

May 4, 2012

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HEALTH FACILITIES &
SERVICES REVIEW BOARD

Ms. Courtney Avery
Administrator
Illinois Health Facilities and Services Review Board
525 West Jefferson Street, 2nd floor
Springfield, IL 32761

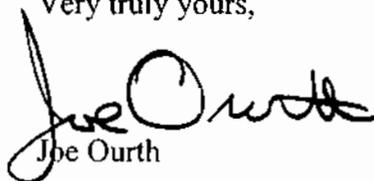
Honorable Richard E. Hart
Administrative Law Judge
Hart, Southworth & Witsman
One North Old State Capitol Plaza
Springfield, IL 62701-1323

Re: In re: Centegra Hospital – Huntley
Docket No.: HFSRB #11-11
Project No.: 10-090

Dear Ms. Avery and ALJ Hart:

On behalf of Advocate Health and Hospitals corporation we file for the Review Board's consideration the attached Exception and Brief in connection with the Centegra matter referenced above.

Very truly yours,


Joe Ourth

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Enclosure

**HEALTH FACILITIES AND SERVICES REVIEW BOARD
STATE OF ILLINOIS**

In re:

CENTEGRA HOSPITAL – HUNTLEY,

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Docket No.: HFSRB #11-11
Project No.: 10-090

**ADVOCATE HEALTH AND HOSPITALS CORPORATION'S
FILING OF EXCEPTION AND BRIEF**

Advocate Health and Hospitals Corporation (“Advocate”) by its attorneys, Arnstein & Lehr LLP, pursuant to 77 Ill. Admin. Code §1130.1160, submits this Exception and Brief to the Proposed Order of the Administrative Law Judge, dated March 30, 2012 (“Proposed Order”).

Summary

This administrative hearing matter returns to the Review Board as part of Centegra’s appeal of the Board’s denial of its permit application. The administrative law judge (“ALJ”) has sent back, or remanded, the case to the Board to correct the administrative record. As part of the administrative hearing process Advocate had urged the administrative law judge (“ALJ”) to:

1. Note the record irregularity, but continue with the administrative hearing in order to save time and expense for all; and
2. If the matter were sent back to the Review Board, that reconsideration of the Project be limited to the issue causing the remand - that is, correcting the record to ascertain that the corrected record would not change the outcome.

We address those issues in this brief and exception below.

Factual Background

This matter arises out of Centegra’s appeal of the Review Board’s decision to deny Centegra’s application for a permit (“CON”) to establish a new hospital in Huntley (the “Project”). On June 28, 2011, the Review Board voted an “Intent-to-Deny” the Project, and a final vote to deny the project on December 7, 2011. Centegra then filed a request for Administrative Review to appeal the decision of the Review Board.

As part of the administrative hearing process the Review Board staff is to produce the record of the prior proceeding of the Project before the Review Board. In producing that record, the attorneys for the Review Board noticed an issue with the record and brought that matter to the attention of ALJ Hart. In essence, the “problem” was that the administrative record in this matter contained a document filed on behalf of Sherman Hospital, St. Alexius Medical Center, and Advocate Good Shepherd Hospital, dated May 24, 2011, and titled “Market Assessment and Impact Study – Proposed Mercy-Crystal Lake Hospital (Project 10-089)” (“Mercy Impact Study”). Similarly, the administrative record in the separate matter initiated by Mercy (Health Facilities and Services Review Board Docket No. 12-01) contains a similar document also dated May 24, 2011 titled “Market Assessment and Impact Study – Proposed Centegra-Huntley Hospital (Project 10-090)” (the “Centegra Impact Study”).

Simply put, the administrative record in this Centegra matter contains the Mercy Impact Study and the administrative record in the Mercy hearing contains the Centegra Impact Study. Both Impact Studies contain similar data and arguments that support the final decision of the Board, the denial of both applications. We note that Advocate, as one of submitters of the document, is not requesting a reconsideration even though it was there document. There is no question that the Review Board members received both reports for consideration, just in the opposite set of files. Thus, the ALJ “remanded” this matter to the Board to address the problem with the record and “reconsider” the Centegra application for a permit.

Advocate Proposed Solution

In the proceeding before ALJ Hart, Advocate suggested as a solution that the administrative hearing proceed without remand. The administrative hearing process involves considerable time and expense for each party involved. To expedite the process and to save costs, Advocate suggested that the irregularity in the record be noted, but that the administrative hearing process first proceed to conclusion. Interestingly, Advocate and Centegra were able to agree on this issue and procedure, and urged that ALJ Hart to utilize this procedure to move the hearing forward. Although we continue to believe that this

solution would have benefited all parties, including the Review Board, now that the matter has been remanded, there is no reason to further pursue this point at this time.

Now that the case has been remanded, Advocate takes no further exception to ALJ Hart's substantive conclusion to remand the case to the Review Board. However, Advocate respectfully submits one exception to clarify that the scope of the remand should be limited to the question of whether the inclusion of the Centegra Impact Study in the administrative record would have changed the decision of the Board to deny the Centegra application.

Exception For Defining the Scope of Reconsideration on Remand

The ALJ had Authority to Enter His Report and Proposal for Decision Concerning the Administrative Record, but that Authority was Limited in Scope.

The Administrative Law Judge identified (at the suggestion of the Review Board's attorneys) an irregularity in the administrative record. In doing so, the ALJ concluded that the "issue of fault or responsibility for the misfiling is irrelevant" and proposed a remand to the Review Board to correct the record and "reconsider [Centegra's] application for permit with the corrected record."

Advocate agrees that the ALJ is authorized to address issues concerning the record.¹ However, the Administrative Code places certain, specific limitations on the exact relief that can be granted when considering irregularities in the administrative record. Thus, the Administrative Code provides that "[t]he administrative law judge shall not have the authority to dismiss, postpone, vacate, or overturn an order or notice by HFPB [now, Illinois Health Facilities and Services Review Board], but may make a recommendation to HFPB any time that circumstances merit such a recommendation." 77 Ill. Admin. Code 1130.1130 (d) (emphasis added).

The issue on remand is actually quite simple - should one report considered by the Board, but in the wrong file, overturn the Board's previous decision to deny the Project. For the reasons outlined below, the Board's reconsideration should be limited to whether the correction on the record would have changed the decision of the Board.

¹ Illinois Supreme Court Rule 329, which was adopted by 77 Ill Admin. Code §1130.1130(a), authorizes the Administrative Law Judge to consider and address issues concerning the administrative record.

1. Board Received and Reviewed both Reports. There is no question that the Review Board received both the Centegra and Mercy Impact Studies. The Board received the project files for both the Mercy and Centegra projects on the same day, heard the projects on the same day and voted on them back to back. Each report was identified on the cover as to the appropriate project. We trust in the Review Board's cognitive abilities to process and give proper consideration to the appropriate report, even if the report was misfiled. The fact that Board members may have read the relevant report, albeit in a different sequence, would hardly seem a basis for the Board to reverse its decision.
2. Document was in Opposition and Would Only have Further Supported the Review Board's Decision. The Impact Studies submitted were submitted on behalf of Sherman Hospital, St. Alexius Hospital and Advocate Good Shepherd Hospital in opposition to the Centegra Project. Those reports documented why a new hospital was not needed in the area. Thus, the inclusion of document involved in the record would only further support the Board's decision and could not rationally justify changing the Board's decision.
3. Document was only One of Many in Large Record. The Centegra Impact Study was part of over a 11,000 page record received by the Board for review. We do not believe that this misfiling of the documents flaws the overall decision in this case. The Board had considerable information and basis to make its decision and the misfiling of a single opposition document would not warrant changing the outcome. Furthermore, arguments found in these documents were also made in oral testimony and in additional submitted materials so the same points and arguments would have been heard and considered by Board members.

Here, to the extent that the Proposed Decision can be seen as requiring "reconsideration" of the entirety of the Centegra application, it is tantamount to overturning or vacating a decision of the Review Board. Such an order is not permissible and, therefore, the remand and reconsideration by the Board should be necessarily limited to a reconsideration of the denial of the application by Centegra in light of the irregularity in the record. Phrased differently, does the inclusion in the formal administrative record of the correct report (i.e., the Centegra Impact Study) change the prior decision of the Review Board to deny the Centegra application.²

Advocate suggests the following revisions to the Proposal for Decision, at paragraph 6:

The Administrative Law Judge has filed with the Board his Administrative Law Judge's Report (Hereinafter referred to as the "Report"), recommending that the Board (i) correct Respondent's record, and (ii) reconsider, without additional hearings, whether the corrected record requires a change to the Board's denial of Respondent's application for permit, with the corrected record.

² Advocate believes that the inclusion of the proper report in the administrative record cannot and should not change the result as the report is additional support for the decision to deny the application.

Conclusion

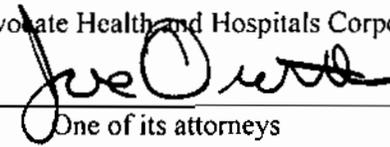
For the reasons stated herein, Advocate respectfully requests that the Review Board modify the Proposed Order to limit the scope of reconsideration to correcting the record as provided in these Exceptions.

Dated: May 4, 2012

Respectfully submitted:

Advocate Health and Hospitals Corporation

By:


One of its attorneys

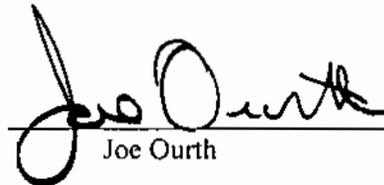
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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that he served **ADVOCATE HEALTH AND HOSPITALS CORPORATION'S NOTICE OF INTENT TO FILE EXCEPTIONS** to the following individuals:

Mr. Frank W. Urso General Counsel Mr. Juan Morado, Jr. Asst. General Counsel Illinois Health Facilities and Services Review Board 122 South Michigan Avenue Suite 700 Chicago, Il 60603 Frank.urso@illinois.gov Juan.morado@illinois.gov	Mr. Daniel J. Lawler K&L Gates LLP 70 West Madison Street Suite 3100 Chicago, Il 60602 Daniel.lawler@klgates.com
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Honorable Richard E. Hart Administrative Law Judge Hart, Southworth & Witsman One North Old State Capitol Plaza Springfield, Il 62701-1323 Rhart1213@aol.com	Ms. Courtney Avery Administrator Illinois Health Facilities and Services Review Board 525 West Jefferson Street, 2d Floor Springfield, Il 62761 Courtney.Avery@Illinois.gov

by email delivery on May 4, 2012.



Joe Ourth

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