

OPINION
79-144

August 15, 1979 (OPINION)

Mr. William J. Delmore
Special Assistant Attorney General
Director, Legal Services
North Dakota State
 Department of Health
Missouri Office Building
1200 Missouri Avenue
Bismarck, ND 58505

Dear Mr. Delmore:

This is in response to your letter of August 7, 1979, wherein you requested our opinion on the submission of recommended findings of fact by a hearing officer following hearings held pursuant to chapters 23-01 and 23-17.2 of the North Dakota Century Code. Your letter sets forth the following facts and questions:

In my position as hearing officer of an administrative hearing conducted under the authority of chapter 28-32 of the North Dakota Century Code regarding application of chapter 23-17.2 (Certification of Need for Expansion of Hospital Facilities) in the case of Department of Health v. Trinity Medical Center, Case Number 79-301, and at the request of the State Health Officer as referenced in the attached memo, I hereby request an Attorney General's opinion regarding the following question:

To what body does an administrative hearing officer operating under authority of chapter 23-01 of the North Dakota Century Code and in accordance with chapter 28-32 of the North Dakota Century Code submit recommendations and findings of fact.

A review of chapter 23-01 and chapter 23-17.2 of the North Dakota Century Code would appear to give a clear answer to this question, but in view of requests made during the administrative hearing and the request made by the State Health Officer, the question would best be answered through an opinion from your office.

As we understand your letter and your reference therein to the proceedings in the administrative case of Department of Health v. Trinity Medical Center, the hearing in that case has now been completed and findings of fact, conclusions of law, and an order have now or will shortly be drafted. Your question pertains to what person or group of persons the findings, conclusion and order should be submitted to for signing; i.e., which agency or person has the legal authority and responsibility to sign the same.

We would agree with the conclusion implicit in your letter that this matter is governed by the provisions of chapters 23-01 and 23-17.2 of the North Dakota Century Code. Chapter 23-01 sets forth the general statutes governing the establishment and operation of the State

Department of Health, including the establishment of the Health Council (section 23-01-02) and the Health Officer (section 23-01-05). Section 23-01-03 sets forth the powers and duties of the Health Council. This section provides in pertinent part:

23-01-03. POWERS AND DUTIES OF THE HEALTH COUNCIL. - The health council shall:

* * *

5. Hold hearings on all matters brought before it by applicants and licensees of medical hospitals with reference to the denial, suspension, or revocation of licenses and make appropriate determination as specified herein.

The council may direct the state health officer to do or cause to be done, any or all of the things which may be required in the proper performance of the various duties placed upon the state department of health.

Section 23-01-05 establishes the qualifications, salary, and duties of the State Health Officer and provides in part as follows:

23-01-05. HEALTH OFFICER - QUALIFICATIONS, SALARY, TERM DUTIES. - . . . The duties of the state health officer shall be as follows:

1. Enforce all rules and regulations as promulgated by the health council.
2. Hold the several boards of health responsible for the enforcement of state regulations, serve in an advisory capacity to the several boards of health in the counties, cities and townships of this state and provide for coordination of health activities.

* * *

These sections of law may by inference govern the particular duties of either the Health Officer or the State Health Council in respect to hearings held pursuant to chapter 28-32, as such hearings may certainly be a matter of enforcement. However, we note that the provisions of chapter 23-17.2 ("Certification of Need for Expansion of Hospital Facilities") contain sections of law more specifically applicable to the question which you raise, in the context of the Trinity Medical Center case. Sections 23-17.2-05 and 23-17.2-11 provide as follows:

23-17.2-05. HEALTH COUNCIL TO PROMULGATE RULES AND REGULATIONS - APPLICATION - CRITERIA FOR CERTIFICATION. - The health council is hereby empowered to promote and execute the purposes contemplated by this chapter including but not limited to the following activities:

1. The development of an application form.

2. The promulgation of such rules and regulations as may be required for Pub. L. 93-641 purposes.
3. The establishment of criteria.
4. The establishment of roles of the department, state health coordinating council, and health system agencies in the administration of the certification program.
5. The establishment of dollar minimum as to inclusion or exclusion of a proposal.
6. The establishment of time frames and limitations in review of proposals by review bodies.

Health care facilities to be certified shall submit an application to the department. Applicants shall comply with criteria of rules and regulations as set forth therein. The health council shall consider the application and determine from its findings whether such application qualifies the applicant for certification of need under criteria as set forth in the rules and regulations. The determination shall be made after receipt of recommendations from the health system agency in which the applicant is located and the determination shall be communicated to the facility or its owners or operators, the respective health system agency, and all persons filing an appearance immediately after being made. (Emphasis added).

23-17.2-11. AUTHORITY TO ISSUE OR DENY CERTIFICATE OF NEED. -
The health council:

1. Shall issue certificates of need for the construction or expansion of health care facilities or health care services subject to this chapter which are found to comply with the provisions of this chapter and such regulations as are lawfully promulgated by the health council. Notice of determination by the health council granting, denying, or revoking the certification of need, or deferring the application for further information, shall be communicated to the applicant, the health system agency, and other persons who have filed an appearance.
2. May deny the issuance of a certificate of need hereunder on any of the following grounds:
 - a. Violation of any of the provisions of this chapter or the rules and regulations promulgated pursuant thereto.
 - b. Conduct or practices detrimental to the health or safety of patients and employees of said existing or proposed health care facilities or services.
 - c. The issuance of a certification of need is not warranted.

Within thirty days from date of mailing the determination, the applicant, any recognized health system agency, or any person

who has filed an appearance may petition the health council for a public hearing for a reconsideration of a department's determination in the case of either a certification approval, denial, or revocation. The public hearing shall be held before the health council in accordance with the provisions of chapter 28-32 pursuant to written notice to persons who have filed an appearance, served by registered or certified mail, which shall concisely state the ground for such approval, denial, or revocation and shall fix the time and place of hearing which shall not be less than thirty days after the date of the mailing of such notice. After such hearing, the council shall make an order denying or granting the application for certification, or revoking the certification previously granted. The council shall send a copy of its order to all persons who have filed an appearance by registered or certified mail, which shall contain its findings and conclusions, and such order shall become final thirty days after the date of mailing unless an appeal is taken therefrom in the manner provided by section 23-17.2-13. (Emphasis added).

These statutes clearly set forth the mode of procedure applicable to determinations made upon applications for certificates of need and to determinations to revoke a certificate of need previously granted. Section 23-17.2-11 specifies the manner of determination of whether a certificate shall be granted, denied, or revoked. Following the determination to grant, deny, or revoke, an applicant for a certificate of need or other specified persons may request a reconsideration of the determination previously made by the Health Council and may request a hearing to be held under chapter 28-32. From the emphasized language of sections 23-17.2-05 and 23-17.2-11 we believe it is clear that it is the Health Council which is required by law to make both the initial determination on an application for a certificate, and to make the decision to deny or revoke the certificate. It is also clear from section 23-17.2-11 that it is the Health Council which must "make" the resulting administrative order. This requirement is consistent with the provisions of section 23-17.2-13 which provides for an appeal "from an order of the Health Council".

Section 23-17.2-11 provides that the hearing is to be a hearing held pursuant to N.D.C.C. chapter 28-32. We note that there are numerous references throughout this chapter to hearings conducted by a hearing officer, examiner, chairman, or acting chairman of an agency. N.D.C.C. sections 28-32-06, 28-32-09, 28-32-10, and 28-32-11. Because of this recognition in law of the authority for an agency to appoint a hearing officer or examiner to conduct the hearing, we do not necessarily read the requirement section 23-17.2-11 that a hearing under chapter 28-32 be conducted "before" the Council as requiring that all the members of a particular department, board, commission, or council actually be present at the time of the hearing. We also believe it is possible for an agency required by law to make an order to delegate the ultimate responsibility for the signing of that order to the hearing officer or examiner or other person actually attending the hearing under the authority of the agency. We are aware that in many instances of hearings held under chapter 28-32, the hearing officer only submits recommended findings, conclusions, and an order to the agency, thus leaving the ultimate

responsibility for the signing of the order with the agency or board. In other cases, assuming a legally sufficient delegation of authority to the hearing examiner, the examiner himself may sign the final order. Your letter does not explain which procedure was used in the case you mentioned or whether there has been any attempt by the Health Council to delegate the ultimate responsibility for the signing of the findings of fact, conclusions of law and order to the hearing officer or to the State Health Officer. (See, N.D.C.C. section 23-01-03, set forth above). We assume that there has been no such delegation and that it is therefore proper that the findings, conclusion, and order be submitted directly to the members of the Health Council for their signature.

We trust that the foregoing will prove of assistance to you.

Sincerely,

ALLEN I. OLSON

Attorney General