



Department of Health
Three Capitol Hill
Providence, RI 02908-5097
TTY: 711
www.health.ri.gov

April 20, 2016

Christopher Callaci, Esq.
United Nurses and Allied Professionals
375 Branch Avenue
Providence, RI 02903
ccallaci@unap.org

Mark Russo, Esq.
FERRUCCI RUSSO P.C.
55 Pine Street, 4th Floor
Providence, RI 02903
mrusso@frlawri.com

RE: Notice of Open Meeting regarding Petition for Declaratory Ruling involving Memorial Hospital of Rhode Island.

Dear Attorneys Russo and Callaci:

This letter is in response to your request for an expedited hearing as set forth on page 12 on your Petition for Declaratory Ruling. On pages 11 and 12 of your Petition you have made a number of requests for Declarations all alleged to be in accordance with Section 18 of R 42-35-PP.

It is the Health Department's interpretation of the controlling statute and regulations that the aforesaid section 18 of R 42-35-PP does not provide a legal pathway to the requests for Declaratory Rulings which you have made. It is the Health Department's interpretation that R 42-35-PP does not legally support the seeking of Declaratory Rulings in proceedings which are not contested case proceedings. The proceedings with regard to the hospital's application for the elimination of primary care services at the Memorial Hospital of Rhode Island are not in the Department's opinion contested case proceedings under the Administrative Procedures Act. (See attached Rhode Island Department of Health Memorial Hospital of Rhode Island Memorandum)

Nevertheless the Department will afford you an opportunity to appear and to present argument in support of your Petition for Declaratory Rulings at an Open Meeting (RIGL Chapter 42- 46). Accordingly please be advised that you may appear and present argument in support of your Petition on Wednesday, April 27 at 2:30 PM at the Rhode Island Department of Health Operations Center lower-level Three Capitol Hill, Providence, Rhode Island.

Very truly yours,


Stephen Morris
Deputy Chief Legal Counsel

RHODE ISLAND DEPARTMENT OF HEALTH

MEMORIAL HOSPITAL OF RHODE ISLAND MEMORANDUM

BACKGROUND

By letter dated March 11, 2016, United Nurses Allied Professionals (UNAP) through its attorney filed a Petition for Declaratory Ruling (Petition) with regard to elimination of primary care services at the Memorial Hospital of Rhode Island (MHRI). This proceeding is sometimes referred to as a Reverse CON. The Petition specifically designated that the Request for the Declaratory Ruling was made “pursuant to Section 18 of the Rules and Regulations Pertaining to Practices and Procedures Before the Rhode Island Department of Health, R42-35-PP.” In addition the Petition has based jurisdiction in Paragraph 8 of its Petition as follows: “The Department has jurisdiction over the instant matter pursuant to R.I. Gen. Laws §42-35-8 and Section 18 of R42-35-PP.”

The Petition cited further jurisdiction under the authority and pursuant to R.I. Gen. Laws §23-17.14-1 *et seq.*, R23-17.14-HCA and R.I. Gen. Laws §23-17-1 *et seq.* UNAP alleged that a declaratory ruling by the Department was necessary as the Hospital Conversions Act (HCA) application previously submitted by the Transacting Parties and the Decision rendered thereon, imposed certain conditions to maintain a balanced healthcare system in a certain community. Said conditions directly impact the retention of workforce.

UNAP seeks a declaratory ruling on numerous issues alleged to be in dispute, including whether HCA conditions are binding; whether HCA conditions are incorporated within hospital licensure of MHRI; whether Transacting Parties are in violation of conditions; whether correspondence submitted by MHRI dated March 2, 2016 have been or should have been deemed complete in compliance with Section 10 of R23-17.14-HCA; whether an alleged certain

notice of an alleged public hearing was in violation of Section 22 or R42-35-PP [sic], requiring a minimum of thirty (30) days advance notice prior to a public hearing; whether the steps taken by MHRI and the related conduct by Care New England amount to a violation of the HCA requiring a hearing under Section 14 of R23-17.14-HCA; whether transacting parties should be ordered to cease and desist from terminating services and additional proceedings.

UNAP alleges that the previous HCA decision imposed conditions to maintain a balanced healthcare system in a certain community, and that said conditions directly impact the retention of workforce.

FUNDAMENTAL ISSUES TO BE DETERMINED

Inasmuch as jurisdiction has been based R.I. Gen. Laws §42-35-8 and Section 18 of R42-35-PP one must determine whether or not the petition rests on a sound legal basis. Section 42-35-8 **Declaratory rulings by agencies** provides as follows:

“Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency. Rulings disposing of petitions have the same status as agency orders in contested cases.”

In and of itself this statute is not self executing. It is an enabling statute. See *A.F. Lusi Construction Inc. v. Rhode Island Convention Center Authority*, 934 A.2d 791 (RI 2007) (a provision is not self-executing when it merely indicates principles without laying down rules by means of which those principles may be given the force of law.) See also *Peloquin v. Haven Health Center of Greenville, LLC*, 61 A.3d 419 (RI 2013) (statutory language authorizing the establishment of rules and regulations allowing persons or entities with sufficient financial resources to be self-insurers not immediately effective without agency first promulgating a regulatory framework for the allowance of such activity.)

Accordingly, Section 42-35-8 in and of itself does not provide authority for UNAP's Petition for Declaratory Ruling. The last sentence of that section refers to contested cases giving rulings disposing of petitions for declaratory rulings the same status as agency orders in contested cases. The statute does not direct that all proceedings are contested cases but rather that where the proceeding itself is a contested case, then the declaratory ruling applicable to that contested case proceeding shall be equivalent to an agency final decision.

The Department of Health (Department) did indeed cover the issue of the declaratory ruling in its Regulations R42-35-PP at Section 18.0:

18.1 As prescribed by §42-35-8 of the Act, any interested person may petition the Director, in the form prescribed by §6.0 of these Regulations for a declaratory ruling. The Director shall consider the petition and within a reasonable time shall:

1. Issue a declaratory ruling; or
2. Notify the petitioner that no declaratory ruling is to be issued; or
3. If requested by a petitioner, or at her/his discretion, set a reasonable time and place for hearing argument upon the matter, and give reasonable notice to the parties of the time and place for such hearing. After said hearing is conducted, the Director or his/her designee shall, within a reasonable time, issue a declaratory ruling.

It is to be noted that the very first line of this section calls attention to the fact that it is in response to section 42-35-8 of the Administrators Procedures Act, Chapter 42-35 of the R.I. Gen. Laws.

R42-35-PP was not enacted for application to The Hospital Conversions Act, Chapter 23-17.14. There is no provision in that Chapter providing for Declaratory Rulings. R42-35-PP was not enacted for application to Rules and Regulations Pertaining to Hospital Conversions (R23-17.14-HCA). Of special note is the fact that R42-35-PP was not enacted for application to Section 10 Elimination or Reduction in Emergency Department and Primary Care Services, which was the regulatory section of the Hospital Conversions Regulations specifically applicable to Section 23-17.14-18 of the Rhode Island General Laws, as amended. This Section 10

particularizes by regulation the details for the implementation of and compliance with a reverse CON. If there were to be a permissible declaratory ruling applicable to Chapter 23-17.14 The Hospital Conversions Act or R23-17.14-HCA Rules and Regulations Pertaining to Hospital Conversions, such declaratory ruling provision would have to appear in those enactments. The proceedings pursuant to Chapter 23-17.14 and R23-17.14-HCA are not contested case proceedings.

R42-35-PP including its Section 18 is only applicable to contested case proceedings. This is demonstrated in many ways. For one thing, appeals to decisions and orders provided for under Section 15 of the Regulations provides for the filing of a complaint with the Superior Court pursuant to Section 42-35-15 of the Administrative Procedures Act which only entertains appeals of contested cases.

The general scheme of these regulations and the particular sections thereof apart from rule making all follow the contested case scenario, particularly exemplified by Section 12 of R42-35-PP.

THE REVERSE CON (SECTION 10 ELIMINATION OR REDUCTION IN
EMERGENCY DEPARTMENT AND PRIMARY CARE SERVICES)
IS NOT A CONTESTED CASE PROCEEDING

In order for a proceeding to be a contested case proceeding there must be a requirement in the statute or regulation governing the proceeding requiring a hearing.

This requirement was probably most succinctly set forth in the case of *Property Advisory Group v. Rylant*, 636 A.2d 317. In explaining the reasoning behind this requirement, the court said at page 318:

“Pursuant to §42-35-15, an agency must comply with the procedural requirements set forth in §§42-35-9 and 42-35-12 of the APA only if the matter before the agency involves a contested case. The term “contested case” is defined in §42-35-1(c) as “a proceeding, including but not restricted to ratemaking, price fixing and licensing, in which the legal

rights, duties, or privileges of a specific party are required by law to be determined by an agency after an opportunity for hearing.”

“As the statutory definition provides, a hearing must be required by law in order for an administrative matter to constitute a contested case.”

See also: State of Rhode Island, Department of Administration, No. C.A. PC99-0499, Nov. 27, 2002, Decision Ragosta, J. Section 42-35-15(a) provides: “[a]ny person who has exhausted all administrative remedies available to him within the agency, and who is aggrieved by a final order in a contested case is entitled to judicial review under this chapter. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law. Any preliminary, procedural, or intermediate agency act or ruling is immediately reviewable in any case in which review of the final agency order would not provide an adequate remedy.

This section is part of the Administrative Procedures Act (APA), which applies to all agencies and agency proceedings not expressly exempted by G.L. 1956 § 42-35-18. An administrative appeal to this Court must be filed within thirty days after mailing notice of the final decision of the agency. G.L. 1956 § 42-35-15(b). The APA defines “agency” as including “each state board, commission, department, or officer, other than the legislature or the courts, authorized by law to make rules or to determine contested cases....” G.L. 1956 § 42-35-1(a). A “contested case” is defined as “a proceeding, including but not restricted to ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a specific party are required by law to be determined by an agency after an opportunity for hearing.” G.L. 1956 § 42-35-1(c). A hearing must be required by law for an administrative matter to be considered a contested case. *Pine v. Clark*, 636 a.2d 1319 (R.I. 1994).

See also Superior Court of Rhode Island, Providence County, *Douglas Ricci, et al v. Grover J. Fugate*, Director et al, C.A. No. 95-1897, filed July 2, 1996, Decision, Vogel, J.

Under 42-35-1(c), ‘contested case’ is defined as ‘a proceeding, including but not restricted to rate making, price fixing, and licensing, in which the legal rights, duties, or privileges of a specific party are required by law to be determined by an agency after an opportunity for hearing.’[A] hearing must be required by law in order for an administrative matter to constitute a contested case. *Property Advisory Group, Inc. v. Rylant*, 636 A.2d 317, 318 (R.I. 1994).. ‘Under 42-35-15, judicial review is authorized for final orders in such [contested] cases *Pine v. Clark*, 636 A.2d 1319, 1325 (R.I. 1994).. ‘Any person who has exhausted all administrative remedies available to him within the agency, and who is aggrieved by a final order in a contested case is entitled to judicial review under this chapter. ‘42-35-15(a). Except in certain circumstances not applicable here, a contested case is a prerequisite for an administrative appeal under 42-35-15. See *Pine v. Clark*, 636 A.2d at 1325.

The definition of “contested case” in R42-35-PP is the same as the definition of “contested case” in the Administrative Procedures Act.

1.5 "**Contested case(s)**" means a proceeding, including but not restricted to ratemaking, price fixing, licensing and benefits, in which the legal rights, duties, or privileges of a specific party are required by law to be determined by the Department after an opportunity for hearing. If the parties agree, proceedings not required by law may also be conducted under these Regulations.

Other jurisdictions have given considerable thought to what is involved in a contested case. See *Loigman, Esq. v. Board of Trustees*, 2008 WL 59978 (N.J.Super.A.D.) (2008), where the court said as follows:

“A contested case is a “proceeding ... in which the legal rights, ... privileges, benefits or other legal relations of specific parties are required by constitutional right or by statute to be determined by an agency by decisions, determinations, or orders, addressed to them or disposing of their interest, after opportunity for an agency hearing.” *N.J.S.A. 52:14B-2(b)*. In a contested case, all parties shall be afforded an opportunity to respond, appear before an Administrative Law Judge (ALJ) and present evidence and arguments on all issues. *N.J.S.A. 52:14B-9(c)*, -10(c). Contested cases, however, “are not informational nor intended to provide a forum for the expression of public sentiment on proposed agency

action or broad policy issues affecting industries or large, undefined classes of people.”
N.J.A.C. 1:1-2.1.”

Although a hearing required by law is a prerequisite to the determination of a contested case under the Administrative Procedures Act, nevertheless that Act does not itself grant the right to a contested case hearing, but rather that right must instead come from another source, such as the enabling act. See *Sugarloaf Citizens Association v. Northeast Maryland Waste Disposal Authority*, 323 Md. 641, 594 A.2d 1115 (1990). There the court stated at page 1121, as follows:

“It is well established, however, that the APA itself does not grant a right to a hearing. That right must come from another source such as a statute, a regulation, or due process principles. Moreover, the statute or regulation which grants the right to a hearing may negate the fact that the hearing is to be a “contested case” or “adjudicatory” hearing. If the statutory or regulatory scheme does so, then the “contested case” provisions of the APA are inapplicable. See, e.g., *Board of Secretary of Personnel*, 317 Md.34, 562 A.2d 700 (1989).”

With respect to Section 10.1.4 of the conversion regulations, there is a reference to a public notice and input from the public. It is clear from the context of these provisions, however, that this is informational and not adjudicatory.

The Maryland Appeals Court noted at page 1123 as follows:

“In our view, when the General Assembly by statute provides that a particular type of hearing be “public,” it is simply mandating, in accordance with the general policy of the State, that the hearing be open to the public. The Legislature is not determining, by use or omission of the word “public,” whether the hearing is a contested case hearing.”

“Contested case” Administrative Procedures Act hearings are trial type proceedings and the context and the language of Chapter 23-17.14 of the R.I. Gen. Laws really demonstrates that trial type procedures were not intended under the statute.

See also *Pine v. Clark*, 636 a.2d 1319 (R.I. 1994) holding that without a contested case the Superior Court lacks subject matter jurisdiction to hear an appeal under the Administrative

Procedures Act. See also transcript of bench decision of Justice Daniel A. Procaccini, May 10, 2004, in *Summit Neighborhood Association vs. Patricia Nolan*, PC2004-1877 attached.

DEFERENCE TO STATE AGENCY DECISION

The Department has determined that Chapter 23-17.14 does not provide for a contested case hearing and is not a contested case proceeding and that determination is entitled to great deference. See *Summit Neighborhood Association v. Rhode Island Department of Health, Thompson J.* No. 03-5200 May 27, 2004, 2004 WL 1351337 (R.I.Super.). There the court stated in her opinion at page 5 as follows:

“It is well settled in Rhode Island law that substantial deference will be paid to an agency’s interpretation of its regulations and enabling statutes. “[W]hile not controlling, the interpretation given a statute by the administering agency is entitled to great weight.” *State v. Cluley*, 808 A.2d 1098, 1103 (R.I.2002) (citing *Berkshire Cable Vision of Rhode Island, Inc. v. Burke*, 488 A.2d 676, 679 (R.I. 1985) “[A]n administrative agency will be accorded great deference in interpreting a statute whose administration and enforcement have been entrusted to the agency.” *In re Lallo*, 768 A.2d 921, 926, (R.I.2001) “Where the provisions of a statute are unclear or subject to more than one reasonable interpretation, the construction given by the agency charged with its enforcement is entitled to weight and deference as long as that construction is not clearly erroneous or unauthorized.” *Whitehouse v. Davis*, 774 A.2d 816, 818-819 (R.I.2001) (quoting *Gallison V. Bristol School Committee*, 493 A.2d 164, 166 (R.I. 1985)).”

COURT DECISION IN CERTIFICATE OF NEED STATUTE APPLICABLE BY ANALOGY

The Certificate of Need Statute is considerably similar to the Hospital Conversions Statute with respect to the administrative scheme and the substantial amount of documentary material required. The Superior Court in the case of *Summit Neighborhood Association vs. Patricia Nolan*, PC2004-1877 definitively determined that the CON proceedings were not contested case proceedings. Those same principles of law and findings are applicable to Hospital Conversions proceedings and reverse CON proceedings which are provided for pursuant to R.I.G.L. 23-17.14-18.

In doing so the Superior Court found as controlling the cases of *Hale v. Petit*, 438 A.2d 226, decided in 1981; and *Greenwood Manor v. Iowa Department of Public Health*, 641 N.W.2d 823, a 2002 case.

The State of Maine in *Hale v. Petit*, Supreme Judicial Court of Maine, 438 A.2d 226 (1981), gave extensive discussion to the problem of applying the administrative procedures act to certificate of need proceedings. There the Commissioner of the Department of Human Services granted a CON to a major health care facility and denied a CON to the other nursing home. The competitor appealed and complained about not being afforded the opportunity of cross examination of witnesses. The competitor in that case challenged the department's procedure relying upon the Maine administrative procedures act and due process and Federal law. The plaintiffs in that case argued that the CON proceedings were adjudicatory proceedings as defined by the Maine APA and therefore adjudicatory features such as cross examination and swearing of witnesses were required. The court in rejecting the plaintiff's contentions said at page 231:

“... [w]e conclude that the statutory scheme of the Certificate of Need Law as a whole indicates a legislative intent that the hearing and review process be separate from the APA. See *Sanford Highway Unit of Local 481 v. Town of Sanford, Me.*, 411 A.2d 1010 91980). Therefore, the APA adjudicatory procedures are not required.

“Several characteristics of the Certificate of Need Law are inconsistent with the APA's adjudicatory procedures. First, the expeditious review and hearing process, required by the time limits imposed by 22 M.R.S.A. § 307(3), would be difficult to meet if the APA's adjudicatory hearing provisions apply. Second, the provisions for a hearing in the review process clearly are inconsistent with adjudicatory safeguards. For example, a hearing is held if requested “during the course of a review by either the department or the Health Systems Agency.” 22 M.R.S.A. § 307(2). At this hearing, any person may present testimony. See 42 C.F.R. § 123.407(7)(i). ... ”

On the issue of due process, the court commented at page 232:

“Wyman contends that the Department's procedures deprived it of due process in that the parties should have been granted the right of cross-examination at the

hearing. The Superior Court observed that for the certificate of need proceedings due process required that the applicants have the opportunity to present their proposals and that the applicants and the public be able to comment critically on competing applications. We agree with the superior Court's assessment of what process was due, and with the court's conclusion the adequate procedures were provided."

The *Hale v. Petit* case is probably the seminal case holding that the APA is not applicable to Certificate of Need proceedings. The *Petit* case was followed explicitly by the Supreme Court of Iowa in *Greenwood Manor v. Iowa Department of Public Health*, 641 N.W.2d 823 (2002). In this case, the State Health Facilities Council granted a Certificate of Need for a 120-skilled nursing facility. The plaintiffs, competitors, filed a motion for a contested case proceeding. The plaintiffs were three facilities located in the geographic area of the proposed facility and were considered affected persons. These plaintiffs claimed that the decision to grant or deny a CON is a contested case proceeding, and therefore, the Council was required to hold an evidentiary hearing. The Council denied the motion.

Witnesses testified at the hearing. Nine affected parties challenged the certificate; eight of the parties were operators or administrators of neighboring nursing care facilities. The Council filed its written decision granting the certificate of need. The plaintiffs petitioned for judicial review. The trial court found that the evaluation of a certificate of need application did not constitute a contested case proceeding. Three plaintiffs took an appeal. They claimed that they had a statutory and constitutional right to a contested case proceeding. The Supreme Court in a very comprehensive decision thoroughly discussing all of the relevant issues affirmed the judgment of the trial court.

The Iowa Code had similar provisions with respect to "affected persons." The Iowa Code, similar to the Rhode Island statute, provided that affected persons have the opportunity to present testimony to the council during the proceedings. The Iowa Code, similar to Rhode

Island, provided for reconsideration and judicial review. The Iowa Code had similar provisions to the Rhode Island law with respect to what constituted agency action. In Iowa, as in Rhode Island, rule making and contested cases fell within the ambit of the administrative procedures act. The court said at page 834:

“A contested case is a proceeding “in which the legal rights, duties or privileges of a party are required by Constitution or statute to be determined by an agency after an opportunity for an evidentiary hearing.” Iowa Code § 17A.2(5); *accord Bernau*, 580 N.W.2d at 766; *Messamaker v. Iowa Dep’t of Human Servs.*, 545 N.W.2d 566, 567 (Iowa 1996); *Citizens’ Aide/Ombudsman*, 454 N.W.2d at 817-18; *Allegre*, 349 N.W.2d at 114; *Polk County*; 330 N.W.2d at 277. On the other hand, other agency action is action that does not constitute rulemaking or a contested case. *Sindlinger*, 503 N.W.2d at 389; *Polk County*, 330 N.W.2d at 276-77. It is a residual category. *Sindlinger*, 503 N.W.2d at 389; *Allegre*, 349 N.W.2d at 114; *Polk County*, 330 N.W.2d at 276. Thus, if the statute or constitution does not require a hearing, or if the required hearing does not rise to the level of an evidentiary hearing, the agency action is considered “other agency action.” *Allegre*, 349 N.W.2d at 114; *Polk County*, 330 N.W.2d at 277; *see L’Enfant Plaza Props. Inc. v. Dist. Of Columbia Redevelopment Land Agency*, 564 F.2d 515, 524 (D.C.Circ. 1977).”

The court held that in agency action outside of the APA affected parties are only entitled to informal hearings. Those parties are entitled to procedures promulgated by agency regulations. With respect to the fact that CON proceedings are not contested case matters, the court said at page 834:

“We conclude the evaluation of an application for a certificate of need by the Council does not implicate the contested case procedures. Neither a statute nor constitution requires the Council to provide an evidentiary hearing. See *Hurd v. Iowa Dep’t of Human Servs.*, 580 N.W.2d 383, 388 (Iowa 1998). Although section 135.66 provides affected persons the opportunity to be heard at a public hearing, Iowa code § 135.66(3)(b), (4), this hearing does not rise to the level of an evidentiary hearing.”

In furtherance of this same proposition, the court further stated at page 835:

“Additionally, we find the legislature did not intend to create a contested case proceeding when it enacted the comprehensive certificate of need statute. We recognize the legislature does not need to expressly provide for an evidentiary hearing in order to find the requirement of a contested case. *Allegre*, 349 N.W.2d at 115; *Bonfield*, 63 Iowa L. Rev. at 312. Yet, we fail to discern any basis in the

statute or its factual context impliedly requiring an evidentiary hearing. *See id.* In fact, by using the word “public” in Iowa Code section 135.66(3)(b) to qualify the type of hearing provided to affected persons, and by giving affected persons the right to present testimony, *id.* § 135.66(4), the legislature evidenced its intent to exclude the evaluation of a certificate of need application from the contested case requirements.”

Again at page 835, the court stated:

“Because the statute governing applications for certificates of need does not mandate an evidentiary hearing, there is no statutory right to contested case proceedings.”

The court further found that at the public hearing on the Certificate of Need Application neither the applicant nor the other affected parties had a protected property interest and accordingly could not claim a denial of due process.

The court cited with approval the case of *Hale v. Petit, supra*. The court noted that the hearing process provided adequate due process. Finally, similar to Rhode Island law (which requires a constitutional or statutory mandate for an evidentiary hearing to require a contested case proceeding), the Iowa court noted the same principle stating at page 839:

“Because the council was not required by statute or constitution to provide an evidentiary hearing, the council did not abuse its discretion or act unreasonably or arbitrarily in denying the three petitioning facilities’ motion for contested case proceeding. The district court properly concluded the review of a certificate of need application is not a contested case.”

The findings and legal principles applied in the above cases are as equally applicable to the Hospital Conversions Act as they are to the Certificate of Need Act. The Hospital Conversions Act at no place requires a hearing other than an informational hearing and at no place has a provision for declaratory rulings.

THE STRUCTURE AND SCOPE OF THE HOSPITAL
CONVERSIONS ACT AND ITS SCHEME MILITATE AGAINST
CONTESTED CASE APPLICATION

Indeed, our Supreme Court has cautioned against interpreting the APA in a manner as to achieve inappropriate or unintended results. The APA should not be interpreted to apply where its application would make the pertinent proceeding under the pertinent statute too cumbersome. See *L'Heureux v. State Dept. of Corrections*, 708 A.2d 549 (RI 1998) at 553, where the court said:

“It is of further interest to observe that in a recent case Chief Judge Lagueux of the Rhode Island District Court, in considering the applicability of the APA to prison disciplinary proceedings, expressed the opinion that the APA procedures were too cumbersome to be used in the day-to-day operations of the ACT and that it is not necessary to give inmates the full panoply of those procedural rights in order to have an effective grievance procedure under the Federal Civil Rights of Institutionalized Persons Act. *Lothar v. Vose*, C.A. No. 94-631L (D.R.I. Sept. 11, 1995) *aff'd*, *Lothar v. Vose*, 89 F.3d 823 (1st Cir.1996). We agree with the court’s analysis, and in interpreting our APA we are mindful of our responsibility not to interpret a statute in such a manner as to achieve an inappropriate or an unintended result. See *e.g. Cardarelli v. Department of Employment and Training Board of Review*, 674 A.2d 398, 400 (R.I.1996); *Wayne Distributing Co. v. Rhode Island Commission for Human Rights*, 673 A.2d 457, 460 (R.I. 1996); *General Accident Insurance Company of America v. Cuddy*, 658 A.2d 13, 16 (R.I. 1995).”

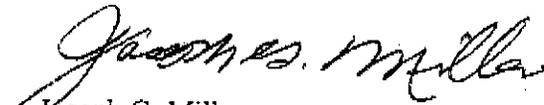
In *Bradford Associates v. Rhode Island Division of Purchases et al*, 772 A.2d 485 (R.I. 2001), the court at page 489 pointed out that the APA authority to review agency decisions is more narrow than the APA authority over rule making provisions. The court further stated:

“In comparison, the APA authority to review agency decisions is more narrow. There are two sections that, if applicable, prevent such review. See §§ 42-35-15, 42-35-18(b)

“First, agency decisions are not reviewable in the Superior Court if the agency is expressly exempted by § 42-35-18(b). Decisions made pursuant to the Purchases Act do not enjoy such exemption. See *id.* Second, agency decisions are not reviewable by the Superior court unless the suit is initiated by a person “who is aggrieved by a final order in a *contested case*.” Section 42-35-15(a). (Emphasis added.) A contested case is a “proceeding, including but not restricted to ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a specific party are required by law to be determined by an agency after an opportunity for hearing.” Section 42-35-1(c).”

Despite the fact that no hearings are required, the Department has provided for public input and record transcripts on March 14, 2016, March 16, 2016 and March 17, 2016. All of UNAP's documents are part of the record in addition to all of the documents submitted by Memorial Hospital of Rhode Island and commentary by the public. A complete and comprehensive record is established for a Decision by the Director. This Memorandum is devoted exclusively, however, to the issue of whether or not the proceedings for the relevant Reverse CON are contested case proceedings pursuant to which the Declaratory Rulings under the auspices of R42-35-PP are appropriate. It is conclusion of this Memorandum that R42-35-PP do not legally support the seeking of Declaratory Rulings in proceedings which are not contested case proceedings.

Respectfully submitted


Joseph G. Miller

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, Sc.

SUPERIOR COURT

SUMMIT NEIGHBORHOOD ASSOCIATION)

VS)

PATRICIA NOLAN)

PC/2004-1877)

HEARD BEFORE

THE HONORABLE JUSTICE DANIEL A. PROCACCINI

MAY 10, 2004

APPEARANCES:

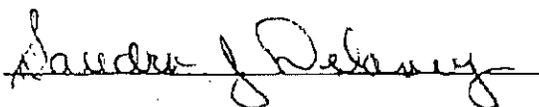
Kevin MCKENNA, ESQUIRE,.....for the Plaintiff

JEFFREY BRENNER, ESQUIRE.....for Miriam Hospital

JOSEPH MILLER, ESQUIRE.....for The Department of Health

CERTIFICATION

I, Sandra J. Delaney, hereby certify that the succeeding pages 1 through 6, inclusive, are a true and accurate transcript of my stenographic notes.



Sandra J. Delaney
Court Reporter

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MAY 10, 2004

MORNING SESSION

THE CLERK: Summit Neighborhood Association vs Miriam Hospital. Would counsel identify themselves for the record.

MR. MCKENNA: Kevin McKenna for Summit Neighborhood Association.

MR. BRENNER: Jeffrey Brenner, representing Miriam Hospital.

MR. MILLER: Joseph Miller for the department of health.

THE CLERK: The case number, Your Honor, is PC/2004-1877.

THE COURT: I am taking this matter out of order to issue a bench decision. My understanding is someone has to be in Federal Court shortly.

MR. BRENNER: That would be me, Your Honor.

THE COURT: This matter is before the court on plaintiff Summit Neighborhood Association's request for preliminary injunction to restrain the director of health, through her hearing officer, from continuing the certificate of need proceeding relating to the Miriam Hospital's application for the expansion of its radiology department and the purchase of a CT scanner. The plaintiff also seeks mandatory injunction relief

1 allowing it to issue subpoenas through its legal counsel
2 to compel witnesses at the certificate of need hearing.

3 The plaintiff contends that the certificate of need
4 proceeding is subject to the same formal hearing
5 procedures applicable to those matters involving
6 contested cases generally and under the Administrative
7 Procedures Act. Conversely, the defendant argues that
8 the certificate of need proceeding is not a contested
9 hearing and is not subject to the APA hearing
10 requirements, but rather the State Enabling Legislation
11 23-15-1 and the certificate of need regulations do not
12 establish the right to issue subpoenas as requested by
13 the plaintiff. This Court agrees.

14 Rhode Island General Law 23-15-6, entitled
15 Procedure For Review, establishes the nature and scope
16 of a certificate of need proceeding. Section
17 23-15-6(b) (5) goes on to state that, "a public meeting
18 may be held during the course of the state agency review
19 at which any person may have the opportunity to present
20 testimony." That same section provides that,
21 "procedures for the conduct of the public meeting shall
22 be established in rules and regulations promulgated by
23 the state agency with the advice of the health services
24 council."

25 The language of 23-15-6 demonstrates that the

1 procedures for a public meeting for a certificate of
2 need are to be in accordance with the certificate of
3 need regulations and need not follow the formal
4 regulations set forth in the APA statute. Moreover,
5 there is no directive within the certificate of need
6 statute for a public hearing, as is required when there
7 is a contested case under the APA Section 42-35-1(c).
8 And Section 42-35-1(c) specifically states that a
9 contested case means a proceeding wherein the legal
10 rights, duties or privileges of a specific party are
11 required by law to be determined by an agency after an
12 opportunity for hearing. However, the certificate of
13 need statute does not require a hearing but rather
14 states that a public meeting may be held, thus
15 illustrating that the procedures required under a
16 certificate of need proceeding differ from those
17 required in a contested case hearing.

18 Other jurisdictions addressing this matter have
19 held that a certificate of need proceeding is not
20 subject to the same administrative procedural
21 formalities as a contested case under the APA. In Hale
22 vs Petit, 438 A.2d 226, decided in 1981, the Supreme
23 Judicial Court of Maine explained why the administrative
24 procedures act is not applicable to certificate of need
25 proceedings. In that case the plaintiff, who was denied

1 a certificate of need, complained about not being
2 afforded the opportunity for cross-examination during
3 that proceeding. The plaintiff asserted that the
4 certificate of need proceeding was adjudicatory as
5 defined by the Maine APA and therefore adjudicatory
6 features such as cross-examination and swearing of
7 witnesses were required. Rejecting that argument, the
8 Hale Court held that the statutory scheme of the
9 certificate of need law as a whole indicates a
10 legislative intent that the hearing review process be
11 separate from the APA. The Hale Court explained that
12 the expedited review process would be difficult to
13 achieve if the APA's adjudicatory procedures applied.
14 With respect to the plaintiff's assertion that due
15 process required the right of cross-examination at the
16 hearing, the Hale Court declared: "The Superior Court
17 observed that for the certificate of need proceeding due
18 process required that the applicants and the public be
19 able to comment critically on competing applications.
20 We agree with the Superior Court's assessment of what
21 process was due and with the court's conclusion that
22 adequate procedures were provided."

23 Similarly, in Greenwood Manor vs Iowa Department of
24 Public Health, 641 N.W.2d 823, a 2002 case, the Supreme
25 Court of Iowa held that the application for a

1 certificate of need proceeding does not implicate
2 contested case procedures. The Greenwood Court reasoned
3 that where there is no explicit requirement by either
4 statute or constitution requiring an evidentiary hearing
5 and there is no factual context impliedly requiring an
6 evidentiary hearing, it cannot be said that a
7 certificate of need proceeding requires a formal
8 evidentiary hearing.

9 This Court finds that a certificate of need
10 proceeding is not subject to the formal hearing
11 requirement set forth in APA. The certificate of need
12 statutory scheme specifically provides that the
13 department of health can establish its own procedures
14 for the conduct of reviews and describe the proceeding
15 as a public meeting as opposed to a hearing as that
16 language is used in the APA. Additionally, like the
17 plaintiffs in Hale and Greenwood, the plaintiffs in the
18 present case are allowed to present witnesses on their
19 behalf and present their reasons for objecting to an
20 expansion of the radiology department at the proceeding.

21 Consequently, this Court finds that the plaintiffs
22 have failed to demonstrate that the certificate of need
23 proceeding is a contested hearing that would entitle
24 plaintiffs to issue subpoenas to compel the attendance
25 of witnesses.

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If you would prepare an order.

MR. BRENNER: Thank you, Your Honor.