

STATE OF OHIO
STATE OF OHIO
DEPARTMENT OF HEALTH

OHIO DEPT. OF HEALTH
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GENERAL COUNSEL

IN THE MATTER OF:

HEARING EXAMINER
WILLIAM J. KEPKO

CAPITAL CARE NETWORK OF TOLEDO
LICENSE NO. 0763AS

HEARING DATE: MARCH 26, 2014

REPORT AND RECOMMENDATION

This matter came on for an administrative hearing on March 26, 2014 as a result of a request for a hearing filed on August 29, 2013 and March 14, 2014 on behalf of Capital Care Network of Toledo ("Capital Care"). The timely requests for a hearing were filed in response to the Ohio Department of Health's two proposed refusals to renew and to revoke Capital Care's health care facility license to operate as an ambulatory surgical facility ("ASF"). Appearing on behalf of Capital Care was Terrie Hubbard, the owner of Capital Care. Capital Care was represented by Jennifer L. Branch, Gerhardstein & Branch. Appearing on behalf of The Ohio Department of Health was Rachel Belenker. The Ohio Department of Health was represented by Lyndsay Nash, Office of the Ohio Attorney General. (Hereinafter the Director of the Ohio Department of Health and the Ohio Department of Health are referred to as the "Director" and "ODH").

I. STATEMENT OF THE CASE

Capital Care operates an abortion clinic in Toledo, Ohio. Pursuant to Ohio Revised Code ("R.C") §3702.30(E), Capital Care is required to be licensed by ODH. In order to be licensed, Capital Care must meet certain quality standards and, pursuant to Ohio Administrative Code ("OAC") §3701-83-19(E), must have a written transfer agreement. A transfer agreement is a written agreement between the facility and a

hospital for transfer of patients in the event of medical complications, emergency situations and for other needs as they arise.

R.C. §3702.303 became effective on September 29, 2013. R.C. §3702.303(A) requires Capital Care to have a written transfer agreement with a local hospital.

On August 02, 2013 ODH notified Capital Care that it intended to revoke and not renew Capital Care's ASF license because Capital Care did not have a written transfer agreement. (State's Exhibit D). On February 18, 2014, ODH notified Capital Care that it intended to revoke and not renew Capital Care's ambulatory surgical facility's license because the written transfer agreement that Capital Care had obtained with a Michigan hospital was not with a "local" hospital, in violation of R.C. §3702.303(A). (State's Exhibit H).

Testifying on behalf of ODH was Tamara Malkoff, Terrie Hubbard on cross-examination and Theodore E. Wymyslo, MD. Tamara Malkoff is employed by ODH and is Chief of the Bureau of Information and Operational Support ("BIOS") and the Division of Quality Assurance. Theodore E. Wymyslo, MD is the former Director of the Ohio Department of Health. State's Exhibits A, D, E, F, G, H, I J, K, L and M were also admitted into evidence. Testifying on behalf of Capital Care were Harvey Blank, MD and Terrie Hubbard. Dr. Blank has been a licensed physician in Ohio for approximately 50 years. Exhibits A, B, C, D, E, G and M were admitted into evidence on behalf of Capital Care. Capital Care also proffered Exhibit I.

At the conclusion of the hearing, the parties, in lieu of closing arguments, agreed to a briefing schedule. ODH filed its brief on April 30, 2014. Capital Care filed its brief on May 21, 2014. ODH filed a reply brief on May 28, 2014.

From the testimony, the exhibits that were admitted into the record and the arguments of counsel, and after a thorough review of all of the evidence, this Report and Recommendation constitutes the Hearing Examiner's Findings of Fact and Conclusions of Law as required by Chapter 119 of the Ohio Revised Code.

II. FINDINGS OF FACT

1. Capital Care operates an abortion clinic in Toledo, Ohio.
2. Capital Care is owned by TNS management which is owned by Terrie Hubbard and her husband. (Transcript page 42). (Hereinafter citations to the transcript are cited as Tr. _).
3. Capital Care is licensed by ODH. (Tr. 19).
4. Prior to September 29, 2013, in order to be licensed and to maintain its license, Capital Care had to have a written transfer agreement with a hospital.
5. A transfer agreement is a written agreement between the facility and a hospital for transfer of patients in the event of medical complications, emergency situations and for other needs as they arise. (Tr. 18, 61).
6. In June 2013, the Ohio Legislature enacted House Bill ("HB") 59 that included R.C. §3702.303, which became effective September 29, 2013. (State's Exhibit K).
7. R.C. § 3702.303(A) requires Capital Care to have a written transfer agreement with a "local" hospital. (State's Exhibit K, Tr. 24).
8. "Local" is not defined in the statute, nor is it defined by ODH regulation. (Tr. 24, 67).
9. In April, 2013 Capital Care submitted an application to renew its license as an ambulatory surgical center. (Tr. 19).
10. At the time of Capital Care's application for renewal, Capital Care had a transfer

- agreement with the University of Toledo Medical Center ("UTMC"). (Tr. 19, Capital Care Exhibit A, hereinafter CC Exhibit _).
11. Capital Care's transfer agreement with UTMC was effective from August 01, 2012 through July 31, 2013. (Tr. 19, CC Exhibit A).
 12. UTMC is a public hospital and is located approximately seven miles from Capital Care. In addition, there are seven to eight hospitals in the immediate area of Capital Care. (Tr. 32, 47).
 13. HB 59 prohibited a public hospital such as UTMC from entering into a transfer agreement with an abortion clinic. (Tr. 32).
 14. On or about April 04, 2013 UTMC notified Capital Care that it intended not to renew its transfer agreement with Capital Care. (CC Exhibit B).
 15. On July 30, 2013 ODH notified Capital Care that it needed to provide a copy of another written transfer agreement no later than July 31, 2013. (Tr. 20, State's Exhibit A).
 16. Between August 01, 2013 and January 20, 2014 Capital Care contacted seven or eight hospitals in the Toledo area in search of a transfer agreement. Capital Care was unable to secure a transfer agreement in the Toledo area either because the hospitals were unwilling to enter into a transfer agreement or were prohibited from doing so by state law. (Tr. 51).
 17. Capital Care did not respond to ODH's July 30, 2013 notification, nor did Capital Care provide ODH with a transfer agreement by July 31, 2013. (Tr. 21).
 18. On August 1, 2013 ODH conducted an on-site survey at Capital Care. (Tr. 45).
 19. At the time of the survey, Capital Care provided ODH an unsigned draft of a transfer

- agreement. (Tr. 45).
20. Between August 01, 2013 and January 20, 2014, Capital Care did not have a written transfer agreement with a hospital. (Tr. 46).
 21. Because Capital Care did not provide another transfer agreement by July 31, 2013, ODH, on August 02, 2013, notified Capital Care that it intended to revoke and not renew Capital Care's ambulatory surgical facility's license. (State's Exhibit D).
 22. On August 29, 2013 Capital Care, through counsel, timely requested a hearing. (State's Exhibit E).
 23. On or about January 20, 2014 Capital Care entered into a transfer agreement with the University of Michigan, on behalf of the University of Michigan Health System ("UMHS") and submitted the transfer agreement to ODH. (CC Exhibit C, State's Exhibit G).
 24. UMHS is located in the state of Michigan and is 52 miles from Capital Care. (Tr. Pg. 46).
 25. The transfer agreement between Capital Care and UMHS does not specifically define the actual transfer mechanism. (Tr. 66).
 26. In the event of an emergency, Capital Care intends to use 911 to transport patients to a hospital in the Toledo area. (CC Exhibit M, Tr. 159).
 27. Capital Care also intends to transport patients to UMHS via a helicopter service. (CC Exhibit M, Tr. 159).
 28. In order to transport patients to UMHS, Capital Care has made arrangements with Air Evac Life Team ("AELT") to provide helicopter service between Capital Care and UMHS. (CC Exhibit M).

29. AELT is based in Licking County, Ohio and it could take as much as an hour to reach Capital Care in Toledo, Ohio. (Tr. 168, 169).
30. The actual flight time between Capital Care and UMHS is fifteen to twenty minutes. (Tr. 160).
31. Capital Care's use of a helicopter service to transport patients to UMHS is inherently unreliable because there is no formal contract between Capital Care and AELT, rendering availability uncertain. In addition, travel time from Capital Care to UMHS is unpredictable, jeopardizing patient health and safety. (Tr. 49, 50, 168 and 169).
32. On February 18, 2014 ODH rejected Capital Care's transfer agreement because UMHS was not a local hospital and the transfer agreement, therefore, violated R.C. 3702.303(A). (State's Exhibit H).
33. On March 14, 2014 Capital Care, through counsel, timely requested a hearing. (State's Exhibit J).

III. LEGAL DISCUSSION

R.C. § 3702.303(A) states that Capital Care, except as provided in division (C) of this section, shall have a written transfer agreement with a local hospital that specifies an effective procedure for the safe and immediate transfer of patients from the facility to the hospital when medical care, beyond the care that can be provided at the ambulatory surgical facility, is necessary, including when emergency situations occur or medical complications arise. A copy of the agreement shall be filed with the director of ODH. The exceptions in Division C are not applicable in this case.

The term "local" as used in R.C. §3702.303(A) is not defined either in the statute

or by regulation. When a word is not defined, courts in Ohio use its common, ordinary, and accepted meaning, unless it is contrary to clear legislative intent. *Cincinnati City School District Board of Education v. State Board of Education of Ohio*, 122 Ohio St.3d 557, 2009-Ohio-3628, 2009 Ohio LEXIS 1965, citing *Hughes v. Ohio Dept. of Commerce*, 114 Ohio St.3d 47, 51, 2007 Ohio 2877, 868 N.E.2d 246, p. 14. R.C. §1.42 instructs courts to read words and phrases in context, and according to rules of grammar and common usage. American Heritage dictionary defines "local" as "of relating to a city, town or district rather than a larger area". *American Heritage Dictionary* 795 (3rd. Ed. 2000). Random House unabridged dictionary offers a similar definition: "Pertaining to a city, town or small district rather than an entire state or country". *Random House Unabridged Dictionary* 1127, 2nd Ed. 1993.

Tamara Malkoff, Chief of the Bureau of Information and Operation Support, testified that, although she did not review Capital Care's transfer agreement, she would first consider the distance between the ASF and the hospital and whether the ASF is located in a rural area or a metropolitan area. (Tr. 29). The hospital must also be able provide the necessary services. (Tr. 31). Ms. Malkoff would exclude public hospitals, as they are not able to provide the necessary services because of the prohibition in HB 59. (Tr. 33). Ms. Malkoff would not consider whether a hospital was willing or not to enter into a transfer agreement with an ASF. (Tr. 31). Ms. Malkoff also testified that, if an ASF was not able to obtain a transfer agreement, then the ASF could apply for a variance. (Tr. 31).

Dr. Theodore Wymyslo is a licensed physician and former Director of the Ohio Department of Health. (State's Exhibit M). As former Director of Health, Dr. Wymyslo

was responsible for approving or rejecting the transfer agreement in this case. In that regard, Dr. Wymyslo reviewed the transfer agreement in this case and determined that UMHS was not a "local" hospital. Dr. Wymyslo concluded, therefore, that Capital Care's transfer agreement was not consistent with R.C. § 3702.303(A). (Tr. 65).

Dr. Wymyslo utilized his prior medical experience to determine whether Capital Care's transfer agreement with UMHS was consistent with R.C. § 3702.303(A). (Tr. 59-60). More particularly, Dr. Wymyslo utilized a guideline that he required for on-call physicians in his residency programs. Dr. Wymyslo characterized this guideline as the "thirty minute availability" rule. (Tr. 58-59). The thirty minute availability rule, in the context of this case, would require Capital Care or any ASF to transfer to the local hospital with which they have a transfer agreement, within thirty minutes, a patient who is experiencing a complication or an emergency. (Tr.58). Dr. Wymyslo equates the thirty minute availability rule with high quality patient care and safety, and believes that the rule is consistent with R.C. §3702.303(A). (Tr.59).

Applying the thirty minute availability rule to Capital Care's transfer agreement and to R.C. § 3702.303(A), Dr. Wymyslo determined that an out of state hospital 52 miles away from Capital Care would not be consistent with the thirty minute availability rule and would not be considered a "local" hospital for purposes of R.C. § 3702.303(A). (Tr. 65). Dr. Wymyslo was also concerned that, since UMHS was out of state, there could be insurance issues and concerns that would not likely arise if UMHS was an in-state hospital. (Tr. 65- 66). Dr. Wymyslo was also concerned that the actual transfer mechanism between Capital Care and UMHS was not defined. (Tr. 66). Dr. Wymyslo's major concern, however, and the reason he rejected Capital Care's transfer



agreement was due to the distance between Capital Care and UMHS and the amount of time it would take to transport patients to that facility. (Tr. 67-68).

IV. CONCLUSIONS OF LAW

1. ODH has jurisdiction over this matter.
2. The record indicates that Capital Care received notice of the date, time and place of the hearing, all in accordance with law. (State's Exhibits D, E, F, H, I, and J).
3. Capital Care, pursuant to R.C. §3702.30, is a health care facility operating as an ambulatory surgical facility.
4. Each ambulatory surgical facility must be licensed and meet certain quality standards established by ODH. R.C. §3702.30(E).
5. Pursuant to R.C. §3702.303(A), Capital Care is required to have a written transfer agreement with a local hospital that specifies an effective procedure for the safe and immediate transfer of patients from the facility to the hospital when medical care, beyond the care that can be provided at the ambulatory surgical facility, is necessary, including when emergency situations occur or medical complications arise.
6. Capital Care's failure to have a written transfer agreement between August 01, 2013 and January 20, 2014 is a violation of Ohio Administrative Code ("OAC") §3701-83-19(E).
7. Capital Care's written transfer agreement with the University of Michigan on behalf of the University of Michigan Health System, located in the state of Michigan, 52 miles from Capital Care, is not a local hospital as required by R.C. §3702.303(A).
8. The use of the thirty minute availability rule by the Director of the Ohio Department of Health when evaluating Capital Care's transfer agreement with UMHS is

reasonable and consistent with R.C. §1.42 and is also consistent with R.C. §3702.303(A) requiring the transfer agreement to be with a local hospital.

9. The Director's consideration of the distance and the time of travel between Capital Care and UMHS when evaluating Capital Care's transfer agreement with UMHS is reasonable and consistent with R.C. §3702.303(A) and R.C. §1.42.

10. Capital Care's written transfer agreement with the UMHS is not consistent with R.C. §3702.303(A) because it does not specify an effective procedure for the safe and immediate transfer of patients from the facility to a local hospital when medical care, beyond the care that can be provided at the ambulatory surgical facility, is necessary, including when emergency situations occur or medical complications arise.

11. Because Capital care did not have a written transfer agreement between August 01, 2013 and January 20, 2014, and because Capital Care does not have a written transfer agreement with a local hospital, Capital Care did not meet the licensing requirements of OAC §3701-83-19(E) and does not meet the requirement in R.C. §3702.303(A) that the transfer agreement be with a "local" hospital.

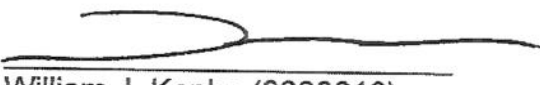
12. Because Capital Care did not meet the licensing requirements in OAC §3701-83-19(E) and does not meet the requirements in R.C. §3702.303(A), the Director's August 02, 2013 and February 18, 2014 decisions to not renew, or to revoke the license of Capital Care, are valid.

13. Capital Care's constitutional challenges to R.C. §3702.303(A), including Capital Care's allegation that HB 59 violates the single subject rule and that the statute is vague, are beyond the jurisdiction of the Hearing Examiner. *MCI Telecommunications Corp. v. Limbach*, (1994), 68 Ohio St.3d 195, 197-199, 625 N.E. 2d 597, 598-99; S.S.

Kresge Co. v. Bowers (1960), 170 Ohio St. 405, 166 N.E.2d 139

V. RECOMMENDATION

Based on the testimony, the exhibits, the briefs submitted by the parties and, for the reasons expressed herein, it is the finding of the Hearing Examiner that the Director's proposed revocation of the licensure of Capital Care Network of Toledo is in accordance with the rules adopted under Chapter 3701.83 of the Ohio Administrative Code and R.C. §3702.303(A) and it is **THEREFORE RECOMMENDED** that the Director's August 02, 2013 proposed non-renewal and revocation of Capital Care's license and the Director's February 18, 2014 proposed non-renewal and revocation of Capital Care's license are valid as a matter of law.


William J. Kepko (0033613)
Hearing Examiner
June 10, 2014

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing REPORT AND RECOMMENDATION was served by certified U.S. mail, postage prepaid, return receipt requested, to the Ohio Department of Health, c/o Kaye Norton, Office of Legal Services, 246 North High Street, 7th Floor, Columbus, Ohio 43215 CMRRR# 7009 3410 0000 4139 6357 on June 10, 2014.


William J. Kepko (0033613)