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NO. COA06-1641

NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 2007

HOSPICE AT GREENSBORO, INC. D/B/A
HOSPICE AND PALLIATIVE CARE OF
GREENSBORO and HOSPICE OF THE
PIEDMONT, INC.,
Petitioners,

v.

North Carolina Department
of Health and Human Services,
Division of Facility Services

NORTH CAROLINA DEPARTMENT OF
HEALTH AND HUMAN SERVICES,
DIVISION OF FACILITY SERVICES,
LICENSURE AND CERTIFICATION
SECTION and NORTH CAROLINA
DEPARTMENT OF HEALTH AND HUMAN
SERVICES, DIVISION OF FACILITY
SERVICES, CERTIFICATE OF NEED
SECTION,

Respondents,

Court of Appeals
Slip Opinion

and

CARROLTON HOME CARE, INC. D/B/A
COMMUNITY HOME CARE AND
HOSPICE,

Respondent-Intervenor.

Appeal by Respondent-Intervenor Carrolton Home Care, Inc. d/b/a Community Home Care and Hospice from the Final Agency Decision 22 August 2006 by Director Robert J. Fitzgerald in the North Carolina Department of Health and Human Services. Heard in the Court of Appeals 23 August 2007.

Smith Moore LLP by Maureen Demarest Murray for Petitioner-Appellee Hospice at Greensboro, Inc. d/b/a Hospice and Palliative Care of Greensboro and Hospice of the Piedmont, Inc.

Williams Mullen Maupin Taylor, P.C. by Marcus C. Hewitt and Kevin Benedict for Respondent-Intervenor-Appellant Carrolton Home Care, Inc.

Attorney General Roy A. Cooper, III by Assistant Attorney General June S. Ferrell for the State. Atty

STROUD, Judge.

Respondent-intervenor Carrolton Home Care, Inc., d/b/a Community Home Care and Hospice ("Community") appeals from the Final Agency Decision by the North Carolina Department of Health and Human Services ("DHHS"), Division of Facility Services ("DFS"), which granted summary judgment in favor of Hospice at Greensboro, Inc. d/b/a Hospice and Palliative Care of Greensboro and Hospice of the Piedmont, Inc. (hereinafter "petitioners") in a contested case. For the following reasons, we affirm the granting of summary judgment in favor of petitioners.

I. Background

On 8 August 2005, the Certificate of Need Section ("CON Section") of the DHHS, DFS issued a "No Review" letter¹ to Community. The letter was based upon Community's certification to the CON Section that it had provided hospice services to one patient in Guilford County, thus allowing it to open a new "branch office" of its existing licensed hospice located in Cumberland County. The CON Section issued the "No Review" letter based upon its interpretation of *In re Total Care, Inc.* See *Hospice At*

¹ See *Hospice At Greensboro, Inc. v. North Carolina Dept. of Health and Human Services*, ___ N.C. App. ___, ___, 647 S.E.2d 651, 655 (2007) for a description of the "No Review" letter process the CON Section used.

Greensboro, Inc. v. North Carolina Dept. of Health and Human Services, ___ N.C. App. ___, ___, 647 S.E.2d 651, 659 (2007). "[T]he CON Section has interpreted *In re Total Care* to create a new definition of service area, such that a health service provider's service area is any area in which it has recently served at least one patient." *Hospice At Greensboro, Inc.*, at ___, 647 S.E.2d at 659; see also *id.* at 653-60 (discussing the "one patient rule" as developed and applied by the CON Section).

The "No Review" letter authorized Community to open a hospice office in Guilford County, North Carolina without first obtaining a Certificate of Need ("CON"). On 12 August 2005, based upon the "No Review" letter, Community applied for a license from DHHS, DFS Licensure and Certification Section ("LC Section"), to operate a "branch office" in Guilford County. The LC Section granted the license on 16 August 2005, with an effective date of 4 August 2005. Community obtained its license twenty-three days before petitioners filed this contested case.

Petitioners contested the DHHS, DFS CON Section's issuance of a "No Review" letter to Community. Petitioners contended the Guilford County office was required to have a CON while Community argued that its office is a "branch office" of its existing licensed and certified Cumberland County hospice which does not require a CON. The final DHHS, DFS agency decision determined that the Guilford County office must obtain a CON and granted summary judgment in favor of petitioners. Community appeals.

Community raises four issues on appeal: (1) whether the LC Section's issuance of a license for Community's Guilford County hospice office, which then became "fully operational," mooted the contested case filed by petitioners; (2) whether Community established a "new institutional health service" in Guilford County for which it was required to obtain a CON; (3) whether the CON Section had statutory authority to require a CON for a hospice "branch office" prior to 31 December 2005; and (4) whether the LC Section acted properly in issuing a license to Community.

The factual situation and the legal issues presented by this case are substantially identical to those in two cases recently decided by this Court. See *Hospice At Greensboro, Inc.*, ___ N.C. App. ___, 647 S.E.2d 651; *Hospice & Palliative Care Charlotte Region v. North Carolina Dept. of Health and Human Services*, ___ N.C. App. ___, 648 S.E.2d 284 (2007). Our holdings in the case *sub judice* are therefore determined by those prior cases. "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." (citations omitted). *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

II. Mootness

Community contends that the LC Section's issuance of a license for Community's Guilford County hospice office, which then became "fully operational," mooted the contested case filed by petitioners. In *Hospice & Palliative Care Charlotte Region*, we

addressed this same mootness issue and held that "DFS did not err by concluding that the Licensure and Certification Section's issuance of a license for Community's . . . County hospice office, which then became 'fully operational,' did not moot the contested case filed by [petitioners]." *Hospice & Palliative Care Charlotte Region* at ___, 648 S.E.2d at 287. The present case is controlled by *Hospice & Palliative Care Charlotte Region*, and therefore petitioner's argument is not moot even with Community's Guilford County's hospice being 'fully operational.' See *id.* This assignment of error is overruled.

III. New Institutional Health Service

Community next argues that it did not establish a "new institutional health service" in Guilford County for which it was required to obtain a CON. "[A]n existing institutional health service must obtain a new CON to open a 'branch office' outside its service area. Such an office, regardless of the label affixed by its developer, is a 'new institutional health service' for which a CON is required." See *Hospice At Greensboro, Inc.*, at ___, 647 S.E.2d at 660-61 (emphasis added).

A hospice's "service area" is "the county in which it is located." See *Hospice At Greensboro, Inc.*, at ___, 647 S.E.2d at 658; see also N.C. Gen. Stat. § 131E-176(24a) (2005). Community's Guilford County office is outside its "service area" as the new office is in a different county than the Cumberland County office. See *id.* Thus, because the Guilford County office is outside Community's "service area," it is a "new institutional health

service' for which a CON is required." See *id.* at ___, 647 S.E.2d at 658, 660-61. This assignment of error is overruled.

IV. Statutory Authority

Community also argues that the CON Section did not have statutory authority to require a CON for a hospice branch office prior to 31 December 2005. In *Hospice & Palliative Care Charlotte Region*,, we addressed and *rejected* Community's argument that the CON section "had no statutory authority to require a certificate of need for a hospice 'branch office' prior to 31 December 2005."² See *Hospice & Palliative Care Charlotte Region* at ___, 648 S.E.2d at 288.

In *Hospice & Palliative Care Charlotte Region*, this Court found that a specific hospice was a "new institutional health service" created prior to 31 December 2005 and that as such it had to obtain a CON. See *id.* The Court specifically stated that "[o]ur holding in *Hospice at Greensboro* [requiring a 'new institutional health service' to obtain a CON] applied to the definition of 'new institutional health service' as set forth in N.C. Gen. Stat. § 131E-176 prior to 31 December 2005." See *id.* In the present case, the "No Review" letter was filed 8 August 2005, "prior to 31 December 2005." See *id.* The holding in *Hospice & Palliative Care Charlotte Region* therefore controls. See *id.* We

² This argument was based upon the 2005 amendments to N.C. Gen. Stat. § 131E-176, which require a CON for all new hospice offices, effective 31 December 2005. See N.C. Gen. Stat. § 131E-176 (2005).

hold that the Final Agency Decision correctly concluded that Community established a "new institutional health service" in Guilford County for which it was required to obtain a CON. See *id.*

V. License

Due to our rulings on the first three issues, we need not address Community's fourth issue of whether the LC Section acted properly in issuing a license to Community. The Final Agency Decision concluded that the LC Section erred in issuing a license to Community on two grounds, one of which was the requirement of a CON. As we have determined that the LC Section should not have issued a license without a CON, we will not address the alternate grounds for the Final Agency Decision, which was that Community had not satisfied all licensure requirements.

VI. Conclusion

We therefore hold that Community's Guilford County office is a "new institutional health service" which requires a CON and affirm the Final Agency Decision entered on or about 22 August 2006 by DHHS, DFS Director Robert J. Fitzgerald awarding summary judgment to petitioners.

AFFIRMED.

Judges ELMORE and STEELMAN concur.

Report per Rule 30(e).