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Health Care

Certificate of Need Law Alert

2008 OAH Decision Leaves Doubt as to Deadline to Appeal CON “No-Review” Determinations

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A “no-review” determination is a written decision issued by the Certificate of Need Section of the N.C. Department of Health and Human Services (CON Section) confirming that a proposed healthcare project does not fall into any legal category that would require the person wishing to develop the project to obtain a Certificate of Need (CON). Decisions issuing no-reviews and decisions not to issue no-reviews are frequently appealed by applicants or their competitors.

A 2008 decision by the North Carolina Office of Administrative Hearings (OAH) leaves doubt as to the deadline by which an interested person must appeal to challenge CON “no-review” decisions. OAH issued the final decision on May 21, 2008 in the contested case hearing *Hospice of the Piedmont, Inc. v. N.C. Dept. of Health & Human Svcs., Div. of Health Svcs. Regulation, Licensure & Certification Section, et al.*, 07 DHR 1617. The contested case was brought by Hospice of the Piedmont, Inc. to challenge a no-review determination in which the CON Section determined that a competing hospice

agency (Liberty Home Care, II, LLC) could open a new branch office without first obtaining a CON.

Under N.C.G.S. § 131E-188, a decision to issue or deny a CON or exemption must be challenged by filing a petition for contested case hearing within 30 days. In the Hospice of the Piedmont case, the no-review determination was issued on May 4, 2005, but the appeal was not commenced until Jan. 18, 2006, eight months later. OAH ruled that the failure to commence the appeal by the deadline “deprives a court of subject matter jurisdiction and requires dismissal of a petition.”

In the same decision, the administrative law judge noted that Hospice of the Piedmont had learned of the no-review on July 5 2005, but still failed to appeal the no-review for approximately six more months. Based on that and several other facts, the administrative law judge held that “equitable considerations will not excuse [Hospice of the Piedmont]’s delay in filing its Petition in this contested case.” Therefore, although this particular appeal



Questions?

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was dismissed, the administrative law judge clearly indicated that an appeal brought after the statutory 30-day deadline might still be allowed if the delay was deemed excusable.

This ruling was therefore intended to allow a person to challenge prior agency decisions after the 30-day deadline, especially if the person wishing to challenge the determination could demonstrate that they never learned of the agency decision within the applicable appeal period. However, there is a strong possibility that such an outcome would not pass legal muster.

Where procedures for the appeal of an administrative action are established by statute, jurisdiction over a contested case hearing is not conferred upon OAH unless the petitioner follows those procedures, and the failure to follow those procedures will subject the petition to dismissal. *Nailing v. UNC-CH*, 117 N.C. App. 318, 327, 451 S.E.2d 351, 357 (1995). “[B]ecause the right to appeal to an administrative agency is granted by statute, compliance with statutory provisions is necessary to sustain the appeal.” *Gummels v. N.C. Dept. of Health and Human Servs.*, 98 N.C. App. 675, 677, 392 S.E.2d 113, 114 (1990). Accordingly, if an appeal was not timely filed, the OAH would lack the jurisdiction to decide that the delay was excusable or to override the statutory time limit.

This theory will likely be tested. No-review decisions are not currently published by the CON Section, and it is very common that competitors do not learn about no-review determinations that they may appeal until after the 30-day appeal period has run. The language in the Hospice of the Piedmont case will likely be used to justify an untimely appeal, and it may be up to another ALJ or ultimately the Court of Appeals to decide if such an untimely appeal may survive.

For more information on this topic and other matters pertaining to health care Certificate of Need law, please contact issue editor Marcus C. Hewitt at 919.981.4308 or mhe-witt@williamsmullen.com

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