

IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT
STATE OF FLORIDA

GULF PINES HOSPITAL, INC. d/b/a
GULF PINES HOSPITAL,

Petitioner,

CASE NO. 1D05-1443
AHCA CASE NO.: 2005001780

vs.

STATE OF FLORIDA, AGENCY FOR
HEALTHCARE ADMINISTRATION,

Respondent .

_____ /

PETITION FOR REVIEW OF NON-FINAL AGENCY ACTION

Pursuant to rule 9.100(c)(2), Gulf Pines Hospital, Inc. d/b/a/ Gulf Pines Hospital, Petitioner/Respondent, petitions this court for review of a non-final order of the Respondent Agency for Health Care Administration ordering the emergency suspension of Gulf Pines Hospital's license to operate as a hospital in the State of Florida.

BASIS FOR INVOKING JURISDICTION

The court has jurisdiction to review non-final orders of administrative agency action under Article V section 4(b)(2) of the Florida Constitution, Rule

9.100(c)(2), Florida Rules of Appellate Procedure, and Section 120.68(1), Florida Statutes.

STATEMENT OF THE FACTS

On March 1, 2004, the Agency for Health Care Administration ("AHCA") issued an Order of Emergency Suspension of License (referred to herein as "Emergency Order") of Gulf Pines Hospital to operate as a hospital. (App. 1). The Emergency Order was signed and executed by Rebecca Knapp for Alan Levine, Secretary, Agency for Health Care Administration. (App. 1, p. 4). The Emergency Order does not contain any delegation authorizing Ms. Knapp to sign on behalf of Mr. Levine.

The Emergency Order was based, in part, on allegations that there were two unidentified areas of the hospital where the fire sprinkler system was inoperable. (App. 1, p. 2). The Emergency Order was also based, in part, on the alleged use of liquid bleach in the Gulf Pines' kitchen to clean dishes. (App. 1, p. 2).

The Emergency Order indicates also that it is based on the finding by AHCA's surveyors of "encrusted bake ware in the kitchen was covered with at least a one-inch layer of flaking food like substance." (App. 1, p. 2). Finally,

the Emergency Order alleged that Gulf Pines Hospital allegedly failed to submit to AHCA documentation that it has obtained professional liability coverage. (App. 1, p. 3). Gulf Pines Hospital has submitted to AHCA documentation that it has obtained professional liability coverage. (App. 2).

THE NATURE OF THE RELIEF SOUGHT

The nature of the relief sought by this petition is an order quashing AHCA's Order of Emergency Suspension of License for the reasons set forth below.

ARGUMENT

I. The Emergency Order was Signed by an Unauthorized Representative from AHCA

An emergency order issued prior to a hearing must contain facts sufficient to demonstrate immediate danger, necessity, and procedural fairness. See Witmer v. Department of Business and Professional Regulation, 631 So. 2d 338 (Fla. 4th DCA 1994) Because the agency is allowed to act before according basic due process rights, the agency's statement of reasons for acting must be factually explicit and persuasive concerning the existence of a genuine emergency. "Every element necessary to the order's vitality must

appear on its face." Commercial Consultants Corp. v. Department of Business Regulation, 363 So. 2d 1162, 1164-5 (Fla. 1st DCA 1978).

The Order under review immediately fails the test articulated in Commercial Consultants. Section 20.05(1)(b), Florida Statutes, grants the authority to the heads of the various executive agencies of state government to "execute any of the powers, duties, and functions vested in the department . . . through assistants and deputies designated by the head of the department . . . , unless the head of the department is explicitly required by law to perform the same without delegation." While undersigned counsel knows of no such explicit non-delegation provision regarding signing administrative orders, it is clear from this statutory provision that the agency head must execute those duties through specific designation delegating that power. No such delegation or designation appears on the face of this Emergency Order authorizing Rebecca Knapp the power to summarily suspend a license. A lawful order of an administrative agency must be executed by the agency head or his duly authorized designee. The agency head for the Agency for Health Care Administration is its Secretary. The signature line of this Order shows that Alan Levine is the current Secretary of the Agency for Health Care Administration. Yet the signatory of the Order is one "Rebecca Knapp." There

is nothing contained in this Order which demonstrates that Ms. Knapp is a lawfully designated alternative signatory to orders of the Agency for Health Care Administration. Because the Order under review was not signed by a person with the authority to act in the capacity of the agency head, the Emergency Order must fail.

II. The Emergency Order Violates Section 120.60(6)(c), Fl. Stat.

Section 120.60(6), Florida Statutes, sets forth the requirements for an administrative agency taking action against a professional license as follows:

If the agency finds that immediate serious danger to the public health, safety or welfare requires emergency suspension, restriction, or limitation of a license, the agency may take such action by any procedure that is fair under the circumstances if:

- (b) The agency takes only that action necessary to protect the public interest under the emergency procedure; and
- (c) The agency states in writing at the time of, or prior to, its action the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances (Emphasis added.)

The Emergency Order issued by AHCA does not comport with the requirements of section 120.60(6), in that it does not state with specificity the facts and reasons for finding an immediate danger to the public health, safety or welfare. Instead, the Order contains generalized and conclusory statements. Specifically, there are conclusory allegations regarding an allegedly inoperable fire sprinkler system in two unidentified areas. The Order noted some structural damage in the kitchen area. According to the Agency, these allegations led to a finding of a clear and present danger to the public health and safety which would support the immediate suspension of the hospital's license. AHCA's Order, however, fails to demonstrate whether, or if, the areas referred to were in use, and thus at all likely to pose a fire hazard or other danger until repaired under the hospital's Plan of Correction.

Similarly, the Agency's Order alleges unsanitary conditions in the kitchen. Specifically, it was noted that a staff member was washing dishes in a sink stopped with a used rag in the drain; "Respondent" added liquid bleach to water to clean dishes, not in accordance with hospital infection control policies and procedures, and finally, there was "bake ware" in the kitchen, encrusted with food. Plugging a drain with something other than the usual plug does not create such a danger as to warrant suspending a hospital's license. Nor does

the existence "encrusted bake ware" in the kitchen constitute sufficient grounds for suspension. While an alleged violation of the hospital infection control policies and procedures may implicate the public health, no such showing was made on the face of this Order. None of these facts nor all of these facts taken together rise to the level of being so dangerous that an immediate suspension of the hospital's license is warranted in the absence of being given the opportunity to immediately correct them.

As justification for the suspension, the Agency notes that "the conduct set forth . . . is likely to continue" based solely on the fact that these alleged violations were all found within a two-week period. This time frame does not support the finding of a continuing pattern of conduct that must be stopped in order to prevent harm to the public. Instead it demonstrates a pattern of harassing visits from Agency representatives and a failure to provide the Gulf Pines sufficient opportunity to remedy the conditions identified.

Finally, and almost as an afterthought, the Agency alleges that Gulf Pines has not submitted documentation of professional liability insurance as required pursuant to section 766.105, Florida Statutes. As such, the Hospital's alleged failure to do so constitutes an immediate danger to the public. Gulf Pines submitted the required proof on the Agency's form on July 29, 2004.

(App. 2). The Agency improperly grounded its suspension of the Hospital's license on a failure to submit proof of professional liability insurance.

The facts relied upon by the Agency in suspending the Hospital's license to operate simply do not justify the drastic and overboard action taken below, in violation of section 120.60(6). The Agency failed to consider alternative, narrower and less drastic measures to address the conditions identified in the Emergency Order. Furthermore, there is no express finding in the Emergency Order that specifies that the actions taken by AHCA were fair under the circumstances. Thus, under the requirements stated in section 120.60(6), Florida Statutes, and pursuant to Commercial Consultants Corp, and other cases cited herein, the Agency's Order of Emergency Suspension was not fair under the circumstances, was an unjustified and overboard action, and was invalid for having been signed by an authorized individual on behalf of the Secretary of the Agency for Health Care Administration

The allegations by AHCA are solely conclusory. The case of Crudele v. Nelson, 698 So. 2d 879 (Fla. 1st DCA 1997), involved an appeal of an emergency order entered by the Florida Insurance Commissioner that suspended all agent licenses in Crudele's name. The First District Court set forth the requirements an administrative agency must specify in an emergency

order. Furthermore, the First District Court of Appeal held:

The reviewing court will not accept a general conclusory prediction of harm as support for an emergency order. The reviewing court must determine whether the emergency order 'sufficiently identifies particularized facts which demonstrate an immediate danger to the public.' Crudele at 880. Quoting, Witmer v. Dep't of Bus. & Prof. Reg., 631 So. 2d 338, 341 (Fla. 4th DCA 1994).

The Emergency Order contains conclusory predictions of harm. Moreover, the Emergency Order fails to allege that the public has been harmed by any of the cited facts. The recent case of Daube v. Dep't of Health, 30 Fla. L. Weekly D 514 (Fla. 1st DCA 2005), involved a motion to stay a Department of Health emergency order suspending the license of a physician to practice medicine after it was discovered that he was using an unapproved product for wrinkle reduction procedures instead of Botox.¹ The Petitioner [Daube, M.D.] argued that the emergency suspension of his license was not necessary to prevent future harm. "An emergency order must contain facts sufficient to demonstrate immediate danger, necessity and procedural fairness." (Emphasis added.) Daube. The First District Court of Appeal granted the motion to stay noting that: "General conclusory predictions of

¹At the time of the drafting of this Petition, the order by the First District Court of Appeal granting the motion for stay in the Daube case was not final.

harm are not sufficient to support the issuance of an emergency suspension order." Daube. The Emergency Order contains only conclusory allegation, including prediction of harm.

The Emergency Order is not reasonably tailored to address the harm. An emergency order suspending a professional license was be narrowly tailored to address the harm and must be set aside.

Based on the foregoing, the Order of Emergency Suspension of License issued below by the Agency for Health Care Administration is invalid and does not comport with the requirements set forth in Section 120.60(6), Florida Statutes. Therefore, the Petitioner, Gulf Pines Hospital, Inc., d/b/a Gulf Pines Hospital, respectfully requests this Honorable Court to set aside the Order of Emergency Suspension of License dated March 1, 2005.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this petition complies with the font requirements of Rule 9.100(l), Florida Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

[DELETED]

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