ADVISORY OPINION

Kentucky Board of Emergency Medical Services

KBEMS 2011-001

May 19, 2011

Issue Presented: When is it permissible for an out-of-county service to engage in nonemergency transports in a geographic area undefined by their CON?

Relevant Statutory Provisions: **311A.030** Administrative regulations relating to ambulance services, etc.

Relevant Regulatory Provisions: **202 KAR 7:501** Ambulance providers and medical first response agencies.

Advisory Opinion Request: Rowan County and Montgomery County Emergency Medical Services (EMS) have both requested Advisory Opinions from the Kentucky Board of Emergency Medical Services (KBEMS). The requests are essentially the same and focus on the EMS licensing term "geographic service area." The following opinion addresses the issues presented in the requests submitted to KBEMS.

In addressing these requests, it is important to define the term "geographic service area." No official definition appears in either KRS 311A.010 or 202 KAR 7:010. The term first appears in 202 KAR 7:501 § 2(4)(g) which requires that "the specific geographic area to be served" appear on the issued license.

Although paragraph (4)(g) is the first mention in regulation or statute of the "geographic service area," the term originates earlier in 202 KAR 7:501 § 2(1). This paragraph prohibits any entity from providing "ambulance services" if that entity has not "obtained a license from the Board pursuant to this administrative regulation and certificate of need if appropriate." Despite the fact that the word license appears prior to certificate of need (CON) in 202 KAR 7:501 § 2(1), the CON actually is a "condition precedent" to the issuance of a license. In other words, the CON must be applied for and granted through the Office of Health Policy prior to the Board acting upon any application for licensure as an ambulance service.

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KRS 311A.030, which gives KBEMS the power to regulate ambulance services, also states, "Nothing in this section shall be construed to change or alter the issuance of certificates of need for emergency medical services providers." This clause is referred to, in general terms, as a reservation clause and ensures that the agency with jurisdiction over a matter maintains that jurisdiction despite other laws such as KRS 311A. In this case, the Cabinet for Health and Family Services, specifically the Office of Health Policy (OHP), oversees the issuance of CONs. Pursuant to the power granted it in KRS 218B.020, the OHP issues CONs upon application for and demonstrated need in a particular geographic area. Once they issue the CON, the OHP notifies KBEMS that a need has been certified in a designated area. That notification is the impetus for KBEMS' action on a properly filed application for an ambulance service license.

When KBEMS begins their process, the CON is transformed into what the EMS regulations refer to as the "geographic service area" (GSA). Having moved from the OHP to KBEMS, the ambulance service no longer falls under the jurisdiction of the Cabinet for Health and Family Services but falls fully under KBEMS' jurisdiction. Consequently, all regulations pertaining to ground ambulance services apply to all licensed providers. This means that 202 KAR 7:501 controls matters pertaining to GSA.

The geographic service area is equivalent to the original area used to grant the CON. Consequently, the general rules for GSA are as follows:

> The ambulance service that applied for and received the CON and a license from KBEMS has the right to conduct its services in the area designated in the CON and on the license.
>
> No other ambulance service may provide services in that area without first applying for and obtaining a CON and thereafter applying for and receiving a license through KBEMS.

Those are general rules, but the regulations promulgated by KBEMS create exceptions to the general rules. 202 KAR 7:501 § 2(6) allows licensed providers to respond to calls outside their GSAs but limits permissible responses to the following situations:

> (a) Mutual aid under an existing agreement with another licensed provider whose geographic service area includes the area in which the emergency call is made;
>
> (b) Disaster assistance;
>
> (c) Nonemergency transfers from damaged or closed health facilities; or
>
> (d) Interfacility care to residents of its service area, who are patients in facilities outside of its service area, for the purpose of returning the patients to their home service area or transporting them to another health facility.

202 KAR 7:501 § 2(6) makes it clear that no other exceptions exist by using the word, "only." The full paragraph states, "A licensed provider may respond to calls outside of its geographic

service area ***only*** if the provider is providing. . . ." (*emphasis added*) Subparagraphs (a) – (d) are the four limited situations that follow paragraph (6).

Because a provider may only venture into another provider's GSA under those limited circumstances, it could appear contradictory that 202 KAR 7:501 § 6 "Operating Requirements" contains a "Good Faith Effort" provision Pursuant to 202 KAR 7:501 § 6(7)

> [a] provider may accept a request to provide service outside of its service area if it requires documentation from the requesting facility or provider that a good faith effort was made to utilize a provider licensed for the area, except as provided for in Section 2(6) of this administrative regulation.

The following elements of the "good faith effort" provision (GFEP) are important to note:

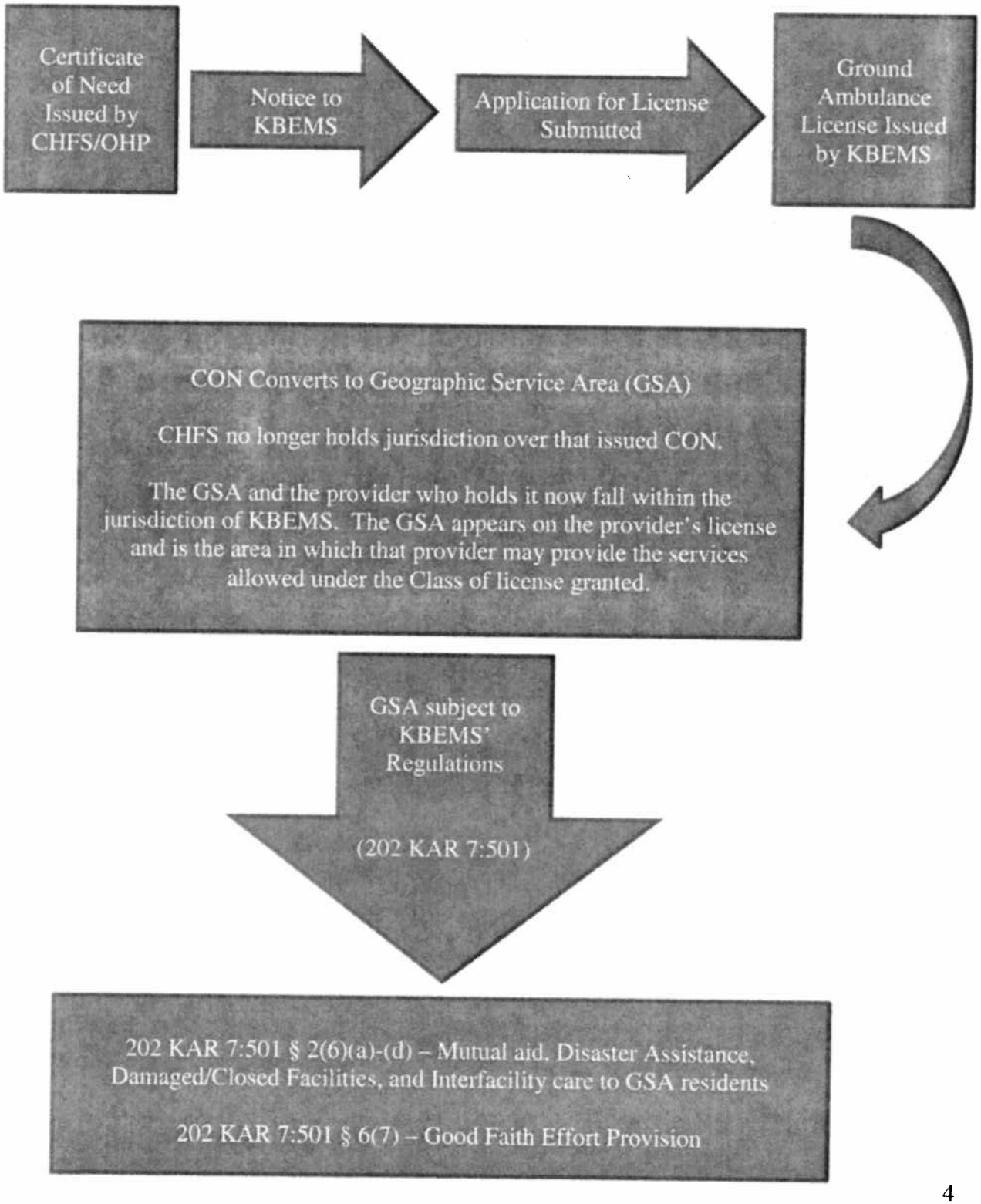
a. The GFEP requires a "documented" effort to obtain an in-service-area provider;

b. The documentation must come from either the requesting facility or the in-service-area provider; and

c. The GFEP is subject to the exceptions in 202 KAR § 2(6)(a)-(d); in other words, if one of those exceptions exists, the out-of-service-area provider need not have a documented GFEP.

The GFEP is a measure placed in the administrative regulations as a means to protect the patient, first and foremost; healthcare facilities; and both in- and out-of-service-area providers. It protects the patient from being left stranded when the in-service-area provider will not or cannot respond for hours. It protects healthcare facilities by ensuring they need not merely accept the delay in transporting that an in-service-area provider might unilaterally impose. Additionally, it protects in- and out-of-service-area providers by allowing the in-service-area provider to call an out-of-service-area provider if necessary. This protection would most likely come into play when a second in-service-area provider has failed to respond and then later complains about the out-of-service-area provider coming into that GSA.

Putting all these areas of discussion together, the GSA, the Regulatory Exceptions, and the Good Faith Effort Provision create a finely tuned mechanism for maintaining the original areas contemplated when CONs are issued. The process put into graphic terms follows on the next page:


Certificate of Need Issued by CHFS/OHP
Notice to KBEMS
Application for License Submitted
Ground Ambulance License Issued by KBEMS
CON Converts to Geographic Service Area (GSA)
CHFS no longer holds jurisdiction over that issued CON.
The GSA and the provider who holds it now fall within the jurisdiction of KBEMS. The GSA appears on the provider's license and is the area in which that provider may provide the services allowed under the Class of license granted.
GSA subject to KBEMS' Regulations
(202 KAR 7:501)
202 KAR 7:501 § 2(6)(a)-(d) – Mutual aid. Disaster Assistance, Damaged/Closed Facilities, and Interfacility care to GSA residents
202 KAR 7:501 § 6(7) – Good Faith Effort Provision

This model and the discussion before it, provide the basis for creating an area through the CON process, transforming that original area to a different regulatory term, and setting logical and rational limitations on that area through promulgated administrative regulations. Consequently, the CON, once created and then turned into the GSA is not like an impenetrable fence, maintained and controlled by the licensed provider. It is an area where a provider may always operate but that operation is subject, at all times, to the regulatory authority of KBEMS. In exercising that authority, the Board has seen fit to apply several exceptions by which all providers must operate in relation to the GSA.

Specific Questions Relevant to GSA:

The following questions have been taken nearly verbatim from the Advisory Opinion Requests submitted by Rowan County and Montgomery County Emergency Medical Services Providers:

1. When can an out-of-county Ambulance Service enter into another county's service area to provide non-emergency or emergency transports?

The general rule requires licensed ambulance providers to limit their runs to their geographic service area as determined by the initial CON grant. That rule is subject to four exceptions and one good faith effort provision. If any one of the four exceptions apply, an out-of-service-area provider may venture into another provider's service area. If none of the exceptions apply, the out-of-service-area provider can enter another provider's GSA only after obtaining documented proof of a good faith effort and subsequent failure to secure action by local service provider. That documented proof may come from the requesting facility or the requesting provider. It must be more than the out-of-service-area's self-serving statement that the local provider was sought and could not respond.

2. Can an out-of-county provider force the hospital in another county service area to call them to return patients from their county? (1) Back to their home county and/or (2) To transport to another hospital without the permission of the hospitals home county Ambulance Provider.

On both counts, the answer is "No." The four exceptions to the general rule are merely permission. They do not amount to an entitlement. An out-of-service-area provider may request that a facility call them when one of their in-area residents needs transport, but the provider has no claim to those individuals. First, the patient's desires are always paramount, so if the patient actually indicates that he does not wish to be transported by his home service, the provider has no authority to force the patient to use that service. Second, KBEMS has no jurisdiction over healthcare facilities. Who the healthcare facility chooses to call is entirely up to the facility. However, it is unethical for the resident's home service to allege a right to transport.

3. Does the county provider with a hospital within its CON coverage area need to get permission to return patients home from other counties?

No permission is required to transport that patient home. The transport has originated in the county where the service provider is licensed to provide EMS. Nothing in the "resident

transport" exception prevents a provider from entering another service area to finish a transport. The exceptions are meant to protect providers from an ongoing "invasion" of another provider's service area to answer calls in that area.

4. Can a provider venturing into another's service area provide transport to a resident of another's service area without the permission of the county holding the CON?

If an out-of-service-area provider goes into a county to retrieve a resident of the provider's home county, that out-of-service-area provider may transport that resident in two ways:

a. Back to their home service area; or

b. To another health facility.

Nothing in this exception indicates the other health facility must be in the home service area. Additionally, the use of "or" makes these transport options exclusive of one another, giving rise to the presumption that the other health facility is in someone else's geographic service area or out of state entirely. The regulations do not have a requirement that permission must be sought to enter into the geographic service area where the facility sits. Again, the issue is where the transport initiated. If the service provider could legally enter into that area and retrieve that patient for either transport home or on to another facility, no permission is required to do so on either end of the run.

5. How can the interpretation of the 202 KAR 7:501 § 2(6)(d) override a provider's license for a geographical service area established by the certificate of need process and KBEMS licensure?

The CON process and KBEMS' recognition of the geographic service area are not undermined by the promulgation of regulations that create exceptions to the general rule of geographic service area. The Board has the power to promulgate regulations, and these particular exceptions have gone through the necessary processes. In essence, the Board has properly exercised its jurisdiction over ground ambulance providers by setting such exceptions.

6. For the purpose of the regulation what is the definition of facility?

The current regulation and statute have no provisions that specifically define "facility." In KRS 311, the repealed EMS statute, the following definition appears in KRS 311.621(9)

> "Health care facility" means any institution, place, building, agency, or portion thereof, public or private, whether organized for profit or not, used, operated, or designed to provide medical diagnosis, treatment, nursing, rehabilitative, or preventive care, and licensed pursuant to KRS Chapter 216B.

KRS 216B governs the "Licensure and Regulation of Health Facilities and Services" and at KRS 216B.015(12) defines "Health facility" as

> . . . any institution, place, building, agency, or portion thereof, public or private, whether organized for profit or not, used, operated, or designed to provide medical diagnosis, treatment, nursing, rehabilitative, or preventive care and includes alcohol abuse, drug abuse, and mental health services. This shall include, but shall not be limited to, health facilities and health services commonly referred to as hospitals, psychiatric hospitals, physical rehabilitation hospitals, chemical dependency programs, tuberculosis hospitals, skilled nursing facilities, nursing facilities, nursing homes, personal care homes, intermediate care facilities, family care homes, primary care centers, rural health clinics, outpatient clinics, ambulatory care facilities, ambulatory surgical centers, emergency care centers and services, ambulance providers, hospices, community mental health and mental retardation centers, home health agencies, kidney disease treatment centers and freestanding hemodialysis units, facilities and services owned and operated by health maintenance organizations directly providing health services subject to certificate of need, and others providing similarly organized services regardless of nomenclature

Although the current EMS statute, KRS 311A, contains no definition but uses the term, it could be assumed that the relationship between 311A and 216B remains intact. It is not necessary, however, to make that argument. The agency with jurisdiction over the CON process through which both healthcare facilities and ambulance services must go has exercised their authority in defining "facility." KBEMS should follow that definition unless an amendment to KRS 311A or to its administrative regulations expressly defines "facility" in a different way.

Rowan County EMS submitted the following examples to request application of facts to regulations:

1. County (A) is the home county with the CON. County (B) is venturing into County (A) geographic service area to take County (C) resident to a hospital or nursing without permission of County (A).

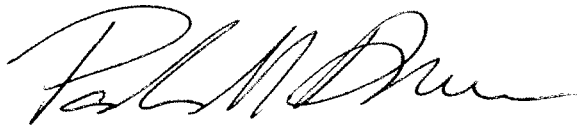
Under this scenario, no exception applies under 202 KAR 7:501 § 2(6)(a)-(d). Because the patient is a resident of County C, not County B, the resident transport exception does not apply. Once it is determined that no exceptions apply, the question arises whether County B can benefit from using the good faith effort provision that appears in 202 KAR 7:501 § 6(7). To do so, County B must obtain documentation that the requesting healthcare facility or provider could not secure the services of a provider who actually holds a license to operate in that geographic service area. If County A complains to KBEMS, and County B cannot prove such effort through actual, written documentation, County B may be subject to disciplinary action under KRS 311A.

2. County (A), the home county that holds the geographic service area, does not want County (B) to venture into its geographic service area to return a County (B) resident home or to another hospital. Can County A stop County B?

No, County A cannot stop County B from coming into its geographic service area if the person to be transported is a County B resident. The only ones who could stop County B would be the resident and/or the healthcare facility. If the resident does not want to be transported by County B, the resident's wish should be honored. Additionally, if the healthcare facility has no desire to have County B come and retrieve the patient, County B cannot force the healthcare facility to allow them to do so. The exception under 202 KAR § 2(6)(d) is permission, not entitlement.

The Advisory Opinion's Bottomline: The CON process determines whether a need exists in a particular geographic location. The licensure process transforms that CON into a "geographic service area." Upon licensure, the provider granted that geographic service area may only operate in that area and providers not granted that area may not operate there as a general rule. However, that basic rule has exceptions created by the Board through the promulgation of administrative regulations. The exceptions grant permission, but do not create an entitlement, for providers to enter another geographic service area. Additionally, the same regulation has a good faith effort exception. This exception requires a provider contemplating entry into another geographic service area to first obtain documentation that a good faith effort was made to contact and obtain the services of the area provider. This documented good faith effort is meant to protect the out-of-service-area provider against a complaint lodged by the provider who holds the license in that area. To prevent use of the good faith effort provision by outside providers, KBEMS recommends providers work at cultivating good relationships with the healthcare facilities in their geographic service area. Additionally, KBEMS recommends that out-of-service-area providers extend the courtesy of notice to the in-service-area provider whenever venturing into another's geographic service area. Currently, however, KBEMS cannot require the out-of-service-area provider to seek permission if one of the four general exceptions or the good faith effort provision is invoked.

KBEMS recommends providers have a good working relationship and extend to other providers the courtesy of notice when venturing into another provider's area, but no permission is required if acting pursuant to the exceptions or the good faith effort provision.



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