



STATE OF KANSAS

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Attorney General

May 24, 1978

ATTORNEY GENERAL OPINION NO. 78-173

Mr. Dwight F. Metzler, Secretary  
Department of Health and Environment  
Building 740- Forbes Field  
Topeka, Kansas 66620

Re: Public Health -- Health Facilities -- Appeal  
of Review Agency

Synopsis: Due to regulations recently enacted by the federal Department of Health, Education, and Welfare, the Kansas Statewide Health Coordinating Council (SHCC) may no longer review decisions pertaining to applications for certificates of need when the review has been requested by the health systems agency which initially reviewed the application.

\* \* \*

Dear Secretary Metzler:

As of July 1, 1976, a Kansas health facility which has desired to undertake certain "projects", as that term is defined in K.S.A. 1977 Supp. 65-4805, has been required to submit an application for a certificate of need which must be reviewed by several administrative bodies. The initial review of the application is conducted by a health systems agency (HSA) which is authorized to "comment upon the application and submit its record of the review proceedings, findings of fact and recommendations to the state agency [the Kansas Department

Mr. Metzler  
Page Two  
May 24, 1978

of Health and Environment] . . ." K.S.A. 1977 Supp. 65-4807. Actual approval or disapproval of the application is then made by the Department of Health and Environment after it has received the recommendations of the HSA. K.S.A. 1977 Supp. 65-4808.

The decision of the Department of Health and Environment may be subjected to an additional administrative review via K.S.A. 1977 Supp. 65-4809 which states in part that:

Any decision issued pursuant to K.S.A. 1976 Supp. 65-4808 shall take effect thirty (30) days following its issuance unless within such time an applicant requests in writing a hearing by the review agency [SHCC], or a written protest is filed by the appropriate health systems agency with the review agency requesting a hearing, or a health facility which believes its interests are adversely affected by the decision requests in writing a hearing by the review agency.

[Emphasis supplied.]

Recently, certain administrators of the Department of Health, Education, and Welfare (HEW) have advised members of your staff that newly enacted federal regulations require that administrative reviews of the Department of Health and Environment decisions on certificates of need must be conducted by an agency other than the SHCC. This HEW policy is based upon that department's interpretation of 42 CFR part 123.104(b)(17)(i), which sets forth certain requirements which must be met by a state program which is designed to administer certain programs authorized by the National Health Planning and Resources Development Act of 1974, 42 U.S.C. 300k, et seq. (this being the federal law which gave rise to the certificate of need program which was enacted by Kansas and now appears at K.S.A. 1977 Supp. 65-4801 et seq.)

Pursuant to these new regulations, before a state program can be approved by HEW, it must, among other things:

. . . provide that if the State Agency  
[the Department of Health and Environment]

makes a decision in the performance of a function under section 1523(a) (3), (4), (5), or (6) of Title XVI of the Act which is inconsistent with a recommendation made under section 1513(f), (g), or (h) of the Act by a health systems agency area located in whole or in part within the State --

(i) such decision (and the record upon which it was made) shall, upon request of such health systems agency, be reviewed, under an appeals mechanism consistent with state law governing the practices and procedures of administrative agencies, by an agency of the State (other than the State health planning and development agency or the Statewide Health Coordinating Council) designated by the governor, and

(ii) the decision of the reviewing agency shall for purposes of Titles XV and XVI of the Act be considered the decision of the State Agency.

42 CFR part 123.104(b)(17)(i) and (ii).

[Emphasis supplied.]

This language is identical to that found in section 1522 of the National Health Planning and Resources Development Act of 1974, 42 U.S.C. 300 m-1(b)(13).

A literal interpretation of the above-quoted regulation would lead one to believe that the SHCC is only precluded from conducting a review hearing when that hearing was requested via K.S.A. 1977 Supp. 65-4809 by the HSA which initially reviewed the application. However, HEW officials have given a much broader interpretation to 42 CFR part 123.104(b)(17)(i) and 42 U.S.C. 300 m-1(b)(13) and have advised you that the SHCC should not conduct any review hearings whatsoever. As the Secretary of the Department of Health and Environment, you have requested my opinion as to what role the SHCC should play in future reviews of applications for certificates of need.

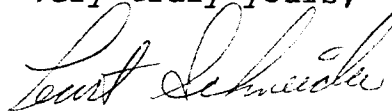
Mr. Metzler  
Page Four  
May 24, 1978

The answer to your question is found in one of the canons of statutory construction known as the plain meaning rule which states that, "when language is clear and unambiguous it must be held to mean what it plainly expresses". Swartz v. Siegel, 117 F. 13 (1902). This canon has been followed by the Kansas Supreme Court in numerous decisions e.g., Phillips v. Vieux, 210 Kan. 612, 504 P.2d 196 (1972); Callaway v. City of Overland Park, 211 Kan. 646, 508 P.2d 902 (1975).

When the plain meaning rule is applied to the language of 42 CFR part 123.104(b)(17)(i), (ii), and 42 U.S.C. 300 m-1(b)(13), there is but one interpretation which can result, that being that a SHCC is only precluded from conducting review hearings when the review is requested by the HSA which initially reviewed the application. This being the case, the SHCC is able to conduct review hearings which have been requested by either the applicant or a health facility which believes that its interests are adversely affected by the decision of the HSA.

As I noted above, the language of 42 CFR 123.04(b)(17)(i) and (ii) and that of 42 U.S.C. 300 m-1(b)(13) are identical. It is clear that if the bureaucrats of HEW had desired to completely remove the SHCC from participating in these review functions, they could have done so by merely using clear and concise words to that effect in the body of the regulation which they drafted. Instead, we find a federal regulation which parrots its statutory counterpart. It is therefore my opinion that in order to comply with federal law and the appropriate regulations, Kansas needs to implement a procedure by which an independent agency conducts reviews of applications for certificates of need when a hearing is requested by an HSA. Our SHCC may still conduct review hearings requested by other appropriate parties.

Very truly yours,

  
CURT T. SCHNEIDER  
Attorney General

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