ALAN WILSON
ATTORNEY GENERAL

February 25, 2020

W. Marshall Taylor, Jr., General Counsel
S.C. Department of Health and Environmental Control
2600 Bull Street
Columbia, SC 29201

Dear Mr. Taylor:

You have requested our opinion "regarding the scope of authority of the South Carolina Department of Health and Environment Control (Department or DHEC) to conduct certain reviews under regulations promulgated pursuant to the Health Care Cooperation Act, S.C. Code Ann. Sections 44-7-500 through 44-7-590 (the 'Act.')" Specifically, DHEC seeks our opinion with regard to the following question: "[w]hat review must be conducted prior to departmental approval of proposed modifications to a cooperative agreement after issuance of a Certificate of Public Advantage if DHEC determines the proposed modifications are substantial under Section 508 of S.C. Code Regulation 61-31, Health Care Cooperative Agreements?" You further advise that "DHEC's interpretation is that 'another review' under Section 508 does not necessarily require the same type of review as occurs when an applicant applies for a Certificate of Public Advantage." You note that "DHEC believes it is within its discretion to conduct the review it deems appropriate based on the facts and circumstances involved including, but not limited to, the significance of the proposed change, any relevant time constraints related to the proposed change, and any exigent circumstances as found by DHEC or as represented to DHEC by the parties to the cooperative agreement."

As will be explained more fully below, we believe a court is likely to agree with DHEC's analysis as reasonable. As the agency charged with approval, monitoring and enforcement of Certificates of Public Advantage, a court will likely conclude DHEC possesses broad discretion to interpret its Regulation. As you note, the language of the Regulation, using the phrase "another review," does not necessarily require that DHEC conduct the same type of review as occurs when an applicant applies for a Certificate of Public Advantage. Thus, in our opinion, a court is likely to conclude that DHEC possesses the discretion to allow the agency to conduct "another review" pursuant to the Regulation, as it deems appropriate, based upon factors such as are specified in your letter.

By way of background, your letter further states:

I. The Health Care Cooperation Act and Regulation 61-31

The Act is predicated upon Legislative findings set forth at Section 44-7-505(1)-(4). The findings recognize "that cooperative agreements among hospitals, health care purchasers, and other health care providers would foster improvements in the quality of health care for South Carolinians, moderate cost increases, improve access to needed services in rural areas, and enhance the likelihood that rural hospitals can remain open," and "that competition as currently mandated by federal and state antitrust laws should be supplanted by a regulatory program to permit and encourage cooperative agreements between hospitals, health care purchasers, or other health care providers when the benefits outweigh the disadvantages caused by their potential adverse effects on competition." Section 44-7-505(2), (4).

DHEC is the state agency authorized to enforce and implement the Act and is authorized to promulgate regulations pursuant to the Act Sections 44-7-510(4) and -570(D). The purpose of the regulation is to "implement the legislative intent that there be a state regulatory program to permit and encourage cooperative agreements between hospitals, health care purchasers, or other health care providers which would otherwise violate federal or state anti-trust laws when the benefits outweigh disadvantages caused by their potential adverse effects on competition." R.61-31, Section 101.

II. Role of DHEC After Issuance of Certificate of Public Advantage

The Act relies upon DHEC's continuing involvement following the approval of an application for a Certificate of Public Advantage. For example, DHEC monitors and regulates agreements approved under the Act and may request information whenever necessary to ensure that the agreements remain in compliance with any conditions of approval. Section 44-7-570(A). While the Act provides a detailed process for review of initial applications and changes to applications prior to issuance of a Certificate of Public Advantage, the Act is silent regarding any process for reviewing proposed changes to a cooperative agreement after issuance of a certificate. However, Section 508 of the regulation addresses this scenario.

> SECTION 508. Changes After Receipt of a Certificate of Public Advantage: If an applicant amends, alters, or otherwise changes the agreement after receipt of a Certificate of Public Advantage, the Department will decide whether or not the amendment is substantial and thereby requires another review. A change in the application will be considered substantial if the Department believes that the change materially changes the reasons for approval, might materially impact the benefits or disadvantages to the community to be served, or will change the service area of the original application. The addition or deletion of a party to the agreement does not necessarily constitute a substantial change unless the Department believes that the above mentioned criteria will occur.

R.61-31, Section 508 (Emphasis added). Therefore, if the Department finds proposed changes to a cooperative agreement after issuance of a certificate are substantial, another review must be performed. Neither the Act nor the regulations provide definitions for "review" or "another review." Because it is not clear from the text of Section 508 what the clear meaning of "another review" is, interpretation of the term is warranted. See Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 333, 766 S.E.2d 707, 717(2014).[ ]

DHEC interprets "another review" in Section 508 to allow it the discretion to conduct the review that may be required, in the event it deems the change to be "substantial." This review will depend on the facts and circumstances involved, such as the significance of the proposed change, any relevant time constraints related to the proposed change, and any exigent circumstances as found by DHEC or as represented to DHEC by the parties to the cooperative agreement. This interpretation is reasonable and consistent with DHEC's statutory authority.

Evidence of the reasonableness of DHEC's interpretation is found in the contrary treatment in Section 308. That section addresses changes made by an applicant prior to the issuance of a certificate. Section 308 necessitates recommencement of the public notice and other steps if DHEC determines that the changes constitute a new application. In such cases, "the requirements of Section 301, 302, and 303" must be complied with. Those sections require submission of an application to DHEC, payment of filing fees, evaluation by DHEC for completeness, and notice of opportunity for public hearings. Section 308 also expressly requires that the time periods, deadlines and waiting periods, be complied with for revisions at the pre-issuance stage.

There is no parallel requirement in Section 508 (post-issuance of a Certificate) to recommence the extensive review process required in Section 308 (pre-issuance of a Certificate). Instead, Section 508 refers simply to "another review." The absence of express requirements like those in Section 308 is a strong indicator that DHEC can conduct the review it deems appropriate at the post-issuance stage.

Separately, further evidence of the Legislature's design to entrust DHEC with broad discretion and authority to conduct appropriate post-issuance reviews is found in the Act. The Legislature recognized the inability to exhaustively articulate criteria that may be material for the analysis to be undertaken by DHEC. Following the list of criteria for advantages and disadvantages in its evaluation of an application (Section 44-7-560(A)), the Act entrusts DHEC to use its discretion to execute the purpose of the effort:

> The department also may establish conditions for approval that are reasonably necessary to ensure that the cooperative agreement and the activities engaged under it are consistent with this article and its purpose to promote cooperation and limit health care costs, protect against abuse of

> private economic power, and to ensure that the activity is appropriately supervised by the State.
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> Section 44-7-560(B).
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> Additionally, the regulations provide that the Certificate of Public Advantage may be revoked by DHEC if, in its discretionary assessment, the parties are not complying, or the benefits of the certified cooperative agreement no longer outweigh the disadvantages, or that the certificate was issued in reliance upon a misrepresentation or other improper basis. Section 503(A)-(C). The Certificate may also be revoked by a single, non-discretionary basis, failure to pay the annual monitoring fee. Section 503(D). The discretionary bases for revocation demonstrate that DHEC is uniquely relied upon in the Health Care Cooperation Act to be the State agent to conduct this activity. This reliance by the Legislature in statute and by approval of DHEC's regulations confirms the reasonableness of DHEC's interpretation regarding the inherent flexibility to determine the appropriate review of modifications pursuant to Section 508.
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> DHEC requests confirmation of its interpretation of S.C. Code Regulations 61-31, Section 508, to allow the review DHEC deems appropriate to give effect to the Health Care Cooperation Act.

LAW/ANALYSIS

In interpreting statutes or regulations, the cardinal rule of construction is to rely upon legislative intent. As was stated by our Supreme Court in Protection and Advocacy for People with Disabilities, Inc. v. Buscemi, 417 S.C. 267, 273-274, 789 S.E.2d 756, 760 (2016),

> "[t]he cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible." Perry v. Bullock, 409 S.C. 137, 140, 761 S.E.2d 251, 253 (2014) (quoting State v. Bauer, 340 S.C. 339, 342, 531 S.E.2d 922, 923 (2000)). "All rules of statutory construction are subservient to the one that legislative intent must be construed in light of the intended purpose of the statute." S.C. Prop. & Cas Ins. Co. Guar. Assn. v. Brock, 410 S.C. 361, 367, 764 S.E.2d 920, 922 (2014) (quoting McClanahan v. Richland Cty. Council, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002)). "The plain language of a statute is considered the best evidence of the legislature's intent." Perry, 409 S.C. at 140, 761 S.E.2d at 253. "When interpreting an undefined statutory term, the Court must look to its usual and customary meaning." Id. at 140-41, 761 S.E.2d at 253.

In Kiawah Development Partners, II v. South Carolina Dept. of Health and Environmental Control, 411 S.C. 16, 32-33, 766 S.E.2d 7070, 717-718 (2014), the South Carolina Supreme Court set forth the rule for an agency's interpretation of the statute's regulations which it is charged to enforce. According to the Court,

> [i]n reaching this conclusion, the ALC erred by failing to give deference to DHEC's interpretation of its regulation. Interpreting and applying statutes and regulations administered by an agency is a two-step process. First, a court must determine whether the language of the statute or regulations speaks to the issue. If so, the court must utilize the clear meaning of the statute or regulation. . . . [cases cited]. If the statute or regulation "is silent or ambiguous with respect to the specific issue," the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference. . . .
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> Advancing to the second step, we must first consider the scope of South Carolina's deference doctrine.
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> . . . . [cases cited] . . .
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> As repeatedly stated in our decisions, our deference doctrine provides that courts defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration or its own regulations "unless there is a compelling reason to differ." . . . Accordingly, the deference doctrine properly stated provides that where an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts including the ALC, will defer to the agency's interpretation absent compelling reasons. We defer to the agency's interpretation unless it is arbitrary, capricious, or manifestly contrary to the statute." ... (quoting Chevron U.S.A v. Nat. Res. Def. Council, Inc. 437 U.S. 837, at 844 (1984).

Our opinions are in accord. See e.g. Op. S.C. Att'y Gen., 2019 WL 4729535 (September 13, 2019) ["it is this Office's long standing policy, like that of our state courts, to defer to an administrative agency's reasonable interpretation of the statutes and regulations that it administers."] (citing numerous opinions).

Moreover, our Supreme Court stated in City of Cola. v. Bd. of Health and Environmental Control, 262 S.C. 199, 2020, 355 S.E.2d 536, 538 (1987),

> [While] as creatures of statute, regulatory bodies are possessed only of those powers which are specifically delineated [,] . . . [t]he delegation of authority to an administrative agency is construed liberally when the agency [here DHEC] is concerned with the protection of the health and welfare of the public.

In other words, "regulations governing public health should be liberally construed." Putnam Lake Comm. Council Bathing Beaches v. Dept'y Comm'r of State of N.Y., 456 N.Y.S.2d 100 (1982).

It should be noted that R. 61-31, § 308 provides for the process that DHEC must utilize when the applicant makes an amendment during the initial application process. Section 308 specifically requires DHEC to review the amendments and notify the applicant if the amendment constitutes a new application. The Regulation requires that in such instance, the review process

provided for in §§ 301-303 must be followed and the review is considered "as though the amendment were a new application." By comparison, § 508 is deemed "Changes After Receipt of a Certificate of Public Advantage." Such Section regulates amendment post-issuance of a COPA. In other words, § 508 applies to an amendment to the operational COPA. If DHEC deems these amendments substantial, the agency is required to conduct "another review."

Such a comparison is striking. As your letter notes, "[t]here is no parallel requirement in Section 508 (post-issuance of a Certificate) to recommence the extensive review process required in Section 308 (pre-issuance of a Certificate)." Instead, Section 508 refers simply to "another review."

You also note that § 44-7-560(B) affords broad discretion to DHEC to "establish conditions for approval that are reasonably necessary to ensure that the cooperative agreement and the activities engaged under it are consistent with this article and its purpose to promote cooperation and limit health care costs, protect against abuse of private economic power, and to ensure that the activity is appropriately supervised by the State." With this legislative intent in mind, we now turn to the phraseology "another review."

In this instance, as your letter indicates, the words "another review" are not defined in Section 508 of R. 61-31. Nor is there any suggestion, at least in the Regulation itself, either that "another review" must be a repeat of the original COPA process, or that something less may be undertaken. The Regulation simply states that if there is an amendment, alteration or change to the agreement by the applicant, the Department must determine if the amendment is "substantial" and, if so, "requires another review." (emphasis added). Your question specifies that DHEC deems the amendment to be "substantial."

As we stated in Op. S.C. Att'y Gen., 1996 WL 82894 (January 17, 1996), "[t]he term 'review' ordinarily means to 'look over, study, or examine again.'" Use of such a term "envisions discretion." And, as defined in Black's Law Dictionary (7th ed.), the term "review" means a "consideration inspection or reexamination of a subject or thing." As one court has explained, the term "'review' commonly denotes a 'looking over or examination with a view to amendment or improvement.'" Kholi v. Wall, 582 F.3d 147, 153 (1st Cir. 2009).

Ordinarily, when the term "judicial review" is used, the reviewing court, of course, does not "start over" from what has already been determined, but examines the lower court's performance for errors. As Chief Justice Hughes famously summarized in St. Joseph Stockyards Co. v. U.S., 298 U.S. 38, 53 (1936), the "judicial duty is performed in the light of the proceedings already had and may be greatly facilitated by the assembling and analysis of the facts in the course of the . . . [prior] determination." In short, common sense and the economy of public resources typically does not require that "another review" entail the painstaking gathering of facts and analysis undertaken originally.

In Farm Management Co., LLC v. Rural Community Ins. Agency, 2015 WL 1809789 (E.D. Wash. 2015), the Court reached this very conclusion. There, the question was whether "the court may conduct a de novo review of the indemnity claims because the arbitrator's decision is not binding. . . ." The Court concluded "on closer examination" that de novo review of the arbitrator's decision was not intended. The provision in question specified that the arbitrator's decision was binding unless "judicial review is sought." Id. at * 4. According to the Court,

> [t]he term "review" means to "view, look at, or look over again" or "to look back upon; view retrospectively." . . . . (citation). Accordingly, the Court is to "review" the arbitrator's decision – not begin anew with the analysis of the issues presented to the arbitrator.

Id. In short, use of the word "review" ["another review"] was deemed to be an analysis which did not "begin anew," but one which "look[s] over again" what was originally done.

In addition, the point you make in your letter regarding the contrast in procedures specified in Section 308 with that of Section 508 is well taken, and we believe a court would give it considerable weight. As your letter notes, "Section 308 necessitates recommencement of the public notice and other steps if DHEC determines that the changes constitute a new application. In such cases, 'the requirements of Section 301, 302 and 303' must be complied with." By comparison, § 508 simply requires "another review." In Op. S.C. Att'y Gen., 2014 WL 2619140 (May 30, 2014), we advised that such a comparison may be used in the interpretation of an agency's Regulation, as follows:

> [t]hus, because the canons of statutory construction explain that where, as here, a regulation provides multiple factors to evaluate within its text, the omission of others is considered intentional. See Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) ("The canon of construction 'expressio unius est exclusio alterius' or 'inclusio unius est exclusio alterius' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.").

In summary, DHEC's interpretation of § 508 may be based upon comparison with other relevant provisions, as well as § 44-7-560(B), and particularly the flexibility and discretion implied by the use of the term "review" in § 508. The foregoing authorities all support DHEC's interpretation.

CONCLUSION

The term "another review," as employed in Section 508 of R. 61-31 is not defined and is open to interpretation. However, based upon the foregoing authorities, DHEC's construction of "another review" – i.e. that the same degree of review and analysis for application of a COPA is not necessarily required for amendment of an existing COPA – would likely withstand scrutiny by a court. DHEC's interpretation that it possesses the discretion to conduct the review it deems appropriate, based upon the relevant facts – such as the significance of the proposed change or

exigent circumstances – would likely be given considerable deference by the courts as a reasonable interpretation. Moreover, comparison of the language of § 508 of the Regulation with § 308 thereof is striking, indicating that there is considerable difference in the review required pre-COPA approval and that required for a post-COPA amendment. Accordingly, we believe a court would likely conclude that DHEC's interpretation is consistent with the language of § 508, and is consistent with the public health. As the agency charged by the General Assembly with approving, monitoring and enforcing a COPA, as well as protecting the public health, in our judgment, a court would likely afford wide berth to DHEC's interpretation of its own Regulation regarding the meaning of "another review."

As we have consistently advised, "'courts give great deference to an agency's interpretation of its own regulations even in circumstances where there may be more than one interpretation and even if such interpretation is not the one the court would adopt in the first instance.'" Op. S.C. Att'y Gen., 2010 WL 5578961 (December 6, 2010) (quoting other previous opinions). Moreover, as we have noted previously, the term "review" certainly "envisions exercise of discretion." Op. S.C. Att'y Gen., 1996 WL 82894 (January 17, 1996). Here, there are substantial reasons, discussed above, as to why a court would likely give great respect to DHEC's interpretation. Thus we advise that DHEC's interpretation of § 508 would likely be upheld by a court.

Sincerely,

Robert D. Cook
Solicitor General