COMMONWEALTH OF KENTUCKY
CABINET FOR HEALTH AND FAMILY SERVICES
Division of Administrative Hearings
Health Services Administrative Hearings Branch
Case No. HSAHB CON 18-0057

IN RE: **SOUTHERN KENTUCKY AMBULANCE SERVICE**
CON No. 114-04-5914(1)
To establish A Class I ground ambulance service to serve Warren County

FINAL ORDER GRANTING SUMMARY JUDGMENT

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PROCEDURAL BACKGROUND

This matter is before the tribunal on the Motion for Summary Judgment filed by the affected parties, Medical Center EMS, LLC d/b/a The Medical Center EMS and Bowling Green-Warren County Community Hospital Corporation d/b/a The Medical Center at Bowling Green (collectively the "Affected Parties"). The certificate of need applicant, Mikrod Services, Inc., d/b/a Southern Kentucky Ambulance Service (hereinafter "SKAS" or "Applicant"), is seeking nonsubstantive review of its application for a certificate of need for a Class I ground ambulance service in Warren County, Kentucky pursuant to Emergency Regulation 900 KAR 6:075E. However, in their motion, the Affected Parties argue SKAS is not entitled to nonsubstantive review, and, consequently, the certificate of need application must be disapproved as a matter of law.

SKAS filed Applicant's Response to Motion or Summary Judgment, and attached an affidavit from Molly Nicol Lewis, Deputy Inspector General of the Cabinet for Health and Family Services, Office of Inspector General, (hereinafter "CHFS" or the "Cabinet"),

which purported to interpret the meaning of the relevant portion of the emergency regulation.[1]

Subsequently, the Affected Parties filed a Reply Memorandum in Support of Their Motion for Summary Judgment, arguing the regulatory interpretation of Ms. Lewis was not binding.

On January 3, 2019, Hon. Matthew Kleinert, Deputy General Counsel for the Cabinet for Health and Family Services, filed a Limited Entry of Appearance and Response to Affected Parties' Motion for Summary Judgment. While stating the Cabinet was taking no position on whether the certificate of need should be granted, the Cabinet argued Ms. Lewis's statement of the agency's interpretation of the emergency regulation was entitled to deference.

On January 3, 2019, a telephonic prehearing conference was convened to address the motion for summary judgment, and several motions in limine, along with the parties' motion to determine the order of proof[2] for the administrative hearing scheduled to take place January 7-10, 2019 and January 16, 2019.

ANALYSIS

On September 25, 2018, an emergency administrative regulation was issued, "amending the existing [certificate of need] administrative regulation by...adding a type of ambulance application to the list of type of applications qualified for nonsubstantive review status" in certificate of need applications. *900 KAR 6:075E Regulatory Impact*

[1] Several other exhibits were attached to the Applicant's response, but those exhibits are not relevant to the analysis here.

[2] At the conclusion of the telephonic prehearing conference, an oral order was issued, granting the Affected Parties' motion permitting them to present their proof first, in the event their motion for summary judgment was not granted.

Analysis and Tiering Statement. Pursuant to KRS 216B.015(18) and the administrative regulation, nonsubstantive review is an "expedited review conducted by the cabinet" in which there is a "presumption that the...service is needed and a presumption that the...service is consistent with the State Health Plan." *900 KAR 6:075E, Section 2(8).*

The relevant emergency regulation is 900 KAR 6:075E. The specific provision applicable in this matter is 900 KAR 6:075E, Section 2 (3)(g). According to that regulatory provision,

> ...[T]he Office of Inspector General shall grant nonsubstantive review status to an application for which a certificate of need is required if:
>
> 1. The proposal involved an application to establish a Class I ground ambulance service;
> 2. The applicant's proposed service area is limited to a county with a population of 50,000 or more;
> 3. There is no more than one (1) licensed Class I ground ambulance service in the county that the applicant is proposing to serve; and
> 4. The current Class I ground ambulance service provider serving the county is not owned or operated by a public organization.
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> 900 KAR 6:075E, Section 2(3)(g)(1)-(4).

The Affected Parties argue the Applicant is not entitled to nonsubstantive review of its certificate of need application for a Class I ground ambulance service because there is more than one Class I ground ambulance service in Warren County, Kentucky, SKAS's proposed service area. The Affected Parties are one Class I ground ambulance service provider, but Franklin-Simpson County Ambulance Service (hereinafter "FSCAS"), is currently licensed to provide ambulance service in a substantial portion of Warren County, Kentucky.

The following facts are not in dispute:

1. SKAS' application is to establish a Class I ground ambulance service in Warren County, Kentucky;
2. The proposed service area of Warren County, Kentucky has a population of 50,000 or more;
3. Franklin-Simpson County Ambulance Service is currently licensed to provide ambulance service in a substantial portion of Warren County, Kentucky;
4. The current Class I ground ambulance service provider serving Warren County, The Medical Center EMS, is not owned or operated by a public organization; and
5. There has been no challenge to the validity of FSCAS' license to serve Warren County.
6. FSCAS has provided ambulance service to individuals in Warren County in the past.

There is no genuine issue of material fact.

Subsection 3 of 900 KAR 6:075E, Section 2 (hereinafter "Subsection 3"), is the pivotal provision in the present determination. The Applicant contends that because FSCAS has a certificate of need authorizing it to provide Class I ground ambulance service in neighboring *Simpson* County, Kentucky, the fact that its ambulance license authorizes it to also provide those same services to "an area limited to a 30 minute response time for 95% of the population served" from FSCAS's physical address (which would at times extend into Warren County) is irrelevant.

The Applicant's reasoning is based largely on the affidavit of Molly Nicol Lewis, Deputy Inspector General of the Cabinet for health and Family Services, Office of

Inspector General, in which she states it is her "opinion and belief that any portion of a license for the the [FSCAS] that is interpreted to include any portion of Warren County in its service area is not authorized" by FSCAS' certificate of need. SKAS' position is also based upon Ms. Lewis' regulatory interpretation that in order for a service to be "in the county" as required in Subsection 3, the ambulance service provider must have an ambulance station physically located within the county it serves. Although language this specific could have easily been included in the regulatory provision, it was not. Further, KRS 311A.020(1)(c)(6) gives the Kentucky Board of Emergency Medical Services ("KBEMS"), and not the Cabinet, exclusive authority over licensure an relicensure of ambulance services. The Applicant's proposed interpretation by Ms. Lewis is contrary to the KBEMS Advisory Opinion, and is not binding.

The plain language of the regulation is unambiguous. It is argued that the word "licensed" in Subsection 3 describes the Class I ground ambulance service, rather than the phrase "in the county." However, such an interpretation would necessarily require the contemplated existence of an "unlicensed" Class I ground ambulance service. Clearly, an unlicensed ambulance service would not be "in the county."

An agency's interpretation of its own regulation is entitled to deference where the regulatory language is ambiguous, and the agency's interpretation is reasonable. However, "[a]n administrative body shall not by internal policy, memorandum, or other form of action... [m[odify a statute or administrative regulation, [or] [e]xpand upon or limit a statute or administrative regulation." *KRS 13A.130(1)(a) and (b).* Nevertheless KRS 216B.040(3)(d) authorizes the Cabinet "to establish a mechanism for issuing advisory opinions to prospective applicants regarding the requirements for certificate of

need." That mechanism is established in 900 KAR 6:105, Section 2. In the present case, an advisory opinion could have been initiated by the Cabinet or "upon the request of any person." *900 KAR 6:105, Section 2(1).* There are mechanisms in place for the Cabinet to establish its interpretation of its own regulation through an advisory opinion. Unfortunately, that mechanism was not employed in regard to the emergency regulation at issue here. Ms. Lewis' opinions were not based upon any advisory opinion by the Cabinet. Therefore, there is no room for agency deference under the present circumstances.[3]

On January 3, 2019 after the telephonic pre-hearing conference was adjourned, the Affected Parties filed a Second Supplemental Memorandum in Support of Their Motion for Summary Judgment. This supplement included reference to portions of the statute applicable to KBEMS's authority over ambulance services and their licensure, KBEMS' authority to issue advisory opinions regarding the application of its statutes and administrative regulations, and Advisory Opinion No. 2011-001 issued by KBEMS on May 19, 2011. The Advisory Opinion states that after a certificate of need is granted by the Cabinet for Health and Family Services, KBEMS begins their licensure process. When this occurs, "the ambulance service no longer falls under the jurisdiction of the Cabinet for Health and Family Services but falls fully under KBEMS' jurisdiction." Therefore, neither this Tribunal, nor the Cabinet, has authority to determine that the scope of the license of FSCAS is different from the geographic service area listed on the license.

[3] Furthermore, the employment of agency deference is questionable in a matter such as this one, where the governmental agency is not a party.

For the foregoing reasons, SKAS' certificate of need application is not entitled to nonsubstantive review. Pursuant to 907 KAR 6:075E, Section 2(11)(a), if it is determined that an application is not entitled to nonsubstantive review status, that application must be disapproved.

Based on the foregoing and being otherwise sufficiently advised,

IT IS HEREBY ORDERED that the Affected Parties' Motion for Summary Judgment is GRANTED, and the nonsubstantive review application of the Applicant is DISAPPROVED;

IT IS FURTHER ORDERED that the Motions in Limine and the Motion to Quash Supboena are DENIED as MOOT; and

IT IS FURTHER ORDERED that the administrative hearing scheduled for January 7-10, 2019 and January 16, 2019 is VACATED.

ENTERED this 4th day of January, 2019.

Karen E. Woodall

HON. KAREN E. WOODALL
Administrative Law Judge

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