IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-672

Filed 19 March 2024

Office of Admin. Hearings, No. 22DHR02385

FLETCHER HOSPITAL INC. d/b/a ADVENTHEALTH HENDERSONVILLE, Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, HEALTH CARE PLANNING AND CERTIFICATE OF NEED SECTION, Respondent.

and

MH MISSION HOSPITAL, LLLP, Respondent-Intervenor.

Appeal by respondent and respondent-intervenor from a Final Decision entered 17 March 2023 by Administrative Law Judge David F. Sutton in the Office of Administrative Hearings. Heard in the Court of Appeals 20 February 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Derek L. Hunter, for respondent-appellant N.C. Department of Health and Human Services, Division of Health Service Regulation, Health Care Planning & Certificate of Need Section.

Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, by Matthew A. Fisher, Kenneth L. Burgess, Iain M. Stauffer, and William F. Maddrey, for respondent-intervenor-appellant MH Mission Hospital, LLLP.

Wyrick Robbins Yates & Ponton LLP, by Charles George, Frank S. Kirschbaum, Trevor P. Presler, for petitioner-appellee Fletcher Hospital. Inc., d/b/a AdventHealth Hendersonville.

Nelson Mullins Riley & Scarborough LLP, by Andrew T. Heath, Noah H. Huffstetler, III, D. Martin Warf, Nathaniel J. Pencook, Candace S. Friel, and Lorin J. Lapidus, for Amici Curiae University of North Carolina Hospitals at Chapel Hill and University of North Carolina Health Care System.

GORE, Judge.

Respondent North Carolina Department of Health and Human Services, Division of Health Service Regulation, Healthcare Planning and Certificate of Need Section (the "Agency" or the "Department") and respondent-intervenor MH Mission Hospital, LLLP ("Mission"), appeal from a Final Decision entered 17 March 2023 by Administrative Law Judge David F. Sutton (the "ALJ"), which granted summary judgment for petitioner Fletcher Hospital. Inc., d/b/a AdventHealth Hendersonville ("AdventHealth"). The ALJ's Final Decision granting summary judgment in favor of AdventHealth, denying the Agency and Mission's respective motions for summary judgment, and reversing the Agency's decision to conditionally approve Mission's Certificate of Need ("CON") application, is a final decision subject to the provisions of N.C.G.S. § 131E-188(b). Therefore, this Court has jurisdiction pursuant to N.C.G.S. § 7A-29(a).

Respondents present two issues for review: (i) whether the ALJ erroneously concluded that the Agency erred by not holding a public hearing on Mission's CON

application pursuant to N.C.G.S. § 131E-185(a1)(2), and (ii) whether the ALJ erred in concluding that AdventHealth had shown substantial prejudice as a matter of law as the result of the Agency's alleged error. Upon review, we vacate and remand for additional proceedings.

I.

In this case, Mission submitted a non-competitive application to develop a freestanding emergency department ("FSED") in Chandler, North Carolina. The total projected capital expenditure for the FSED was $14,749,500. The Agency did not hold an in-person public hearing on Mission's CON application, citing public health concerns related to the COVID-19 pandemic. Instead, the Agency devised an alternative process whereby members of the public could submit written comments regarding applications under review in lieu of appearing at in-person public hearings.

AdventHealth filed written comments in opposition to Mission's application to develop the FSED. Pursuant to the alternative process, members of the public also filed written comments in lieu of appearing at an in-person public hearing. At the conclusion of the review, the Agency conditionally approved Mission's CON application to develop the FSED.

AdventHealth commenced this action by filing a Petition for Contested Case Hearing on 23 June 2022 contesting the Agency's decision to conditionally approve Mission's CON application. AdventHealth alleged, among other things, that the Agency's failure to hold an in-person public hearing constituted Agency error and

substantially prejudiced AdventHealth's rights as a matter of law. AdventHealth, the Agency, and Mission all filed motions for summary judgment on 15 February 2023. The ALJ held a hearing on the motions on 27 February 2023. The ALJ entered its Final Decision granting summary judgment in favor of AdventHealth on 17 March 2023.

On 14 April 2023, the Agency and Mission each filed written notice of appeal from the ALJ's 17 March 2023 Final Decision.

II.

"The nature of the error asserted determines the appropriate manner of review[.]" *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 596 (2005) (citation omitted). "Where a party asserts an error of law occurred, we apply a *de novo* standard of review." *Presbyterian Hosp. v. N.C. HHS*, 177 N.C. App. 780, 782 (2006) (quotation marks and citation omitted). Here, respondents assert the ALJ erred in concluding that petitioner AdventHealth was entitled to judgment as a matter of law. "As summary judgment is a matter of law, review by the Court in this matter is *de novo*." *Id.* (internal citation omitted).

"[J]ust as in other contested cases, an ALJ may enter summary judgment in a case challenging a CON decision." *Cumberland Cnty. Hosp. Sys. v. N.C. HHS*, 237 N.C. App. 113, 119 (2014). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that

any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2023).

> The burden is upon the moving party to show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. To meet its burden, the movant is required to present a forecast of the evidence available at trial that shows there is no material issue of fact concerning an essential element of the non-movant's claim and that the element could not be proved by the non-movant through the presentation of further evidence.

Bio-Medical Applications of N.C. Inc. v. N.C. HHS, 282 N.C. App. 413, 415 (2022).

III.

The first question presented is whether the ALJ correctly determined that the Agency erred by failing to hold a public hearing on Mission's CON application under N.C.G.S. § 131E-185(a1)(2). We conclude that AdventHealth has shown Agency error.

The North Carolina General Assembly has designated the Agency as the health planning agency for the State of North Carolina and empowered it to establish standards, plans, criteria, and rules to carry out the provisions and purposes of the CON Law (§§ 131E-175–192) and to grant or deny CONs. N.C.G.S. §§ 131E-177(1), (6) (2023). The CON Law requires health care providers to obtain a CON from the Agency before developing or offering a "new institutional health service" within the State. § 131E-178(a) (2023).

In this case, Mission's proposed capital expenditure to develop a FSED is

$14,749,500. This amount exceeds the statutory threshold of $4,000,000 "to develop or expand a health service or a health service facility" as defined by § 131E-176(16)(b). Therefore, Mission's proposed FSED project would constitute a "new institutional health service" within the meaning of § 131E-178(a) and require a CON.

North Carolina General Statutes § 131E-185 "sets forth procedures and requirements for the CON review process, allowing any interested party to submit written comments or make oral comments at the scheduled public hearing." *Good Hope Health Sys., L.L.C. v. N.C. HHS*, 189 N.C. App. 534, 563 (2008). Section 131E-185(a1)(2) expressly provides, the Agency "*shall ensure* that a public hearing is conducted at a place within the appropriate service area if one or more of the following circumstances apply[:] . . . the proponent proposes to spend five million dollars ($5,000,000) or more . . . ." § 131E-185(a1)(2) (2023) (emphasis added). "When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning." *Lemons v. Old Hickory Council, Boy Scouts, Inc.*, 322 N.C. 271, 276 (1988) (citation omitted). Respondents concede that Mission's Application met the criteria for a public hearing, given that Mission's proposed capital expenditure to develop its FSED project exceeded $5,000,000. *See* § 131E-185(a1)(2). Further, there is no dispute among the parties that the Agency did not conduct a public hearing during its review of Mission's application.

Still, respondents contend the Agency's decision to not hold in-person public

hearings during the relevant time of review was not error considering the "unique challenges" posed by the COVID-19 pandemic. A decision to this effect, they assert, would have been "irresponsible," have "undermine[d]" the Agency's "statutory duties," and have been "contrary to public policy." Moreover, respondents argue the Agency's unilateral "decision to implement an alternative process for public hearings in CON reviews" effectively "balance[ed] the protection of public health with the rights of the public to participate in the CON process[,]" while also "eliminating the risk associated with a public gathering." We note that the record shows, and respondents do not dispute the fact, that the Agency *did* conduct public hearings while the State of Emergency for COVID-19 was still in effect.

Regardless, we recognize the COVID-19 pandemic presented a wide range of unique and complex challenges, but neither the Agency nor Mission directs this Court to any statute, rule, regulation, or case law that would authorize the Agency to implement its own procedures as a substitute to the public hearing provision, or any other provision mandated by statute. Respondents may argue that strict compliance with § 131E-185(a1)(2) would have been irresponsible under the circumstances, have undermined the Agency's statutory duties, or that the public hearing provision in § 131E-185(a1)(2) should yield to broader public policy concerns. Yet, "we must decline" respondents' "invitation to engage in public policy considerations here in light of the unambiguous and specific language chosen by the General Assembly in drafting and enacting . . ." the CON law. *In re N.P.*, 376 N.C. 729, 737 (2021). It is

well-established that this Court has "no power to add to or subtract from the language of the statute." *Ferguson v. Riddle*, 233 N.C. 54, 57 (1950). "Given the clarity of the statutes which pertain to" the public hearing requirement in § 131E-185(a1)(2), "any such public policy concerns raised here should be directed to the state's legislative branch for contemplation." *In re N.P.*, 376 N.C. at 737.

Alternatively, the University of North Carolina Hospitals at Chapel Hill and University of North Carolina Health Care System (together, "UNC Health") filed an Amici Curiae brief with this Court in support of no party, seeking "only to offer its perspective on the statutory question raised by the Agency not holding an in-person public hearing under the unique circumstances presented by the COVID-19 pandemic and what significant impact that would have on UNC Health and other similarly situated health care entities across the State." Amici UNC Health asserts, among other things, that "applying settled canons of statutory construction to the public hearing provision [in § 131E-185(a1)(2)] confirms that the time period for holding a public hearing specified in the statutes is directory, not mandatory." While UNC Health presents an argument that is both persuasive and well-supported by citation to authority, that argument is difficult to reconcile with our Supreme Court's decision in *HCA Crossroads Residential Ctrs. v. N.C. Dep't of Human Res.*, 327 N.C. 573 (1990), wherein the Court held that statutory provisions in § 131E-185(a1) and (c) "clearly prescribe a mandatory maximum time limit of 150 days within which the Department must act on applications for certificates of need. To the extent it is

applicable, this time limit is *jurisdictional* in nature." 327 N.C. at 577 (emphasis added). The Court further explained:

> When viewed in its entirety, Article 9 of Chapter 131E of the General Statutes, the Certificate of Need Law, reveals the legislature's intent that an applicant's fundamental right to engage in its otherwise lawful business be regulated but not be encumbered with unnecessary bureaucratic delay. The comprehensive legislative provisions controlling the times within which the Department must act on applications for certificates of need, set forth in Article 9, will be nullified if the Department is permitted to ignore those time limits with impunity.

Id. at 579. Accordingly, we determine that the Agency was required to hold a public hearing under the facts in this case, and its failure to do so was error. Even so, Agency error alone does not resolve this matter and our inquiry does not end here.

AdventHealth filed its petition for a contested case hearing pursuant to N.C.G.S. §§ 131E-188 and 150B-23 and 26 N.C.A.C. 3.0103, challenging the Agency Decision to conditionally approve the Mission Application.

North Carolina General Statutes § 150B-23(a) states, in relevant part:

> A party that files a petition . . . shall state facts tending to establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights *and* that the agency did any of the following:
>
> (1) Exceeded its authority or jurisdiction.
>
> (2) Acted erroneously.

> (3) Failed to use proper procedure.
>
> (4) Acted arbitrarily or capriciously.
>
> (5) Failed to act as required by law or rule.
>
> The parties in a contested case shall be given an opportunity for a hearing without undue delay. Any person aggrieved may commence a contested case under this section.

§ 150B-23(a) (2023) (emphasis added). "This Court has previously addressed the burden of a petitioner in a CON contested case hearing pursuant to this statute." *Parkway Urology, P.A. v. N.C. HHS*, 205 N.C. App. 529, 536 (2010).

> [T]he ALJ in a CON case must, in evaluating the evidence, determine *whether the petitioner has met its burden in showing that* (1) *the agency substantially prejudiced the petitioner's rights, and* (2) acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule.

Surgical Care Affiliates, LLC v. N.C. HHS, 235 N.C. App. 620, 630 (2014) (cleaned up). Generally, "[t]hese are discrete requirements and proof of one does not automatically establish the other." *Id.* (citations omitted).

AdventHealth contended, and the ALJ agreed, that it was entitled to summary judgment on its claim for relief on grounds that the Agency erred by failing to hold an in-person public hearing on Mission's CON application as required by § 131-185(a1)(2), and as a result, that the Agency substantially prejudiced its rights *as a matter of law*. The ALJ expressly relied on this Court's decision in *Hospice at Greensboro, Inc. v. N.C. HHS Div. of Facility Servs.*, 185 N.C. App. 1 (2007) to support

its conclusion that failure to hold a public hearing is inherently prejudicial, and thus, eliminates a requirement that AdventHealth separately show actual, particularized harm resulting from the impairment of its rights.

In contrast, respondents assert the ALJ not only misapplied our holding in *Hospice at Greensboro*, but also ignored decades of appellate precedent that conclusively establish agency error and substantial prejudice are separate and distinct elements under § 150B-23. While we have already determined that AdventHealth met its burden in showing that the Agency erred by failing to hold a public hearing under the facts of this case, we agree with respondents' position that substantial prejudice must be proven; it is not presumed to exist *per se* on this record. A mere showing that the Agency's action was erroneous "does not absolve the petitioner of its duty to separately establish the existence of prejudice, *i.e.*, to show *how* the action caused it to suffer substantial prejudice[ ]" to satisfy each element of its claim for relief. *Surgical Care*, 235 N.C. App. at 630.

In *Hospice at Greensboro*, the Agency issued a "No Review" letter that authorized the respondent-intervenor to open a hospice without first undergoing the statutorily required CON review process, and the petitioner sought a contested case hearing. 185 N.C. App. at 3–5. On appeal, the respondent-intervenor argued for reversal because the petitioner "failed to allege in its petition for a contested case hearing that the CON Section 'substantially prejudiced' its rights and failed to forecast evidence of 'substantial prejudice' as required by [N.C.G.S.] § 150B-23(a)

(2005)." *Id.* at 16. We disagreed and held "that the issuance of a 'No Review' letter, which results in the establishment of 'a new institutional health service' without a prior determination of need, substantially prejudices a licensed, pre-existing competing health service provider as a matter of law." *Id.* In reaching our holding, we reasoned that the petitioner:

> was denied any opportunity to comment on the CON application, because there was no CON process. In fact, the CON Section's issuance of a "No Review" letter to [the respondent-intervenor] effectively prevented any existing health service provider or other prospective applicant from challenging [the respondent-intervenor's] proposal at the agency level, except by filing a petition for a contested case.

Id. at 17.

Our determination in *Hospice at Greensboro* represents a narrow holding in a fact-specific case, and its guidelines apply to such instances where a petitioner is deprived of *any* opportunity to contest the applicant's proposal at the Agency level. It applies to instances where a CON determination is required, but the Agency foregoes the CON review process entirely and issues an exemption instead. In such cases, an affected person is deprived of any opportunity to contest the Agency's determination at the Agency level, and thus, prejudice is presumed as a result. *See id.* at 16–17. We have declined to extend the reach of *Hospice at Greensboro* and its automatic prejudice rule to cases where the Agency does subject a qualifying application to a CON review, but that review process is alleged to be deficient in some enumerated way. *See Surgical Care*, 235 N.C. App. at 629.

In our case, the Agency did conduct a CON review on Mission's application. AdventHealth challenged Mission's application at the Agency level by filing written comments in opposition to Mission's proposal. The Agency determined that the CON should issue upon findings that Mission's proposal "is either consistent with or not in conflict with" each of the criteria listed in § 131E-183(a). Thereafter, AdventHealth filed its petition for a contested case hearing alleging the Agency's CON determination was deficient or erroneous in several specified ways.

Section 150B-23(a) imposes dual requirements on the petitioner in a contested case hearing; "[a]s discussed above, . . . the petitioner must establish ([1]) that the Agency has deprived it of property, has ordered it to pay a fine or penalty, or has otherwise substantially prejudiced the petitioner's rights, *and, in addition*, . . . ([2]) that the [A]gency's decision was erroneous in a certain, enumerated way, such as failure to follow proper procedure or act as required by rule or law." *Surgical Care*, 235 N.C. App. at 629. As the petitioner, AdventHealth has the burden of proof in this matter pursuant to § 150B-25.1. As "[t]he party moving for summary judgment[,]" AdventHealth "bears the burden of establishing that there is no triable issue of material fact." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681 (2002) (citation omitted). As already discussed, AdventHealth satisfied its burden of proof by showing Agency error. However, it must also separately establish that it was substantially prejudiced by the Agency's error; it may not rest its case upon a bare allegation that it was prejudiced by Agency error alone. "[P]roof of one does not

automatically establish the other." *Surgical Care*, 235 N.C. App. at 630; *see also Midulla v. Howard A. Cain Co.*, 133 N.C. App. 306, 309 (1999) (citation omitted) ("It is well-established that conclusory statements standing alone cannot withstand a motion for summary judgment."). "[T]he Agency's action under part two of this test might ultimately result in substantial prejudice to a petitioner, [but] the taking of the action does not absolve the petitioner of its duty to separately establish the existence of prejudice, *i.e.*, to show *how* the action caused it to suffer substantial prejudice." *Surgical Care*, 235 N.C. App. at 630.

> In order to establish substantial prejudice, the petitioner must provide specific evidence of harm resulting from the award of the CON that went beyond any harm that necessarily resulted from additional competition. The harm required to establish substantial prejudice cannot be conjectural or hypothetical and instead must be concrete, particularized, and actual or imminent.

Bio-Medical, 282 N.C. App. at 417 (cleaned up).

Here, AdventHealth satisfied its burden of proof in showing Agency error, but it failed to forecast particularized evidence of substantial prejudice. Yet, our determination in this case should not be misconstrued. AdventHealth may ultimately satisfy its burden; it may not. The ALJ ruled on two specific issues that have been raised and briefed in this appeal: failure to conduct a public hearing under § 131E-185(a1)(2) and reversible error *per se*. We have resolved those specific issues. While this Court may address summary judgment on alternative grounds de novo, we deem this case an appropriate circumstance to remand for further proceedings not

inconsistent with this opinion.

IV.

For the foregoing reasons, we determine that petitioner met its burden in showing that the Agency erred by failing to hold a public hearing on respondent-intervenor's application under § 131E-185(a1)(2), but substantial prejudice cannot be presumed *per se* under § 150B-23(a). Our narrow, fact-specific holding in *Hospice at Greensboro* does not apply to the facts in this case. Thus, we vacate the ALJ's Order on Summary Judgment and remand for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

Judges GRIFFIN and STADING concur.

Report per Rule 30(e).