OAH 71-0913-35344

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE EMERGENCY MEDICAL SERVICES REGULATORY BOARD

In the Matter of the License Application of Children's Minnesota	**ORDER DENYING PETITION TO INTERVENE AND REQUEST FOR CONTINUANCE**

This matter came before Administrative Law Judge Jessica A. Palmer-Denig upon a petition to intervene (Petition) and request for continuance filed by the Minnesota Ambulance Association (Petitioner).

Gregory J. Schaefer, Assistant Attorney General, represents the Minnesota Emergency Medical Services Regulatory Board (Board). Gregory R. Merz, Gray, Plant, Mooty, Mooty & Bennett, P.A., represents Children's Minnesota (Applicant). Petitioner is represented by Christopher Heinze, Libby Law Office, P.A.

Based upon the record, pursuant to Minn. R. 1400.6200, .7500 (2017), and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge issues the following:

ORDER

1. Petitioner's Petition is **DENIED**.

2. Petitioner's request to continue the hearing is **DENIED.**

Dated: September 19, 2018

JESSICA A. PALMER-DENIG
Administrative Law Judge

MEMORANDUM

I. Background

This contested case concerns whether Applicant should be granted a license by the Board to operate a statewide Advanced Life Support Specialized ambulance service

to provide intra-facility transports to pediatric and neo-natal patients.[1] A hearing is scheduled to begin on September 24, 2018.

Petitioner filed its Petition on September 13, 2018. On September 17, 2018, Applicant filed an objection to the Petition. The Administrative Law Judge further addressed this matter with the parties on the record at a prehearing conference on September 17, 2018.[2] Petitioner stated its request for a continuance on the record at the prehearing conference,[3] and filed its request formally on September 18, 2018.[4]

Petitioner asserts that it represents the interests of over 350 members of its organization, including members that are ambulance service providers and staff.[5] Petitioner contends that its members will be significantly impacted by the outcome of this contested case. According to Petitioner, if Applicant is granted the license it seeks, Petitioner's members will experience encroachment upon their services, competition among ambulance service providers, and loss of revenue and other deleterious effects. Petitioner also maintains that granting Applicant a license will result in increased costs to Minnesota citizens. By intervening, with all the rights of a party, Petitioner aims to protect the interests of its licensed members and Minnesota citizens. Petitioner wishes to develop the record through discovery, testimony, cross-examination, motions, and briefing, though it has identified obtaining discovery as the primary basis for its request to become a party.[6] Petitioner contends that no other entity or person could adequately represent the interests of its members.

Applicant opposes the Petition.[7] Applicant notes that members of Petitioner's organization had the opportunity to object to the application for licensure and that many did not do so. Applicant contends that the Petition is based upon the premise that all ambulance service providers will be harmed if Applicant obtains the requested license, but that this is not the case. Applicant maintains that the interests of ambulance service providers opposed to the license application are adequately represented by individual ambulance services that intend to participate in this matter, making intervention by Petitioner unnecessary. Applicant further argues that the Petition is untimely because it was filed only six working days before the hearing is to begin and on the eve of prehearing deadlines. Applicant notes that the Board published a notice regarding the application in March 2018, and that notice of this hearing was published in August 2018. Applicant asserts that Petitioner should have sought to intervene earlier if it wished to do so.

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[1] Notice and Order for Prehearing Conference and Hearing (Notice and Order) at 2, Exhibit (Ex.) A (June 22, 2018).
[2] Prehearing Conference Digital Recording (Sept. 17, 2018) (on file with the Minn. Office Admin. Hearings).
[3] *Id.*
[4] Letter from Christopher J. Heinze to Administrative Law Judge (Sept. 18, 2018).
[5] *See* Petition (Sept. 13, 2018).
[6] Statement of Counsel for Petitioner ((Prehearing Conference Digital Recording (Sept. 17, 2018) (on file with the Minn. Office Admin. Hearings)).
[7] *See* Applicant's Objection to Petition (Sept. 17, 2018).

Petitioner's request for a continuance[8] asserts that development of the record in this matter requires that the hearing be continued. Petitioner contends that proceeding to hearing as scheduled will unduly burden all parties and interested persons. Petitioner argues that the current schedule in this case will make it difficult, if not impossible, to render justice because Petitioner and other interested persons are unable to adequately prepare for the hearing without additional discovery. Petitioner asserts that granting a continuance does not conflict with the statutory deadline in Minn. Stat. § 144E.11, subd. 5(g) (2018), because sufficient time exists to complete this case even if a continuance is granted. Alternatively, Petitioner proposes that the Board could re-issue the notice of hearing, triggering a new 90-day window to hear this matter.

II. Legal Standards

Intervention in a contested case is governed by Minn. R. 1400.6200. Under that rule:

> Any person not named in the notice of hearing who desires to intervene in a contested case as a party shall submit a timely written petition to intervene to the judge and shall serve the petition upon all existing parties and the agency. Timeliness will be determined by the judge in each case based on circumstances at the time of filing. The petition shall show how the petitioner's legal rights, duties, or privileges may be determined or affected by the contested case; shall show how the petitioner may be directly affected by the outcome or that petitioner's participation is authorized by statute, rule, or court decision; shall set forth the grounds and purposes for which intervention is sought; and shall indicate petitioner's statutory right to intervene if one should exist.[9]

The Administrative Law Judge "shall allow intervention upon a proper showing pursuant to subpart 1 unless the judge finds that the petitioner's interest is adequately represented by one or more parties participating in the case," and if intervention is permitted, the Administrative Law Judge must determine the degree of intervention that will be allowed.[10]

Intervention is not the only method by which a non-party may participate in a contested case hearing. Under Minn. R. 1400.6200, subp. 5, in the absence of a petition for intervention, the Administrative Law Judge may allow a person to appear at a hearing without requiring that the person become a party. Additionally, the governing statute in this case provides that the Administrative Law Judge shall hold a public hearing and "allow any interested person the opportunity to be heard, to be represented by counsel, and to present oral and written evidence at the public hearing."[11]

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[8] Letter from Christopher J. Heinze to Administrative Law Judge (Sept. 18, 2018).
[9] Minn. R. 1400.6200, subp. 1.
[10] *Id.*, subp. 3.
[11] Minn. Stat. § 144E.11, subd. 5(f)(2) (2018).

A request for a continuance is analyzed under Minn. R. 1400.7500. Under that rule, a request for a continuance "shall be granted upon a showing of good cause," and the Administrative Law Judge must give "due regard" to the ability of the party requesting the continuance to effectively proceed if the continuance is not granted.[12] The rule provides examples of good cause and of an absence of good cause. A continuance request filed within five business days of the hearing shall be denied unless the reason for the request could not have been ascertained earlier. In any event, a "continuance shall not be granted when to do so would prevent the case from being concluded within any statutory deadline."[13]

III. Analysis

The Administrative Law Judge determines that Petitioner has not made a proper showing pursuant to Minn. R. 1400.6200, subp. 1. Therefore, the Administrative Law Judge denies the Petition. Additionally, the Administrative Law Judge concludes that good cause does not exist to grant a continuance.

First, the Administrative Law Judge determines that the Petition is untimely. Petitioner filed its Petition on September 13, 2018, shortly before the due date for prehearing submissions and the first day of the hearing. The Prehearing Order in this matter establishes September 17, 2018, as the filing date for Applicant's prehearing submissions and that submissions by any other interested person must be filed by September 19, 2018.[14] As noted above, the hearing is scheduled to begin on September 24, 2018.

At the prehearing conference, Petitioner identified a desire to engage in discovery as the primary reason it sought to intervene, rather than participating in the hearing as an interested person. Petitioner noted that such discovery efforts would require that the hearing be continued and rescheduled for one or two weeks later than the scheduled date. Under Minn. Stat. § 144E.11, subd. 5(g), however, the Administrative Law Judge must issue a recommendation to the Board within 90 days of publication of a notice of hearing in the State Register. According to the Board, the notice of hearing was published in the State Register on August 20, 2018. As a result, the recommendation in this case must be issued no later than November 18, 2018.

Though this case has been proceeding on an expedited timeline, Petitioner could have sought to intervene before it did. The Board represents in its Notice and Order that it issued public notice of Applicant's application on March 20, 2018. This contested case was commenced by the filing of the Notice and Order on June 25, 2018. On July 25, 2018, the Administrative Law Judge issued subpoenas for document production to entities that had objected to the application, which subpoenas were subsequently served on a number of ambulance services. During August 2018, the Administrative Law Judge received and considered objections to the subpoenas from several entities,

[12] Minn. R. 1400.7500.
[13] *Id.*
[14] Prehearing Order (July 30, 2018).

including some ambulance services who intend to appear as interested persons in this case. According to the Board, it published its Notice of Hearing in the State Register on August 20, 2018. Petitioner has not shown it was unaware of these proceedings. Yet, Petitioner did not seek to intervene until September 13, 2018, a matter of days before prehearing deadlines and the scheduled hearing. Under the circumstances in this case, Petitioner's request was untimely.

Second, the Administrative Law Judge concludes that Petitioner has not shown that its intervention is required to protect its own legal interests or that of its members. It is unclear that Petitioner has legal rights and interests of its own to protect in this proceeding. Even assuming that intervention would be permitted to allow it to assert its members' interests, Petitioner has not established that intervention is necessary to protect those members or what the members' interests may be.

Several individual ambulance service providers intend to participate as interested persons in this case and they generally support Petitioner's Petition. It is not clear from this record, however, that intervention by Petitioner is required to protect their interests or that they will not assert their own interests at the hearing. Rather, it appears that these service providers are capable of representing their own interests. Additionally, Petitioner has not established that its intervention is required to protect the interests of all of its other members that do not wish to appear at the hearing as interested persons. Petitioner asserts that it represents 350 members, of which some are ambulance service providers, and generally that its members will be harmed if Applicant is granted a license. The identity of Petitioner's members is not established in this record. The record also does not show that this matter will determine or affect their "legal rights, duties, or privileges," or that they may be "directly affected" by the outcome in this case.[15] Further, while Minn. Stat. § 144E.11, subd. 5(f)(2), permits interested persons to be heard, it does not create a statutory right of intervention.

Third, intervention is not required for Petitioner to participate in the hearing. It may appear as an interested person and offer evidence under Minn. Stat. § 144E.11, subd. 5(f)(2). The Administrative Law Judge has indicated she will permit interested persons to file closing briefs following the hearing to articulate any legal arguments those persons wish to assert. As a result, Petitioner's position in the case, on behalf of its members, will be made a part of the record if it participates in the hearing.

Finally, Petitioner asserts that its intervention is required, and a continuance must be granted, to allow for additional discovery. At the prehearing conference, Applicant agreed to provide its exhibits to interested persons.[16] Petitioner contends that this is not sufficient and that more discovery is required. According to Petitioner, it and other interested persons will be unable to adequately prepare for the hearing without more time and more information. Petitioner further maintains that a continuance will not conflict with completion of this matter before the statutory deadline in Minn. Stat.

[15] Minn. R. 1400.7500.
[16] Prehearing Conference Digital Recording (Sept. 17, 2018) (on file with the Minn. Office Admin. Hearings).

§ 144E.11, subd. 5(g), and that if it did, the hearing could be re-noticed to begin the timeline anew.

The Administrative Law Judge is unpersuaded by these arguments. As noted above, the Board provided notice of Applicant's application in March 2018. The statutory process, including initiation of a contested case, on an application for an ambulance service license is public information. Ambulance services that had objected to the application received subpoenas some time ago, making it clear that this matter was well underway. Only one interested person sought to obtain more information by requesting a subpoena and that request was granted. Petitioner did not submit a request for a subpoena. Petitioner and other interested persons could have taken steps to seek intervention or additional information earlier, but did not do so. Further, Petitioner initially raised the issue of a continuance at the prehearing conference, held five business days before the first day of the hearing, and filed its formal written request only four business days before the hearing is to begin. Such a request "shall be denied" unless the reason for the request could not be ascertained earlier.[17] In this case, Petitioner's interests and those of other interested persons could have been ascertained before now.

Additionally, the legislature has established the process for these proceedings. The burden of proof rests with Applicant to show that it should be granted a license according to four statutory factors.[18] The legislature provides that interested persons may appear at the hearing and submit evidence on this question.[19] The Administrative Law Judge has read the governing statute broadly to encourage public participation in this matter, including by issuing a subpoena to an interested person. However, the statute does not grant interested persons the full notice and hearing rights available to parties.

The statute also contains a clear deadline. The Administrative Law Judge must issue a decision within 90 days of publication of the notice of hearing. This deadline requires not that the hearing be held by a certain date, but that the matter be fully concluded by the Office of Administrative Hearings by that time. A continuance is not permitted if it will prevent a case from being concluded by the statutory deadline.[20] Given the dates scheduled for the hearing, the need to permit the filing of a transcript and post-hearing briefs, and in order to allow the time necessary for consideration of this case by the Administrative Law Judge, insufficient time exists to permit a continuance. The Administrative Law Judge is also unwilling to circumvent the deadline established by the legislature by cancelling the hearing and requiring that the matter be re-noticed.

[17] Minn. R. 1400.7500.
[18] Minn. R. 1400.7300, subp. 5 (2017); *Matter of Rochester Ambulance Serv.*, 500 N.W.2d 495, 498 (Minn. Ct. App. 1993) (stating that the applicant bears the burden in ambulance service license proceedings); Minn. Stat. § 144E.11, subd. 6 (2018).
[19] Minn. Stat. § 144E.11, subd. 5(f)(2).
[20] Minn. R. 1400.7500.

IV. Conclusion

The Administrative Law Judge determines that the Petition is untimely based on the circumstances of this case and that Petitioner has not shown its interests or those of its members require that it be permitted to intervene. Therefore, the Petition is **DENIED**. The Administrative Law Judge concludes that good cause does not exist to grant a continuance and that Petitioner's continuance request must be **DENIED**.

J. P. D.