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COMMON PLEAS COURT
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IN THE COURT OF COMMON PLEAS
LUCAS COUNTY, OHIO

CAPITAL CARE NETWORK OF TOLEDO	:	Case No. CI201403405
	:	
	:	Judge Myron C. Duhart
Appellant,	:	
	:	
v.	:	
	:	
OHIO DEPARTMENT OF HEALTH	:	
	:	
Appellee.	:	

MEMO CONTRA OF THE OHIO DEPARTMENT OF HEALTH TO APPELLANT'S MOTION FOR STAY OF THE ORDER OF THE OHIO DEPARTMENT OF HEALTH

Appellant Capital Care Network of Toledo, Inc. ("CCN") is not entitled to the emergency relief it seeks staying the Ohio Department of Health Director's adjudication order refusing to renew and revoking CCN's license to operate. First, it has little chance of succeeding on the merits – and CCN is simply wrong in arguing that its (low) likelihood of success on the merits "is of limited importance." This administrative appeal presents a single issue for the Court's resolution: whether CCN can prove that the Director's Order is unsupported by reliable, probative and substantial evidence or is contrary to law. It cannot. CCN does not have a written transfer agreement with a local hospital and its license was properly revoked as a result. This factor alone warrants denying the stay request. Second, denying the stay will protect public safety without imposing unusual irreparable harm on CCN. Therefore, the Director respectfully requests that CCN's stay request be denied.

Background and Procedural History

CCN applied to renew its license to operate as an ambulatory surgical facility ("ASF"). An ASF is a freestanding facility where outpatient surgeries are routinely performed. R.C. 3702.30(A)(1). As an ASF, CCN must have a written transfer agreement with a local hospital unless the Director has granted a variance of that requirement[1]. R.C. 3702.303. R.C. 3702.303(A) states:

> an ambulatory surgical facility 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." (Emphasis added).

Because CCN submitted a transfer agreement with a non-local hospital, the Director proposed to issue an order refusing to renew CCN's license, or alternatively, to revoke it. An administrative hearing was held. Following the hearing, the parties submitted briefs and the Hearing Officer reviewed the evidence and issued a Report and Recommendation (Exhibit 1); including Findings of Fact, Conclusions of Law, and a Recommendation that CCN's license be revoked due to lack of a written transfer agreement with a local hospital. The Director adopted the entire Report and Recommendation and issued an Adjudication Order on July 29, 2014 (Exhibit 2), which refused to renew and revoked CCN's license to operate an ASF. The entire administrative appeal was completed within five months.

Standard for Staying an Agency's Administrative Order

A continued stay would permit CCN to operate indefinitely without the required assurances for continuity of care for patients who need to be transferred to the hospital in an emergency. "The filing of an administrative appeal does not automatically entitle a party to a

[1] It is undisputed that CCN never requested a variance of the transfer agreement requirement.

stay of execution pending judicial review." *Bob Krihwan Pontiac-GMC Truck, Inc. v. Gen. Motors Corp.* (2001), 141 Ohio App.3d 777, 782, 753 N.E.2d 864, 867 (10th Dist. 2001). R.C. 119.12 sets forth a very specific standard that must be met before the Court may grant a request for stay:

> The filing of a notice of appeal shall not automatically operate as a suspension of the order of an agency. If 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.

R.C. 119.12[2] (emphasis added). When asked to stay an administrative order, courts must give significant weight to the expertise of the administrative agency, as well as to the public interest served by the proper operation of the regulatory scheme. See *Hamlin Testing Labs., Inc. v. United States Atomic Energy Comm.* (C.A. 6, 1964), 337 F. 2d 221.

Although R.C. 119.12 does not set forth or prescribe the factors a court may consider in determining whether to suspend operation of an administrative order, those factors have been developed by courts. Courts have repeatedly relied upon the following factors as logical considerations when determining whether it is appropriate to stay an administrative order pending judicial review. Those factors are: (1) whether the appellant has shown a strong or substantial likelihood or probability of success on the merits; (2) whether the 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. See *Bob Krihwan Pontiac-GMC Truck, supra* at 783 (citing, *inter alia, Gurtzweiler v. United States* (N.D. Ohio 1985), 601 F.Supp. 883; *Holden v. Heckler* (N.D. Ohio 1984), 584 F.Supp. 463; *UpJohn Co. v.*

[2] R.C. 119.12 contains provisions for other stays involving specifically delineated state agencies. However, stays regarding ODH orders are not specifically delineated. Therefore, those provisions do not apply here.

Finch (W.D. Mich. 1969), 303 F.Supp. 241; and *Friendship Materials v. Michigan Brick, Inc.* (6th Cir. 1982), 679 F.2d 100). CCN succeeds with none of them: it has little likelihood of success on the merits, the requirement it seeks to avoid relates to patient care, and the public interest is not served by permitting a clinic in clear violation of law to continue to operate.

Likelihood of Success on the Merits

R.C. 119.12 vests reviewing courts with limited discretion to reverse an administrative agency's order. The sole issue presented in this appeal is whether there is reliable, probative and substantial evidence to support the agency's judgment, and whether the agency's decision is in accordance with the law. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 614 N.E.2d 748 (1993); R.C. 119.12. If the agency meets the requirements under R.C. 119.12, a reviewing court may not substitute its judgment for that of the agency, even if the court may have reached a different conclusion. *Henry's Café Inc. v. Bd. of Liquor Control*, 170 Ohio St. 233, 163 N.E.2d 678 (1959).

Appellant will not succeed on the merits of this case because it cannot show that it meets even the minimum criteria for licensure. Every ASF in the state is required to have a transfer agreement with a local hospital or receive a variance waiving the transfer-agreement requirement. R.C. 3702.303(A). Because CCN has neither, it is not entitled to renew its license and the Director properly refused to renew and revoked the license.

CCN's arguments to the contrary lack merit. First, implicitly conceding its inability to satisfy this requirement, Appellant argues that "likelihood of success [] is of limited importance in this case." (Motion, p. 5.) In support, it cites authority for the proposition that the likelihood of success "is not particularly helpful" where the motion for a stay "comes at a time when the merits of an appeal have not been fully examined" and "the Court cannot conclude that it is

substantially unlikely" that the appellant will prevail. *Lake County Bd. of Mental Retardation (and Developmental Disabilities) v. SERB,* Franklin C.P. No 92CVF02-1504, 1992 WL 699882, 1 (April 14, 1992); see also *Hudson Township Trustees v. SERB,* Summit C.P. CV 86 3 0903, 1986 WL 295943, (May 20, 1986) (likelihood of success factor is not dispositive where "[t]he merits of the appeal have not yet been examined, and the likely result is therefore unknown"). These cases are inapposite here, where the record forecloses the possibility of success on the merits. *Cf., Wayside Farm, Inc. v. Bowen,* 698 F.Supp. 1356, 1366 (N.D. Oh. 1988) (consideration of other matters "in the face of a low showing of a likelihood of success does not warrant an order maintaining the status quo;" preliminary injunction pending resolution of review of agency determination denied).

The administrative record shows that CCN is unlikely to succeed on the merits. CCN's purported transfer agreement is with an out-of-state hospital located 53 miles away. CCN plans to transport patients to Ann Arbor, Michigan by helicopter service. At the administrative hearing, Ms. Hubbard, the owner of CCN, testified that patients would be transferred to Ann Arbor by helicopter. Ms. Hubbard has no formal contract with a helicopter company and did not know what it would cost or whether the company would work with the patient's insurance. (TR. 49, 160). For a helicopter to even reach CCN, it would take at least an hour, land in an abandoned parking lot next to CCN's offices and take off for another 15-20 minute flight to Ann Arbor, Michigan. (TR. 160, 169). CCN's plan is not a reasonable or responsible plan to care for patients who need emergency medical treatment outside of the facility.

According to CCN, "it was reasonable for Terrie Hubbard to interpret the term "local" as meaning within 50-75 miles of the facility." (Motion, pg. 10). CCN believes that traveling 50-75 miles for medical care is reasonable. However, CCN does not believe it is reasonable to

travel this same distance to a clinic in Michigan, Cleveland or Columbus that performs abortion services. (Motion, pg. 16). CCN cannot have it both ways. If this is a reasonable distance to travel for emergency medical care, it is certainly a reasonable distance to travel for a scheduled medical procedure.

CCN, with little chance of success on the merits, raises purported constitutional challenges to the statute. Each of these challenges fails. CNN argues that the statute is unconstitutionally vague because a person of reasonable, ordinary intelligence could not determine the meaning of the word "local." (Motion , p. 6) Because the term "local hospital" has an ordinary and customary meaning, no need for interpretation arises. *See State v. Taylor,* 114 Ohio App.3d 416, 422, 683 N.E.2d 367, 371 (2d Dist. 1996). CCN's void-for-vagueness challenge fails because CCN cannot satisfy the high burden of showing vagueness in this case. A statute is not void "simply because it could be worded more precisely or with certainty." *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶96 (2006) citing *State ex rel. Rear Door Bookstore v. Tenth Dist. Court of Appeals*, 63 Ohio St.3d 354, 588 N.E.2d 116 (1992).

Because this is a civil statute, and not a criminal statute, the burden of proof to show that a statute is unconstitutionally vague is stringent. "A civil statute that does not implicate the First Amendment is unconstitutionally vague only if it is so vague and indefinite that it sets forth no standard or rule or if it is substantially incomprehensible." *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-51, 882 N.E.2d 400, at ¶ 46 (2008).

The ordinary inquiry is "whether the law affords a reasonable individual of ordinary intelligence fair notice and sufficient definition and guidance to enable him to conform his conduct to the law; those laws that do are not void for vagueness." *Norwood*, 110 Ohio St.3d at

380 citing *Grayned v. Rockford*, 408 U.S. 104, 108–109, (1972) (holding that anti-noise ordinance which prohibited noise which would disturb the peace, near a school, was not unconstitutionally vague because the statute gives fair notice to those at whom it is directed).

The statute is not impermissibly vague because the meaning of the word "local" is easily ascertained, especially for medical professionals. If CCN was unclear what the word "local" meant, it could have consulted a dictionary. CCN could have also consulted ODH, the agency charged with enforcing the statute. CCN claims the statute is "vague," but did nothing to ascertain the statute's meaning. Additionally, the statute allows a licensee to easily conform its behavior. CCN can re-submit transfer agreements until it produces one that meets the statutory requirement. CCN does not face any threat of monetary penalty or imprisonment in this action. CCN's vagueness challenge should be rejected.

The statutory requirement for a written transfer agreement is not an unconstitutional delegation of licensing authority to private individuals. The Sixth Circuit Court of Appeals has expressly rejected that argument. *Women's Med. Professional Corp. v. Baird*, 438 F.3d 595 (6th Cir. 2006). *Baird* held that Ohio's transfer agreement requirement is not an unconstitutional delegation of licensing authority to private hospitals. *Id.* at 609, 610 (discussing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 876 (1992)). As *Baird* says, Ohio's transfer agreement requirement is fully constitutional.

Unusual Hardship

Next, R.C. 119.12 requires that CCN prove that it will suffer an "unusual" hardship. As cogently explained in *State Med. Bd. v. Alsleben* (Mar. 17, 1980), Summit Co. C.P. Case No.

CV80-3-0614, unreported:[3]

> There is a dearth of authority in Ohio defining what constitutes "unusual hardship." However, some reasonable analysis may be helpful. The very term itself presupposes that the legislature foresaw that there would be a hardship in every one of these types of cases. Therefore, it must be concluded that the lawmakers meant just what they said when the adjective "unusual" was included. That there will be a hardship in this case is certainly true, as in every case. The question is whether there has been a showing that it is an unusual one.

Id. at 1-2; *see also Williams v. State of Ohio Department of Insurance* (January 12, 1994), Franklin Co. C.P. Case No. 93CVF08-5808, unreported, p. 2 (Reece, J.) (stating that "there will be a hardship in this case is certainly true, as in every case. The question is whether there has been a showing that it is an unusual one.");[4] *see also Douglas S. Goldman, C.T. v. State Medical Board* (June 20, 1997), Franklin Co. C.P. Case No. 97CVF06-5968, unreported, p. 3 (Fais, J.) ("[U]nusual hardship means more than financial hardship");[5] *see also Herman Dreskin, M.D. v. State Medical Board* (October 22, 1997), Franklin Co. C.P. No. 97CVF-09-8830, unreported (McGrath, J.) (holding that doctor's "loss of patients, ***income*** and reputation in the community" resulting from revocation of license is not sufficient to constitute unusual hardship [emphasis added]).[6] Loss of a business or financial hardship is not the unusual hardship one must show to be granted a stay. The harm must be more than economic. Following the requirements of law will not result in unusual hardship.

Harm to Others and Public Interest

The third and fourth factors CCN must demonstrate are that no harm to others will result

[3] Attached as Appendix A
[4] Attached as Appendix B
[5] Attached as Appendix C
[6] Attached as Appendix D

and that the public interest will be served by the clinic remaining open until the conclusion of this appeal. CCN does not have a transfer agreement with a local hospital to ensure the safe and orderly transfer of patients who may suffer medical complications while at the facility. Further, the public interest is not served when a clinic in clear violation of law is permitted to continue to operate. Our State has concluded that patients may be harmed if a written transfer agreement with a local hospital, required by law, is not in place in the event of medical complications, emergencies or other needs.

Conclusion

CCN fails to meet the standard pursuant to R.C. 119.12. CCN is unlikely to succeed on the merits, they cannot show an unusual hardship, harm to others may occur, and it is in the public interest for the adjudication order to proceed. For the above reasons, this Court should deny CCN's Motion for Stay of Execution.

Respectfully submitted,

MICHAEL DEWINE (0009181)
Attorney General of Ohio

Lyndsay Nash (0082969)
Assistant Attorney General
30 East Broad Street, 26th Floor
Columbus, OH 43215
Telephone: (614) 466-8600
Fax: (866) 818-6923

CERTIFICATE OF SERVICE

I hereby certify that, on August 8, 2014, a true and accurate copy of the foregoing Memorandum in Opposition was filed with the Clerk and sent via e- mail and regular mail to the following:

Jennifer L. Branch
Alphonse A. Gerhardstein
Gerhardstein & Branch Co., LPA
432 Walnut St. #400
Cincinnati, Ohio 45202
Attorneys for Appellant

Terry Lodge
316 North Michigan Street, Suite 520
Toledo, Ohio 43604-5627
Attorney for Appellant

LYNDSAY NASH (0082969)
Assistant Attorney General