

ENTERED
AUG 15 2014

**COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO**

FOR COURT USE ONLY

S. C. Line #: 18

**LEBANON ROAD SURGERY CENTER
APPELLANT**

CASE NO. A1400502

JUDGE JEROME METZ, JR.

-VS-

**STATE OF OHIO DEPARTMENT OF HEALTH,
APPELLEE.**

**ENTRY OVERRULING APPELLANT'S
OBJECTIONS TO THE MAGISTRATE'S
DECISION OF JULY 10, 2014 AND ADOPTING
THE MAGISTRATE'S DECISION WITH
MODIFICATIONS**



D107424481

This matter came before the Court for a hearing on the record of August 15, 2014, on Appellant Lebanon Road Surgery Center's objections to the Magistrate's Decision of July 10, 2014.

The Court has reviewed the briefs, the objection, the response to the objection, and the complete record of the proceedings. The Court heard arguments on the objection on the record of August 15, 2014. For the reasons expressed on the record of August 15, 2014, the Court hereby overrules Appellant Lebanon Road Surgery Center's objections to the Magistrate's Decision and adopts the Magistrate's Decision of July 10, 2014, with modifications.

This case is an administrative appeal under R.C. 119.12. That section provides that a Common Pleas Court's review of an order from an administrative appeal is limited to whether the order is supported by reliable, probative, and substantial evidence and is in accordance with the law. The Court finds that the order of the Director of the Board of Health is supported by reliable, probative, and substantial evidence and is in accordance with the law.

The Clinic objects to the Magistrate's decision that the Clinic had no right to a due process hearing as to the Director's decision whether to grant or deny a variance from the requirement for a

written transfer agreement. In *Women's Med. Prof. Corp. v. Baird*¹, the Court held that with regard to deprivation of an ambulatory surgical facilities license, there must be "some chance to react to proposed governmental action before deprivation occurs." And, the Court held further that a fact issue for a pre-deprivation hearing was whether the alternative arrangements for patients will adequately protect them.² *Baird* was a § 1983 action challenging the constitutionality of the deprivation in that case and the federal court clearly had jurisdiction to consider those issues. *Baird* determined that the Director could not simply issue a cease and desist order without an opportunity to respond.

In this case, prior to deprivation of the license and prior to deprivation of its variance the clinic received notice and was given the opportunity to present evidence for the Director's consideration as to the variance and present evidence to the hearing officer with respect to the licensing decision. Under Ohio Admin. Code 3701-83-14, the Director's refusal to grant a variance "shall be final and shall not be considered as creating any rights to a hearing under R.C. Chapter 119." This is an appeal under R.C. 119.12. This Court has no jurisdiction in this appeal to review either the decision of the Director or the procedure by which he made his decision apart from those matters committed to the administrative proceeding with respect to the license. The Court does not, accordingly, determine whether the clinic had a due process right to a pre-deprivation hearing with regard to its variance or whether the procedure employed with respect to no face-to-face hearing by the Director violated due process. Those matters are not committed to this Court in this proceeding and the Court has no jurisdiction to rule upon them.

Lebanon Road Surgery Center further argues that the stay previously ordered by the Court under R.C. 119.12 should remain in place pending the outcome of the appeal to the First District Court

¹ 438 F.3d 595, 599, 614 (6th Cir. 2006).

² *Id.*

of Appeals and potentially the Ohio Supreme Court. The Clinic concedes, however, that the suspension order is interlocutory and subject to review in this Court before judgment. R.C. 119.12 provides that “[i]f it appears to the court that an unusual hardship to the appellant will result from the execution of the agency’s order pending determination of the appeal, the court may grant a suspension and fix its terms.” The Court shall consider four factors when determining whether suspension of the agency’s order is appropriate. “Those factors are: (1) whether appellant has shown a strong or substantial likelihood or probability of success on the merits; (2) whether appellant has shown that it will suffer irreparable injury; (3) whether the issuance of a stay will cause harm to others; and (4) whether the public interest would be served by granting a stay.”³ The Court’s suspension order addresses those issues and determined that the balance tipped in favor of suspension in large part because the factor of whether the Appellant has shown a strong likelihood of success on the merits was given little weight at the beginning stages of this proceeding. At this point, the Court has had an opportunity to fully review the record and briefs and has heard the arguments of counsel and has now ruled on the merits of the appeal. The Court finds that the factors now weigh against keeping the stay in place because Appellant cannot at this stage show a strong or substantial likelihood of probability of success on the merits given the limits on the Court’s jurisdiction. The stay entered by this Court on January 31, 2014 shall expire at 4:00 p.m. five days after the date of this order.

The Conclusions of law in the Magistrate’s decision are amended as follows:

4. It is solely within the Director’s discretion whether to grant or deny a variance from the written transfer agreement and the Director’s refusal to do so does not create any rights to an appeal under R.C. Chapter 119. Ohio Admin. Code 3701-83-14(D). Accordingly the Court lacks

³ *Bob Krihwan Pontiac-GMC Truck, Inc. v. GMC*, 141 Ohio App. 3d 777 , 783 (10th Dist.).

jurisdiction in this appeal to determine whether the Director's decision on the variance, or his procedure in revoking it, comport with due process.

5. The Stay granted in this matter on January 31, 2014 shall end at the close of business (4 p.m.) five days after this Entry is docketed.

The Magistrate's decision is otherwise adopted as the decision of the Court.

ENTERED

SO ORDERED

AUG 5 2014

COURT OF COMMON PLEAS	
ENTERED JEROME J. METZ, JR. JUDGE	
JEROME J. METZ, JR. JUDGE	NOTICE
TO CLERK SHALL SERVE NOTICE TO PARTIES PURSUANT TO CIVIL RULE 58 WHICH SHALL BE TAXED AS COSTS HEREIN.	

cc: counsel of record