

Before the
Administrative Hearing Commission
State of Missouri



REPRODUCTIVE HEALTH SERVICES)
OF PLANNED PARENTHOOD OF THE)
ST. LOUIS REGION,)
)
Petitioner,)
)
vs.)
)
DEPARTMENT OF HEALTH AND)
SENIOR SERVICES,)
)
Respondent)

No. 19-0879

ORDER

We grant the motion for stay filed by Reproductive Health Services of Planned Parenthood of the St. Louis Region (RHS).

Procedure

On June 21, 2019, the Department of Health and Senior Services (DHSS) issued a denial of RHS' application to renew its abortion facility license. On June 24, 2019, the Missouri Circuit Court, 22nd Judicial Circuit issued a preliminary injunction (PI) that extended RHS' license until June 28, 2019 at 5:00 p.m. Also on June 24, 2019, RHS filed a complaint appealing DHSS' denial of its renewal application. On June 25, 2019, RHS filed a motion for stay. On June 26, 2019, DHSS filed suggestions in opposition to the motion. On June 28, 2019, RHS filed a reply in support of its motion.

Analysis

This Commission has jurisdiction to hear RHS' complaint.¹ A stay preserves the *status quo* pending resolution of the case.² The *status quo* represents the last non-contested condition preceding the pending controversy.³ By virtue of the PI issued by the 22nd Judicial Circuit, RHS holds an effective abortion facility license. The statute governing our authority to grant a stay is in § 621.035, which provides in part:

The administrative hearing commission may stay or suspend any action of an administrative agency pending the commission's findings and determination in the cause. The administrative hearing commission may condition the issuance of such order upon the posting of bond or other security in such amount as the commission deems necessary to adequately protect the public interest.

Consistent with that statute, 1 CSR 15-3.320(1) provides:

(1) Scope and Content. The commission may stay or suspend any action of an administrative agency pending the commission's findings and determination in the cause.

(A) All motions for stay of the action from which petitioner is appealing shall be in writing.

(B) The movant shall include in the motion:

1. The full name, address and telephone number of movant, any attorney representing movant and the respondent;
2. Suitable space in the caption for the commission to affix a case number;
3. A clear heading, Motion for Stay;
4. Facts showing why the commission should grant the stay, set forth in numbered paragraphs, each of which shall contain, as far as practical, a single set of circumstances; and

¹ Section 197.221. Statutory references are to RSMo 2016, unless otherwise noted.

² See *Katz v. Anheuser-Busch, Inc.*, 347 S.W.3d 533, 547-48 (Mo. App. E.D. 2011) (stay serves purpose of preserving status quo).

³ *State on Inf. of McKittrick v. Americans Ins. Co.*, 173 S.W.2d 51, 52 (Mo. banc 1943).

5. A copy of any written notice of the action from which the petitioner is appealing.

(C) The movant or movant's legal counsel shall sign the motion.

“May” means an option, not a mandate.⁴ The determination of whether a stay of an agency’s decision is warranted must be based on a balancing of four factors:

- (1) the likelihood that the party seeking the stay will prevail on the merits;
- (2) the likelihood that the moving party will be irreparably harmed absent a stay;
- (3) the prospect that others will be harmed if a stay is granted; and
- (4) the public interest in granting a stay.⁵

The party seeking a stay must provide evidence as to each of these factors.⁶ It is the movant’s burden to justify the exercise of such an extraordinary remedy.⁷ The movant must show that the probability of success on the merits and irreparable harm decidedly outweigh any potential harm to the other party or to the public interest if a stay is issued.⁸ In this order, we consider these four factors in turn.⁹

Likelihood of Success on the Merits

A “likelihood of success” does not assure that a movant will ultimately prevail. Rather, it connotes an evaluation of the merits of the movant’s position.¹⁰ This inquiry should not involve rigid formulations or require exact certainty of an outcome.¹¹

Section 197.215 provides that DHSS shall renew a license to an abortion facility that meets the requirements established in Chapter 197. DHSS may deny an application for renewal if it finds

⁴ *S.J.V. ex rel. Blank v. Voshage*, 860 S.W.2d 802, 804 (Mo. App. E.D. 1993).

⁵ *State ex rel. Director of Revenue v. Gabbert*, 925 S.W.2d 838, 839-40 (Mo. banc 1996).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ DHSS requested an opportunity for a hearing to present oral argument on RHS’ motion for stay. Pursuant to 1 CSR 15-3.320(3), this Commission may grant such a request in its discretion. Both parties have filed detailed briefs that clearly outline their positions along with multiple exhibits that sufficiently detail the factual underpinning of these claims. Because of the detail and clarity of these filings, we see no need for a hearing.

¹⁰ *See D.M. by Bao Xiong v. Minnesota State High Sch. League*, 917 F.3d 994, 1000 (8th Cir. 2019).

¹¹ *See Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981).

a “substantial failure” to comply with those requirements, if the applicant or its affiliate persons have been found guilty of certain crimes, or if the applicant’s licensure status or records indicate granting a license would be detrimental to the public interest.¹² In this case, DHSS denied RHS’ application under the first provision, specifically:

[DHSS] finds—based on serious, extensive unresolved deficiencies cited in the [Statement of Deficiencies] and the absence of an acceptable corrective-action plan from RHS with respect to those deficiencies—that there has been a substantial failure to comply with the requirements of sections 197.200 to 197.240 RSMo. The Department therefore denies RHS’s application for a license renewal. This denial does not preclude RHS from submitting an application for license at any time, provided outstanding deficiencies are resolved.^{13]}

DHSS’ June 21, 2019 denial letter outlines five specific violations to support its denial.

We summarize those violations as follows:

- RHS failed to cooperate with DHSS’ investigation by failing to procure interviews with medical staff that provided patient services at RHS.
- Two failed abortions occurred at RHS. This fact in conjunction with RHS’ failure to procure interviews of treating physicians means that RHS failed to provide assurances that such failures will not be repeated.
- RHS disregarded guidance from the American College of Obstetricians and Gynecologists (ACOG) by performing abortion services on a patient while unprepared for the possibility that said patient may have suffered severe hemorrhaging at RHS’ facility. This fact in conjunction with RHS’ failure to procure interviews of treating physicians means that RHS failed to provide assurances that such failures will not be repeated.
- In two instances, RHS failed to comply with § 188.027 in that physician(s) who did not perform patients’ abortions delivered statutory informed consent disclosures. RHS refused to accept these instances as deficiencies and failed to provide assurance that those failures will not be repeated.
- In one instance, RHS failed to document a failed abortion as a complication in an individual abortion report as required by § 188.052 and consequently failed to submit a complication report for this instance as required by 19 CSR 30-30.060(3)(H). This failure resulted from an “inaccurate pelvic examination.”¹⁴ RHS refused to accept this instance as a deficiency and failed to provide assurance that such failures will not be repeated.

¹² Section 197.220.

¹³ Ex. D to Sugg. in Opp. at 4.

¹⁴ *Id.*

RHS argues that it submitted a complete renewal application that met all requirements for licensure and that DHSS possesses neither a legal basis nor substantial evidence to support its grounds for denial. RHS specifically argues that Chapter 197 and DHSS regulations do not require it to procure the interviews DHSS requested.

Three of DHSS' five stated failures rest, in whole or in part, on the absence of physician interviews. DHSS argues RHS must procure these interviews. In support of this position, DHSS cites § 197.230.1, RSMo Supp. 2018:

The department of health and senior services *shall make, or cause to be made, such inspections and investigations as it deems necessary.* The department may delegate its powers and duties to investigate and inspect ambulatory surgical centers or abortion facilities to an official of a political subdivision having a population of at least four hundred fifty thousand if such political subdivision is deemed qualified by the department to inspect and investigate ambulatory surgical centers. The official so designated shall submit a written report of his or her findings to the department and the department may accept the recommendations of such official if it determines that the facility inspected meets minimum standards established pursuant to sections 197.200 to 197.240.

(Emphasis added).

DHSS interprets this section to provide broad authority to conduct investigations in the manner it deems fit. DHSS reads this authority together with 19 CSR 30-30.050(2)(I), which provides:

No license shall be issued or renewed by the department until the department has inspected the facility and determined that it is in compliance with all requirements of applicable regulations and statutes.

In DHSS' interpretation, these provisions mean that it must deny RHS' application because it cannot determine RHS complied with applicable statutes and regulations without the interviews it seeks. At this point, we find DHSS' position unpersuasive.

Our review of the applicable statutes and rules finds no provision that affirmatively provides an obligation for DHSS to make, or RHS to procure, such interviews. As stated in the 22nd Judicial Circuit’s first PI, “to the extent that Respondents are relying upon 19 C.S.R. 30-30.050(2)(I) to indefinitely delay the decision or official action on Petitioner’s application for renewal of its license, it appears that regulation conflicts with the procedure identified in Chapter 197 for licensing of abortion facilities.”¹⁵ Similarly, we find that to the extent DHSS relies on 19 CSR 30-30.050(2)(I) to provide an affirmative cause to deny licensure for failure to procure physician interviews, we find it conflicts with Chapter 197. That regulation provides only that DHSS must inspect an abortion facility and determine compliance with regulations and statutes before issuing a license. Section 197.230 requires DHSS to make or cause investigations to be made as it sees fit, but provides no explicit authority for what those investigations must entail. We find nothing to preclude DHSS from making inferences from the absence of these interviews as it has in this case. However, the absence of these interviews in itself does not constitute a failure to comply with licensure requirements.

Although DHSS has cited two other failures to comply with Chapter 197 and its pertinent regulations, the crux of its finding of cause to deny RHS’ license lies in its failure to procure interviews. In DHSS’ own words:

The troubling incidents of patient care under review in this case, while serious, are the sorts of incidents that can and should be addressed through the regulatory process without resulting in a non-renewal. Indeed, in this very case, RHS and the Department have managed to resolve every deficiency for which the non-cooperation of RHS and its physicians did not obstruct its resolution. *The non-cooperation of RHS and its physicians thus*

¹⁵ *Reproductive Health Services v. Parson*, No. 1922-CC02395, Order dated June 10, 2019.

presents the final, critical obstacle preventing the renewal of RHS's license.^{16]}

(Emphasis added). Because DHSS relies substantially on the lack of these interviews as grounds for denial, we find there is a likelihood that RHS will succeed in its claim.

Threat of Irreparable Harm

RHS argues it will suffer irreparable harm because it will lose its license as an abortion facility. DHSS does not dispute that RHS will suffer actual harm. Instead, DHSS argues this harm is of RHS' own making by virtue of its failure to procure physician interviews. It is true that parties cannot claim a threat of irreparable harm based on an "injury of their own making."¹⁷ But as discussed above, we find nothing in Chapter 197 or DHSS' regulations that would authorize cause for denial based on the absence of these interviews. Therefore, we find that RHS would suffer irreparable harm if a stay is not issued.

Balancing Harms

DHSS argues that granting a stay would effectively end administrative regulation of all licensees in the Missouri. Because a stay merely maintains the *status quo*, and is not a ruling on the merits, we cannot say that the harm to other interested parties would be greater if the stay is granted. Furthermore, this Commission's decisions do not have precedential authority.¹⁸ Therefore, we do not believe this stay will effectively end administrative regulation of all licensees in Missouri.

Public Interest in Granting a Preliminary Injunction

The issue of abortion entails great public interests for opponents and proponents. However, the only issue before us at this time is a motion to stay the expiration of a statutory license. Consequently, the public interest of our concern is the procedural due process of licensees to

¹⁶Sugg. in Opp. at 25-26.

¹⁷ See *Long by Long v. Robinson*, 432 F.2d 977, 981 (4th Cir. 1970).

¹⁸ *Central Hardware Co. v. Director of Revenue*, 887 SW.2d 593, 596 (Mo. banc 1994).

appeal the decisions of regulatory bodies. We find that granting this stay sufficiently protects that interest.

Summary

We grant the motion for stay. RHS has an active license that shall remain in effect for the pendency of RHS' case at this Commission. To expeditiously address the merits of RHS' complaint, we have set the hearing for August 1, 2019.

SO ORDERED on June 28, 2019.

SREENIVASA RAO DANDAMUDI
Commissioner