

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1667-20

IN RE PROTEST OF
CONTRACT FOR RETAIL
PHARMACY DESIGN,
CONSTRUCTION, START-UP
AND OPERATION, REQUEST
FOR PROPOSAL NO.
UH-P20-006.

APPROVED FOR PUBLICATION

February 21, 2023

APPELLATE DIVISION

Argued November 1, 2022 – Decided February 21, 2023

Before Judges Gilson, Rose, and Gummer.

On appeal from the final decision of University Hospital.

Jason A. Levine argued the cause for appellant Sumukha, LLC (Hanglely Aronchick Segal Pudlin & Schiller, attorneys; Jason A. Levine and Robert A. Wiygul, on the briefs).

Peter Matthew Slocum argued the cause for respondent, University Hospital (Lowenstein Sandler LLP, attorneys; Christopher Porrino and Ryan Goodwin, on the brief).

Brian P. O'Neill argued the cause for intervenor Shields Pharmacy of University, LLC (Chiesa Shahinian & Giantomasi PC, attorneys; Jeffrey S. Chiesa, Ronald L. Israel, and Brian P. O'Neill, on the brief).

Buttaci Leardi & Werner LLC, attorneys for amicus curiae Garden State Pharmacy Owners, Inc. (John W. Leardi and Nicole P. Allocca, on the brief).

The opinion of the court was delivered by

GILSON, J.A.D.

The novel question presented is whether University Hospital is a state administrative agency whose final decisions are directly appealable to this court under Rule 2:2-3(a)(2). University Hospital issued a request for proposals (RFP) to design, construct, and operate a pharmacy at its hospital. Sumukha, LLC (Sumukha), one of the unsuccessful bidders, appeals from University Hospital's denial of its protest of the award of the contract to Shields Pharmacy of University, LLC (Shields). We hold that the Legislature did not intend to make University Hospital a state administrative agency when it created the hospital "as a body corporate and politic" that is not situated in an executive branch department. Consequently, we dismiss this appeal.

I.

A. University Hospital.

University Hospital is an acute care facility and trauma center located in Newark. It was established in 2012, when the Legislature enacted and the Governor signed the New Jersey Medical and Health Sciences Education

Restructuring Act (the Act), N.J.S.A. 18A:64M-1 to -43. "The Act restructured the [medical] higher education system in New Jersey in order to improve the quality and increase the efficiency of public educational services." In re Christie's Appointment of Perez as Pub. Member 7 of Rutgers Univ. Bd. of Governors, 436 N.J. Super. 575, 579 (App. Div. 2014).

Before the Act's adoption, University Hospital was affiliated with the University of Medicine and Dentistry of New Jersey (UMDNJ). L. 2012, c. 45 § 3. The Act dissolved the relationship between UMDNJ and University Hospital, creating "an independent University Hospital that will maintain its status as the principal teaching hospital of the New Jersey Medical School, New Jersey Dental School and any other medical education programs located in Newark." N.J.S.A. 18A:64M-2(z). University Hospital's enabling statute, N.J.S.A. 18A:64G-6.1 to -6.1i, states that University Hospital was established "as a body corporate and politic [that] shall be treated and accounted for as a separate non-profit legal entity from Rutgers, The State University," and as "an instrumentality of the State." N.J.S.A. 18A:64G-6.1a(a).

The management, supervision, and administration of University Hospital is "vested in a 13-member board of directors" (the Board), some of whom are appointed by the Governor. N.J.S.A. 18A:64G-6.1(a). The Board "h[as] the

power and duty to exercise general oversight over the affairs of University Hospital to ensure the fulfillment of its mission." N.J.S.A. 18A:64G-6.1(e).

Through its Board, University Hospital has the authority to:

- (1) direct and control expenditures of University Hospital funds;
- (2) borrow money;
- (3) enter into contracts with the State or federal government, or any individual, firm, or corporation;
- (4) solicit and accept grant moneys;
- (5) acquire, own, lease, dispose of, use, and operate property;
- (6) sue and be sued;
- (7) enter into a contract or other agreement with a nonprofit corporation operating one or more hospitals in New Jersey to operate and manage or assist in the operation and management of University Hospital; and
- (8) hire, fire, and fix salaries for all employees of University Hospital.

[Ibid.]

University Hospital also has the right to offer itself for sale, provided it complies with regulations adopted by the New Jersey Attorney General and obtains court approval. N.J.S.A. 18A:64G-6.1d(a) and (b).

University Hospital's exercise "of the powers conferred by [the Act are] deemed to be public and essential government functions necessary for the welfare and health of the State and the people of New Jersey." N.J.S.A. 18A:64G-6.1a(a). The hospital receives state funding "sufficient to maintain the level of community services provided on the effective date of [the Act] and to maintain University Hospital as an acute care facility and trauma center." N.J.S.A. 18A:64G-6.1a(d).

B. The RFP.

On October 25, 2019, University Hospital issued an RFP seeking an "experienced vendor" to design, construct, start up, and operate a retail pharmacy at the hospital. The RFP twice referred to University Hospital "[a]s a state agency" and stated that the RFP "is a public sector bid." The RFP also stated that bidders must comply with certain statutory provisions governing public contracts, including N.J.S.A. 52:13D-13(b), N.J.S.A. 52:32-58, N.J.S.A. 52:32-44(b), and N.J.S.A. 52:34-12.2.

In addition, the RFP referenced the availability of appellate review for certain claims made by the contractor who is awarded the contract. Subsection 4.16 of the RFP, which was entitled "Claims and Remedies," stated:

Final decisions concerning all disputes relating to contract award[,] rescission, contract interpretation[,]

Contractor performance and/or reduction, suspension or termination are to be made in the manner consistent with N.J.A.C. 17:12-1.1 et. seq. The Executive Director's final decision shall be deemed a final agency action reviewable by the Superior Court of New Jersey, Appellate Division.

University Hospital received five proposals in response to the RFP. Four of those submissions were deemed to be responsive; one submission was determined to be non-responsive. The four responsive bidders included Sumukha, Shields, Maxor National Pharmacy Services, LLC, and Kaplan Group, LLC. The responsive bids were reviewed by an Evaluation Committee (the Committee), which consisted of four members drawn from the hospital's departments of purchasing services, pharmacy, finance, and facilities.

In evaluating the proposals, the Committee awarded each bidder a "cost rank" and a "technical rank." In that regard, the Committee ranked the proposals based on the total sum of the amounts for design, start up, and a three-year fixed management fee offered by the bidders. The Committee also evaluated and ranked each bidder based on its technical experience. After conducting its evaluation, the Committee issued a thirty-four-page report summarizing its findings.

Shields was ranked first in cost and technical abilities. Sumukha was ranked fourth in cost and third in technical abilities. The Committee report

concluded that Shields' proposal was "the highest technically ranked and the lowest total cost of the proposals received" and, thus, "represent[ed] the best value for University Hospital." In not accepting Sumukha's bid, the Committee pointed out that Sumukha met "the Scope of Work Requirements" but lacked "prior experience operating a hospital-owned pharmacy or managing a meds-to-beds program." On September 24, 2020, University Hospital's Board accepted the Committee's recommendation and adopted a resolution awarding the contract to Shields.

On November 19, 2020, Sumukha submitted a written protest of the award of the contract and requested University Hospital to disqualify Shields and resolicit the RFP. Sumukha alleged that Shields' proposal violated the RFP and state and federal laws by failing to comply with conflict-of-interest rules, denying patients their choice of pharmacy provider, and underestimating the proposed management fee and labor costs. Sumukha also alleged that the Committee arbitrarily and unfairly had included certain operating expenses in evaluating its proposal while excluding those expenses when evaluating Shields' proposal, had overstated Shields' experience while underestimating Sumukha's experience, and had given undue credit to Shields' proposal based on a "contribution margin."

University Hospital appointed its interim chief financial officer as the hearing officer to review Sumukha's protest. On January 29, 2021, the hearing officer issued a "final decision" denying the protest of the award of the contract to Shields. That decision contained detailed findings of facts and an analysis of Sumukha's contentions.

Initially, the hearing officer determined that University Hospital was "not bound, limited or governed by statutes and regulations governing procurement and the award of public contracts for the State of New Jersey and local government entities" because University Hospital "is a 'separate non-profit legal entity' and 'body corporate and politic' established pursuant to [the Act]." In making that determination, the hearing officer acknowledged that University Hospital "is an instrumentality of the State" but reasoned that it "is funded separately from other state entities" and "falls outside the administrative jurisdiction of the Division of Purchase and Property." The hearing officer also reasoned that University Hospital "applies procurement policies and procedures consistent with the provisions of state procurement law and regulations that are supportive of its mission and Enabling Legislation."

Addressing the substantive aspects of Sumukha's protest, the hearing officer concluded that Sumukha had failed to provide any "legal or equitable

basis for th[e] proposed relief" it sought. The hearing officer also reasoned that even if Shields was not awarded the contract, Sumukha would not be entitled to the contract award based on its scores and ranking.

After receiving the hearing officer's denial of its protest, Sumukha asked for a stay of the Shields contract award pending its appeal. The hearing officer denied that request.

On February 25, 2021, Sumukha filed a notice of appeal with this court challenging University Hospital's denial of its contract protest. Sumukha also sought a stay from this court, but we denied that request. We then granted Shields' motion to intervene and allowed the Garden State Pharmacy Owners, Inc. to submit a brief as an amicus curiae in support of Sumukha's appeal.

II.

On appeal, Sumukha argues that University Hospital's hearing officer erred in (1) finding that University Hospital was not a state administrative agency; (2) finding that University Hospital was not subject to New Jersey's procurement laws and regulations; (3) not finding that Shields had conflicts of interest; and (4) rejecting its protest and violating its due process rights. Amicus Garden State Pharmacy Owners, Inc. supports Sumukha's position, contending that the arrangement between University Hospital and Shields violates the Board

of Pharmacy's anti-steering regulations. In response, University Hospital and Shields assert that (1) we have no jurisdiction to hear Sumukha's appeal because University Hospital is not a state administrative agency; (2) University Hospital is not subject to the State's procurement laws and regulations; and (3) even if University Hospital was subject to the State's procurement laws, its rejection of Sumukha's protest should be affirmed.

We begin with the jurisdiction issue. Because we hold that University Hospital is not a state administrative agency whose final decisions are directly appealable to us under Rule 2:2-3(a)(2), we dismiss this appeal. Consequently, we do not reach or express an opinion on whether RFPs issued by University Hospital are subject to state procurement laws and regulations, or whether University Hospital correctly denied Sumukha's contract protest.

A. University Hospital is Not a State Administrative Agency.

Whether University Hospital is a state administrative agency is ultimately governed by the Legislature's intent as reflected in the Act that established University Hospital. See State v. Carter, 247 N.J. 488, 513 (2021) (explaining that the "overriding goal of statutory interpretation is to determine and give meaning to the Legislature's intent"). To put the Act's plain language in context,

it is helpful to review the history of judicial review of state administrative agency determinations.

1. "State Administrative Agency" As Used in Rule 2:2-3(a)(2).

"Prior to the adoption of the New Jersey Constitution of 1947, 'persons aggrieved by action or inaction of state or local administrative agencies could seek review by applying for one of the prerogative writs.'" Vas v. Roberts, 418 N.J. Super. 509, 515 (App. Div. 2011) (quoting Pascucci v. Vagott, 71 N.J. 40, 51 (1976)). "The 1947 Constitution superseded the prerogative writs 'and, in lieu thereof,' afforded 'review, hearing and relief . . . in the Superior Court, on terms and in the manner provided by rules of the Supreme Court, as of right.'" Ibid. (alteration in original) (quoting N.J. Const. art. VI, § 5, ¶ 4). In that regard, the New Jersey Constitution states:

Prerogative writs are superseded and, in lieu thereof, review, hearing and relief shall be afforded in the Superior Court, on terms and in the manner provided by rules of the Supreme Court, as of right, except in criminal causes where such review shall be discretionary.

[N.J. Const. art. VI, § 5, ¶ 4.]

"Pursuant to this constitutional grant, the Supreme Court adopted Rule 2:2-3(a)(2)" Vas, 418 N.J. Super. at 516. That Rule states that "appeals may be taken to the Appellate Division as of right" from "final decisions or

actions of any state administrative agency or officer" subject to limited exceptions not applicable to this matter. R. 2:2-3(a); see also Infinity Broad. Corp. v. N.J. Meadowlands Comm'n, 187 N.J. 212, 227 (2006) (explaining that "appeals from state agencies must lie in the Appellate Division unless the matter is a condemnation or inverse condemnation appeal arising from state agency action and, therefore, are cognizable in the Law Division in the first instance").

The Court Rules do not define the terms "state administrative agency," but the New Jersey Constitution, the Administrative Procedures Act (APA), N.J.S.A. 52:14B-1 to -15, and caselaw provide guidance. Article V, Section 4, Paragraph 1 of the New Jersey Constitution requires the Legislature to allocate "[a]ll executive and administrative offices, departments, and instrumentalities of the State government . . . by law among and within not more than twenty principal departments, in such manner as to group the same according to major purposes so far as practicable." N.J. Const. art. V, § 4, ¶ 1; see also In re Plan for Abolishment of Council of Affordable Hous., 214 N.J. 444, 459 (2013). "Each principal department shall be under the supervision of the Governor." N.J. Const. art. V, § 4, ¶ 2.

"[W]hen the Legislature creates an agency and places it 'in' a department of the Executive Branch, the above constitutional requirement is met." In re

Plan for Abolishment of Council of Affordable Hous., 214 N.J. at 462. In addition, when the Legislature creates an agency and places it "in, but not of" an executive branch department, those words also satisfy the constitutional mandate. Id. at 462-63.

The APA provides that "state agency" or "agency"

shall include each of the principal departments in the executive branch of the State Government, and all boards, divisions, commissions, agencies, departments, councils, authorities, offices or officers within any such departments now existing or hereafter established and authorized by statute to make, adopt or promulgate rules or adjudicate contested cases, except the office of the Governor.

[N.J.S.A. 52:14B-2.]

Our Supreme Court and this court have held that agencies whose actions are reviewable in the first instance by the Appellate Division under Rule 2:2-3(a)(2) are those located within the principal departments in the executive branch of the State government. See Infinity Broad. Corp., 187 N.J. at 215 (holding that the New Jersey Meadowlands Commission "is a state agency; the very statute that created it makes that conclusion unassailable"); In re Hartz/Damascus Bakery, Inc., 404 N.J. Super. 49, 59 (App. Div. 2008) (concluding the same); Hartz Mountain Indus., Inc. v. N.J. Sports & Exhibition Auth., 369 N.J. Super. 175, 187-88 (App. Div. 2004) (holding that the New

Jersey Sports and Exhibition Authority (NJSEA) is a state administrative agency because it "is constituted as a body corporate and politic within the Department of Community Affairs").¹

2. University Hospital's Enabling Statute.

Having examined the definitions of what constitutes a state administrative agency, we turn to the issue of whether the Legislature intended University Hospital to be a state administrative agency whose final decisions are appealable as of right to us under Rule 2:2-3(a)(2). The answer to that question is found in the plain language of University Hospital's enabling statute, as set forth in the Act. See DiProspero v. Penn, 183 N.J. 477, 492 (2005) (explaining that "generally, the best indicator of [the Legislature's] intent is the statutory language").

University Hospital's enabling statute states "University Hospital shall be the principal teaching hospital of New Jersey Medical School and New Jersey Dental School, and any other Newark-based medical education program." N.J.S.A. 18A:64G-6.1a(a). As a teaching hospital, University Hospital provides medical care and treatment like the care and treatment provided by privately-

¹ In 2012, the Legislature transferred NJSEA from the Department of Community Affairs to the Department of State pursuant to the State Agency Transfer Act, N.J.S.A. 52:14D-1 to -8. N.J.S.A. 5:10-4.1.

operated hospitals. Like those hospitals, University Hospital is regulated by various state administrative agencies, principally the Department of Health.

The Legislature established University Hospital "as a body corporate and politic" and "an instrumentality of the State" because it deemed University Hospital's functions "to be public and essential government functions necessary for the welfare and health of the State and the people of New Jersey." Ibid.

The Act did not place University Hospital in any state executive branch department. Indeed, the Legislature separated University Hospital from UMDNJ, which had been allocated to the Department of State. L. 1992, c. 84 § 3; N.J.S.A. 18A:3B-27. Moreover, through the Act, the Legislature allocated Rowan University to the Department of State. N.J.S.A. 18A:64M-30. Had the Legislature intended to allocate University Hospital to a department of the executive branch, like other public institutions of higher education, it would have done so expressly.

Moreover, the Act did not give University Hospital authority to promulgate regulations or make quasi-judicial decisions. In that regard, University Hospital does not administer a government program or act as a government regulator. Further, University Hospital's decisions are not subject to contested proceedings before an administrative law judge. By contrast, the

boards of public institutions of higher education "have final authority to determine controversies and disputes concerning tenure, personnel matters of employees not classified under Title 11A . . . and other issues arising under Title 18A . . . involving higher education." N.J.S.A. 18A:3B-6(f). Those boards may assign those disputes to an administrative law judge. Ibid. No similar authority to assign disputes to an administrative law judge was given to the hospital. Consequently, University Hospital does not meet the definition of a state administrative agency under the APA. See N.J.S.A. 52:14B-2.

The Act also does not expressly state that decisions by University Hospital are reviewable as final agency actions. In that regard, the Act differs from many other statutes establishing other state entities because those statutes expressly provide for appellate review of final actions by those state entities. See, e.g., N.J.S.A. 39:10-20 (providing the Appellate Division with authority to review "a final determination of the chief administrator [of the Motor Vehicle Commission]"); N.J.S.A. 34:15-66 (providing that "[a]ny party may appeal from [a workers' compensation judgment] to the Appellate Division"); N.J.S.A. 18A:6-9.1(a) (conferring Appellate Division jurisdiction to final decisions of the Commissioner of Education); N.J.S.A. 30:4C-27.11 (stating that "[a] person aggrieved by a final decision of the [Department of Human Services] is entitled

to seek judicial review in the Appellate Division"); N.J.S.A. 46:30B-84 (stating that a "person whose [property] claim has been denied by the [Treasurer of the State of New Jersey] . . . may appeal the final decision to the Appellate Division"); N.J.S.A. 49:5-17(a) (granting Appellate Division review from "act[s], determination[s], rules, regulation[s], or order[s] or any other action[s] of [the Bureau of Securities in the Division of Consumer Affairs]"); N.J.S.A. 52:34-10.10 (conferring Appellate Division jurisdiction from final agency determinations of the Division of Purchase and Property).

The authorities given to University Hospital are also unlike authorities generally given to state administrative agencies. For example, University Hospital (1) has independent control over its funds and grants; (2) can enter contracts with "the State and federal government"; (3) can borrow money; (4) can "sue and be sued;" and (5) can hire, fire and fix salaries for all its employees. N.J.S.A. 18A:64G-6.1(e).

University Hospital also has two unique rights. It can offer itself for sale, N.J.S.A. 18A:64G-6.1d(a), and it can enter a contract to have another non-profit entity manage or assist in the management of its operations, N.J.S.A. 18A:64G-6.1(e)(7). However, the State oversees University Hospital in exercising those rights.

If University Hospital wants to enter a contract with a non-profit corporation to operate or manage the hospital, it must use "a competitive contracting method" as outlined in N.J.S.A. 18A:64G-6.1e(b). In addition, any management contract must be reviewed and approved by the Department of Health and Senior Services. N.J.S.A. 18A:64G-6.1e(a). If University Hospital seeks to offer itself for sale and be acquired by another entity, it must comply with regulations issued by the Attorney General. Moreover, the acquisition must be approved by a court. N.J.S.A. 18A:64G-6.1d(a) and (b).

In summary, the plain language used by the Legislature in establishing University Hospital does not indicate that the Legislature intended University Hospital to be a state administrative agency. Consequently, its final decisions are not directly appealable to us under Rule 2:2-3(a)(2).

In so holding, we point out that University Hospital does not have the power to declare itself a state administrative agency. Under New Jersey's Constitution, only the Legislature can create a state administrative agency. N.J. Const. art. V, § 4, ¶ 1. Consequently, that the RFP twice stated that University Hospital was a state agency is not controlling.

University Hospital can, however, subject itself to rules governing its procurement process. In that regard, we note that University Hospital had


adopted a "Procurement and Purchasing and Delegation of Authority to Contract Policy" (Procurement Policy) that was in place when it issued its RFP in October 2019. See Univ. Hosp., Procurement and Purchasing and Delegation of Authority to Contract (rev. July 22, 2020). The current University Hospital Procurement Policy, as amended, was adopted on September 26, 2019.

B. In Summary.

We hold that the Legislature did not intend for University Hospital to be a state administrative agency. Accordingly, we hold that University Hospital is not a state administrative agency whose final decisions are directly appealable to us under Rule 2:2-3(a)(2). This appeal is dismissed without prejudice to Sumukha's right to file an action in the Law Division.

Dismissed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION