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IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D22-3148

HOPE HOSPICE AND COMMUNITY SERVICES, INC.,

Appellant,

v.

AGENCY FOR HEALTH CARE ADMINISTRATION AND VITAS HEALTHCARE CORPORATION OF FLORIDA, INC.,

Appellees.

On Appeal From the Division of Administrative Hearings
Lower Tribunal Case No. 21-2328CON

REPLY BRIEF OF HOPE HOSPICE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Florida Statutes

Regulations

Florida Constitution

Administrative Decisions

PRELIMINARY STATEMENT

Citations to the hearing transcript are identified as "Tr." followed by the page(s) and line(s), *e.g.*, Tr. 25:5-10. Citations to the record on appeal are identified as "R." followed by the page number(s), *e.g.*, R. 25-26. Citations to the supplemental record are identified as "Supp." followed by the page number(s), *e.g.*, Supp. 5035-36. References to "Rule" specifically refer to Florida Administrative Code Rule 59C-1.0355. "CON" means "certificate of need." References to "8C" refer to AHCA Hospice Service Area 8C. "Application" refers to CON Application No. 10655. "Agency" refers to appellee, the Agency for Health Care Administration; "VITAS" refers to appellee, VITAS Healthcare Corporation; and "Hope" refers to Hope Hospice And Community Services, Inc.

ARGUMENT

I. VITAS EXPLICITLY STATED IT WAS NOT APPLYING UNDER SPECIAL CIRCUMSTANCES, AND APPROVAL UNDER SPECIAL CIRCUMSTANCES REQUIRES AN IMPERMISSIBLE APPLICATION AMENDMENT.

Appellees do not acknowledge or attempt to refute the undisputed fact that VITAS, in its Application, twice stated that "special circumstances" approval under Florida Administrative Code

Rule 59C-1.0355(4)(d) was "Not applicable" to its Application. R. 951-52.

SCHEDULE B | **All Applicants *Except* Transfer of CON** | **PROJECT DESCRIPTION and CONFORMANCE WITH REVIEW CRITERIA**

Page 179 of 230

2. AGENCY RULE PREFERENCES

Does the project respond to preferences stated in agency rules? Please indicate how each applicable preference for the type of service proposed is met. See the enclosed list of preferences found in Chapter 59C-1.032-.044 of the Florida Administrative Code.

For ease of review, the applicant will present the following agency rule preferences in the order that they appear in the State Agency Action Report ("SAAR"). The order in which each criterion will be addressed is as follows:

Rule 59C-1.0355:

Rule Section		Page
(1)	Agency Intent	180
(2)	Definitions – Not repeated	180
(4)	Criteria for Determining Need	180
(4)a-c	*Need Calculation – Not repeated*	180
(4)d	*Special Circumstances – Not applicable*	180
(4)e	*Agency Rule Preferences*	180
(5)	Consistency with Plans	188
(6)	Required Program Description	188
(7)	Construction of a Freestanding Inpatient Hospice – Not applicable	198
(8)	Semi-Annual Utilization Reports	198
(9)	Grandfathering Provisions	199
(3)	General Provisions	200
(3)a	*Quality of Care:* *- F.A.C. 58A-2 (transferred to 59A-38)* *- Chapter 400 Part IV*	200
(3)b	*Conformance with Statutory Review Criteria – Discussed in the Section 3. Statutory Review Criteria*	217

Rule 59C-1.0355, F.A.C., states the criteria and standards AHCA uses to evaluate applications for a Certificate of Need for Hospice Services. The rule criteria describe AHCA's intent, definitions, general provisions, numeric need, preferences, application content and data collection and reporting requirements. This application meets all criteria. This section of the application describes how the VITAS application is consistent with the definitions in **Rule 59C-1.0355(2).** How VITAS meets the rest of the criteria in **Rule 59C-1.0355** will be discussed. Rule sections and criteria are stated or referenced in bold. **Section 59C-1.0355(3)(a)** states that "Hospice programs shall comply with the standards for program licensure described in Chapter 400, Part IV, Florida Statutes, and Chapter 58A-2, Florida Administrative Code. Applicants proposing to establish a new hospice program shall demonstrate how they will meet

the standards." VITAS meets these standards in its existing Florida hospice programs.

59C-1.0355 Hospice Programs.

(1) Agency Intent. This rule implements the provisions of Sections 408.034(3), 408.036(1)(d) and 408.043(2), F.S. It is the intent of the Agency to ensure the availability of Hospice programs as defined in this rule to all persons requesting and eligible for Hospice services, regardless of ability to pay. This rule regulates the establishment of new Hospice programs and the construction of freestanding inpatient Hospice facilities as defined in this rule. A separate Certificate of Need application shall be submitted for each service area defined in this rule.

(2) Definitions (Omitted).

(4) Criteria for Determination of Need for a New Hospice Program.

a. Numeric Need for a New Hospice Program – Not repeated

The Agency has determined there is not a need for a new hospice program in Subdistrict 8C. However, VITAS has identified a Not Normal Circumstance, which has been discussed herein.

b. Licensed Hospice Program
Not applicable

c. Approved Hospice Program
Not applicable

d. Approval Under Special Circumstances
Not applicable

e. Preferences for a New Hospice Program. The Agency shall give preference to an applicant meeting one or more of the criteria specified in subparagraphs 1 through 5:

1. Preference shall be given to an applicant who has a commitment to serve populations with unmet needs.

VITAS meets this preference and is committed to serving populations with unmet needs. As discussed at length above, VITAS has identified several underserved populations in Subdistrict 8C which have prompted this Not Normal Circumstance application. Although there are several special populations that would benefit from hospice services in Subdistrict 8C, the patient groups with the largest unmet need identified quantitatively or through local meetings include:

There cannot be a more fundamental amendment to an application than where the applicant explicitly states it is not seeking approval under a certain circumstance—here the "special circumstances" described in Rule 59C-1.0355(4)(d)—and then presents evidence at hearing and ultimately be approved based upon that disavowed provision. Lesser changes routinely have been declared impermissible application amendments. *See, e.g., Manor Care, Inc. v. Dep't of HRS*, 558 So.2d 26 (Fla. 1st DCA 1989) (finding that changes to a proposed facility from three-bed rooms to two-bed rooms, with an increase in square footage of over 20 percent, constituted an impermissible application amendment); *Cmty. Hospice of N.E. Fla. v. AHCA*, DOAH Case No. 10-1865CON (DOAH Mar. 22, 2011; AHCA May 2, 2011), RO at ¶ 148-149 (finding that when an applicant proposes approval of one program, the applicant could not argue for approval of two at final hearing); *North Broward Hosp. Dist. v. South Broward Hosp. Dist. & AHCA*, DOAH Case No. 15-5549CON (DOAH May 4, 2016; AHCA May 31, 2016), RO at ¶ 145 (same reasons as *Cmty. Hospice of N.E. Fla.*).

In an attempt to overcome the fact that VITAS's Application clearly stated it was not seeking approval under "special

circumstances," Appellees continue to claim that "not normal circumstances" and "special circumstances" are interchangeable terms. AHCA Ans. Br., 54-55; VITAS Ans. Br., 31-32. While Appellees refer to common or dictionary meanings of the terms and the fact that some witnesses seemed to use them interchangeably as justification for construing VITAS's Application as seeking approval under "special circumstances," that is not what the Application clearly indicates: not once, but twice VITAS indicated "special circumstances" were inapplicable.

The Rule plainly differentiates between the two expressions, and the terms are not interchangeable in Florida's CON framework for hospice programs. *See Maddox v. State*, 923 So. 2d 442, 446 (Fla. 2006) ("The legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended.")(cleaned up); *see also Hospice of the Fla. Suncoast, Inc. v. AHCA*, DOAH Case No. 07-2906RX (DOAH May 14, 2008), FO at ¶ 35 ("Under the hospice need methodology, 'special circumstances' are distinguishable from 'not normal' circumstances, in part because

the three[1] 'special circumstances' are comprised of three delineated criteria rather than generally referencing what has been characterized as 'free form' need arguments.").

Where "not normal circumstances" apply, AHCA "shall not normally approve" a hospice application—regardless if need has been determined under the formula—"unless each Hospice program serving that area has been licensed and operational for at least 2 years as of 3 weeks prior to publication of the Fixed Need Pool" or "for any service area that has an approved Hospice program that is not yet licensed." Fla. Admin Code R. 59C-1.0355(4)(b) and (c). In other words, AHCA may deny an application under "not normal circumstances" even where need has been determined to exist. That provision speaks nothing to granting an application.

Conversely, "special circumstances" only applies when the inverse is true: when AHCA has determined there is no need, it may grant an application, but only in circumstances where it is demonstrated that "a specific terminally ill population is not being served" or "a county or counties within the service area of a licensed

[1] As of 2008 the Rule included three "special circumstances" compared to the two in the current version of the Rule.

Hospice program are not being served." *See* Fla. Admin Code R. 59C-1.0355(4)(d). The Rule is clear cut: in the absence of published need, approval may only be granted based upon the "special circumstances" in Rule 59C-1.0355(4)(d). Such a standard is not an impossible standard, but it is rightly a heightened standard that would reasonably apply where the Agency has already determined there is no need for a new provider.

VITAS specifically rejected that avenue of approval in its Application in lieu of seeking approval under the more "free form" need argument of "not normal circumstances." Allowing VITAS to reverse course after submission of its Application constitutes an impermissible Application amendment in violation of Rule 59C-1.010(3)(b). This Court should reverse the Final Order because VITAS did not seek approval under Rule 59C-1.0355(4)(d).

II. THE RULE ESTABLISHES THE SHOWING REQUIRED TO PROVE SPECIAL CIRCUMSTANCES—THAT POPULATIONS OR COUNTIES ARE "NOT BEING SERVED"—AND THERE IS NO EVIDENCE, NOR WAS THERE ANY FINDING, THAT POPULATIONS OR COUNTIES IN 8C ARE NOT BEING SERVED.

Even if VITAS's Application may be deemed to be an application for approval under "special circumstances" under Rule 59C-1.0355(4)(d)—which it is not—VITAS did not even attempt to

establish, and the ALJ did not find, that populations or counties in 8C are "not being served." Indeed, at paragraph 93 of the Recommended Order, the ALJ specifically found that "[r]ather than document specific instances of patients or families not being served, VITAS conducted [a different analysis to attempt to establish need]." R. 627. This finding by the ALJ was adopted in the Final Order and is not at issue in this appeal. Supp. R. 5534. There are no findings of fact that populations or counties in 8C are "not being served."

Instead, VITAS, and ultimately the ALJ and AHCA, suggested or applied numerous alternative standards other than "not being served" to describe the level of service to populations and counties in 8C to purportedly meet the criteria in Rule 59C-1.0355(4)(d). No fewer than four different levels of service are described in the Recommended Order and adopted in the Final Order to support the determination that Rule 59C-1.0355(4)(d) was satisfied, including that populations or counties were "*under*served," "not being *adequately* served," "being served *below the statewide average,*" or "not being *fully* served." R. 615-16, 633. Each describes a unique standard and none is consistent with the standard required by the Rule. As argued more fully in the Initial Brief, if "not being served" is

the functional equivalent of any level of "underserved," then the Rule affords the agency unbridled discretion to grant an application under virtually any circumstances, without regard to whether need has been determined or not. Such an interpretation would plainly violate the law. *See* § 120.52(8)(d), Fla. Stat. (defining "[i]nvalid exercise of delegated legislative authority" to include a rule that "is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency").

If AHCA wished to utilize the "underserved" standard in the "special circumstances" provision of its Rule, it could have used the term "underserved"—a term that appears 13 times elsewhere in Chapter 59C-1 of the Florida Administrative Code. Instead, it used the expression "not being served", and only used that expression twice, both times in Rule 59C-1.0355(4)(d) in the context of "special circumstances." Giving any credence to the Agency's numerous differing interpretations of the Rule and its express request that this Court sanction the Rule being read "broadly to allow a CON applicant to present evidence that one or more of the listed populations are underserved," AHCA Ans. Br. p. 27, rather than that such populations are "not being served" defies the plain meaning of the

text of the Rule. Of course, this Court owes no deference to Agency's suggested interpretation. Art. V, § 21, Fla. Const.

The only appellate decision cited by Appellees in support of their argument that "not being served" is the same as "underserved" for purposes of Rule 59C-1.0355(4)(d), *Big Bend Hospice, Inc. v. AHCA*, 904 So. 2d 610 (Fla. 1st DCA 2005), is inapposite for a number of reasons. First, *Big Bend Hospice* was not a special circumstances case decided under Rule 59C-1.0355(4)(d). Instead, the Application at issue responded to AHCA's publication of a "fixed need pool determination indicating that there is a need for an additional hospice program in SA 2B." *Big Bend Hospice, Inc. v. AHCA*, Case No. 02-455CON (Fla. DOAH Nov. 19, 2003), RO ¶ 223; *see also Big Bend Hospice, Inc.*, 904 So. 2d at 611 (noting the "finding by AHCA . . . that the fixed need pool for a hospice in the service area designated as SA 2B for the January 2003 planning horizon is one"). Second, the discussion of underservice in the Recommended Order in *Big Bend Hospice* concerned a ruling on a motion in limine, not a determination of whether special circumstances existed that would support approval in the absence of published need. *Big Bend Hospice, Inc. v. AHCA*, Case No. 02-455CON, RO ¶¶ 203-216 (Fla. DOAH Nov.

19, 2003). Finally, the appellate Court in *Big Bend Hospice* simply affirmed the Final Orders and issued a written opinion "only to articulate the standard of review in appeals from administrative proceedings involving certificates of need." *Big Bend Hospice, Inc.*, 904 So. 2d at 611. There is no indication that any issue relating to Rule 59C-1.0355(4)(d) was even before the Court, and certainly no determination by the Court as to its proper interpretation or application in circumstances where the fixed need pool is zero, as is the case here. Indeed, the Court's ultimate holding, that "in reviewing final orders of AHCA which concern certificates of need, AHCA will be accorded the same degree of deference an agency is accorded when we review its interpretation of a statute which it is charged with administering" has been superseded by Article V, § 21, of the Florida Constitution. *Id.* at 611.

This Court should reject the Appellees' invitation to improperly broaden Rule 59C-1.0355(4)(d) and reverse the Final Order below.

III. WITHOUT AHCA'S IMPROPER MODIFICATION, PARAGRAPH 94 OF THE RECOMMENDED ORDER SUPPORTS DENIAL OF VITAS'S APPLICATION, OR AT MINIMUM, REMAND FOR FURTHER FINDINGS.

At the second sentence of paragraph 94, the ALJ issued a finding of fact that VITAS's argument that Glades and Hendry Counties were not being served (as evidenced by outmigration) was "premised upon faulty reasoning" and that the argument from VITAS "fundamentally overstated the significance of hospice to those patients and families as they made decisions to seek healthcare outside 8C." Appellees argue that AHCA's sterilization of this finding—converting it from an adjudicated conclusion based on a weighing of evidence to a mere description of one party's position—was necessary to "clarify" the finding to indicate it was only Hope's position, not a finding or conclusion reached by the ALJ, that VITAS fundamentally overstated the significance of hospice patients and families as they made decisions to seek healthcare outside 8C. AHCA Ans. Br. p 42-43; VITAS Ans. Br. p. 23. Of course, this assumes the ALJ mistakenly stated the finding as his own. There is no support whatsoever for such a conclusion, much less any record evidence. And though the ALJ attributed various positions or arguments to certain parties in numerous other places throughout the Recommended Order, the ALJ did not contend at paragraph 94 that this was merely Hope's argument. He stated it as his own finding.

Even if the finding of fact at paragraph 94 was somehow unclear, there is no basis for modifying a finding of fact to "clarify" a finding that, as written, is supported by competent substantial evidence. There also is no basis to modify a finding of fact based on the blind assumption that the ALJ actually meant to find something other than what he or she clearly stated in the Recommended Order. Rather, findings of fact may be modified only if "there is *no* competent, substantial evidence from which the finding could reasonably be inferred." *Heifetz v. Dep't of Bus. Regul., Div. of Alcoholic Beverages & Tobacco*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985) (emphasis added).

Competent substantial record evidence to support the ALJ's finding of fact in the second sentence of paragraph 94 is, conveniently, identified by the ALJ in the third and fourth sentences of paragraph 94. R. 627-28. The testimony of Samira Beckwith and Jeff Gregg as described by the ALJ in the third sentence of paragraph 94, which supports the finding by the ALJ in the second sentence of paragraph 94, is found at pages 2001-2003 and 2602-2605, respectively, of the final hearing transcript. The fourth sentence of paragraph 94, which further supports the disputed finding, is

supported by the testimony of Jeff Gregg and Armand Balsano found at pages 2703-2704 and 2814-2818, respectively, of the final hearing transcript, among others. This competent substantial record evidence supports the findings in paragraph 94 and forbids AHCA from modifying the order.

Contrary to Appellees' contention, AHCA's attempted modification of the findings of fact in paragraph 94 was not harmless. The finding of fact in paragraph 94 is crucial to the ultimate outcome of this case, as it constitutes the only finding by the ALJ as to whether VITAS established any population or county in 8C was "not being served," and concluded that VITAS failed to establish that Glades and Hendry Counties were not being served. The change eviscerates the ALJ's finding, converting it from a substantive finding that VITAS failed to meet its burden to show populations or counties are not being served to simply a restatement of one litigant's position on the issue, a fact that is immaterial to any determination in this case, and instead leaves essentially no finding of fact on the issue. If the change were allowed, at minimum, remand would be necessary for the ALJ to make a finding of fact as to whether any population or county is

"not being served" in 8C to justify approval under Rule 59C-1.0355(4)(d).

This Court should reject AHCA's modifications to paragraph 94 of the findings of fact and reverse the Final Order approving VITAS's Application. Alternatively, this Court should reject AHCA's modifications to paragraph 94 and remand this matter to AHCA for further proceedings consistent with the proper application of the law.

CONCLUSION

For the reasons stated above and in Hope's Initial Brief, AHCA's approval of VITAS's Application is unsupported by the VITAS Application, unsupported by the plain text of the Rule, was a misapplication of the law, and should be reversed. Alternatively, this Court should reverse AHCA's approval of VITAS's Application and remand for proceedings consistent with the proper application of the law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 29, 2023 a true copy of the foregoing was electronically filed using the Florida Courts E-Filing Portal, and furnished via email to the following recipients:

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CERTIFICATE OF COMPLIANCE

I certify that this brief is filed in Bookman Old Style 14-point font and contains approximately 2,515 words, and therefore complies with the applicable font and word-count limit requirements in Florida Rules of Appellate Procedure 9.045(b) and 9.210(a)(2)(B).

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