

No. 32669 & 32670 -

Fairmont General Hospital Inc. v. United Hospital Center, Inc.  
and West Virginia United Health Care Systems, Inc., and West  
Virginia Health Care Authority

**FILED**

**December 5, 2005**

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RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

Davis, J., concurring:

In this proceeding, the majority opinion has reinstated the certificate of need issued to United Hospital Center, Inc. (United) by the West Virginia Health Care Authority (HCA). I concur in the judgment reached by the majority opinion. I have chosen to write separately because I believe a different analysis should have been applied to attain the proper legal result.

***A. The Certificate of Need Standards***

The majority opinion acknowledged that none of parties raised the issue of whether HCA had authority to modify or amend certificate of need requirements. Nevertheless, the majority chose to sua sponte address this issue. In doing so the majority determined that, pursuant to W. Va. Code § 16-2D-6(d) (1999) (Repl. Vol. 2001), “[a]n application for a certificate of need may not be made subject to any criterion not contained in [W. Va. Code § 16-2D-1 *et seq.*] or not contained in rules adopted pursuant to [W. Va. Code § 16-2D-8].” Based upon this finding, the majority opinion determined that the 5 mile geographical limitation created by HCA was invalid because it was not contained in a statute or regulation. This determination by the majority represents a misinterpretation of the law applicable to a certificate of need. I say “misinterpretation” because the majority decision has unnecessarily invalidated all of the certificate of need standards created by HCA that are

not contained in a statute or regulation.

There is a difference between the “[m]inimum criteria for certificate of need reviews” under W. Va. Code § 16-2D-6, and the authority of HCA to modify or amend certificate of need standards under W. Va. Code § 16-2D-5 (1999) (Repl. Vol. 2001). Pursuant to W. Va. Code § 16-2D-5(l)(1), HCA is granted express authority to propose “amendments or modifications to the certificate of need standards[.]”<sup>1</sup> Further, W. Va. Code § 16-2D-5(l)(2) empowers the governor to “either approve or disapprove all or part of the amendments and modifications[.]”<sup>2</sup>

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<sup>1</sup>W. Va. Code § 16-2D-5(l)(1) (1999) (Repl. Vol. 2001) provides in full:

The state agency shall coordinate the collection of information needed to allow the state agency to develop recommended modifications to certificate of need standards as required in this article. When the state agency proposes amendments or modifications to the certificate of need standards, it shall file with the secretary of state, for publication in the state register, a notice of proposed action, including the text of all proposed amendments and modifications, and a date, time and place for receipt of general public comment. To comply with the public comment requirement of this section, the state agency may hold a public hearing or schedule a public comment period for the receipt of written statements or documents.

<sup>2</sup>W. Va. Code § 16-2D-5(l)(2) provides in full:

All proposed amendments and modifications to the certificate of need standards, with a record of the public hearing or written statements and documents received pursuant to a public comment period, shall be presented to the governor. Within thirty days of receiving the proposed amendments or modifications, the governor shall either approve or disapprove all or part of the amendments and modifications, and, for any portion of amendments or modifications not approved, shall

Pursuant to the authority of W. Va. Code §§ 16-2D-5(l)(1) & (2), HCA has proposed and the governor has approved amendments and/or modifications to the following certificate of need standards:

Long-term Acute Care Hospitals (approved 7/10/00); Cardiac Surgery Services (approved 5/5/04); Lithotripsy Services (approved 7/7/00); Hospice Services (approved 6/21/01); Cardiac Catheterization (approved 8/22/02); Megavoltage Radiation Therapy Services (approved 10/9/02); Addition of Acute Care Beds (approved 10/9/02); Renovation-Replacement of Acute Care Facilities and Services (approved 10/9/02); Ambulatory Care Centers (approved 10/5/92); Ambulatory Surgical Centers (approved 10/5/92); Positron Emission Tomography (approved 7/7/00); Fixed Magnetic Resonance Imaging Services (approved 11/5/97); Birthing Centers (approved 10/5/92); Home Health Services (approved 11/13/96); Behavioral Health/Developmental Disabilities (approved 11/13/95); ICR/MR Group Homes (approved 10/5/92); In-home Personal Care Services (approved 5/4/99); and End Stage Renal Disease and Home Training (approved 10-5-92).<sup>3</sup>

One of the above certificate of need standards, Renovation-Replacement of Acute Care Facilities and Services,<sup>4</sup> contained a 5 mile geographical limitation<sup>5</sup> which the majority found was not set forth in W. Va. Code § 16-2D-6 or a regulation. Consequently,

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specify the reason or reasons for nonapproval. Any portions of the amendments or modifications not approved by the governor may be revised and resubmitted.

<sup>3</sup>See <http://www.hcawv.org/CertOfNeed/conRevStd.htm>.

<sup>4</sup>I have attached the Renovation-Replacement of Acute Care Facilities and Services certificate of need standards as an appendix to this concurring opinion. I have done this in order to provide an example of what the majority has actually invalidated.

<sup>5</sup>The geographical limitation has been amended to now read 15 miles.

the majority held that HCA and the governor had no authority to impose the 5 mile geographical limitation. Implicit in this decision is that all of the above certificate of need standards are invalid because they provide factors that are not contained in W. Va. Code § 16-2D-6 or a regulation.

A decision reached this Term of Court illustrates the implications of the majority decision today. In *Family Medical Imaging, LLC v. West Virginia Health Care Authority*, \_\_\_ W. Va. \_\_\_, \_\_\_ S.E.2d \_\_\_ (No. 32565 Nov. 17, 2005), two physicians were denied a certificate of need to provide ultrasound diagnostic services to patients referred to them by other physicians. One of the issues raised in the case was whether HCA relied upon the standard for acute care facilities in denying the certificate of need. This Court concluded that HCA did not rely on that standard, but instead relied upon the Ambulatory Care Centers standard. Ultimately, this Court affirmed the denial of the certificate of need. Under the decision rendered in the instant case, the two physicians may now reapply for a certificate of need and do not have to comply with the Ambulatory Care Centers standard, because that standard cannot be found in W. Va. Code § 16-2D-6 or a regulation. It is therefore invalid under the majority decision. I do not believe the majority intended such an outcome.

***B. United Hospital Center Should be Allowed to Keep the Certificate of Need Because of the Change in the Geographical Requirement***

The record is clear. At the time United applied for a certificate of need, the

certificate of need standard did not allow United to build its replacement facility outside of 5 miles of its existing facility. United was prepared to build the replacement facility 8 miles outside of its existing facility. Clearly, under the standards existing at the time of United's application, it did not satisfy the geographical limitation of the certificate of need standards. Even so, HCA found that the additional 3 miles was harmless. I disagree.

This Court has consistently held that “[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs.” Syl. pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977). See also *Appalachian Power Co. v. State Tax Dep’t of West Virginia*, 195 W. Va. 573, 583 n.8, 466 S.E.2d 424, 434 n.8 (1995) (“[A]n agency must follow and apply its rules and regulations in existence at the time of agency action.”). Insofar as United did not satisfy the 5 mile limitation at the time of its application, HCA should have denied the certificate of need. Otherwise, HCA would have empowered itself to make arbitrary decisions regarding the geographical limitation.

Although HCA should have denied United's application when the decision was rendered, I would have upheld issuance of the certificate of need because the 5 mile limitation was extended to 15 miles during the pendency of the case. That is, United has now satisfied the current geographical limitation. I believe it would be an unnecessary waste of funds and administrative resources to have United reapply for a certificate of need when the only impediment to its issuance has been removed.

Based upon the foregoing analysis, I respectfully concur.