FINAL ORDER

COPY

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

GEORGIA EMS AMBULANCE SERVICE, INC.,	:	
Petitioner,	:	
	:	CIVIL ACTION FILE NO.2013CV229494
v.	:	
GEORGIA DEPARTMENT OF PUBLIC HEALTH, OFFICE OF EMERGENCY MEDICAL SERVICES AND TRAUMA,	:	
Respondent.	:	

ORDER AFFIRMING FINAL AGENCY DECISION

On April 5, 2013, Petitioner filed with this Court a Petition for Judicial Review and Motion to Stay pursuant to section 50-13-19 of the Official Code of Georgia Annotated ("Georgia Code") for review of the administrative decision issued on January 17, 2013 by the Office of State Administrative Hearings ("OSAH") and affirmed by the Georgia Department of Public Health's (the "Department") agency reviewer. Petitioner seeks review of a decision of the Department to impose upon Petitioner a fine of $6,000 and imposition of probation for a one year period. On April 23, 2013, the record was filed in this matter, and both parties submitted briefs in support of their positions. This Court heard argument on November 5, 2013 and took the matter under advisement.

STANDARD OF REVIEW

This Court's review of the Department's decision is "'appellate in nature.'" *Georgia Pub. Serv. Comm'n v. Southern Bell*, 254 Ga. 244, 246 (1985) (quoting *Howell v. Harden*, 231 Ga. 594 (1973)). Thus, this Court must affirm the decision below if there is any evidence to support it, unless it was affected by error of law. *See* O.C.G.A. § 50-13-19(h). Furthermore, this Court's review shall be confined to the administrative record. *See* O.C.G.A. § 50-13-19(g). "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." O.C.G.A. § 50-13-19(h). The scope of judicial review is limited to those objections, which were presented to the agency. *See Georgia Pub. Serv. Comm'n v. Southern Bell*, 254 Ga. at 247.

When a superior court reviews a final decision of an agency, the appropriate standard of review is whether the agency's decision was, "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." O.C.G.A. § 50-13-19(h)(5). This "clearly erroneous" standard has been held to be the same as the "any evidence rule" which leaves "only a determination of whether the facts found by the [agency] are supported by 'any evidence.'" *Atlanta Gas Light Co. v. Georgia Pub. Serv. Comm'n*, 212 Ga. App. 575, 579 (1994) (quoting *Hall v. Ault*, 240 Ga. 585, 586 (1978)).

As to alleged errors of law, this Court reviews conclusions of law *de novo*.

See O.C.G.A. § 50-13-19(h); *Municipal Elec. Auth. of Ga. v. Georgia Pub. Serv. Comm'n*, 241 Ga. App. 237, 239 (1999); *St. Joseph's Hosp. v. Thunderbolt Health Care*, 237 Ga. App. 454, 456 (1999); *Georgia Dep't of Agric. v. Brown*, 270 Ga. App. 646, 649 (2004). However, this Court may reverse or modify the administrative decision only if substantial rights of Petitioner were prejudiced by one of the defects listed in section 50-13-19(h). *Georgia Dep't of Cmty. Health v. Medders*, 292 Ga. App. 439, 440 (2008) (citing OCGA § 50-13-19 (h)).

The interpretation of a statute by an administrative agency that has the duty of enforcing or administering said statute is to be given great weight and deference. *See Municipal Elec. Auth. of Ga v. Georgia Pub. Serv. Comm'n*, 241 Ga. App. at 239; *St. Joseph's Hosp., Inc. v. Thunderbolt Health Care*, 237 Ga. App. at 457-58; *North Georgia E.M.C. v. City of Calhoun*, 195 Ga. App. 382, 384 (1991); *Chevron USA, Inc. v. Natural Res. Defense Council*, 467 U.S. 837, 844-45 (1984); *United States v. Larionoff*, 431 U.S. 864, 872 (1977). The agency responsible for enforcement and administration of an act is in a better position than the courts to determine the appropriate extent of regulation under that act. Further, in construing administrative rules, the "ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the rule." *Atlanta Journal & Constitution v. Babush*, 257 Ga. 790, 792 (1988).

Pursuant to section 31-11-1(a)(4) of Georgia Code, the Department has the authority to oversee the emergency medical systems of the State of Georgia. In particular, the General Assembly declared that, in the exercise of the sovereign powers of the state to safeguard and protect the public health and general well-being of its citizens, it is the public policy of this state to encourage, foster, and promote emergency medical systems communications programs and that such programs shall be accomplished in a manner that is coordinated, orderly, economical, and without unnecessary duplication of services and facilities. *See* O.C.G.A. § 31-11-1(b).

Pursuant thereto, the Department has the authority on behalf of the state to designate and contract with a public or nonprofit local entity to coordinate and administer the Emergency Medical Systems Communications Program ("EMSC Program") for each health district designated by the Department. *See* O.C.G.A. § 31-11-3(a). The local coordinating entity is responsible for recommending to the board or its designee the manner in which the EMSC Program is to be conducted. In making its recommendations, the local coordinating entity must give priority to making the EMSC Program function as efficiently and economically as possible.

EMSC Program means "any program established pursuant to Public Law 93-154..., which serves as a central communications system to coordinate the personnel, facilities, and equipment of an emergency medical services system."

O.C.G.A. § 31-11-2(8). The local coordinating entity shall "request from each licensed ambulance provider in its health district a written description of the territory in which it can respond to emergency calls," and the local coordinating entity then recommends to the Department the "territories within the health district to be serviced by the ambulance providers." O.C.G.A. §§ 31-11-3(b) & (c). When zoning is opened, the local coordinating entity sends a letter to all the ambulance providers within each health district to seek what service they can provide, response times and projected response times. Local governments can ask for a zoning plan to be opened. "The recommendations of the local coordinating entity shall not be modified unless the board or its designee shall find, after a hearing, that the determination of the district health director is not consistent with operation of the EMSC Program in an efficient, economical manner that benefits the public welfare." O.C.G.A. § 31-11-3(e).

After the Department makes its final decision, the local coordinating entity "shall begin administering the EMSC Program in accord with the decision" of the Department. O.C.G.A. § 31-11-3(f). The Department is "authorized to enforce compliance with this chapter, including but not limited to compliance with the EMSC Program and furnishing of emergency services within designated territories." O.C.G.A. § 31-11-9.

Under the Department's regulations, ambulance providers are to comply at

all times with the provisions of Chapter 31-11. Department R. and Reg. 511-9-2-.18(1). Pursuant to Department R. and Reg. 511-9-2-.19, the Department is to revoke the license of any provider who fails to comply with the approved zoning plan, but it may impose a lesser sanction. The only exceptions to transporting a patient by a non-designated zone provider when a zone provider is dispatched, are (1) if the zone provider is canceled by the appropriate dispatching authority and the zone provider approves the cancellation; or (2) medical control determines the patient's condition is life-threatening or subject to significant and rapid deterioration based upon the estimated arrival time of the zone provider. Department R. and Regs. 511-9-2-.07. Otherwise, an ambulance provider is to stabilize the patient until the designated zone provider arrives.

The Department also regulates the "reasonable health, sanitation, and safety standards" for the transportation of patients in ambulances, including the criteria for the training of ambulance attendants. O.C.G.A. § 31-11-5. To that end, "[n]o person shall operate an ambulance service in this state without having a valid license" issued by the Department. O.C.G.A. § 31-11-30. Further, all ambulance services shall act in compliance with the Department's rules and regulations. *See* O.C.G.A. § 31-11-34.

FINDINGS OF FACT

The record in this matter shows an OSAH administrative law judge ("ALJ")

held a two day hearing and at the conclusion thereof, affirmed the Department's sanction. The Department's agency reviewer wholly adopted the OSAH ALJ's decision and this Court hereby adopts all of the factual findings thereof.

In particular, the ALJ found the creation of a statewide zoning plan was a response to the chaos, which existed through the 1970s. Ambulances would stage at certain locations and in some cases monitor radios or scanners hoping to hear that a competing service had been dispatched and literally race to the call, creating public safety issues. Then at the scene, there would be disputes over which ambulance carrier would transport the patient to the hospital. To address this serious public health and safety risk, the Georgia General Assembly enacted ambulance zoning laws. Zoning plans were put in place in every county as it was not in the public's best interest to have multiple ambulances speeding unnecessarily to the scene of a single emergency.

In this matter, MetroAtlanta Ambulance Service ("Metro") has provided ambulance services within Cobb County since 2001. They are the designated provider for EMS Council Region 3 Battalions 3, 4, and 5, which encompasses northern Cobb County. The EMS Council Region 3 reapproved the plan in 2010. As such, Metro is to receive all emergency calls for the area at issue. There is no other provider designated for that area.

Petitioner is a licensed Georgia ambulance service provider. From January

to May 2012, the period at issue, Petitioner responded to 9-1-1 emergency calls within the City of Kennesaw. However, Petitioner was not the designated zoning provider. Metro is the designated zoning provider for the zone at issue. The City of Kennesaw no longer directs 9-1-1 emergency calls to Petitioner.

On or about May 16, 2012, the Department notified Petitioner that it violated the zoning plan for Cobb County, Georgia by transporting patients "without having been requested or designated as the designated zone provider by the approved Region 3 Zoning Plan." The violations occurred on January 10, 2012, January 25, 2012, April 12, 2012, April 18, 2012, April 23, 2012, April 25, 2012, May 3, 2012, and May 8, 2012. As Petitioner is not listed as a designated zone provider for Cobb County, Petitioner had no authority to respond to 9-1-1 emergency calls unless mutual aid had been requested, which request never occurred.

There are three general means by which a provider may be dispatched to an emergency. First, an individual could contact the provider directly. When a patient does so, the provider can transport that patient directly. Petitioner is currently providing such service in the City of Kennesaw. Second, an ambulance may come upon the scene of an emergency and thereby render aid. In such a situation, the provider is to call the ambulance communication center and receive approval for the dispatch. Calling to report the scene is not the same as becoming the dispatched unit. Third, if one calls the 911 emergency system, the public safety

answering point ("PSAP") either directs the ambulance directly or contacts an ambulance communication center to have an ambulance dispatched. PSAPs dispatch the ambulance provider designated in the zoning plan. The PSAP may cancel an EMS unit if there is already one on scene by contacting the unit or the communication center. Acknowledging cancellation does not indicate approval.

The term "Medical Control" means physician directed clinical management of patients in a pre-hospital setting. Medical Control can either be direct contact with a live physician or a written protocol created by the provider's medical director, which provides field direction for patient care. In each of these incidents, Petitioner made no attempt to contact Medical Control. Medics only contact Medical Control when they need specific orders for patients with serious conditions or injuries. Dr. Jill Mabley testified at the OSAH hearing as an expert in emergency services and transport without objection by Petitioner.

CONCLUSIONS OF LAW

Petitioner violated the Department's rules and regulation. The regulations specify the procedure to be followed when a non-designated provider arrives at the scene of an emergency. The non-designated provider is to "sustain and stabilize the patient until the arrival of the designated ambulance provider," but cannot transport the patient unless:

1. The designated ambulance is canceled by the appropriate dispatching authority with approval of the responding designated ambulance provider; or
2. Medical control determines that the patient's condition is life-threatening or otherwise subject to rapid and significant deterioration and there is clear indication that, in view of the estimated time of arrival of the designated ambulance, the patient's condition warrants immediate transport. In the event the medic is unable to contact medical control, the medic will make the decision. The transporting ambulance service shall file a copy of the patient care report including an explanation of the incident to the department within seven calendar days of the transport.

Department R. and Regs. 511-9-2-.07(j). For all six incidents, Petitioner transported patients in violation of the Department's rules and regulations as neither exception applied.

Metro did not approve the cancellation of any of the incidents at issue. Given the professionalism of Metro's employees, they left each scene rather than risk a confrontation. As the OSAH ALJ described,

> [I]f the Court concluded that the acquiescence of the individual Metro medics amount to approval of the designated provider, then a non-designated provider could always race to the scene, rely on the professionalism of the designated provider's medics, and ultimately transport the patient. This is exactly the type of scenario the Georgia General Assembly sought to remedy when it enacted the zoning laws.

Likewise, the second exception does not apply to the six incidents at issue. Each patient's condition was not life-threatening or swiftly deteriorating. Since Petitioner does not have the patient sign the consent to transport form if they are incoherent and each patient signed the form in this matter, it appears Petitioner did

not believe the patients were in serious conditions. Moreover, the expert in emergency services and transport opined that none of the patients needed emergency transport.

The second part of the second exemption also does not apply as there is no question that in four of the six incidents Metro was on scene prior to the transport of the patient. Thus, this Court cannot conclude that the designated ambulance service would not arrive in time to transport the patient. Department R. and Regs. 511-9-2-.07(j)(2).

In response, Petitioner asserts the statewide EMS zoning scheme is unconstitutional. That is, Petitioner asserts section 31-11-5(a)(1) is unconstitutional, but in reality, Petitioner is asserting sections 31-11-1, 31-11-2(7) & (8), 31-11-3, 31-11-4, 31-11-5(a), and 31-11-9 of Georgia Code are unconstitutional. Petitioner believes the Home Rule provisions of the Georgia Constitution invalidate the entire statewide EMS zoning scheme.

"[A]ny municipality...may exercise the following powers and provide the following services:...(3) Public Health facilities and services, including hospitals, ambulance and emergency rescue services." Georgia Constitution Art. IX, § II, Paragraph III.[1] But then the Constitution states

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[1] This Court questions whether Petitioner has standing to assert the rights of a municipality as no municipality is a party to this action. "A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact

> Nothing contained within this Paragraph shall operate to prohibit the General Assembly from enacting general laws relative to the subject matters listed in subparagraph (a) of this Paragraph or to prohibit the General Assembly by general law from regulating, restricting, or limiting the exercise of the powers listed therein; but it may not withdraw any such powers.

Id. (emphasis added). By the plain language of the provision, the Department is authorized to regulate ambulance services. "Where the language of a statute is plain and unambiguous, judicial construction is not only unnecessary but forbidden." *Arby's Rest. Group, Inc. v. McRae*, 292 Ga. 243, 245 (2012)(quoting *Six Flags Over Ga. II v. Kull*, 276 Ga. 210, 211 (2003)).

Moreover, "'Constitutions, like statutes, are properly to be expounded in the light of conditions existing at the time of their adoption.' [Cit.]". *Gwinnett County Sch. Dist. v. Cox*, 289 Ga. 265, 268 (2011)(citing *Clarke v. Johnson*, 199 Ga. 163, 166 (1945)). In this matter, there are zoning statutes created to address call jumping in late 1970s, prior to the adoption of Constitution and prior to the City of Kennesaw's actions. That is, the Constitution was created just after all of the ambulance incidents were addressed by the Georgia legislature. If this Court accepts Petitioner's interpretation, the Home Rule provisions were created to allow the very evil previously addressed to come back. *See* O.C.G.A. § 1-3-1(a)(holding

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on his own rights." *Stover v. State*, 256 Ga. 515, 516-17 (1986) (quoting *County Court of Ulster v. Allen,* 442 U. S. 140, 154-55 (1979); applying in the criminal context). Moreover, the municipality whose rights it seeks to assert, follows the EMS zoning plan.

"In all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy").

In contrast, the Home Rule provision at issue, specifically authorizes the legislature to regulate ambulances by general law so long as the power is not withdrawn.

> Nothing contained within this Paragraph shall operate to prohibit the General Assembly from enacting general laws relative to the subject matters listed in subparagraph(a)...to prohibit the General Assembly by general law from regulating, restricting, or limiting the exercise of the powers listed therein; but it may not withdraw any such powers.

Ga. Const. Art. IX, § II, Para. III (emphasis added). The statewide zoning scheme is a general law. "A law to be general...must operate uniformly, throughout the whole State, upon the subject or class of subjects with which it purposes to deal." *Thomas v. Austin*, 103 Ga. 701, 704 (1898).

Here, the OSAH ALJ found that there are several PSAPs in the City of Kennesaw vicinity, including Cobb 9-1-1 and Kennesaw 9-1-1. For this matter, Cobb 9-1-1 was the appropriate dispatching authority. There is no finding that Kennesaw 9-1-1 dispatched Petitioner to the incidents at issue. Thus, even if Petitioner could properly raise the Home Rule argument, it is inapplicable to these incidents as Kennesaw 9-1-1 did not dispatch Petitioner to any of the six incidents.

Moreover, the City of Kennesaw's authority is not withdrawn. For example, either Petitioner or the City of Kennesaw could petition the Department to reopen the zoning plan. In the alternative, Petitioner could continue to operate in the City of Kennesaw, it would just need to refrain from responding to calls through the 9-1-1 system. That is, people could contact them directly. But most importantly, there is no dispute that throughout the time period in question, the City of Kennesaw always had ambulance service.

This Court finds further support for its interpretation through the Georgia Supreme Court, which held

> It is a cardinal rule . . . that legislation under attack as being in violation of constitutional mandates will be construed and upheld as constitutional unless conflict with the Constitution is clear and palpable.

Cobb County v. Campbell, 256 Ga. 519 (1986) (emphasis added). This Court cannot construe the statewide EMS zoning plan as a clear and palpable violation of the City of Kennesaw's power. However, if there is any doubt, "the constitutionality of a statute is presumed, and [] all doubts must be resolved in favor of its validity." *Albany Surgical, P. C. v. Ga. Dep't of Cmty. Health*, 278 Ga. 366, 368 (2004).

There is another constitutional provision that illustrates the fallacy of Petitioner's argument, the Uniformity Clause, which provides:

> (a) Laws of a general nature shall have uniform operation throughout this state and no local or special law shall be enacted in any case for which provision has been made by an existing general law, except that the General Assembly may by general law authorize local governments ...to exercise police powers which do not conflict with general laws.

Ga. Const. Art. III, § VI, Para. IV. Here we clearly have a statewide evil addressed by the Georgia legislature through a statewide zoning plan.

> The General Assembly therefore declares that, in the exercise of the sovereign powers of the state to safeguard and protect the public health and general well-being of its citizens, it is the public policy of this state to encourage, foster, and promote emergency medical systems communications programs and that such programs shall be accomplished in a manner that is coordinated, orderly, economical, and without unnecessary duplication of services and facilities

O.C.G.A. § 31-11-1(b).[2]

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[2] Petitioner further asserts the statewide EMS zoning scheme violates the anti-monopoly clause of the Georgia Constitution. *See* Ga. Const. Art. III, § VI, Para. V. In this Court's view, the zoning plan is not a monopoly, all ambulance providers are authorized and encouraged to compete to win the bid to provide such services. O.C.G.A. § 31-11-3 provides

> Each licensed ambulance provider in the health district shall have the opportunity to participate in the EMSC Program...
> (b) The local coordinating entity shall request from each licensed ambulance provider in its health district a written description of the territory in which it can respond to emergency calls, based upon the provider's average response time from its base location within such territory; and such written description shall be due within ten days of the request by the local coordinating entity.

Then once all submissions are in, the local coordinating entity makes a recommendation to the Department. The Department cannot modify

> unless the board or its designee shall find, after a hearing, that the determination of the district health director is not consistent with operation of the EMSC Program in an efficient, economical manner that benefits the public welfare.

As O.C.G.A §§ 31-11-1, 31-11-2(7) & (8), 31-11-3, 31-11-4, 31-11-5(a), and 31-11-9, are constitutional Petitioner did not prove any grounds pursuant to O.C.G.A. § 50-13-19(h) for reversal, thus, the Department's decision to sanction Petitioner is hereby AFFIRMED.

SO ORDERED, this 13 day of December, 2013.

Tom Campbell

TOM CAMPBELL, Judge
Fulton County Superior Court
Atlanta Judicial Circuit

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That is, the law itself encourages all ambulance providers to bid to be the zone provider and the only prohibition for the losing bidder is the requirement to refrain from responding to 9-1-1 calls.