



OHIO DEPARTMENT OF HEALTH

246 North High Street
Columbus, Ohio 43215

614/466-3543
www.odh.ohio.gov

John R. Kasich / Governor

Theodore E. Wymyslo, M.D. / Director of Health

January 17, 2014

Martin Haskell, M.D.
Lebanon Road Medical Building, LLC
dba Lebanon Road Surgery Center
P.O. Box 43100
Cincinnati, Ohio 43243

**Re: Lebanon Road Surgery Center Adjudication Order
License No. 0980AS**

Dear Dr. Haskell:

Enclosed please find a copy of the Director of Health's Adjudication Order in the matter of the proposed revocation and non-renewal of the ASF license for Lebanon Road Surgery Center.

Please call me at (614) 466-4882, if you have any questions about this matter.

Sincerely,


Heather Coglianese
Senior Counsel

C: Jennifer Branch, Esq. CMRRR: 7012 1640 0000 4512 9127
Rebecca Maust, Chief, Division of Quality Assurance
Melinda Snyder, Assistant Attorney General

CMRRR: 7012 2630 0002 1125 2856



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IN THE MATTER OF:

Lebanon Road Medical Building, LLC
dba Lebanon Road Surgery Center
c/o Martin Haskell, M.D.
P.O. Box 43100
Cincinnati, Ohio 43243

License No. 0980AS

ADJUDICATION ORDER

By letter dated October 19, 2012, Lebanon Road Medical Building, LLC was notified that the Director of Health ("Director") proposed to issue an order refusing to renew Lebanon Road Surgery Center's ("LRSC") health care facility license (ambulatory surgical facility) in accordance with Chapter 119 of the Revised Code, section 3702.32(D)(2) of the Revised Code ("R.C."), and Ohio Administrative Code ("OAC") rule 3701-83-05.1(C)(2) due to a violation of paragraph (E) of OAC rule 3701-83-19, which requires ambulatory surgical facilities to obtain a written transfer agreement with a hospital for the transfer of patients in the event of medical complications, emergency situations, and for other needs as they arise.

By letter dated November, 23, 2012, Lebanon Road Medical Building, LLC was notified that the Director proposed to issue an order revoking LRSC's health care facility license (ambulatory surgical facility)) in accordance with Chapter 119 of the Revised Code, section 3702.32(D)(2) of the Revised Code ("R.C."), and Ohio Administrative Code ("OAC") rule 3701-83-05.1(C)(2) due to a violation of paragraph (E) of OAC rule 3701-83-19. I now order that license revoked and not renewed, as detailed below.

Procedure, hearing, and decision

Both letters notified LRSC that it was entitled to a hearing regarding the proposals to refuse to renew and/or revoke the health care facility license if a hearing was requested within thirty (30) days of receipt of the notice. LRSC requested a hearing by letters dated October 31, November 1, and November 29, 2013.

The administrative hearing was held on September 6, 2013. (It had been scheduled twice before, for June 10-12, 2013 and July 22-23, 2013, and was continued upon LRSC's request.) Hearing Examiner William J. Kepko presided over the hearing. Appearing on behalf of LRSC were W. Martin Haskell, M.D. and Valerie Haskell. LRSC was

represented by attorney Jennifer L. Branch of Gerhardstein & Branch. Appearing on behalf of the department was Tamara Malkoff. The department was represented by Melinda Ryans Snyder and Tara L. Paciorek, Office of the Ohio Attorney General.

The parties filed joint stipulation of facts on September 16, 2013. The department, through its attorney, filed its Post Hearing Brief on September 23, 2013. LRSC, through its attorney, filed its Post-Trial Brief and Proposed Findings of Fact and Conclusions of Law on September 23, 2013. The department, through its attorney, filed its Rebuttal Brief on September 30, 2013. LRSC, through its attorney, filed its Reply Brief on September 30, 2013.

The Hearing Examiner's October 8, 2013 Report and Recommendation was received by the Department on October 10, 2013. By letter sent via email dated October 11, 2013, the department transmitted the Report and Recommendation to attorney Jennifer L. Branch and informed LRSC that it may file written objections to the Report and Recommendation within ten days of date of receipt of the letter. In addition, the letter provided that the Objections shall be considered by the Director before approving, modifying, or disapproving the Report and Recommendation. LRSC, through its attorney, submitted objections to the Report and Recommendation via email on October 21, 2013.

By letter dated January 17, 2014, I refused to grant LRSC's October 8, 2012 request for a variance to OAC rule 3701-83-19, which requires all ambulatory surgical facilities to have a written transfer agreement with a hospital for the transfer of patients in the event of medical complications, emergency situations, and for other needs as they arise. Pursuant to OAC 3701-83-14, the refusal to grant a variance, in whole or in part, shall be final and shall not be construed as creating any rights to a hearing under Chapter 119. of the Revised Code.

Upon consideration of the file, exhibits admitted in the administrative hearing, joint stipulations, post-hearing briefs, hearing examiner's Report and Recommendation, LRSC's Objections to Report and Recommendation, LRSC's Request for Additional Evidence and the department's response, I hereby approve the hearing examiner's Report and Recommendation. Specifically, I approve and adopt Findings of Fact Nos. 1-33 and Conclusions of Law Nos. 1-8. Conclusions of Law Nos. 9 and 10 contain typographical errors in the Revised Code citations. I hereby modify and adopt Conclusions of Law Nos. 9 and 10 to correctly reference R.C. Section 3702.30.

The hearing examiner's Report and Recommendation found that, as of the date of the hearing, LRSC did not have a written transfer agreement as required by 3701-83-19(E). The hearing examiner concluded that because LRSC does not have a written transfer agreement or a variance, it does not meet the licensing requirements. The hearing

examiner further concluded that because LRSC does not meet the licensing requirements of R.C. Section 3702.30, the Director's decision not to renew, or to revoke the license of LRSC, is valid. Based upon these findings, and in accordance with R.C. 3702.32, R.C. Chapter 119, and OAC 3701-83-19(E), I hereby issue this Adjudication Order refusing to renew and revoking LRSC's 2012-2013 health care facility license No. 0980AS.

Your right to appeal and to seek a stay pending appeal

If you wish to appeal this final adjudication order, you must file a notice of appeal with the Ohio Department of Health, Office of General Counsel, 246 North High Street, Seventh Floor, Columbus, Ohio 43215, setting forth the order appealed from and stating that the Department's order is not supported by reliable, probative, and substantial evidence and not in accordance with law. The notice of appeal may, but need not, set forth the specific grounds of the party's appeal beyond the statement that the Department's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. You must also file the notice of appeal in the court of common pleas of the county in which the place of business of the licensee is located or the county court of common pleas where the licensee resides. In filing a notice of appeal with the Department or court, the notice that is filed may be either the original notice or a copy of the original notice.

A notice of appeal must be filed within fifteen (15) days after the mailing of the notice of the Department's order as provided in R.C. section 119.12. You may, of course, file any appeal immediately, and need not wait until the end of the fifteen-day period.

Further, as noted in the Department's October 23, 2012 letter to your attorney Jennifer L. Branch, R.C. section 119.12 authorizes the court of common pleas to stay any adjudication order while the case is pending.

Effective date to allow for orderly closure or other process

To ensure that this order does not affect patient health and safety and to allow for orderly closure, this order shall become effective for enforcement purposes on February 4, 2014. Please note that the February 4th date does not affect the deadline for appeal, which remains fifteen (15) days from the date of mailing of this order, pursuant to R.C. section 119.12.

Date 1/17/2014

Theodore E. Wymyslo, M.D.
Director of Health

I hereby certify this to be a true and correct copy of the Journal Entry of the Director of the Ohio Department of Health.

Date 1/17/2014

Michelle L. Jarrett
Custodian of the Director's Journals
Ohio Department of Health



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JAN 17 2014

Jennifer L. Branch, Esq.
Gerhardstein & Branch
432 Walnut Street, Suite 400
Cincinnati, Ohio 45202

VIA FACSIMILE & REGULAR MAIL

Re: Denial of Request for Variance to Hospital Transfer Agreement Requirement
Lebanon Road Surgery Center, License No. 0980AS

Dear Ms. Branch:

By letter dated October 8, 2012 on behalf of Lebanon Road Medical Building, LLC and Women's Med Group Professional Corporation, the owner and operator of Lebanon Road Surgery Center ("LRSC"), you requested a variance to the written transfer agreement requirement set forth in paragraph (E) of Ohio Administrative Code ("OAC") rule 3701-83-19. For the reasons below, I am denying that request.

Rule 3701-83-19(E) requires all ambulatory surgical facilities to have a written transfer agreement with a hospital for transfer of patients in the event of medical complications, emergency situations, and for other needs as they arise. Pursuant to OAC rule 3701-83-14(A), the Director of Health may grant a variance or waiver from any building or safety requirement established by Chapter 3701-83 of the Administrative Code, unless the requirement is mandated by statute. OAC rule 3701-83-14(C) further provides that, upon written request, the Director may grant a variance if the director determines that the requirement has been met in an alternative manner.

I have carefully considered LRSC's request pursuant to the department's *November 17, 2011 Operational Procedure: Variance Request Processing, Ambulatory Surgical Facility Transfer Agreement Requirement* and OAC rule 3701-83-14. I have also carefully considered the information that LRSC presented at the September 6, 2013 licensure hearing regarding its variance request. I have also considered LRSC's October 23, 2013 letter and materials supplementing its October 8, 2012 request.

A variance is an exception to or deviation from the applicable rule, so I expect that any variance be strictly adhered to and prudently managed to ensure the purpose and intent of the rule are being met in an alternate manner. I also expect that any facility granted a variance will meet its obligation to keep the department continually updated on any circumstance that could affect the approved variance.

As I indicated in prior correspondence, LRSC's past failure to timely communicate and request approval for changes to the previously approved variance worried me that conditions at the facility while operating under the variance could not be adequately monitored to ensure patient safety. LRSC's failure

to timely communicate and request approval for the addition of two back-up physicians in January 2012 caused me serious concern. The previously granted variance was expressly conditioned on the service of particular named back-up physicians, and LRSC did not inform the department of the two new back-up physicians until May, 2012. Further, LRSC's failure to timely notify the department of credentialing and disciplinary issues related to its back-up physicians caused me serious concern. These issues could have directly affected the ability to have back-up physicians available, without interruption, to admit patients in order to provide for the timely and effective continuity of care in the event of an emergency.

The basis for my concerns was confirmed, rather than alleviated, by the testimony offered at the September 6, 2013 license hearing, at which LRSC had the opportunity to provide additional evidence in support of the requested variance. That testimony confirmed that LRSC did not meet my standards regarding its ability or commitment to managing a variance to the requirement for a written transfer agreement. For example, at the hearing, LRSC admitted that although it had checked the status of proposed back-up physicians in the past, it did not check one physician's license profile with the State Medical Board. LRSC also admitted that it failed to verify with the hospital the extent of one back-up physician's admitting privileges. At the hearing LRSC also engaged in semantics as to whether the additional two physicians were "substitutes" or "back-up" physicians when their contracts were identical to those of the named back-up physicians—as if the distinction eliminated the need for LRSC to comply with the terms of the 2011 variance or the requirement to notify the department of any proposed deviations from the approved variance.

OAC rule 3701-83-14 provides that all variance requests shall be considered on a case-by-case basis. In addition, the decision to grant or deny a variance is within my discretion and a responsibility that I take very seriously. Any doubts as to whether any variance applicant, including LRSC, can strictly adhere to the terms of a variance and prudently manage a variance must be resolved in favor of ensuring patient safety and continuity of care. Accordingly, I hereby deny LRSC's request for a variance to the requirement for a written transfer agreement.

Sincerely,



Theodore E. Wymyslo, M.D.
Director of Health

cc: Rebecca Maust, Chief, Division of Quality Assurance
File