

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

WOMEN’S MED CENTER OF DAYTON,

CASE NO.: 2016 CV 06088

Appellant,

JUDGE MARY WISEMAN

-vs-

STATE OF OHIO DEPARTMENT OF
HEALTH,

**DECISION, ORDER AND ENTRY
GRANTING APPELLANT WOMEN’S
MED CENTER OF DAYTON’S
EMERGENCY MOTION TO
SUSPEND AND STAY THE ORDER
OF THE OHIO DEPARTMENT OF
HEALTH**

Appellee.

This administrative appeal is before the Court on Appellant Women’s Med Center of Dayton’s [“WMCD”] *Emergency Motion to Suspend and Stay the Order of the Ohio Department of Health from which Appellant Appeals and Memorandum in Support* [“Motion to Stay”], filed on December 2, 2016; and on the *Affidavit of W. Martin Haskell, M.D. in Support of Motion to Suspend and Stay the Order of the Ohio Department of Health* [“Haskell Affid.”], filed on the same date. On December 8, 2016, Appellee Ohio Department of Health [“ODH”] filed its *Memorandum Contra Motion to Stay* [“Memo Opp.”], and on December 9, 2016, Appellant WMCD filed its *Reply to Appellee’s Memorandum Contra Motion to Suspend and Stay the Order of the Ohio Department of Health* [“Reply”].

For the reasons that follow, Appellant Women’s Med Center of Dayton’s *Emergency Motion to Suspend and Stay the Order of the Ohio Department of Health from which Appellant Appeals* is GRANTED.

FACTUAL & PROCEDURAL BACKGROUND/THE PARTIES’ CLAIMS

Women’s Med Center of Dayton is a clinic located in Kettering, Ohio which provides reproductive services, including surgical abortions, to women from across Ohio and beyond. (*Haskell Affid.*, ¶¶1-2, 8); (*Motion to Stay*, attached Jt. Exh. A, “Stipulations of Fact” from administrative hearing, Stipulation #1).¹ WMCD currently is the only facility in the greater Dayton, Ohio area that provides surgical abortions. (*Haskell Affid.*, ¶¶5, 7). WMCD’s medical director, Dr. Martin Haskell, is a physician licensed in Ohio and is the sole shareholder of Women’s Medical Group Professional Corporation, the company that has owned and operated WMCD since 1983. (*Id.*, ¶¶1-3); (*Motion to Stay*, Jt. Exh. A, Stipulations ##1-2).

Beginning in 2002, WMCD was licensed by the Ohio Department of Health as an “ambulatory surgical facility” [“ASF”] in accordance with R.C. § 3702.30(A)(1). (*Motion to Stay*, Jt. Exh. A, Stipulations ##4, 6). R.C. § 3702.303(A) requires any ASF to have

a written transfer agreement with a local hospital that specifies an effective procedure for the safe and immediate transfer of patients from the facility to the hospital when medical care beyond the care that can be provided at the ambulatory surgical facility is necessary, including when emergency situations occur or medical complications arise.

A copy of the relevant written transfer agreement [“WTA”] must be filed with the director of ODH, *id.*, and must be updated every two years. R.C. § 3702.303(B). However, the statute provides an exception to the WTA requirement if the ODH director “has, pursuant to the procedure specified in section 3702.304 of the Revised Code, granted the facility a variance from the requirement.” R.C. § 3702.303(C)(2).

¹ Although a complete transcript of the administrative record has not yet been filed in this case, certain excerpts from that record are appended as exhibits to the parties’ filings herein. (See *Motion to Stay* and *Memo Opp.*).

In 2008, ODH granted WMCD's request for a variance from the WTA requirement. (*Motion to Stay*, Jt. Exh. A, Stipulation #6). The facility's ASF license also was renewed in 2008 and annually thereafter through 2011, based on the 2008 variance. (*Id.*).

In December of 2011, however, ODH notified WMCD that, beginning in 2012, it would be required to apply annually for both renewal of its ASF license and a WTA requirement variance. (*Motion to Stay*, attached Exh. 26 from administrative hearing, affidavit of Dr. Haskell, ¶22).² In 2012, 2013, 2014 and 2015, WMCD filed timely license renewal and variance applications, but not until June 25, 2015, did ODH's director deny WMCD variance requests for 2012, 2013 and 2014. (*Id.*, Exh. 26, ¶¶22-24, 27 and Jt. Exh. A, Stipulation #8). One reason given for that denial was that WMCD's 2013 and 2014 applications included "just two named back-up physicians," whereas three back-up physicians had been listed in the facility's prior applications. (See *Motion to Stay*, attached Exh. 10 from administrative hearing, 6/25/15 denial letter from ODH director, p. 1). The ODH director opined that "two back-up physicians cannot meet [ODH's] expectation for 24/7 back-up coverage and uninterrupted continuity of care, as a WTA with a hospital would provide." (*Id.*). The director gave WMCD 30 days to submit a new variance request or a WTA, absent which ODH "may propose revocation of [WMCD's] ambulatory surgical facility license." (*Id.*, p. 2).

WMCD thereafter submitted a renewed request for a WTA requirement variance for 2014 and 2015, which added a third back-up physician as well as the practice group of the three named physicians and another practice group as additional back-up should those three physicians be unavailable. (*Motion to Stay*, attached Exh. 9 from administrative hearing, 7/24/15 letter from Gerhardstein & Branch, L.P.A., and attachments thereto). After reviewing the renewed application, the ODH director again denied WMCD's variance requests for 2012 through 2015. (*Motion to Stay*, attached Exh. 11 from administrative hearing, 9/25/15 denial letter from ODH director). The director therein stated that "WMC[D]'s provision of three named backup physicians does not meet

² See n.1, *supra*.

my expectation that a variance provide the same level of patient health and safety that a [WTA] with a local hospital assures for 24/7 back-up coverage.” (*Id.*, p. 2). He also reiterated concerns that listing “un-named physicians in [a] group practice” does not satisfy statutory requirements, and that Miami Valley Hospital, “where the three named backup physicians have admitting privileges, has again shared its objection to any involvement with WMC[D].” (*Id.*, p. 2); (see also *Motion to Stay*, attached Exh. 16 from administrative hearing, 7/31/15 letter from Miami Valley Hospital president & CEO to ODH). By separate letter issued on the same date, the ODH director also proposed “to issue an Order revoking and refusing to renew” WMCD’s ASF license due to the facility’s lack of a WTA with a local hospital and ODH’s denial of WMCD’s request for a variance from the WTA requirement. (*Motion to Stay*, attached Exh. 12 from administrative hearing, 9/25/15 revocation letter from ODH director).

Following an April 26, 2016 administrative hearing on ODH’s revocation/non-renewal proposal, the hearing examiner issued a report recommending that WMCD’s ASF license be revoked and not renewed. (*Memo Opp.*, Exh. A, 9/2/16 “Report and Recommendation”). On November 30, 2016, the ODH director issued an “Adjudication Order refusing to renew and revoking WMC[D]’s health care facility [ASF] license” (12/1/16 *Notice of Appeal*, attached Exh. A, 11/30/16 “Adjudication Order,” p. 3), to “become effective fifteen days after the date of this Adjudication Order” (*id.*, p. 4) – *i.e.*, on December 15, 2016. It is from that final administrative decision that Appellant WMCD brings the instant appeal.

In moving to stay implementation of the Adjudication Order, WMCD asserts that it “would suffer an unusual hardship” if that order is executed, in that it “will have to close its business and stop treating patients.” (*Motion to Stay*, p. 1). WMCD contends that it has tried but failed to secure a written transfer agreement with a local hospital, as all local hospitals have religious affiliations and have bowed to “political pressure” that discourages affiliation with a provider of abortion services. (*Id.*, p. 2). WMCD further argues that it can demonstrate all elements necessary to

warrant injunctive relief from enforcement of ODH’s administrative order. (*Id.*, pp. 5-19). Although minimizing the significance of the “success on the merits” element (see *id.*, p. 6), WMCD first argues that it is likely to succeed on this appeal, urging that ODH’s revocation decision relies on an unconstitutional statute and on unenforceable administrative code provisions. (*Id.*, pp. 6-10). In addition, WMCD urges that the ODH director’s decision is not supported by reliable, substantial and probative evidence, as his conclusion that “only three named backup physicians” could not provide an acceptable level of care (see *id.*, Exh. 11, p. 2) is belied by the evidence presented. (*Motion to Stay*, pp. 10-12).

As to the “irreparable harm” element, WMCD cites other Ohio court decisions that have stayed orders against abortion clinics, preserving the *status quo* where “no potential harm to the public was present after the order was issued that was not present prior to the order.” (*Id.*, pp. 12-13 and attached copies of unreported stay orders). Dr. Haskell’s affidavit attesting to the impracticality of reopening WMCD if the surgery center was “mothball[ed]” during the administrative appeal (*Haskell Affid.*, ¶¶5-6), and to the consequences of closure for potential patients (*id.*, ¶¶3, 5, 7-19) and the training of medical students and resident physicians (*id.*, ¶20), also is offered as evidence of the irreparable harm that allegedly would occur. (See *Motion to Stay*, ¶¶13-15). WMCD also maintains that no harm would befall ODH or the public if the facility is permitted to remain open, averring that “the health benefits of the WTA requirement are ‘virtually nonexistent,’” and that the procedures already in place provide sufficient protection if the *status quo* is maintained. (*Id.*, pp. 16-17). Finally, WMCD urges that issuing a stay would serve the public interest by preserving the *status quo* and the availability of safe pregnancy termination services. (*Id.*, p. 18). It thus asks that ODH’s revocation of WMCD’s ASF license be suspended until the appellate process has been completed. (*Id.*, p. 19).

In opposing WMCD’s motion, ODH first focuses on the “unusual hardship” standard, which it insists is not demonstrated by the expected consequences of the loss of a license. (*Memo Opp.*,

pp. 4-7). ODH further argues that WMCD is unlikely to succeed on the merits due to the validity of the WTA requirement and WMCD's failure to acquire either a WTA or a variance. (*Id.*, pp. 7-17). Finally, ODH maintains that consideration of the other equitable factors also would not warrant staying the revocation of WMCD's license, purporting that WMCD's own interest in staying in business "does not outweigh the public interest in having all surgical clinics follow Ohio's health and safety rules," and that any alleged harm to potential patients is "purely speculative." (*Id.*, pp. 17-18) (emphasis in original). ODH therefore concludes that WMCD's request for a stay should be denied. (*Id.*, p. 19).

WMCD's reply avers that ODH misconstrues WMCD's legal arguments. (*Reply*, p. 1). WMCD then repeats and defends its assertions that R.C. § 3509.303 violates the "single subject rule" of the Ohio Constitution; that ODH's decision relies on administrative rules that have been superseded by statute; and that WMCD "ha[s] achieved the purpose of the WTA requirement in an alternative manner by having a contract with three preeminent backup physicians" and other safety provisions in place. (*Id.*, pp. 2-4). It further urges that reliable, substantial and probative evidence does not support the ODH director's determination that WMCD's alternative proposal is inadequate. (*Id.*, p. 4). For those reasons, WMCD maintains that it is likely to succeed on the merits of its appeal. (*Id.*). Finally, WMCD asserts that revocation of WMCD's license presents an undue hardship different from that caused by the revocation of a single physician's license, because no other clinic would be readily accessible to low income women seeking surgical abortions. (*Id.*, p. 5). It again requests a stay of the ODH director's Adjudication Order. (*Id.*).

LAW & ANALYSIS

Law re Stays of Administrative Orders Pending Appellate Review

Applicable law regarding appeals to common pleas courts from administrative licensure decisions is codified at R.C. § 119.12, which authorizes such appeals from any final agency

decision that “is not supported by reliable, probative, and substantial evidence and is not in accordance with law.” See R.C. § 119.12(D). Pursuant to that statute,

The filing of a notice of appeal shall not automatically operate as a suspension of the order of an agency. If it appears to the court that an unusual hardship to the appellant will result from the execution of the agency’s order pending determination of the appeal, the court may grant a suspension and fix its terms.

R.C. § 119.12(E); see also *City of Dayton v. Haddix*, 2nd Dist. No. 9951, 1987 Ohio App. LEXIS 5639, at *4 (Jan. 22, 1987) (quoting same). A stay issued pursuant to such provision prevents the licensing body from denying the benefits of a license to the party granted the stay until the agency’s decision has been reviewed. *Haddix, supra*, at *5 (citing *Lewis v. Ansporn*, 92 Ohio App. 78, 81, 109 N.E.2d 545 (2nd Dist. 1951)). When considering a request to stay an administrative order, courts are to “give significant weight to the expertise of the administrative agency, as well as to the public interest served by the proper operation of the regulatory scheme.” *Bob Krihwan Pontiac-GMC Truck, Inc. v. General Motors Corp.*, 141 Ohio App. 3d 777, 782, 753 N.E.2d 864 (10th Dist. 2001) (citing *Hamlin Testing Labs., Inc. v. United States Atomic Energy Comm’n*, 337 F.2d 221 (6th Cir. 1964)).

Although R.C. § 119.12 does not further define “unusual hardship” nor delineate the factors to be considered in determining whether to suspend operation of an administrative order, the court in *Krihwan Pontiac, supra*, identified the relevant factors as follows:

(1) whether appellant has shown a strong or substantial likelihood or probability of success on the merits; (2) whether appellant has shown that it will suffer irreparable injury; (3) whether the issuance of a stay will cause harm to others; and (4) whether the public interest would be served by granting a stay.

Id., 141 Ohio App. 3d at 783 (citing, *inter alia*, *Hamlin, supra*; *Gurtzweiler v. United States*, 601 F. Supp. 883 (N.D. Ohio 1985); *Holden v. Heckler*, 584 F. Supp. 463 (N.D. Ohio 1984); *Friendship Materials v. Michigan Brick, Inc.*, 679 F.2d 100 (6th Cir. 1982)).

WMCD’s Motion for Stay

Having carefully considered the parties' respective arguments and the competing authority they cite, the Court concludes that Appellant WMCD has demonstrated its entitlement to a stay of the Adjudication Order at issue in this case. The Court finds that the revocation and non-renewal of WMCD's license to operate as an ambulatory surgical facility while this appeal remains pending will pose an unusual hardship to WMCD. See R.C. § 119.12(E). Dr. Haskell's undisputed affidavit credibly attests that if WMCD's surgery center were to be "mothball[ed]" throughout this appeal, the cost of later re-staffing and reopening the clinic would be prohibitive. (*Haskell Affid.*, ¶¶5-6). The Court disagrees with ODH's assertion that such a result amounts to no more than the "typical harms" suffered as a consequence of any license revocation. (See *Memo Opp.*, p. 4). The unreported decisions advanced by ODH regarding requests to stay the suspension of an individual's medical license (see *id.*, Exh. B) are largely inapposite. In contrast to those cases, ODH here proposes to deprive Dr. Haskell of his livelihood not because he personally has engaged in conduct deemed to make him unfit to practice medicine or to pose a threat to patient safety, but rather because his clinic has been deemed to fall short of the ODH director's subjective expectations. This Court does not find those decisions to be persuasive for purposes of the particular license revocation herein at issue. Conversely, the decisions cited by WMCD involve the granting of stays under circumstances comparable to those now before the Court, and are more persuasive for that reason. (See unreported decisions attached to *Motion to Stay*).³

The Court's "unusual hardship" finding is bolstered by consideration of the non-binding⁴ but nonetheless instructive additional factors outlined in *Krihwan Pontiac*, 141 Ohio App. 3d at 783. Consistent with the analysis above, the Court first concludes that WMCD has demonstrated that it

³ Those decisions include *Founder's Women's Health Ctr. v. Dep't of Health*, Franklin Cty. Common Pleas No. 00CV505-4276 (Jun. 14, 2000); *Capital Care Network of Toledo v. Dep't of Health*, Lucas Cty. Common Pleas No. C10201403405 (Aug. 11, 2014); and *Lebanon Road Surgery Ctr. v. Dep't of Health*, Hamilton Cty. Common Pleas No. A1400502 (Jan. 31, 2014).

⁴ The sole Second District Court of Appeals decision found to invoke the term "unusual hardship" contains no substantive discussion of the meaning or application of that terminology. See *Haddix*, 1987 Ohio App. LEXIS 5639.

would suffer “irreparable injury,” the second factor set forth in *Krihwan Pontiac*, if its surgery center is forced to cease operation while this appeal proceeds. See *id.*; (see *Haskell Affid.*, ¶¶4-6).

Additionally, WMCD also convincingly has shown that the closure of its surgical clinic “will cause harm to others,” the third factor, in that Dayton area women seeking a surgical abortion no longer will have access to that procedure locally, and the financial circumstances of many prospective patients may mean that they effectively are foreclosed from obtaining such services at all. See *Krihwan Pontiac*, 141 Ohio App. 3d at 783; (see *Haskell Affid.*, ¶¶5, 7, 11-13, 17). Moreover, because WMCD is one of few facilities to offer termination services beyond the first trimester, potential patients from beyond the greater Dayton area who discover later in pregnancy that their fetus has an anomaly or genetic abnormality also will be negatively impacted by WMCD’s closure (*Haskell Affid.*, ¶¶8-9), and clinics in Cincinnati, Columbus and Cleveland may be unable to expeditiously serve the additional patients diverted from WMCD, causing delays that will increase both the cost and risks of later term abortions. (*Id.*, ¶¶10, 13-16). Indeed, Dr. Haskell’s unrebutted affidavit alludes to even greater public health concerns that may result from the loss of the services that WMCD currently provides. (*Id.*, ¶¶17-18). The Court rejects ODH’s characterization of the risk of harm to women as “purely speculative” (*Memo Opp.*, pp. 17-18), given undisputed evidence that over 2,000 women served by WMCD each year would be forced to pursue other alternatives for pregnancy termination services if WMCD no longer provided such services. (See *Haskell Affid.*, ¶3; *Motion to Stay*, attached Exh. 26, Dr. Haskell affidavit from administrative hearing, ¶5).⁵ The evidence supports a conclusion that revoking WMCD’s license will cause harm to prospective patients.

In light of the foreseeable potential consequences of shuttering WMCD’s surgical center, the fourth *Krihwan Pontiac* factor – *i.e.*, “whether the public interest would be served by granting a stay,” 141 Ohio App. 3d at 783 – also is satisfied. As WMCD aptly observes, suspending execution

of the Adjudication Order “would merely preserve the *status quo*” (*Motion to Stay*, p. 1), meaning that no risk to public health will arise from the surgery center’s continued operation that has not existed throughout the entire four years that WMCD’s 2012 request for a variance was pending, until ODH issued its final Adjudication Order decision on November 30, 2016. (*Id.*, pp. 16-17). The fact that ODH saw no need to act more expeditiously on WMCD’s variance application reinforces the impression, as captured in the again-uncontested evidence presented by Dr. Haskell, that no reason exists to believe that WMCD had been operating in an unsafe manner. (See *Haskell Affid.*, ¶¶3, 7, 9, 15); (see also *Motion to Stay*, attached Exh. 26, Dr. Haskell affidavit from administrative hearing, ¶¶6, 12).⁶ The Court therefore concludes that granting a stay would serve the public interest in this instance.

Finally, the Court is persuaded by WMCD’s arguments regarding the likelihood of its success on the merits of this appeal. (See *Motion to Stay*, pp. 6-12 and *Reply*, pp. 2-4). Significantly, one Ohio appellate court already has held that the licensing provisions of R.C. §§ 3702.303, 3702.304 and 3727.60 are unconstitutional. See *Capital Care Network of Toledo v. Dep’t of Health*, 2016-Ohio-5168, 58 N.E.3d 1207 (6th Dist.). In the absence of an Ohio Supreme Court reversal of that decision, this Court finds the Sixth District’s opinion to constitute sufficient indicia of WMCD’s probable success on its comparable arguments. Alternatively, the Court agrees that the ODH hearing examiner apparently premised his revocation and non-renewal recommendation in part on outdated administrative code provisions that had been supplanted by the 2015 enactment of R.C. § 2702.304’s variance provisions. (See *Motion to Stay*, pp. 8-10 and *Reply*, pp. 3-4); (see *Memo Opp.*, attached Exh. A, Report and Recommendation, pp. 1, 4, 7, 8-9, 10-11). The Court also does not accept ODH’s assertion that the ODH director’s decision to deny a WTA variance is “final” and thus “not subject to review” (*Memo Opp.*, p. 15) even if that decision “is not

⁵ Those affidavits recite the number of surgical abortions performed at WMCD in 2015-16 and 2014-15, respectively, as “over 2,262” and “over 2600.”

supported by reliable, probative, and substantial evidence and is not in accordance with law.” See R.C. § 119.12(D). The Court also believes there is merit to WMCD’s contention that the ODH director’s final decision is not supported by reliable, probative and substantial evidence. (*Memo Opp.*, pp. 10-12 and *Reply*, p. 4). For all of these reasons, WMCD’s request for a stay is well taken.

CONCLUSION

For the foregoing reasons, Appellant Women’s Med Center of Dayton’s *Emergency Motion to Suspend and Stay the Order of the Ohio Department of Health from which Appellant Appeals* hereby is GRANTED, and the November 30, 2016 “Adjudication Order” of the Director of the Ohio Department of Health, which refused to renew and revoked Appellant’s ambulatory surgical facility license effective December 15, 2016, hereby is STAYED and execution thereon on is SUSPENDED pursuant to R.C. § 119.12 pending a final decision on Appellant’s appeal from that order.

SO ORDERED:

JUDGE MARY WISEMAN

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⁶ That earlier affidavit addresses the safety of abortion procedures in general as well as WMCD’s own history regarding post-procedure complications.

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General Division
Montgomery County Common Pleas Court
41 N. Perry Street, Dayton, Ohio 45422

Type: Decision
Case Number: 2016 CV 06088
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DEPARTMENT OF HEALTH

So Ordered

May Wiseman