

STATE OF NEW YORK : DEPARTMENT OF HEALTH

IN THE MATTER

OF

THE APPLICATION

OF

NORTHEAST ADVANCED LIFE SUPPORT, LLC

Under Section 3008 of the Public Health Law

**REPORT OF
THE ADMINISTRATIVE
LAW JUDGE**

TO: New York State Emergency Medical Services Council

On February 10, 2006, Northeast Advanced Life Support, LLC, 12 Hadden Lane, Troy, New York 12180 ("NEALS" or "Applicant") submitted an application for a determination of public need, as per Public Health Law ("PHL") § 3008, to the Regional Emergency Medical Services Council of the Hudson-Mohawk Valleys, Inc. ("REMSCO"). Specifically, NEALS applied for an Advanced Life Support First Response Emergency Medical Service Certificate of Need for Rensselaer County.

After a determination by the REMSCO Certificate of Need Committee ("CON Committee") that the application was incomplete, the application was resubmitted, on February 27, 2006, with additional material. On March 13, 2006, the application was again determined by the CON Committee to be incomplete and, on April 10, 2006, the application was submitted for a third time. At an April 18, 2006 CON Committee meeting, the application was deemed to be complete, and a Notice of Public Hearing was served. On May 8, 2006, a public hearing was held at the Tamaric High School Auditorium, NY Route 2, Troy (Brunswick), New York 12180.

Evidence was received and a transcript of the proceedings was made. On May 12, 2006, the CON Committee met and deliberated concerning the NEALS application. Findings of Fact were issued. A motion was made to approve the application, with the specific and purposeful exclusion of operating territory within the Cities of Troy and Rensselaer and the Towns of East Greenbush and Brunswick. The motion to approve the application, with the aforementioned restriction of operating territory, was defeated. A second motion was made to deny the application on the grounds that adequate resources exist within the county which if organized could provide the services which NEALS proposes to provide. The second motion was passed by the CON Committee and brought to the full REMSCO for debate. On May 25, 2006, the full REMSCO voted to approve the motion to deny the application.

On June 22, 2006, NEALS appealed REMSCO's May 25, 2006 decision and requested that the New York State Emergency Medical Services Council ("State EMS Council") reverse REMSCO's decision to deny the NEALS' CON application.

The Bureau of Emergency Medical Services ("EMS") of the New York State Department of Health ("Department") issued a Policy Statement # 93-10, dated December 1, 1993, entitled "Policy for the Determination of Need for New or Expanding EMS Services in Accordance with PHL Article 30". Policy 93-10 states that in the event of an appeal, the Department shall request the assignment of an Administrative Law Judge ("ALJ") to hear the appeal and to make findings of fact and a recommendation to the State EMS Council. Pursuant to a request from EMS, an ALJ, FREDERICK ZIMMER, ESQ., was assigned to render an opinion on this appeal and to make the requisite findings of fact and recommendation to the State EMS Council.

On July 13, 2006, REMSCO responded in writing to the NEALS' appeal papers. The ALJ ruled, upon agreement from the parties, that NEALS could submit a written rebuttal to REMSCO's response. The written rebuttal was submitted on July 20, 2006.

The parties argued this case on the basis of the papers which they submitted, and on the basis of the record established before the CON Committee and REMSCO. In pursuing this appeal, both parties followed the procedures set forth within Policy 93-10. Christian Bodner, Esq., represented NEALS. REMSCO appeared PRO SE through Richard Brandt, Executive Director of REMSCO.

In reaching his Findings of Fact, Conclusions and Recommendations, the ALJ reviewed the following documents submitted by the parties;

1. The NEALS Application for Certificate of Need ("NEALS application");
2. The February 27, 2006 Supplement to the NEALS' Application for Certificate of Need;
3. The May 12, 2006 CON Committee report and a May 26, 2006 cover letter ("CON Committee Report");
4. The Amended Stenographic Record of the May 25, 2006 REMSCO meeting ("T. 5/25/06") and a June 22, 2006 cover letter;
5. The June 22, 2006 Appeal from NEALS ("NEALS appeal") and Exhibits 1 through 35;
6. The July 12, 2006 response of REMSCO ("REMSCO 7/12/06 response letter") with two July 13, 2006 cover letters and Exhibits A through P, particularly Exhibit N which is the transcript of the May 8, 2006 public hearing ("T. 5/8/06"); and
7. The NEALS rebuttal of July 20, 2006 and Exhibits 36 through 59.

During an August 15, 2006 conference call with Mr. Bodner and Mr. Brandt, the parties advised the ALJ that he was in possession of all documents pertinent to this appeal.

FINDINGS OF FACT

The following Findings of Fact were made after a review of the entire record in this matter. Numbers in parenthesis refer to the transcript page number, pertinent document or exhibit number as indicated. These citations represent evidence found to be persuasive and substantial by the ALJ in arriving at particular findings. Conflicting evidence, if any, was considered and rejected in favor of the cited evidence.

1. On June 3, 2005, Northeast Advanced Life Support, LLC ("NEALS" or "Applicant"), filed its certificate to operate as a limited liability company with the New York State Department of State (undisputed-See CON Committee Report, Finding of Fact #1).
2. On February 10, 2006, NEALS submitted an application to the Regional Emergency Medical Services Council of the Hudson-Mohawk Valleys, Inc. ("REMSCO") for an Advanced Life Support First Response Emergency Medical Service Certificate of Need for Rensselaer County (CON Committee Report at pg. 1; NEALS Application).
3. NEALS proposed that rather than having units travel to an intercept location, it would strategically place paramedic units throughout Rensselaer County. Its units would be non-transporting and, therefore, would not be involved in non-emergent inter-facility transports. This would enable NEALS to provide rapid advance life support ("ALS") in Rensselaer County and would alleviate strain on

the ALS system by allowing ALS ambulances to remain within their corresponding municipalities (NEALS Application at pg. 46).

4. Each regional council is required to establish a committee, usually consisting of five persons, in order to consider each application. The NEALS application was considered by the REMSCO Certificate of Need Committee ("CON Committee") which is a standing subcommittee of REMSCO with assigned members, appointed by the REMSCO chair, and confirmed by a majority vote of the REMSCO membership (REMSCO 7/12/06 response letter at pg. 2; REMSCO EX. B at pg. 7).
5. The Bureau of Emergency Medical Services of the New York State Department of Health ("Department") has issued Policy 93-10 which lists numerous items required to be present in a certificate of need application in order for the application to be deemed complete and eligible for consideration (REMSCO Ex. B [Policy 93-10] at pgs. 4-5).
6. The CON Committee conducted an initial evaluation of the NEALS application, determined that it was incomplete and notified NEALS of its determination via a February 22, 2006 letter. The application was resubmitted, on February 27, 2006, and a second evaluation was conducted on March 13, 2006. The CON Committee, again, deemed the application to be incomplete, notified NEALS of its determination via a March 15, 2006 letter, and NEALS was required to submit its application for a third time (NEALS Ex. 3 and attachments thereto; REMSCO 7/12/06 response letter at pg. 4).

7. Mr. Stephan Retzlaff is the President of Empire Ambulance Service and is a stockholder in Troy Ambulance Service, Inc. d/b/a Empire Ambulance Service. He is a member of the CON Committee (REMSCO 7/12/06 response letter at pg. 2).
8. REMSCO's Constitution and Bylaws state that "Any member of the Regional Council, who has a pecuniary interest in any matter before the Council, shall declare the nature and extent of his/her interest prior to any discussion of the matter and that member is to abstain from voting." The Constitution and Bylaws, also, require that "All members shall avoid any action which might result in, or create an appearance of a conflict of interest." (NEALS Ex. 2 [Constitution and Bylaws of REMSCO, Article VIII, Sections A and D]).
9. Mr. Retzlaff had a pecuniary interest in the outcome of the NEALS application by virtue of his position as an officer and stockholder of Empire Ambulance, which would have been a competing ambulance service in the event that the application was granted. Had REMSCO approved the NEALS application, the approval could have adversely affected the value of Mr. Retzlaff's company (REMSCO 7/12/06 response letter at pg. 3).
10. Mr. Retzlaff participated in both the initial evaluation of the NEALS application, and in the second evaluation after the application was resubmitted. In both instances, the CON Committee deemed the application to be incomplete and NEALS was required to resubmit its application (NEALS Ex. 3; REMSCO July 12, 2006 response letter at pg. 4).

11. On March 27, 2006, a CON Committee meeting was held at which Chairperson Robert stated that Mr. Retzlaff needed "to recuse himself from the process for the NEALS application from here on out" (NEALS Ex. 14 at pg. 28).
12. Jim Stairs replaced Mr. Retzlaff on the CON Committee for the purpose of considering the NEALS application (NEALS Ex. 14 at pg. 37).
13. On April 10, 2006, NEALS submitted its application for the third time. The application was deemed complete by the CON Committee, on April 18, 2006, and a public hearing was scheduled for May 8, 2006 (CON Committee Report at pg. 2).
14. On May 2, 2006, the Department issued a Statement of Fitness and Competency for NEALS and its three general partners, Christian P. Bodner, Steven Mitchell and Charles R. Ransom (NEALS Ex. 20).
15. Following the May 8, 2006 public hearing, the CON Committee met on May 12, 2006 to deliberate and vote on the application (CON Committee Report at pg. 5).
16. Policy 93-10 defines "Public Need" as "The demonstrated absence, reduced availability or an inadequate level of care in ambulance or emergency medical service available to a geographical area which is not readily correctable through the reallocation or improvement of existing resources...The Regional Council has an obligation to determine if the issues identified are truly ones of public need/necessity or if an improvement in existing resource allocation or coordination within a specific time frame can solve the problem. Inherent in this review is a determination as to why appropriate measures were not taken by

existing providers prior to the submission of the new application". (REMSCO Ex. B [Policy 93-10] at pgs. 3-4).

17. During the May 12, 2006 CON Committee meeting, an initial motion was made by Chairperson Robert to approve the application with the exclusion of territory within the Cities of Troy and Rensselaer and the Towns of East Greenbush and Brunswick. He stated that NEALS had proven need in parts of the county, and that if any of the existing providers had intended to serve these areas, they would have done so by now. The motion was defeated by a vote of 3 to 2 (CON Committee Report at pg. 5).
18. A motion was then made to deny the application. One CON Committee member, Mr. Politis, stated that the application should be denied because adequate resources exist within the county, which if organized could provide the services proposed to be offered by NEALS, and that there had been no effort to reallocate or improve existing resources. Another Committee member, Mr. Battini, stated that there was a need for the services proposed in the application but that he wanted to be assured that NEALS was financially stable (CON Committee Report at pg. 6).
19. The motion to deny the application was passed 3 to 2. Mr. Battini voted with those in favor of denying the application (CON Committee Report at pg. 6).
20. On May 25, 2006, the motion to deny the application was brought to the full REMSCO for debate (CON Committee Report, pg. 6; Amended Stenographic Record of 5/25/06 REMSCO meeting ["T. 5/25/06"] at pgs. 25-27).

21. At the May 25, 2006 meeting, Mr. Battini stated that he had resolved his questions about NEALS' financial stability based on new information and that he would be voting against the motion to deny the application (T. 5/25/06 at pg. 27).
22. After discussion on the motion, the full REMSCO voted to approve the motion denying the NEALS application by a vote of twenty in favor, two against and two abstentions (T. 5/25/06 at pgs. 25-39).
23. A motion was then made by Lynn Kane to approve the application with the exclusion of territory within the Cities of Troy and Rensselaer and the Towns of East Greenbush and Brunswick. Ms. Kane pointed out that Mr. Battini would have voted in support of the application at the CON Committee level had he had access to the additional financial information at that time (T. 5/25/06 at pgs. 39-43).
24. NEALS is currently financially solvent (CON Committee Report, Finding of Fact #3).
25. Mr. Retzlaff abstained from voting on the application at the May 25, 2006 REMSCO meeting on the grounds that he had "a financial interest in a potentially competitive company" (T. 5/25/06 at pg. 36).
26. Mr. Retzlaff, nevertheless, participated in the deliberations concerning the REMSCO application. In particular, he opposed Ms. Kane's motion to approve NEALS' provision of ALS services in Rensselaer County with exceptions for the Cities of Rensselaer and Troy and the Towns of East Greenbush and Brunswick. He argued that Policy 93-10 was complied with by virtue of the

process completed by the CON Committee and that the motion was inappropriate (T. 5/25/06 generally and particularly at pgs. 39-40).

27. Ms. Kane's motion was ultimately declared out of order by Chairperson Robert on the grounds that Policy 93-10 did not authorize the motion. Mr. Battini appealed the Chair's ruling. The Chair's action was approved by a vote of twenty three in favor and three against (T. 5/25/06 at pgs. 55-59).
28. Based on the year 2005 call volume, it is projected that NEALS will respond to approximately 7,521 calls during its first year of operation, of which approximately 3,751 will require advanced life support (REMSCO Ex. N [Transcript of 5/8 hearing of the CON Committee or "T. 5/8/06"] at pgs. 25-26).
29. First year revenue is budgeted at \$826,248 and first year costs are budgeted at \$604,804 (NEALS Application at pg. 48; CON Committee Report, Findings of Fact #5 and 6).
30. There are currently seven providers who are licensed to provide ALS services in Rensselaer County or portions thereof. Empire and Mohawk Ambulance are the two primary ALS providers (T. 5/8/06 at pgs. 32-33, 39, 41, 45).
31. While there are adequate ALS services for communities located in the more densely populated Western portions of Rensselaer County, ALS services are sporadic, untimely and often unavailable in the rest of the county (NEALS Application at pg. 5).
32. The benchmark standard of a 90% success rate in bringing ALS services to a patient's side in 15 minutes or less, is not met in many communities throughout Rensselaer County. Information provided by the Rensselaer County

Department of Public Safety, for Berlin, Grafton, Nassau, Petersburg, Schaghticoke, Schodack and the Town of Hoosick, demonstrates that fractile response time reliability for the provision of ALS in 15 minutes or less, ranges from a best of only 47% of the time in Schaghticoke to 2% of the time in the Town of Hoosick (NEALS Application at pg. 5; T. 5/8/06 at pgs. 16-19).

33. Because 25% of all requests for ALS are unanswered by any Rensselaer County ALS agency and an additional 34% of all requests result in missed or incomplete intercepts, public need is not readily correctable through the reallocation or improvement of existing resources (T. 5/8/06 at pgs. 20-21).

APPLICABLE LAW AND REGULATIONS

PHL § 3003(5) provides that the regional council shall have the responsibility to make determinations of public need for the establishment of additional emergency medical services and ambulance services and to make determinations of public need as provided in PHL § 3008. The regional council shall make such determination by an affirmative vote of a majority of all of those members consisting of voting members.

PHL § 3008 generally describes procedures for filing a certificate of need application and also provides that the applicant may appeal the determination of the appropriate regional council to the state council within thirty days after the regional council makes its determination (PHL § 3008(5)).

DISCUSSION

Policy 93-10 places the burden of proof upon the Applicant to demonstrate public need. NEALS submits that REMSCO's denial of its application was

erroneous, arbitrary and capricious and not supported by factual evidence, and that the applicant did not receive a fair and impartial review of its application at the Regional Council level. NEALS cites numerous conflicts of interest by individuals who reviewed the NEALS application, and, also, claims that the CON Committee failed to weigh the evidence properly. Additionally, NEALS claims that the CON Committee actually voted to approve the application but the full REMSCO refused to consider the favorable vote.

REMSCO argues that the NEALS appeal is baseless and without merit. Any conflict of interest was remedied by the recusal of Mr. Retzlaff who had a pecuniary interest in the vote, from both voting and from participation in the process. Other individuals are claimed not to have had a conflict. Additionally, REMSCO disputes Applicant's account as to remarks made by Mr. Stairs who was a member of the CON Committee.

REMSCO claims that Applicant's failure to meet its burden of proof is demonstrated by the overwhelming vote in favor of the motion which denied the NEALS application. REMSCO asserts that it complied with the requirements of PHL § 3008 and Policy 93-10 and that it weighed the evidence properly.

REMSCO argues that the statutory scheme governing the CON process clearly contemplates the possibility that regional council members affiliated with competing EMS agencies may receive a degree of financial benefit, however attenuated, through participation in the CON process (REMSCO 7/12/06 response letter at pgs 14-15). PHL § 3003(2) prescribes that "...Not less than one third of the membership of the regional councils shall be representatives of ambulance services

and the remaining membership of the regional councils shall consist of, but not be limited to, representatives of existing local emergency medical care committees, physicians, nurses, hospitals, health planning agencies, fire department emergency and rescue squads, public health officers and the general public.” Any financial interest on the part of these persons, required to be on the regional councils by virtue of § 3003(2), is outweighed by the expertise and experience with the EMS process that such individuals bring to the regional councils. REMSCO points out that the legislature did not provide for the disqualification of regional council members because of bias or conflict, and that it did not provide for substitute members in the event of a conflict. REMSCO claims that the only individual who had a conflict which could have affected his participation in this process, was Mr. Retzlaff and that Mr. Retzlaff recused himself in a timely manner.

CONCLUSIONS

The process by which REMSCO denied the NEALS application was tainted by the participation of Mr. Retzlaff in the initial meetings on the application, and later by his participation in the deliberations of the full REMSCO, on May 25, 2006. REMSCO's Constitution and Bylaws provide that “Any member of the Regional Council, who has a pecuniary interest in any matter before the Council, shall declare the nature and extent of his/her interest prior to any discussion of the matter, and that member is to abstain from voting.” The Constitution and Bylaws, also, require that “All members shall avoid any action which might result in, or create an appearance of, a conflict of interest.”

It appeared from the materials reviewed by the ALJ that a number of individuals, aside from Mr. Retzlaff, namely Mr. Brandt who advised Chairperson Robert (T. 5/25/06 at pg. 55) and Ms. Keppler, Mr. Williams, Mr. Freemantle and Dr. Dailey who voted on the application may have had some degree of conflict of interest which at very least should have been declared by those individuals. They appear to have either been employed, to have been previously employed or to have had other connections with potentially competing ambulance services

The ALJ recognizes that the statutory scheme under which the CON process operates seems to implicitly allow for some measure of a conflict of interest through financial interests or employment by virtue of PHL § 3003(2) which states that "...Not less than one third of the membership of the regional councils shall be representatives of ambulance services and the remaining membership of the regional councils shall consist of, but not be limited to, representatives of existing local emergency medical care committees, physicians, nurses, hospitals, health planning agencies, fire department emergency and rescue squads, public health officers and the general public."

The ALJ, also, is cognizant that there is a lack of clarity in REMSCO's Constitution and Bylaws as to when a conflict of interest needs to be declared. Policy 93-10 states that "Each Regional Council shall establish a policy within the framework mandated by NYS Ethics Rules and established by the State EMS Council regarding members abstaining from voting in cases of conflicts of interest. This policy shall address members who have a pecuniary interest in a competing service and those who serve as an officer in an organization deemed to be in direct

competition with the applicant.” REMSCO’s Constitution and Bylaws do address the issue of a conflict in the case of an individual having a pecuniary interest in a matter before the council by requiring a declaration of such interest and recusal from voting. However, contrary to Policy 93-10, the Constitution and Bylaws do not address situations where an individual is an officer in a potentially competing organization. They, also, do not clarify whether mere employment with a potentially competing service constitutes a conflict of interest, and do not clarify the procedure to be followed in the event an individual is an officer in or is employed by a potentially competing organization. In the absence of direction from the Constitution and Bylaws, fairness and full disclosure would dictate that an individual should declare whether he/she is an officer in or is employed by a potentially competing ambulance service.

It was conceded by REMSCO that Mr. Retzlaff who is a stockholder and President of Empire Ambulance Service, had a disqualifying pecuniary interest in this application. On March 27, 2006, he was belatedly directed by Chairperson Robert “to recuse himself from the process for the NEALS application from here on out”. Mr. Retzlaff had previously participated in two deliberations at which the application was deemed incomplete. I conclude that Mr. Retzlaff should have declared his conflict of interest and recused himself from the process immediately when the application was first up for consideration. Mr. Retzlaff’s actions violated Article VIII, Section D of the Constitution and Bylaws which states that “All members shall avoid any action which might result in, or create an appearance of a conflict of interest.”

Mr. Retzlaff abstained from voting on the application at the May 25, 2006 REMSCO meeting because he had a "financial interest in a potentially competitive company" but he, nevertheless participated in the deliberations at that meeting concerning the application notwithstanding Chairperson Robert's directive that he "recuse himself from the process for the NEALS application from here on out". Mr. Retzlaff's comments at the May 25, 2006 meeting may well have impacted Chairperson Robert's ruling that a motion to approve the application with territory excluded was out of order pursuant to Policy 93-10.

With regard to improper remarks allegedly made by Mr. Jim Stairs of the CON Committee, the weight of the evidence does not allow me to credit either side's version of these remarks. The applicant submitted affidavits indicating that Mr. Stairs made remarks, with respect to the application, to the effect that "We can destroy this now, or we can destroy this at the public hearing." REMSCO asserts that Mr. Stairs actually said "dissect" rather than "destroy". I find no convincing basis in the record which would lead me to believe one party's account of Mr. Stairs' remarks as opposed to the other.

I conclude that in making its Findings of Fact, the CON Committee did not resolve conflicts in the evidence. Importantly, any number of REMSCO findings such as Findings of Fact # 8, 9, 10, 11, 12, 13, 14 and 15 found that individuals had stated, asserted, stipulated or used a point to buttress. These are not proper findings of fact but rather are statements of opinion by the parties. Additionally, where the Findings conflicted, REMSCO did not resolve the conflict. For example, Finding of Fact #12 states that the Applicant's position is that public need is not

readily correctable through the reallocation or improvement of existing resources. Finding of Fact # 14 states that Mr. Retzlaff said that if there is a problem with the delivery of ALS service, the problem is readily correctable through the reallocation or improvement of existing resources. These two positions are in conflict and the CON Committee did not make findings to resolve the conflict.

The procedural matters, set forth above, would normally necessitate a remand of this matter to the regional council. However, in addition to the procedural problems which are noted above, the ALJ concludes that NEALS successfully carried its burden of demonstrating that its certificate of need application should be approved, albeit with the limitations proposed in the first CON Committee motion.

NEALS presented impressive and persuasive statistical evidence based upon information provided by the Rensselaer County Department of Public Safety demonstrating that in a number of areas of Rensselaer County, there is an inadequate response time by existing ALS providers. This information was not adequately rebutted by REMSCO. I, therefore, conclude that there is a need for the services that NEALS proposes to provide.

In reaching this conclusion, great weight was given to the remarks of a number of the speakers who spoke in favor of the NEALS application at the May 8, 2006 public hearing. The remarks of these speakers supported the statistical evidence presented by NEALS. In particular, Mr. Evan Eisenhandler who is the current EMS Coordinator for Rensselaer County, stated that certain ALS intercepts can take 30 to 40 minutes from the initial call for help (T. 5/8/06 at pg, 65). He asserted that "...anyone that truly understands the existing level of ALS service in

Rensselaer County would agree that it does not serve all geographic areas in this county on an adequate level (T. 5/8/06 at pg. 66). He, further, stated that the NEALS application, if approved, could be part of the solution to the county's problems (T. 5/8/06 at pg. 67).

Ms. Johanna Flanigan, former EMS coordinator for Rensselaer County and former Chair of the State EMS Council, presented a compelling argument that ALS services in Rensselaer County need to be improved in Stephentown, Hoosick Falls, Castleton, Petersburg and Johnsonville (T. 5/8/06 at pgs. 30-35). Mr. Steven Robelotto, Ms. Denise King and Ms. Barbara Danylak, all presented compelling arguments as to the very real risks posed to the residents of Rensselaer County who cannot obtain adequate ALS services (T. 5/8/06 at pgs. 36-41, 70-74).

In contrast, a number of the speakers who spoke against the application seemed motivated, at least in part, by the competition that NEALS would present to them. Mr. Otto Madsen of Capital District Ambulance noted that his service was awaiting resolution of its PHL § 3009 application in Rensselaer County (T. 5/8 at pgs. 55-57). Mr. Retzlaff, of Empire Ambulance Service, a commercial ambulance service certified to operate in Rensselaer County, spoke of his concern that the addition of another ALS provider would "serve to dilute the effectiveness of the seven providers that currently exist" (T. 5/8/06 at pgs. 47-48).

The existence of problems indicative of a need for improved ALS services is acknowledged by the three members of the CON Committee who voted against the NEALS application. For example, Mr. Battini voted against the application when it was considered by the CON Committee, based upon his uncertainty concerning

NEALS financial status. However, he affirmed that there is a need for the services proposed by NEALS. Mr. Politis rejected the application because, in his view, there had been no effort to reallocate or improve existing services. He did not question the proposition that ALS response times by the currently existing providers are inadequate. Mr. Stairs shared Mr. Politis' views (CON Committee Report at pg. 6).

In this regard, the ALJ found it compelling that Mr. Battini who cast the deciding vote against the NEALS application at the May 12, 2006 CON Committee meeting, stated at that meeting that he believed there was a need for the services proposed in the NEALS application but that he wanted to be assured that NEALS was financially stable. By the time of the May 25, 2006 full REMSCO meeting, Mr. Battini had become convinced that NEALS was financially stable and indicated that he would be voting against the motion to deny the NEALS application. He even appealed Chairperson Robert's ruling that Ms. Kane's motion to consider approving the application with limitations was out of order. It is reasonable to assume that if the CON Committee vote could be revisited, Mr. Battini would have voted in favor of the CON Committee motion to approve the application albeit with a limited service area, and that that motion would have passed by a vote of 3 to 2. It is also reasonable to assume that he would have voted against the second CON Committee motion to deny the application. Had the CON Committee passed the initial motion in favor of the application, the full REMSCO might have taken a different approach to the application at the May 25, 2006 meeting.

Having found a need for improved ALS services, the ALJ next examined the question of whether the need for improved ALS service can be readily met through

the utilization of existing resources. Inherent in this review, according to Policy 93-10, is a determination as to why appropriate measures were not taken by existing providers prior to the submission of the new application.

The Applicant demonstrated, based upon the data provided by the Rensselaer County Department of Public Safety for the year 2005, that 25% of all requests for ALS in Rensselaer County are unanswered and that another 34% result in incomplete/missed intercepts. In the ALJ's view, this information was not rebutted during the process. The ALJ found these statistics to be convincing evidence that existing providers are unable to adequately provide ALS services throughout the county. It is difficult to believe that the lack of adequate ALS services would not have been known to the existing providers. It is, also, difficult to believe that, if correction was possible with existing resources, it would not have already been accomplished. Indeed, Chairperson Robert stated at the May 12, 2006 CON Committee vote that "...if any of the existing providers intended to serve these areas, they would have done so by now".

Additionally, numerous statements by the speakers at the public hearing convinced the ALJ that resources are stretched thin in Rensselaer County and that this problem is longstanding. Ms. Flanigan who is a former Rensselaer County EMS Coordinator related that "...Anyone with a scanner who hears the numerous requests for ALS go out over the air can attest to the need for another ALS provider in our county...Quite honestly, the two current ALS providers have had many years to designate dedicated Rensselaer County first response vehicles but have failed to do so...NEALS is asking for permission from the Regional EMS Council to assemble

together certified personnel in a system that quite honestly is long overdue.” (T. 5/8/06 at pgs. 33-35).

Steven Robelotto, Fire Chief and Town Supervisor in the Town of Sand Lake recounted that “Fly cars is the best answer...It’s just too big of a county”. (T.5/8/06 at pgs. 36-38). Ms. King, a member of Sand Lake Ambulance, stated that “We’re at a real critical time...especially in this county... Our resources just are stretched thin. We have trouble recruiting new members and retaining them....I don’t think that NEALS should be turned away....”. (T. 5/8/06 at pgs. 38-39). Ms. Danlyak, of the Stephentown Fire Department and Rensselaer County Ambulance, stated that “...at the present time, the Eastern part of the county is supplied ALS from Massachusetts to Vermont.” (T. 5/8/06 at pgs. 70-72). Mr. Eisenhandler offered that “We need to find viable solutions to this problem yesterday.” (T. 5/8/06 at pg. 66).

In short, the ALJ concludes that there is a need for the services which NEALS proposes to provide and that these services cannot be readily provided through the existing resources or providers.

In reaching this conclusion, it is noted that NEALS conceded that there are areas of Rensselaer County such as the City of Troy and other municipalities which receive “great ALS responses” (T. 5/8/06 at pgs.14-16). It is further noted that the municipalities which were excluded by Ms. Kane’s and Mr. Robert’s motions to approve the application, namely the Cities of Rensselaer and Troy and the Towns of East Greenbush and Brunswick, were not listed as those with deficient response times by NEALS.

The ALJ, therefore, recommends to the State EMS Council that the NEALS Certificate of Need Application be granted with the specific exclusion of operating territory for the Cities of Rensselaer and Troy and the Towns of East Greenbush and Brunswick. Although NEALS applied for approval to provide ALS service throughout Rensselaer County, modification of the application by the State EMS Council is permitted by PHL § 3002(3) which states that "Upon appeal from the appropriate regional council, the state council shall have the power, by an affirmative vote of a majority of those present, to amend, modify, and reverse determinations of the regional councils made pursuant to subdivision five of section three thousand three and section three thousand eight of this article."

Should the State EMS Council disagree with this recommendation, at very least, the application should be remanded for reconsideration by the CON Committee members who originally voted upon the application on May 12, 2006, followed by a reconsideration by the full REMSCO. Such a remand would be necessitated by the procedural irregularities described above.

RECOMMENDATIONS


Based on the foregoing, I hereby make the following recommendations;

1. The NEALS Certificate of Need Application should be granted by the New York State Emergency Medical Services Council and the determination by the Regional Emergency Medical Services Council of the Hudson Mohawk Valleys, Inc. which denied the application should be reversed;

2. The application should be granted with the specific exclusion of operating territory within the Cities of Troy and Rensselaer and the Towns of East Greenbush and Brunswick.

DATED: Troy, New York
August 25, 2006

Respectfully submitted,


Frederick Zimmer
Administrative Law Judge

TO: Ms. Donna Gerard
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