



OHIO DEPARTMENT OF HEALTH

246 North High Street
Columbus, Ohio 43215

614/466-3543
www.odh.ohio.gov

John R. Kasich/Governor

Richard Hodges/Director of Health

November 30, 2016

Martin M. Haskell, M.D., Director
Women's Med Center of Dayton
P.O. Box 43100
Cincinnati, OH 45243

**Re: Women's Med Center of Dayton Adjudication Order
License No. 0600 AS**

Dear Dr. Haskell:

Enclosed please find a certified copy of the Adjudication Order in the above referenced matter.

Please refer questions regarding the Adjudication Order to your counsel.

Sincerely,

A handwritten signature in cursive script that reads "Rachel Belenker".

Rachel Belenker
Assistant Counsel
Office of the Director

Enclosure

Certified Mail Return Receipt Requested: 7014 2870 0000 6738 5963

c: Jennifer Branch, Esq.
James T. Wakely, Assistant Attorney General



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Director's Journal Entry

(Adjudication Order)

Re: Women's Med Center of Dayton, License No. 0600AS

By letter dated September 25, 2015, Women's Med Center of Dayton was notified that the Director of Health ("Director"), proposed to issue an Order revoking and refusing to renew Women's Med Center of Dayton's ("WMC") health care facility license (ambulatory surgical facility y), in accordance with Chapter 119 of the Revised Code and section 3702.32(D)(2) of the Revised Code ("R.C."), due to violations of R.C. 3702.303 and Ohio Administrative Code ("O.A.C.") 3701-83-19(E). R.C. 3702.303 requires ambulatory surgical facilities to obtain a written transfer agreement ("WTA") with a local hospital for the safe and immediate transfer of patients when medical care is needed beyond that which can be provided in the facility. O.A.C. 3701-83-19(E) independently requires an ambulatory surgical facility to have a WTA with a hospital for the transfer of patients in the event of medical complications, emergency situations, and for other needs as they arise.

The September 25, 2015 letter notified WMC that it was entitled to a hearing regarding the proposal to not renew, and/or to revoke, the health care facility license if a hearing was requested within thirty days of receipt of the notice. WMC requested a hearing by letter dated October 22, 2015.

On September 15, 2015, in a separate letter, the Department notified WMC that it denied WMC's variance requests for the 2012, 2013, 2014, and 2015 licensure periods. The letter notified WMC that pursuant to R.C. 3702.304, and O.A.C. 3701-83-14, the denial of WMC's applications for a variance shall be final and shall not be construed as creating any rights to a hearing under R.C. Chapter 119.

The hearing was scheduled by mutual agreement for April 26, 2016. The hearing was conducted by Hearing Examiner William Kepko, Esq., on April 26, 2016. Appearing on behalf of WMC was Jennifer Branch, Esq., of Gerhardstein and Branch. Appearing on behalf of the Department was Heather Coglianesse, Senior Legal Counsel. The Department was represented by James Wakely, Office of the Ohio Attorney General.

The department, through its attorney, filed its Post Hearing Brief on May 26, 2016. WMC, through its attorney, filed its Post Hearing Brief and Proposed Findings of Facts and Conclusions of Law on June 27, 2016. The department, through its attorney, filed its Reply Brief on July 29, 2016.

The Hearing Examiner's August 29, 2016, Report and Recommendation was received by the Department on September 1, 2016. By letter sent via certified U.S. mail dated September 6, 2016, the Department transmitted the Report and Recommendation to Jennifer Branch, Esq., and informed WMC that it may file written objections to the Report and Recommendation within ten days of receipt of the letter. In addition, the letter provided that the objections shall be considered by the Director before approving, modifying, or disapproving the Report and Recommendation. WMC, through its attorney, submitted objections to the Report and Recommendation, via email and overnight delivery on September 15, 2016.

The Hearing Examiner's Report and Recommendation found that pursuant to R.C. 3702.303(A), and O.A.C. 3701-83-19(E), an ambulatory surgical facility must have a written transfer agreement with a hospital, for transfer of patients in the event of medical complications, emergency situations, and for other needs as they arise. Pursuant to R.C. 3702.304(A) and, O.A.C. 3701-83-14(A), the Director may grant a variance or a waiver of the transfer agreement requirement. Pursuant to R.C. 3702.304(C), and O.A.C. 3701-83-14(F), the refusal of the Director to grant a variance or waiver, in whole or in part, shall be final and shall not be construed as creating any rights to a hearing under R.C. Chapter 119.

The Hearing Examiner found that each ambulatory surgical facility must be licensed and meet certain quality standards established by ODH. R.C. 3702.30(D). The Hearing Examiner concluded that because WMC does not have a written transfer agreement or a variance, WMC does not meet the licensing requirements of O.A.C. Chapter 3701-83.

WMC's Objections state that evidence in the record supports granting a variance and therefore, renewing WMC's ambulatory surgical facility license. WMC argues that its variance application satisfies the requirements of R.C. 3702.304 by having three backup doctors that are credentialed with admitting privileges to Miami Valley Hospital, and by including the emergency protocol for transferring patients. WMC's Objections state that it has shown that its emergency protocol and system of backup doctors "achieves the purpose of a written transfer agreement." The Objections also state that the statute requiring a written transfer agreement is unconstitutional because the bill enacting the statute, House Bill 59, violated the single-subject provision of the Ohio Constitution.

WMC's statements regarding the rejection of its variance application are not the subject of this Adjudication Order. R.C. 3702.304(C) provides that the Director's decision to grant, refuse, or rescind a variance is final. O.A.C. 3701-83-14 provides that the Director's denial of a variance is final and does not create the right to a hearing under R.C. Chapter 119. Therefore, the Hearing Examiner properly determined that WMC's constitutional challenges to the statute were not within the administrative hearing purview. In the same respect, WMC's challenges to House Bill

59 is beyond the power of the Hearing Examiner to decide. The Hearing Examiner liberally permitted WMC to proffer its record and include arguments regarding the single-subject rule. However, determining the constitutionality of state statutes is beyond the scope of an administrative licensing hearing.


The Hearing Examiner concluded that WMC does not have a written transfer agreement or variance, and therefore does not meet the licensing requirements of O.A.C. 3701-83, or the requirements of R.C. 3702.303. The Hearing Examiner specifically found that, pursuant to R.C. 3702.303(A), WMC must have a written transfer agreement with a hospital for transfer of patients in the event of medical complications, emergency situations and for other needs as they arise. WMC's Objections argue that the Hearing Examiner relied upon the rule and not the statute. To the extent that the Hearing Examiner's conclusion might not rely on both the statute and the rule, as bases for revocation, I hereby modify the Report and Recommendation to rely on both a violation of R.C. 3702.303(A) and a violation of O.A.C. 3701-83-19 as independent bases to refuse to renew, and to revoke, WMC's license.

In conclusion, the Hearing Examiner recommended that the Director's decision not to renew or to revoke, the license of WMC is valid as a matter of law. Based upon such report, recommendation, transcript of testimony and evidence, and objections of the parties, and additional testimony and evidence, and in accordance with R.C. 3702.32, R.C. 3702.303(A), R.C. Chapter 119, and O.A.C. 3701-83-19(E), I hereby issue this Adjudication Order refusing to renew and revoking WMC's health care facility license.

Any party desiring to appeal this final adjudication order shall file a notice of appeal with the Ohio Department of Health, Office of the General Counsel, 24 North High Street, 7th Floor, Columbus, Ohio, 43215, setting forth the Order appealed from, and stating that the Department's Order is not supported by reliable, probative, or substantial evidence, and is not in accordance with law. The notice of appeal may, but need not, set forth the specific grounds of the party's appeal beyond the statement that the Department's Order is not supported by reliable, probative, and substantial evidence, and is not in accordance with law. The notice of appeal shall also be filed by the appellant with the court of common pleas of the county in which the place of business of the licensee is located, or the county court of common pleas where the licensee resides. In filing a notice of appeal with the Department or court, the notice that is filed may be either the original of the notice or a copy of the original notice. Such notices of appeal shall be filed within fifteen (15) days after the mailing of the notice of the department's order, as provided in R.C. section 119.12.

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To ensure that this Order does not affect patient health and safety, this Order shall become effective fifteen days after the date of this Adjudication Order. Please note that the effective date of this Order does not extend the fifteen-day deadline noted above for filing a notice of appeal. As R.C. 119.12 provides, WMC may, in conjunction with filing an appeal, request that the court of common pleas stay this Order pending appeal.



Richard Hodges, MPA
Director of Health

11/30/16

Date

I hereby certify this to be a true and correct copy of the Journal Entry of the Director of the Ohio Department of Health.

11-30-2016

Date



Custodian of the Director's Journals
Ohio Department of Health