



STATE OF CONNECTICUT

DEPARTMENT OF PUBLIC HEALTH

Office of Health Care Access

In Re: Constitution Eye Surgery Center of Eastern Connecticut, LLC
Docket Number: 11-22488-MDF

FINAL DECISION

On June 7, 2011, a Proposed Final Decision was issued in the above matter pursuant to Section 4-179 of the Connecticut General Statutes.

In accordance with Connecticut General Statutes Section 4-179, the attached Proposed Final Decision dated June 7, 2011 by Hearing Officer Melanie A. Dillon is hereby adopted as the final decision of the Deputy Commissioner of the Department of Public Health in this matter. A copy of the Proposed Final Decision is attached hereto and incorporated herein.

WHEREFORE, it is the final decision of the Deputy Commissioner that the Certificate of Need for Constitution Eye Surgery Center of Eastern Connecticut, LLC under Docket Numbers 00-500 and 00-500a, are hereby Modified.

6/21/2011

Date

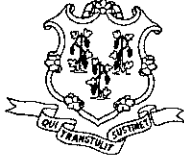
Jeannette B. DeJesus, MPA, MSW
Deputy Commissioner, OHCA

An Equal Opportunity Employer

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STATE OF CONNECTICUT
DEPARTMENT OF PUBLIC HEALTH
Office of Health Care Access

June 7, 2011

To: Elizabeth Windhom, RN BSN, Administrator
Constitution Eye Surgery Center of Eastern Connecticut, LLC
175 Cross Road
Waterford, CT 06385

Re: CON Modification, Docket No.: 11-22488-MDF
Modification of the CON Final Decision Docket Nos.: 00-500 and 00-500a
Constitution Eye Surgery Center of Eastern Connecticut, LLC

Dear Ms. Windhom:

Enclosed please find a copy of the Proposed Final Decision rendered by Hearing Officer Melanie Dillon in the above-referenced matter.

Pursuant to Connecticut General Statutes § 4-179, the Constitution Eye Surgery Center of Eastern Connecticut, LLC, the party in this matter, may request the opportunity to file exceptions and briefs and/or present oral argument, in writing, with the Deputy Commissioner of the Department within fourteen (14) days from the date of this notice, or by June 21, 2011. If no such request is received by this date, the Deputy Commissioner will assume those rights to be waived and will render a Final Decision in this matter.

If the applicant wishes to expedite the process and avoid the necessity that the Deputy Commissioner await the expiration of the aforementioned fourteen days, the applicant may submit a written statement to the Deputy Commissioner affirmatively waiving those rights.

Sincerely,

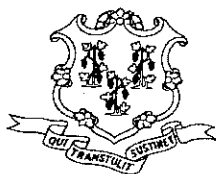
A handwritten signature in cursive script, appearing to read 'Kimberly R. Martone', written over a horizontal line.

Kimberly R. Martone
Director of Operations

cc: John Blair, Esq., Blair Law, LLC

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**State of Connecticut
Department of Public Health
Office of Health Care Access**

Proposed Final Decision

**Modification of a Previously
Authorized Certificate of Need**

Applicant: Constitution Eye Surgery Center of Eastern Connecticut, LLC

Docket Number: 11-22488-MDF

Project Description: Modification of Previous Certificate of Need authorizations 00-500 & 00-500a

Procedural History: On April 27, 2000, under Docket Number 00-500, the Office of Health Care Access ("OHCA") granted a Certificate of Need ("CON") to Constitution Eye Surgery Center of Eastern Connecticut, LLC ("CESC") for the establishment of a freestanding single specialty ophthalmic ambulatory surgery center to be located in Waterford, Connecticut at a total capital expenditure of \$995,500. On July 19, 2000, OHCA reconsidered the original decision and modified the final decision under Docket Number 00-500a.

On September 13, 2010, OHCA received a letter from Anthony Romania, M.D. asserting that the ophthalmology section of Lawrence & Memorial Hospital ("L&M Hospital") is having difficulty providing adequate coverage to the L&M Hospital's Emergency Department ("ED") and requesting that OHCA enforce Condition #5 of the decision rendered under Docket Number 00-500a. On March 3, 2011, OHCA reopened the matter to determine whether there had been a change in conditions that warrant a modification of the decision under Docket Numbers 00-500 and 00-500a. On March 7, 2011, OHCA received a letter from Daniel Rissi, M.D., VP/Chief Medical Officer at L&M Hospital, stating that Dr. Romania's request to enforce Condition #5 was not made on behalf of L&M Hospital and that L&M Hospital would not be represented at the hearing. Commissioner Jewel Mullen designated Melanie Dillon, Staff Attorney as the hearing officer in this matter on March 17, 2011. The public hearing was held on March 23, 2011.

Findings of Fact

1. Condition #5 of the decision under Docket Number 00-500a provides as follows:

The Applicant's Medical Staff Bylaws shall provide that utilization of the Facility is restricted to licensed physicians who (a) are credentialed members of the Applicant LLC's medical staff, (b) are owners/members of the Applicant LLC, and (c) hold active medical staff privileges at a local acute care hospital. The physicians who utilize the Facility shall maintain their active medical staff privileges at the local acute care hospital(s) where they currently hold such privileges, and thereafter any additional physicians shall obtain and maintain such privileges in a manner to ensure adequate coverage at each of the three local acute care hospitals.

2. Condition #6 of the decision under Docket Number 00-500a provides as follows:

The Applicant shall annually file with OHCA the name of each physician utilizing the facility with the name(s) of the local hospital(s) at which each such physician maintains active medical staff privileges. The Applicant shall make its initial filing at the time of licensure and shall thereafter file the required information every January.

3. The Bylaws of the Medical Staff of Lawrence & Memorial Hospital ("Hospital's bylaws") provide in relevant part as follows:

Members in good standing of the Active Staff who have served on the Active Staff for a period of time designated by each department may apply to the Chairman of their respective department, for a change of Staff category to Senior Active Staff. The department chairman will act on the request and forward the chairman's recommendation to the Medical Executive Committee at their next regularly scheduled meeting. Members of the Senior Active Staff retain all the rights, privileges and responsibilities of the Active Staff except they are no longer required to provide departmental emergency service call.

Record, Ex. Q.

4. Pursuant to the Hospital's bylaws, the Medical Executive Committee reviews each application for a change of staff category and forwards its written report and recommendations to the President/CEO of the Hospital for transmittal to the Board of Directors. Record, Ex. Q.
5. Upon receipt of a favorable recommendation from the Medical Executive Committee, the Board of Directors adopts or rejects the recommendation in whole or in part. Notice of the

Board's decision is given through the President/CEO to the Medical Executive Committee, the chair of the department concerned and the applicant. Record, Ex. Q.

6. Consistent with the Hospital's bylaws, four CESC physicians changed their status from active staff to senior active staff since the final decision was rendered under Docket Number 00-500a, as follows:
 - a. Robert Klimek, M.D. on July 31, 2000,
 - b. Anthony Barri, M.D. on August 28, 2000;
 - c. Charles Lanzillo, M.D. on March 20, 2005; and
 - d. Francis Falck, M.D. on February 1, 2011.

Testimony of John Newman, Senior Vice President and General Counsel, Constitution Surgery Centers, LLC, Public Hearing, March 23, 2011.

7. CESC provided documentation demonstrating that the approval of the change in staff privileges for Dr. Falck was consistent with the Hospital's bylaws. Record, Ex. Q.
8. On November 22, 2010, Peter J. Famiglietti, M.D., Chief of the Ophthalmology department at the Hospital verified that Dr. Falck met the department's internal requirements for senior active staff and he supported the request. Record Ex. Q.
9. On February 7, 2011, Bruce D. Cummings, President/CEO of L&M Hospital informed Dr. Falck that his request for a change in staff category from active staff to senior active staff had been approved by the Board of Directors effective February 1, 2011. Record, Ex. Q.
10. CESC has not received any complaints from the Hospital with respect to ophthalmic related coverage issues at L&M Hospital's ED. Testimony of John Newman, Public Hearing, March 23, 2011.

Discussion

General Statutes § 4-181a (b) provides in relevant part: "On a showing of changed conditions, the agency may reverse or modify the final decision, at any time, at the request of any person or on the agency's own motion." CESC asserts that there are no changed conditions that would warrant a modification of the final decision in this matter because its bylaws have not changed, the Hospital's bylaws have not changed and CESC has not taken any unilateral action that would affect OHCA's order or CESC's compliance with the same. Record, Ex. Q. Additionally, CESC points out that L&M Hospital has granted the physicians' requests for senior active status for over ten years and, therefore, would not constitute a change in conditions. Record, Ex. Q. OHCA disagrees, however, that L&M Hospital's approval of requests for a change in status from active staff to senior active staff is not a change in conditions. The evidence demonstrates that L&M Hospital approved the requests of four physicians affiliated with CESC to change their status from active staff to senior staff between July 2000 and February 2011. The approval is a three step process that starts with the respective chair of department verifying that the physician has satisfied that department's requirements for senior active staff and that the department supports the request. Record, Ex. Q. Thereafter, the Medical

Executive Committee reviews the request and makes a recommendation to the Board of Directors. Record, Ex. Q. These facts demonstrate that L&M Hospital makes all decisions with respect to the staff privileges of its physicians and those decisions are based upon the recommendations and approval of a department chair, the Medical Executive Committee and the Board of Directors of L&M Hospital.

OHCA finds that the changed condition is L&M Hospital's approval of a change in status for four CESC physicians from active staff to senior active staff. OHCA further finds that L&M Hospital makes all decisions regarding staff privileges and coverage at its Hospital and Condition #5 has not precluded L&M Hospital from granting senior active staff privileges to CESC physicians. In light of the fact that the evidence demonstrates that only the Hospital has the ability to determine whether a particular physician is eligible for a change in status and how this will affect coverage in its ED, OHCA concludes that it is appropriate to modify Condition #5 and vacate Condition #6 of the order under Docket Numbers 00-500 and 00-500a at this time.

Order

Based upon the foregoing, OHCA hereby modifies Condition #5 of the CON Order under Docket Numbers 00-500 and 00-500a as follows:

5. The Applicant's Medical Staff Bylaws shall provide that utilization of the Facility is restricted to licensed physicians who (a) are credentialed members of the Applicant LLC's medical staff, (b) are owners/members of the Applicant LLC, and (c) hold medical staff privileges at a local acute care hospital. The local acute care hospital shall make all decisions with respect to any change in medical staff privileges of a particular physician in accordance with the bylaws for that hospital.

OHCA hereby vacates Condition #6 as it is no longer necessary for CESC to file a list of its physicians and the hospitals at which those physicians maintain active medical staff privileges. All the remaining conditions under Docket Numbers 00-500 and 00-500a will remain in full effect.

Based upon the foregoing, I respectfully recommend that the Deputy Commissioner modify the decision in accordance with the above.

10-7-11
Date


Melanie A. Dillon, Esq.
Hearing Officer