beds authorized by the CONs (collectively the "Beds"). In particular, PSI actively lobbied the Legislature to amend the statute in order to relocate the Beds to PSI's existing facilities. Over the 2006 and 2007 Legislative sessions, PSI attempted to have a bill passed that would relocate the Beds from Vicksburg to Brentwood's facility in Rankin County and to Alliance, another PSI facility in Meridian. PSI engaged Beth Clay, an experienced Mississippi lobbyist, paying over $70,000.00 for both the 2006 and 2007 legislative sessions, to lobby on behalf of PSI to relocate the Beds from Warren County. T.88-9. However, a political disagreement regarding medical/surgical beds in DeSoto County in the last week of the session prohibited the amendment from passing, though both chairmen of the Public Health Committee in the House and Senate supported the relocation of the Beds. T.90. This was in March 2007. T.91.

The Department, and specifically Sam Dawkins ("Dawkins"), the Director of the Office of Health Policy and Planning, was aware of PSI's intent and efforts to relocate the Beds during the two Legislative sessions. T.64-66. Dawkins testified,

> Yes, sir, I have knowledge of -- well, the bills that were introduced to effect that, and actually the -- **I had hopes** that the Legislature would in fact, you know, deal with the situation over the last two years, and **have** even through this, **delayed this hearing process,** through the last Legislative Session, **in anticipation** of them doing something . . .

(emphasis added). T.64. The bill which would have authorized the relocation made its way through the legislative process "significantly," according to Dawkins, before it died, with support from both chairmen. T.64-5. If the Legislature had authorized the relocation, Dawkins testified, it "would have *started the clock anew* on the proposed project" (emphasis added). T.65.

Brentwood's reliance on its belief that the Legislature would authorize the relocation, and its delay in moving forward with construction of a new facility, was reasonable as Dawkins himself admitted.

> Q. I'm asking you if you were waiting on the Legislature, to have this revocation hearing, is it not reasonable to assume that Psychiatric Solutions should be **allowed to wait and see what the Legislature was going to do** before they started trying to build something in Warren County?
> A. For this particular Session?
> Q. Yes, sir.
> A. Oh, yes, sir. Yes, sir.
> Q. Okay.
> A. **That's reasonable.**
> Q. I'm sorry?
> A. **That's reasonable.**

(emphasis added). T. 66.

Meanwhile, on August 28, 2006, having been aware (as shown above) that PSI was seeking Legislative approval to relocate the CONs, the Department sent a letter to PSI, seeking evidence of progress on the facility. T.50. PSI then provided a progress report describing in detail its efforts to find land suitable for the facility. T.51.

On December 18, 2006, the Department sent the above-mentioned letter, giving as basis for revoking the CONs that "[p]rogress reports received on March 11, 2005, and September 12, 2006, reveal that adequate progress has not been made since 2001 toward completing the referenced project" (R.E.4), after which matters proceeded as already set

forth above. This was the first notice that PSI had ever received suggesting that its progress to date was unsatisfactory to the Department. T.53.

SUMMARY OF THE ARGUMENT

The State Health Officer revoked two CONs belonging to Brentwood without having substantial evidence that Brentwood was not making a good-faith effort to put the designated beds into service. The Department was well aware the Brentwood had sound reasons, from a health-planning standpoint, to relocate the beds, and in fact the Department found it reasonable to postpone revocation pending Brentwood's efforts to secure necessary authority for relocation from the Legislature. But when those efforts fell through and Brentwood promptly turned to putting the beds into service in their authorized location, the Department "pulled the trigger" on Brentwood despite its good-faith efforts and despite the fact that the Department did not seek to revoke other CONs that were out of date. The Department offered no evidence to rebut Brentwood's evidence, and it was arbitrary and capricious for the State Health Officer to revoke the CONs.

The hearing officer's Findings, relied upon by the State Health Officer, were flawed in other respects. They incorrectly and prejudicially deferred to an interlocutory decision by the Department as if it were a final order of the State Health Officer, and they improperly and prejudicially relied upon an erroneous Attorney General opinion that was not part of the record properly before the State Health Officer.

It's also questionable whether the CONs at issue could even be revoked by the Department, given that they were the result of the Legislature's statutory directive authorizing the CONs. Revoking the CONs was contrary to the Legislature's intent.

This Court should therefore either reverse the final order and reinstate the CONs outright, or else reverse and remand for a new hearing.

ARGUMENT

The scope of review of an appeal of a final order of the State Health Officer is controlled by statute, which provides in part:

> [t]he [Final] Order shall not be vacated or set aside, either in whole or in part, except for errors of law, unless the Court finds that the Order 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 State Department of Health, or violates any vested constitutional rights of any party involved in the appeal . . .

Miss. Code Ann. § 41-7-201(2)(f). This statute is a "restatement of familiar limitations upon the scope of judicial review of administrative agency decisions." *Miss. State Dep't of Health v. Natchez Cmty. Hosp.*, 743 So. 2d 973, 976 (Miss. 1999). Matters of law are reviewed de novo. *Oktibbeha County Hosp. v. Miss. State Dep't of Health*, 956 So. 2d 207, 208-09 (Miss. 2007). The Court "must look at the full record before it in deciding whether the agency's findings were supported by substantial evidence," and in its review, the Court "is not relegated to wearing blinders." *Pub. Employees' Ret. Sys. v. Marquez*, 774 So. 2d 421, 427 (Miss. 2000). This Court has held,

> it is within the power of the chancellor to reverse the decision to grant the CON if such decision is not supported by substantial evidence. Substantial evidence means more than a scintilla or a suspicion. If an administrative agency's decision is not based on substantial evidence, it necessarily follows that the decision is arbitrary and capricious.

Natchez Cmty. Hosp., 743 So. 2d at 977 (citations omitted); *see also Marquez*, 774 So. 2d at 425 (stating "substantial evidence" means "such relevant evidence as reasonable minds might accept as adequate to support a conclusion" (citation omitted)).

Where an administrative agency has before it substantial evidence for one position and no evidence contradicting that position, it is arbitrary and capricious for the agency to rule against the position having substantial evidence in its favor. *Stevison v.*

reason and judgment," since it singled out Brentwood for unequal treatment, which is in and of itself a denial of due process of law. *See United States v. Williams*, 264 F.3d 561, 573 (5th Cir. 2001) ("denying equal treatment to similarly situated defendants is itself a denial of due process"). *See Victoria W. v. Carpenter*, 369 F.3d 475, 488 (5th Cir. 2004) ("unequal application of the policy made it arbitrary and irrational").

Moreover, the decision by the State Health Officer was not based on substantial evidence (and thus was arbitrary and capricious), as the Department failed to properly consider the evidence presented by Brentwood. The CON Manual, citing § 41-7-195 of the Mississippi Code, states,

> 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 that 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.

R.E. 6 (CON Manual § 104.01 (quoting Miss. Code Ann. § 41-7-195)) (emphasis added).

At the Hearing, Brentwood presented credible, substantial evidence of its good faith efforts to obligate the approved capital expenditure. The Department did not provide any evidence contradicting Brentwood's position, and Dawkins agreed, as shown herein, Brentwood's actions regarding the CONs were reasonable.

This Court has stated that a licensing statute which provides for revocation of a license for failure to comply with its terms is a penal statute and "should be strictly construed against the governmental body attempting to enforce a penalty." *Miss. Milk, Miss. Milk Comm'n v. Winn-Dixie La., Inc.*, 235 So. 2d 684, 688 (Miss. 1970) (revocation of store's license by agency for alleged violation of Milk Commission Act).

See also Craig v. So. Bell Tel. & Tel. Co., 45 So. 2d 732, 733 (1950) (stating licensing statutes must be strictly interpreted).

Brentwood filed several progress reports regarding the CONs at issue. T.13-15. More important than the progress reports is the fact that the Department never expressed a concern regarding the now alleged inadequacy of these progress reports for over four years. T.47-9, 53. It was not until December 18, 2006, that the Department notified Brentwood that its previous progress reports were unacceptable. T.53. The December 2006 notice of the Department's intent to revoke the CONs was the first indication received by Brentwood from the Department which stated Brentwood was allegedly non-compliant with the CON rules. T.53.

Though the hearing officer recited portions of the testimony presented by Brentwood's witnesses, the Department failed to produce any evidence to contradict Brentwood's testimony and evidence or support the Department's position on revocation. Under the standard of review related to appeals from administrative agencies, the court cannot reject the only evidence presented, if no contrary view of that evidence is presented, "unless the offered evidence is so absurd or unbelievable that no reasonable person could believe it." *Pub. Employees' Ret. Sys. v. Thomas*, 809 So.2d 690, 696 (Miss. Ct. App. 2001). That was not the case, particularly given Dawkins's admission that it was reasonable for Brentwood and PSI to hold off on the project while seeking Legislative approval for a relocation. Especially when combined with the improper deference which the hearing officer, and in relying upon her Findings the State Health Officer, bestowed upon the Department (see issue II below), the net result was that the Final Order in this case disregarded substantial evidence in favor of no evidence at all.

In light of the evidence presented by Brentwood at the Hearing demonstrating its good faith efforts and the Department's lack of evidence at the Hearing to support revocation, it was arbitrary and capricious to revoke the CONs, as we shall now see in more detail.

A. Brentwood Made a Good-Faith Effort to Relocate the Beds.

The Beds at issue are different than regular psychiatric beds which are awarded to a CON applicant by the Department. Since these Beds were authorized by statute, the Department issued them regardless of any calculation of need, and they cannot be relocated without an amendment to the statute. T.56. Generally, a CON holder wanting to relocate beds would file a CON amendment with the Department, and the normal CON process would be applied to review the proposed relocation. However, since these Beds were granted specifically for Warren County by the Legislature, the Department advised Brentwood that an amendment to the statute was necessary to relocate the Beds from Warren County. T.89.

As Phillip Cook ("Cook"), an officer of PSI (Brentwood's owner), testified, PSI's "goal [for the CONs] has been to work to find the most efficient and effective way to utilize those beds." T.121. The approach PSI took was two-pronged: first, lobby the Legislature to amend the statute to allow a relocation of the Beds from Warren County to existing PSI facilities, and then, if the efforts at the Legislature were unsuccessful, find an acceptable location for the utilization of the Beds in Warren County. T.123. The first prong of PSI's approach was designed to comply with the State Health Plan's four goals: to prevent the unnecessary duplication of health resources; to provide cost containment; to improve the health of Mississippi residents; and to increase the accessibility,

acceptability, continuity, and quality of health services. *St. Dominic-Jackson Mem'l Hosp. v. Miss. State Dep't of Health*, 954 So. 2d 505, 509 (Miss. Ct. App. 2007).

Since both Brentwood and Alliance[3] obtain their patients from across the State, PSI believed that relocating the Beds to these existing facilities, rather than building new, freestanding facilities, best met the goals of the State Health Plan, especially the primary goals of cost containment and avoiding the unnecessary duplication of health resources. T.92. As stated above, a relocation of the Beds requires an amendment to the statute authorizing the issuance of the CONs. It is also reasonable that Brentwood would ensure the CONs remained valid before spending additional money for construction. T.99-100.

The proposed relocation of the Beds would not only prevent the duplication of health resources, but also promote cost containment – two of the primary goals of the State Health Plan. There generally is a savings when beds are utilized at existing facilities as opposed to building new facilities, hiring new staff, and incurring new costs. T.68. "[Y]ou're going to have some economies of scale," Mike Carney ("Carney"), the Chief Executive Officer ("CEO") of Brentwood, testified. T.105. The utilization of the Beds at existing facilities would "not only reduce the costs of starting those services, but it would reduce the cost of [Brentwood's and Alliance's] existing services. A number of [Brentwood's and Alliance's] services are cost-based, so that would actually decrease the cost of the existing services at both locations," Carney testified. T.92. "[A]n existing

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[3] Brentwood, in Rankin County, is a 107-bed licensed acute psychiatric facility with approximately seventy percent (70%) of its psychiatric services provided to children and adolescents and thirty percent (30%) to adults. T.86, 106. Alliance, in Lauderdale County, provides child/adolescent psychiatric beds at its 60-bed facility which is 100% occupied. T.121. PSI also owns Diamond Grove in Winston County, which has 20 acute psychiatric beds and 30 residential treatment beds with an average per day census of 45-47 patients. T. 88, 121.

campus would cost the State [specifically Medicaid] a lot less than what it would cost to do it at a freestanding facility," Carney testified. T.93, 106.

Both Carney and Philip Merideth, M.D. ("Merideth"), Chief Medical Officer at Brentwood, testified regarding the need for these psychiatric services. T.108, 165-66. Carney testified that all three Mississippi PSI facilities on any given day may be filled, so there are usually ten to thirteen children/adolescents placed out-of-state which is inappropriate for their psychiatric needs. T.108. Merideth testified it is at times "extremely difficult" to place children timely in a facility reasonably close to their homes. T.165-66. Merideth also testified regarding the need for the relocation.

> I think there is a need. And when you look at how the need could best be met, it would make more sense to me to establish those beds at a facility that's already up and running for reason of cost effectiveness, and seamlessness of services. We've already got a fully-operating staff and physical plant there at Brentwood, and establishing a residential treatment facility there would enable us to -- to provide a full scope of inpatient psychiatric services at a cost effective -- in a cost effective and seamless manner.

T.162.

Brentwood's delay in construction due to its ongoing efforts at the Legislature was reasonable, as Dawkins testified. Dawkins himself delayed the Hearing in hopes the amendment would be approved by the Legislature. The relocation of the Beds to existing facilities would best promote the goals of the State Health Plan, primarily cost containment and preventing the duplication of health resources. Brentwood's relocation proposal made it "significantly" through the legislative process according to Dawkins, and the passage of an amendment allowing the relocation of the Beds would have started the "clock anew" for the project. Thus, the delay in further expenditures while awaiting the outcome of Brentwood's and PSI's lobbying efforts was entirely reasonable. The

lobbying efforts also demonstrate PSI's dedication to utilizing the CONs in the most cost effective manner.

B. Brentwood Made a Good-Faith Effort to Proceed at the Existing Location.

When it became apparent that the Legislative route was stalled, PSI turned to the second prong of its strategy: putting the Beds into use in Warren County. Carney made numerous trips to the Vicksburg area looking for an appropriate location to construct a psychiatric facility and had numerous conversations with Brentwood's realtor concerning different parcels of land. T.88, 91, 95. Carney also had numerous conversations with the CEO of a competing facility, River Region, to consider the lease of space from River Region, and Brentwood's Plant Operations Director visited the Marian Hill facility which recently became available for lease. T.91, 95. Brentwood retained an architect, Darren Rozas ("Rozas"), and with his help determined, after visiting two different pieces of property, on which property Brentwood should acquire an option to purchase.[4] T.93, 95; R.E.18, 20. Carney and Rozas also visited the Marian Hill location to determine the feasibility of leasing existing space from River Region. T.95.

Brentwood also prepared financial projections regarding the construction of a new acute and residential treatment facility for the Beds in Warren County. R.E.7. According to the pro-forma, the new construction at the end of Year One would have a net income of approximately $800,000.00, not taking into consideration the cost to build the

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[4]Rozas was retained to generate a conceptual plan and identify the size of the facility so that numbers for construction could be prepared. T.134. Rozas testified in "every development . . . the [pre-design conceptual package] has to happen. Obviously you don't have a full set of drawings all at once . . . You have to generate them, and there's a lot of influences attributed to that," Rozas testified. T.135-36. It is impossible to 'break ground' on a project based upon the site plans, the site plans are only a small part of construction. T.152-53.

T.138. The pro-forma Brentwood prepared for the potential lease at Marian Hill shows a net income of $700,000.00 the first year. T.104; R.E.8.

Brentwood's actions concerning the utilization of the Beds in Warren County demonstrate its good faith efforts to put the Beds into service. Since the end of the Legislative session, when Brentwood realized its lobbying efforts were going to be unsuccessful, Brentwood immediately returned to its plans to utilize the Beds in Warren County. Brentwood retained an architect to begin the tedious process of planning for and constructing a new psychiatric facility in Warren County; obtained an option on a viable piece of land; and negotiated a potential lease arrangement with River Region for space at Marian Hill to utilize the Beds. Such steps demonstrate Brentwood's progress and dedication to the utilization of the Beds and the offering of needed psychiatric services for children and adolescents within the State.

The steps taken by Brentwood both in the Legislature and within Warren County demonstrate a good faith effort to utilize the CONs and operate the Beds. As Dawkins agreed, it was entirely reasonable for Brentwood to delay any action on the Beds until the outcome of the most recent Legislative session. Similarly, the Department itself delayed the Hearing in hopes that the Legislature would relocate the Beds. The substantial efforts made by Brentwood at the Legislature, both in the 2006 and 2007 sessions, demonstrate that Brentwood was not simply holding the Beds, but it was making a good faith and aggressive effort to relocate the Beds to existing facilities where the goals of the State Health Plan, preventing the unnecessary duplication of health resources and promoting cost containment, could best be met. The hearing officer failed to seriously consider the

steps taken by Brentwood which demonstrate that Brentwood has made a good faith effort to bring the Beds on-line, and thus, the CONs should not be revoked.

Notwithstanding Brentwood's demonstration at the Hearing of its good faith efforts to utilize the CONs, the State Health Officer in issuing the Final Order relied upon the Findings made by the hearing officer which were not based on any credible evidence and were arbitrary and capricious.

II. The Final Order Resulted from Improper Deference to an Interlocutory Decision of the Department.

The hearing officer's Findings made two fatal errors which require reversal regardless of the actual CON revocation issue as the hearing officer failed to conduct the Hearing and make her Findings in compliance with the Department's rules and regulations contained in the CON statutes and Manual.

The Findings rely upon the Department's "decision" to revoke the CONs. However, the purpose of the Hearing was to provide Brentwood an opportunity to demonstrate its compliance with the Department's rules and regulations. As discussed herein, Dawkins admitted that, since this revocation proceeding did not follow a formal procedure similar to the procedure followed for the approval and issuance of a CON, the Department did not develop any formal recommendation or staff analysis concerning the revocation. T.69. Dawkins also admitted that if Brentwood provided sufficient information at the Hearing to come into substantial compliance, the CONs should not be revoked. T.52.

The letter cited in the Findings as giving notice of the Department's decision to proceed with the withdrawal/revocation of the CONs due to a "determination" "that little or no progress had been made," R.E.5 at 2, was not a "determination" by the Department,

as Dawkins himself admitted, T.69, but a letter giving notice of intent to revoke the CONs so that Brentwood had the opportunity to advise the Department why the CONs should not be revoked. R.E.4. Since the Department had not developed a formal recommendation, Dawkins testified that if Brentwood at the Hearing demonstrated its compliance, the CONs should not be revoked. T.52. As discussed above, Brentwood produced substantial evidence demonstrating its good faith efforts to utilize the CONs. The Department did not produce any evidence or testimony regarding the necessity or reason for revoking the CONs, and the staff did not issue a formal analysis and/or recommendation regarding the CONs.

Nonetheless, the hearing officer's Findings incorrectly state,

> Due to the Department [sic] issuance of its notice of intent and its finding [sic], the Applicant has the burden to show the Department's finding is "arbitrary and capricious" and without "substantial evidence" or in the alternative, demonstrate compliance with substantial progress on the project. Generally, the Department is afforded "great deference" and has a presumption in favor of its decision. Therefore, the evidence presented by the Applicant would have to show that evidence relied upon by the Department in this matter is not based on reason or judgment and contrary to the applicable criteria.

R.E.5 at 13.

As this Court can see, the hearing officer completely mistook the nature of deference to administrative decisions. Decisions of the Department's staff and individual employees of the Department, *during the CON process*, are not entitled to any sort of deference. If the hearing officer were correct, a mere employee at the Department could express any opinion which would be cloaked by an arbitrary and capricious standard – doing so would render the hearing process and the purpose of the CON rules meaningless.

There cannot be a "standard of review" or "burden of proof" applicable to decisions of the Department's staff or its individual employees made prior to a final order by the State Health Officer, as those decisions or recommendations do not constitute an "official action" of the Department entitled to review by the courts. An administrative agency can only speak through an official action. *Barrett Refining Corp. v. Miss. Comm'n on Env. 'l Qual.*, 751 So. 2d 1104, 1121 (Miss. Ct. App. 1999) (agency speaks, not through letters, but "through its own official action") (quoting *Miss. Dep't of Envtl. Quality v. Weems*, 653 So. 2d 256, 272 (Miss. 1995)). *See also Molden v. Miss. State Dep't of Health*, 730 So.2d 29, 36-37 (Miss. 1998) (stating licensing agency's findings do not constitute final findings "but merely amount to pending allegations awaiting a final determination by the hearing officer" in case regarding removing nurse aide's name from aide registry). As this Court recently noted in the instance of the Department itself, even a staff analysis (which was not performed in the present case) is only "an intermediate step on the way to the final decision of the State Health Officer," and "is entitled to no deference on appeal." *Miss. State Dep't of Health v. Baptist Mem'l Hosp.-DeSoto, Inc.*, ___ So. 2d ___, No. 2007-SA-00035-SCT, at ¶ 5 n.6 (Miss. June 19, 2008).

In a CON case, judicial deference to administrative acts is due only to official, final, and appealable decisions of the Department made by the State Health Officer – the only person who can make final, official agency decisions. As the CON Manual states, "The State Health Officer's decision to approve or deny the Certificate of Need shall be the final order of the Department . . . Any party aggrieved by the final order by the Department shall have the right of appeal to the Chancery Court . . ." R.E.6 at § 101.01.

That language is taken from Miss. Code Ann. § 41-7-201, which gives those aggrieved by the State Health Officer's final CON decisions, the right to appeal to the chancery court. Miss. Code Ann. § 41-7-201(2)(b). The CON statute provides a right to appeal, but that right is *only* applicable to final orders of the State Health Officer. Thus, only after the State Health Officer issued the Final Order revoking the CONs did Brentwood have a right to appeal to the chancery court.

This is consistent with general practice as regards agency decisions. "Appeals from state administrative agency hearings are controlled by statute and will only be allowed after entry of *a final order*" (emphasis added). *Bay St. Louis Cmty. Assoc. v. Comm'n on Marine Res.*, 729 So. 2d 796, 798 (Miss. 1998). Furthermore, before a party can appeal to the courts, its "administrative remedies must be exhausted before judicial review can be sought." *Bay St. Louis*, 729 So. 2d at 798. Therefore, Brentwood requested and participated in the Hearing. Brentwood could not have appealed from a decision of the staff at the Department, Dawkins, or the hearing officer since it has to exhaust its administrative remedies prior to seeking judicial review. By statute, it is only that one official action/final order of the State Health Officer which is appealable.

As for the deference applied by the Findings, as this Court has stated, in reviewing an administrative action "it is important that [the court] understand and accept what this fact implies. The Legislature has directed that a CON order be subject to judicial review, but that [the review]" is limited by § 41-7-201(2)(f). (emphasis added). *St. Dominic-Jackson Mem'l Hosp. v. Miss. State Dept. of Health*, 728 So. 2d 81, 83 (Miss. 1998); *Natchez Cmty. Hosp.*, 743 So. 2d at 976. This limited *judicial* review is set forth in Mississippi Code Section 41-7-201(2)(f) which states in part and is stated above:

> The order shall not be vacated or set aside, either in whole or in part, except for errors of law, unless the court finds that **the order of the State Department of Health** 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 State Department of Health, or violates any vested constitutional rights of any party involved in the appeal.

Miss. Code Ann. § 41-7-201(2)(f) (emphasis added). Thus, deference is afforded by the courts only to final orders of the Department. It is only logical that the application of deference to an administrative agency's decision be applied at the judicial review level, not at administrative decision making levels. The purpose of the Hearing, and any hearing during the course of review, is to afford the affected person an opportunity to present arguments and evidence in support of its position for the hearing officer to consider in making any findings.

The prejudice caused by the hearing officer's misguided deference to an interlocutory decision of the Department is demonstrated several times in her Findings.

(1) The hearing officer stated, relying on her mistaken belief that the Opinion justified a finding that the CONs ceased to be valid, that "the inquiry in this case *has to be limited* to whether under the facts and circumstances has the Department *abused its discretion* . . ." (emphasis added). R.E.5 at 12.

(2) In regards to the extension of the CONs, the hearing officer stated that "the Department [has not] abused its discretion" in finding (again, the Department made no findings) that the CONs should be revoked. R.E.5 at 13.

(3) Later the hearing officer stated that since the Department had issued a finding (which Dawkins testified the Department had not), "the Applicant has the burden to show the Department's finding is 'arbitrary and capricious' and without 'substantial evidence' . . ." R.E.5 at 13.

(4) Finally, in conclusion, the hearing officer stated, she did not find that the Department had "abuse[d] its discretion," in determining Brentwood had not made a good faith effort toward the project. R.E.5 at 16.

The CON Manual states that the hearing officer issues a recommendation after she has had an "opportunity to review, study and analyze the evidence presented during the Hearing." R.E.6 at § 100.

Instead of deferring to the Department's actions, or to its "show cause" letter in this case, the hearing officer should have reviewed the case independently in making her Findings. This would have afforded Brentwood a quasi-judicial hearing which would have given it the opportunity to present evidence for an independent review. If this had been done, then the State Health Officer, from a review of the entire record, could have issued a final, appealable order which the statute would require be afforded deference by courts. As it happened, the State Health Officer erred in relying upon findings which were fundamentally flawed in their failure to provide an independent analysis of the evidence.

This Court should reverse the State Health Officer's decision and remand for a new hearing at which the hearing officer will exercise her own judgment as part of the process, as the rules of the Department require, rather than mistakenly sitting as an appellate authority obliged to defer to interlocutory steps taken within the Department.

III. The Final Order Erroneously Relied Upon an Inapplicable Attorney General's Opinion.

Besides the mistaken deference by the hearing officer, she also erred in her unfounded reliance on an Attorney General's Opinion which was issued June 15, 2007 (the "Opinion"). R.47-49 (text of Opinion). The issuance of this Opinion was *after* the conclusion of the Hearing on May 10, 2007, but the Department's attorney sent a copy of the Opinion to the Hearing Officer on July 18, 2007.[5]

This additional submission was made without attempting to open and/or supplement the record, and without Brentwood's being offered the opportunity to respond. The parties' proposed findings of fact and conclusions of law were submitted simultaneously to the hearing officer on June 29, 2007, prior to the issuance of the Opinion, and the hearing officer issued her Findings on July 31, 2007. The Manual states the State Health Officer "*shall* consider *only* the record in making his decision; he *shall not* consider any evidence *or material* which is not included therein" (emphasis added). Manual, Ch. 5, Sec. 101.01, pg. 49. As the hearing officer's Findings, which relied on the Opinion, were relied upon by the State Health Officer, the Final Order was based on information not contained in the record.

The hearing officer's reliance on the Opinion is demonstrated on pages 11-13 of the Findings. The hearing officer's Findings incorrectly assumed that the "Opinion speaks directly to the issues presented at the hearing concerning the CON and whether such is valid or expired. In this [O]pinion, several questions were answered that have an effect on the outcome of the [H]earing." (citation omitted) Findings, pg. 11. Since the

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[5]Without, we must note, copying Brentwood on that correspondence. Brentwood learned of the Opinion only when it received a copy of the hearing officer's Findings.

Opinion was not part of the record, Brentwood never had an opportunity to review the Opinion and demonstrate why the Opinion is inapplicable to its present case.

It should be noted, Mississippi courts have repeatedly found that while opinions of the Attorney General may be persuasive when on point or helpful to the courts, they are not binding and do not have the force of law. *See, e.g., State ex rel Holmes v. Griffin*, 667 So. 2d 1319, 1326 (Miss. 1995); *McGhee v. Johnson*, 868 So. 2d 1051, 1053 (Miss. Ct. App. 2004); *Frazier v. Lowndes Co., Miss. Bd. of Edu.*, 710 F.2d 1097, 1100 (5th Cir. 1979) (applying Mississippi law). Likewise, the Opinion is not binding on this Court, especially as the Opinion's facts are not on point with those at issue for Brentwood, and since the Opinion contradicts the CON statutes and testimony given at the Hearing, which is in the record.

In response to the hearing officer's reliance on the Opinion, Brentwood argues the following.[6] The request for the Opinion was sent by Bryant W. Clark on May 8, 2007, and it does not provide any factual background for his situation. R.50. A brief review of the Opinion's four questions and responses is as follows:

(1) This question asked, "Does a CON automatically expire or lapse without further action on the part of its holder to obtain an extension prior to the expiration or lapse?"

The Opinion, in response to question number 1, states that CONs expire by their own terms unless the holder has been granted an extension. R.48. However, while a

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[6] Brentwood does not intend by discussion of the Opinion to imply that the Opinion is or should be a part of the Hearing record. However, as the hearing officer based her Findings on the Opinion, which were relied upon by the State Health Officer in revoking the CONs, Brentwood believes it must take this opportunity to demonstrate the irrelevance of the Opinion.

CON is initially valid for one year, the Department at the time of the Hearing routinely allowed a CON's validity to extend beyond the one-year limit, either by extensions or by not following the applicable procedures for revocation. As Dawkins testified at the Hearing, since neither CON R-0077 nor CON R-0134 had been revoked, both CONs remained valid. T.43-44. A CON is valid until it is revoked, and only the State Health Officer can revoke a CON. T.43. Only if the Department determines that an applicant is not making a good faith effort to obligate an approved expenditure, does the State Department of Health have "the right" to withdraw, revoke or rescind the Certificate. Miss. Code Ann. § 41-7-195.

As further evidence of the Department's general acceptance of the validity of CONs extending past their own terms, Dawkins testified the Department has only revoked one CON that anyone at the Department can recall, and since Dawkins has been at the Department there has not been a revocation hearing. T.41. Furthermore, though there are several "delinquent" CONs (extending over one year since their issuance), the Department has not given notice to revoke those CONs. T.41-2. Thus, as evidence and sworn testimony in the record demonstrates, a CON may be valid for more than one year without an extension since until such time as the State Health Officer revokes the CON, it remains valid. Moreover, the next part of the Opinion actually contradicts the answer to the first question.

(2) The second question was, "After an issued CON has expired, can a holder later file for an extension of the term thereof?"

The Opinion responds that the Department has discretion to determine whether a CON has expired and whether a holder can request an extension. R.48. This response to

question number 2 contradicts the Opinion's response to question number 1. The Opinion stated in response to question number 1 that CONs expire by their own terms (which as discussed above was not the case), and the response to question number 2 says the Department has discretion to determine whether a CON has expired after the one year alleged "valid period." Provided that discretion is not exercised arbitrarily and capriciously, the answer to question number 2 is correct, unlike the answer to question number 1. However, as we have already seen, the Department did act arbitrarily and capriciously in the present case.

(3) The third question is, "Because a CON is expired, must the Department of Health cite the expiration and take action under Section 41-7-195(4) to withdraw, revoke or rescind the certificate?"

The Opinion in response to question number 3 says that the Department has the right to revoke the CON but is not required to revoke the CON. R.48. Again the Opinion's response to question number 3 contradicts its previous response to question number 1. However, response number 3 is correct in that the Department has the "right" to withdraw, revoke or rescind a CON and to determine if a holder of a CON has undertaken steps to utilize the CON.

(4) Finally, the Department asked, "Does the Department have the authority under the CON law to grant an extension to a holder of a CON after such has expired or lapsed according to the specified time period?"

The Opinion answered that the Department does not have discretion to extend a CON "valid period." This answer again is in direct contradiction to the Opinion's

response to question number 2, which says the Department has discretion to determine when a CON has expired.

The hearing officer should not have relied on the Opinion at all, since it was not part of the record, and she should not have relied on it in any event, because it was hopelessly self-contradictory and showed a complete lack of familiarity with the Department's practices at the time. Testimony at the Hearing, which is actually included in the record (unlike the Opinion), demonstrated that CONs may remain valid more than one year since only the State Health Officer can revoke a CON. Revocation of a CON, a property right, requires due process and until such actions are taken, a CON remains valid.

The Department effectively admitted the incomprehensible reasoning of the Opinion by sending a request for clarification of the Opinion back to the Attorney General's office, upon which an additional opinion ("Opinion II") issued. R.114-15. This "second Opinion" further complicates the procedural posture, as the Department now relies on an opinion issued on October 12, 2007, nearly *one year after* the Department's first letter and indication of a concern with the CONs sent to Brentwood on December 18, 2006, and a month and a half after the conclusion of the Hearing. Without a doubt, Opinion II is not part of the administrative record. Opinion II was *never* considered by the hearing officer in her Recommendation or by the State Health Officer in his Final Order revoking the CONs as it was issued *after* Brentwood's appeal was perfected in this Court. Therefore, it is prohibited from review by this Court, which is limited to the administrative record. While the Department may attempt to argue that Opinion I must be part of the record as the hearing officer considered it (in error as far as

Brentwood is concerned), Opinion II can in absolutely no way be construed to be part of the administrative record as it was issued *after* the present appeal.

However, if the Court does decide that the Department's new arguments regarding Opinion II are appropriate for this Court's appellate review, the following should be considered. The gist of Opinion II, which contradicts Dawkins' testimony given at the Hearing, is that certificates of need automatically expire and become void without any action of the Department. However, according to the Attorney General, the Department may, prior to the expiration of a certificate of need, withdraw, revoke or rescind a certificate of need, or may grant an extension if it does so before the CON is void.

This analysis ignores the fact that, as a property right, a CON cannot be rescinded or revoked until the holder is given notice, and if requested a hearing is held. "There is *no doubt* that, under Mississippi law, *a CON is a valuable property right entitled to protection.*" *Baptist Mem'l Hosp.-DeSoto, Inc. v. Miss. Health Care Comm'n*, 617 F. Supp. 686, 689 (S.D. Miss. 1985) (emphasis added). "[T]he hallmark of 'property' . . . is an individual entitlement grounded in state law, which cannot be removed except 'for cause.' " *Id.* at 691 (quoting *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982)). The Fourteenth Amendment and Article 3, Section 14 of the Mississippi Constitution ensure that only by due process of law can a person be deprived of property. *Miss. Tele. Corp. v. Miss. Pub'l Serv. Comm'n*, 427 So. 2d 963, 967 (Miss. 1983). The Fourteenth Amendment requires an "opportunity . . . granted at a meaningful time and in a meaningful manner, for [a] hearing appropriate to the nature of the case." (citations omitted). *Logan*, 455 U.S. at 437; *see also Mathews v. Eldridge*, 424 U.S. 319, 333

(1976). An "administrative body must protect such rights before depriving a person of his property," and doing so requires that the person have the right to present evidence at a hearing. *Miss. Tele. Corp.*, 427 So. 2d at 967.

As a property right, CONs, as the ones at issue, are entitled to protection and can only be taken "for cause," after a hearing and an opportunity to present evidence. Without providing certificate of need holders due process protections for their property rights in their certificates of need, the Department cannot revoke the certificate of need and the Attorney General cannot declare the certificates of need automatically void.

For these reasons, the hearing officer and the State Health Officer should not have considered the extraneous and ill-founded opinions of the Attorney General in deciding the present appeal. Neither should this Court.

IV. Since the CONs at Issue were Granted by the Legislature, the Department Lacks Authority to Revoke the CONs.

Regardless of the standard of review or the substantial evidence Brentwood presented at the Hearing to demonstrate its efforts to utilize the CONs, a dispositive question for this appeal is whether, as a matter of law, the Department (through the State Health Officer) has authority to revoke the CONs at issue. These CONs and Beds were not issued upon a Departmental finding of need, but rather were authorized by a Legislative mandate. Allowing the Department to have authority to revoke such CONs would effectively nullify that mandate.

The Legislature's direction requiring the issuance of the CONs removed the CONs from the normal application and CON process, and also restricted the authority of the Department to require compliance with any need methodology and any other requirements of the State Health Plan and CON Manual. *See Oktibbeha County Hosp.*,

956 So.2d at 209-11 (stating that throughout Miss. Code Ann § 41-7-191, Legislature has provided for increase in medical services without requiring compliance with CON criteria). In the *Oktibbeha County Hospital* case, this Court held that the Legislature has the ability to waive "*all* CON requirements." *Oktibbeha Co.*, 956 So.2d at 211 (emphasis added). The Department, an administrative agency, has only the powers expressly granted or necessarily implied to it by the Legislature and its issued statutes. *Miss. Milk Comm'n,* 235 So. 2d at 688. The statute at issue directs the Department to issue the CONs and does not provide any basis for the CONs to be revoked.

To allow the Department to revoke the legislative CONs would enable the Department to issue a CON as required by a statute, and then, without an amendment to that statute, revoke the CON because of an alleged non-compliance with the CON rules, which were not applicable in the beginning due to the Legislature's statutes authorizing the CONs issuance. Allowing such an action would undoubtedly thwart the Legislature's intent. Therefore, the decision of the State Health Officer should be reversed.

CONCLUSION

For the reasons set forth above, the final order of the State Health Officer revoking the CONs at issue in this case should be reversed and the CONs reinstated, or in the alternative, this Court should reverse the final order and remand for a new hearing that conforms to the rules of the Department.

Respectfully submitted, this the *7th* day of July, 2008.

Brentwood Health Management of Mississippi, LLC d/b/a Children's Hospital of Vicksburg

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CERTIFICATE OF SERVICE

The undersigned counsel for Appellant does hereby certify that he has on this day caused to be sent via United States mail, a true and complete copy of the above and foregoing document to:

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So certified, this the *7th* day of July, 2008.

Thomas L. Kirkland, Jr.