

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

17-6-11131-Z
FILED
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PRESTON MEMORIAL HOMECARE, LLC and
TENDER LOVING CARE HEALTH CARE
SERVICES OF WEST VIRGINIA, LLC d/b/a
AMEDISYS HOME HEALTH OF WEST VIRGINIA,

Petitioners,

v.

Civil Action No. 18-AA-228
(Hon. Carrie L. Webster)

UNITED HOSPITAL CENTER, INC. and
THE WEST VIRGINIA HEALTH CARE AUTHORITY,
Respondents.

**FINAL ORDER DENYING APPEAL
AND AFFIRMING THE DECISION OF THE OFFICE OF JUDGES**

On July 24, 2018, Petitioners, Preston Memorial Homecare, LLC ("PMH") and Tender Loving Care Health Care Services of West Virginia, LLC d/b/a Amedisys Home Health of West Virginia ("Amedisys") filed the instant petition for appeal seeking reversal of the *Decision* issued by the West Virginia Health Care Authority (the "WVHCA") on February 15, 2018, in the matter of *In re: United Hospital Center, Inc.*, CON File No. 17-6-11131-Z. The Decision approved a certificate of need application filed by United Hospital Center, Inc. ("UHC") and was later affirmed by the West Virginia Health Care Authority/Office of Judges (the "Office of Judges").

On August 16, 2018, the Court issued its *Order Setting Administrative Briefing Schedule*, pursuant to which the parties submitted their respective briefs and proposed orders.

Thereafter, on March 30, 2020, UHC filed a "Motion for Leave to File Supplemental Briefing on behalf of United Hospital Center, Inc." UHC sought leave to bring to the Court's attention the recent ruling issued by the Honorable Tod Kaufman in Civil Action No. 19-AA-145, which UHC asserted presented substantially similar factual and legal arguments to the case at bar.

On April 1, 2020, the Court advised counsel via electronic mail,¹ that it would grant leave of the parties to present supplement briefing, and the Court established deadlines to permit the filing of a response by the other parties, if they chose to do so.

The matter has now been fully briefed, and the Court has considered both the original arguments of counsel and the arguments raised in the supplemental briefing. The Court does not believe that oral argument is required. Having reviewed pleadings and the record below, the Court **FINDS** that the conclusions of the Office of Judges are supported by substantial evidence on the record considered as a whole, and the Court does hereby **DENY** the petition for appeal and **AFFIRM** the *Decision* of the Office of Judges for the reasons set forth more fully herein.

FINDINGS OF FACT

1. Respondent United Hospital Center, Inc. ("UHC") is a 292 bed, non-profit, acute care hospital located in Bridgeport, West Virginia. UHC provides a broad range of inpatient and outpatient acute care hospital services to the residents of Harrison County and surrounding area.

2. UHC is one of eight West Virginia hospitals which comprise the West Virginia United Health System, Inc. ("WVUHS"), a non-profit regional health care system.

3. UHC also provides hospice and home health services under the name United Home Health & People's Hospice. UHC currently offers home health services to the residents of Barbour, Doddridge, Harrison, Lewis, Marion, Taylor, and Upshur Counties.

4. UHC proposes to expand its provision of home health services into Preston County. This proposed expansion will allow Preston County patients receiving care from WVUHS

¹ UHC's motion and the request for the opportunity to respond thereto were filed during the Judicial Emergency that was declared in response to the Covid-19 crisis. During this time, the Court communicated with counsel via electronic mail in an effort to avoid further delay.

facilities to have the option of receiving post-acute home health care from the same regional health care system.

5. To ensure that its proposed expansion complies with West Virginia law, UHC filed a Certificate of Need ("CON") application with the West Virginia Health Care Authority (the "Authority") on July 17, 2017.

6. The CON program exists by virtue of W. Va. Code § 16-2D-1, *et seq.*, and jurisdiction over this program is vested in the Authority. *See* W. Va. Code § 16-2D-3(a)(1).

7. Two of the main purposes of the CON program are: (1) to ensure that appropriate and needed health services are made available, and (2) to avoid the unnecessary duplication of health services which will result in cost increases. *See* W. Va. Code §§ 16-2D-1(1) and (2).

8. To accomplish these purposes, the Legislature has delegated power to the Authority to promulgate, modify, and enforce the CON standards set forth in the State Health Plan. W. Va. Code § 16-2D-3 *et seq.*; W. Va. Code § 16-2D-6 *et seq.*; W. Va. Code § 16-2D-12(a).

9. The State Health Plan Standards for Home Health Services (the "SHP Standards") were drafted by the Authority and were approved by the Governor on November 13, 1996. Any applicant seeking to expand home health services must demonstrate consistency with the SHP Standards. *See* W. Va. Code § 16-2D-12(a)(2).

10. Under Steps 1 through 3 of the Need Methodology contained in the SHP Standards, the Authority calculated that there is currently an unmet need for home health services in Preston County. According to the Authority, this unmet need exists for 44 projected patients.

11. The two parties objecting to UHC's proposed expansion of home health services into Preston County are Preston Memorial Homecare, LLC ("PMH") and Tender Loving Care Health Care Services of West Virginia, LLC d/b/a Amedisys Home Health Care ("Amedisys" and together with PMH, "Petitioners"), both for-profit West Virginia subsidiaries of national home health chains.

12. Despite Petitioners' objections, the Authority granted a CON to UHC to expand home health services into Preston County in a Decision dated February 15, 2018 (the "Decision").

13. Petitioners appealed the Authority's Decision to the Office of Judges ("OOJ"), the state agency designated to initially review appeals under the CON program pursuant to W. Va. Code § 16-2D-16(a).

14. On June 28, 2018, the OOJ issued its decision affirming the Authority's Decision to approve UHC's proposed expansion of home health services into Preston County (the "OOJ Decision").

15. Petitioners subsequently appealed the OOJ Decision to this Court on July 24, 2018.

STANDARD OF REVIEW

Judicial review of Decisions made by the Authority and the OOJ is governed by W. Va. Code § 29A-5-4 of the West Virginia Administrative Procedures Act ("West Virginia APA"). *See* W. Va. Code § 16-2D-16; *Sr. Mary's Hospital v. SHPDA*, 364 S.E.2d 805 (W. Va. 1987). W. Va. Code § 29A-5-4 provides in relevant part the following:

(g) The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial

rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon lawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W. Va. Code § 29A-5-4(g).

The standard of review under W. Va. Code § 29A-5-4(g) has been held by our West Virginia Supreme Court of Appeals to be a deferential one which is limited to a determination of whether the agency's decision was based on a consideration of relevant factors, and whether there has been a clear error of judgment. *Princeton Community Hospital v. SHPDA*, 328 S.E.2d 164 (W. Va. 1985).

Our West Virginia Supreme Court of Appeals has also emphasized that the determination of matters within an agency's area of expertise is entitled to substantial weight, and a reviewing court is not intended to function as a "superagency" that can supplant the agency's expert decision-making process. *Princeton*, 328 S.E.2d at 171.

In reviewing questions of law relating to an agency's decision, a reviewing court first must ask whether the Legislature has directly spoken to the precise question at issue. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Appalachian Power Co. v. State Tax Department*, 466 S.E.2d 424 (W. Va. 1995); *HCCRA v. Boone Memorial Hospital*, 472 S.E.2d 411 (W. Va. 1996). If the intention of the Legislature is clear, that is the end of the matter, and the agency's position must be upheld if it conforms to the Legislature's expressed intent.

However, if legislative intent is not clear, a reviewing court may not simply impose its own construction in its review of a statute, legislative rule, or other rule carrying the force of law. *Appalachian*, 466 S.E.2d at p. 433; *Boone*, 472 S.E.2d at 421-22; *W. Va. Consol. Pub. Ret. Bd. v. Wood*, 757 S.E.2d 752, 758 n.9 (W. Va. 2014), citing *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). Rather, if a statute, legislative rule, or rule carrying the force of law is silent or ambiguous with respect to the specific issue, the question for the reviewing court is whether the agency's answer is based upon a permissible construction of the applicable legal authority. *Id.* If it is, then the interpretation of the statute, legislative rule, or rule carrying the force of law by the agency charged with its administration is given great deference and weight. *Id.*

The SHP Standards are initially promulgated by the Authority, and then approved by the Governor. In 2016, the Legislature affirmatively adopted the SHP standards, giving them "full force and effect" so long as they were active before July 1, 2016. W. Va. Code § 16-2D-6(g). Because of this overt adoption of the SHP Standards by the Legislature, and because a CON application can only be approved if it is found to be consistent with the State Health Plan pursuant to W. Va. Code § 16-2D-12(a)(2), the SHP Standards carry the force of law in respect to the UHC project.

DISCUSSION AND CONCLUSIONS OF LAW

The only issue raised on appeal by Petitioners is whether a sufficient need for the UHC project was demonstrated under the SHP Standards' Need Methodology. In raising this issue, Petitioners do not contest the Authority's projection that home health services are currently not available to 44 projected persons in Preston County based upon Steps 1 through 3 of the Need Methodology. Instead, Petitioners argue that the SHP Standards require a showing of an unmet need of 229 projected persons for a CON to be granted.

The Need Methodology in the SHP Standards identify four-steps for calculating need. The Authority completed the first three steps of this calculation, and correctly determined that an unmet need exists for 44 projected patients in Preston County. This finding was sufficient to conclude that the UHC application is consistent with the State Health Plan pursuant to W. Va. Code § 16-2D-12(a)(2).

In this case, the Authority did not perform the fourth step of the calculation based upon the highlighted language from the SHP Standards set forth below:

Calculation 4 involves an adjustment factor for the agencies receiving Certificate of Need approval in the previous 12 months to allow for their initiation and development of home health services. Each agency is allowed a 229 home health recipient adjustment factor for each county in the approved service area. An unmet need or threshold of at least 229 projected home health recipients must occur in the county before consideration will be given to issuing another Certificate of Need for the county.

* * * *

4. CALCULATION OF THE THRESHOLD (ADJUSTMENT FACTOR)

(This calculation is done only if there are agencies in the proposed county which received CON approval in the previous 12 months.)

Formula $a - b = c$

- a. List the current home health recipients
below state rate (3.c)
- b. Subtract adjustment factor for agencies
receiving CON approval in previous 12 months.
- c. Number above threshold adjustment.

Conclusion:

If the threshold is at least 229 projected home health recipients, an unmet need exists.

(emphasis added)

The facts are undisputed that no other home health agency was approved to provide services in Preston County in the 12 months prior to UHC's application. Therefore, the Authority's decision not to perform Calculation 4 was consistent with the plain language of the SHP Standards quoted above.

The "Conclusion" which Petitioners attempt to impose upon UHC's application (and not just those in counties with new agencies) references only what the "**threshold**" calculation is. The word "**threshold**" does not appear in Steps 1 - 3, and the "Conclusion" about the "threshold" likewise has no relevance to Steps 1 - 3. In fact, the word "**threshold**" **only** appears when the SHP Standards reference a need to support the development of a new CON applicant approved within the previous 12 months, a matter exclusively addressed by Step 4 of the SHP Standards. Hence, the "Conclusion" is inextricably linked by its plain language to only what is calculated in Step 4.

Even if this Court were to find some level of ambiguity within Step 4 of the SHP Standards related to the 229 projected patients "**threshold**" urged by Petitioners, this Court nevertheless concludes that the Authority reached a reasonable and permissible construction of the relevant provisions, and that such construction must be accorded great deference and weight.

In addition to the SHP Standards, this Court concludes that the Authority's Decision was made in accordance with the statutorily enumerated purposes behind the CON program. Specifically, the Authority's Decision to allow UHC to expand home health services into Preston County will ensure that needed health services are made available to 44 projected unserved Preston County residents. UHC's provision of home health care to these 44 unserved Preston County residents will likewise not constitute an unnecessary duplication of health services.

This Court does not find credible Petitioners' assertion that the Authority's interpretation of the SHP Standards will result in an unnecessary duplication of health services, since there are significantly fewer home health agencies in the State today than in 1996 (when the SHP Standards were first promulgated by the Authority). Moreover, the state use rate of home health services is projected to increase in the coming years, coinciding with a projected increase of the state's elderly population. Therefore, Petitioners' proposed adoption of a highly restrictive interpretation of the SHP Standards would needlessly restrict access to low cost home health services.

This Court has been made aware of, and agrees with, numerous other administrative decisions issued by the Authority which have interpreted the SHP Standards in a manner consistent with how they were applied to the UHC application. *See In re: Three Rivers Home Care*, CON File No. 00-2-7110-X/Z, Decision (February 26, 2002); *see In re: Pleasant Valley Hospital d/b/a Pleasant Valley Home Health and Pleasant Valley Private Duty*, CON File No. 01-2/3/5-7206-Z, Decision (May 2, 2002); *see In re: Memorial Hospital Home Health d/b/a Mingo Wayne Home Health and Preferred Home Health*, CON File No. 02-1/2/3-7399-Z, Decision (July 3, 2003); *see In re: Jefferson Memorial Hospital d/b/a Jefferson Memorial Home Care*, CON File No. 03-9-7597-X/Z, Decision (January 9, 2004); *see In re: Elite Health Care, Inc.*, CON File No. 04-1-7801-Z, Decision (June 23, 2004); *see In re: Medi Home Health Agency, Inc.*, CON File No. 07-2-8664-Z, Decision on Request for Reconsideration (November 14, 2008); *see In re: Caring Angels Home Health, LLC*, CON File No. 14-8/9-10231-Z, Decision (October 30, 2015); *see In re: Stonerise Reliable Healthcare LLC*, CON File No. 17-5-11187-Z, Decision (December 11, 2017).

This Court is not persuaded by a 2007 Mason County Circuit Court decision which contradicts the Authority's longstanding and consistent interpretation of the SHP Standards. *See*

Pleasant Valley Hospital v. West Virginia Health Care Authority, et al., Civil Action No. 06-AA-20 (March 27, 2007). The *Pleasant Valley* decision failed to acknowledge that the purpose of the CON law extends beyond the mere elimination of duplicative services. Like Petitioners, the *Pleasant Valley* decision repeatedly cites the need to avoid unnecessary duplication to the exclusion of any other statutory factor or purpose. See *Pleasant Valley Hospital v. West Virginia Health Care Authority, et al.*, Civil Action No. 06-AA-20 (March 27, 2007) at pp. 4, 5, 7, 8, 9.

The statutory purpose of ensuring that “appropriate and needed health care services are made available for persons in the area to be served” was totally discounted by the Court in *Pleasant Valley*. See W. Va. Code § 16-2D-1(2). The Mason County Circuit Court therefore failed to undertake a “balanced consideration” of all applicable statutory criteria as envisioned by the West Virginia Supreme Court of Appeals. See *Fairmont General v. United Hosp. Ctr. Inc.*, 624 S.E.2d 797, 803 (W. Va. 2005).

Based upon the plain language of the SHP Standards, the statutorily- enumerated purposes behind the CON law, the Authority’s consistent enforcement policy of the relevant SHP Standards, and the level of deference to be accorded to administrative agency determinations, the Decisions of the Authority and OOJ approving UHC’s proposed expansion of home health services into Preston County were supported by substantial evidence on the whole record; were rendered in accordance with law; were not arbitrary or capricious; and did not constitute an abuse of discretion or clearly unwarranted exercise of discretion.

WHEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, this Court does hereby **AFFIRM** the Decisions of the Authority and the OOJ. The Court notes that this ruling

is in accord with the ruling issued by the Honorable Judge Tod Kaufman in Civil Action No. 19-AA-145.

The Clerk of Court is directed to send a copy of this order, duly certified, to the following:

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ENTERED on this 21st day of May 2020.

Carrie Webster

HONORABLE CARRIE L. WEBSTER

STATE OF WEST VIRGINIA
COUNTY OF LAMARCA, JR
I, CATHY S. DAYSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL ON SAID COUNTY THIS
DAY OF May 2020
Cathy S. Dayson
CLERK OF CIRCUIT COURT OF LAMARCA COUNTY, WEST VIRGINIA