

**BEFORE THE WEST VIRGINIA
HEALTH CARE AUTHORITY / OFFICE OF JUDGES**

**IN RE: ROANE GENERAL HOSPITAL, INC.
 CON File No, 21-5-12124-P
 Ap. Doc. No. 22-HC-02**

BRIEF OF MINNIE HAMILTON HEALTH CARE CENTER, INC.

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I. Introduction

Minnie Hamilton Health Care Center, Inc. dba Minnie Hamilton Health System (“MHHC”) by counsel, hereby submits this brief in support of its appeal of a decision by the West Virginia Health Care Authority (the “WVHCA”) dated April 29, 2022 (the “Decision”). A copy of the Decision is attached as **Exhibit A**. West Virginia Code Section 16-2D-16(a) provides that “[a]n applicant or an affected person may appeal the authority’s final decision in a certificate of need review to the Office of Judges.” Further, West Virginia Code requires that “[t]he Office of Judges shall conduct its proceedings in conformance with the West Virginia Rules of Civil Procedure for trial courts of record and the local rules for use in the civil courts of Kanawha County and shall review appeals in accordance with the provisions governing the judicial review of contested administrative cases in article five, chapter twenty-nine-a of this code.” *See* W.Va. Code §16-2D-16(b).

II. Statement of Relevant Facts, Procedural History, and the Decision

Hospital Development Co. d/b/a Roane General Hospital (“RGH”) operates a 25-bed critical access hospital and a 35-bed skilled nursing facility in Spencer, Roane County, West Virginia. In addition to hospital services, RGH operates four rural health centers (“RHCs”), two located on campus and two located off-campus. These four RHCs offer primary care services and certain specialty care services, including the primary and specialty care services proposed in a Certificate of Need Application that RGH filed on July 22, 2021 (the “Application”). In the Application, RGH proposes the relocation of one of its existing RHCs from its current location on RGH’s campus to an off-campus site in Arnoldsburg, Calhoun County, West Virginia where it will serve Arnoldsburg, Chloe, and Orma, West Virginia (collectively, the “Service Area”). RGH’s proposal is a reviewable “proposed health service” because it constitutes the

establishment of an “ambulatory care center,” pursuant to W.V a. Code § 16-2D-8(b)(8). *See* W.Va. Code § 16-2D-2(2); *see also* W.Va. Code § 16-2D-8(a)(1); *see also* W.Va. Code § 16-2D-2(33).

RGH filed a letter of intent with the WVHCA for its proposed relocation on July 12, 2021. The Application followed on July 22, 2021 and was determined to be complete on July 30, 2021. The capital expenditure associated with the relocation was estimated by RGH to be approximately \$439,720. MHHC requested an administrative hearing on August 26, 2021, and the WVHCA entered a Hearing Order on September 14, 2021. RGH filed replacement pages to the Application on October 6, 2021. The parties engaged in discovery and MHHC filed a Motion to Compel on December 1, 2021.

Pursuant to the Hearing Order, a prehearing conference was held on December 7, 2021. At the prehearing conference, RGH and MHHC argued their respective positions regarding MHHC’s Motion to Compel, and the Hearing Examiner denied the Motion to Compel in part and granted it in part. RGH and MHHC also exchanged lists of witnesses and exhibits. Thereafter, the public hearing was conducted on December 14, 2021. Both RGH and MHHC were present and offered testimony and introduced evidence. Thereafter, RGH filed a brief on January 28, 2022, MHHC filed a response brief on February 28, 2022, and RGH filed a reply brief on March 15, 2022.

In its response brief, MHHC opposed the Application for three reasons. First, MHHC contended that RGH had failed to prove that the relocation is needed or consistent with the State Health Plan, including with the applicable State Health Plan Standards for Ambulatory Care Centers (the “Ambulatory Care Center Standards”). Second, MHHC contended that RGH did not adequately demonstrate the financial feasibility of its relocation. Finally, MHHC contended that

RGH had failed to prove that its relocation proposal is a superior alternative to maintaining the status quo in Arnoldsburg, Calhoun County, West Virginia and also in Spencer, Roane County, West Virginia. For these reasons, MHHC argued that the Application should be denied. Nevertheless, the WVHCA approved the Application and the associated relocation proposed by RGH to relocate its existing RHC to the Service Area in Arnoldsburg, West Virginia.

III. Standards for Review

The standard under which the Office of Judges must review decisions by the WVHCA is set forth in Section 16-2D-16(b) of the West Virginia Code which provides, in pertinent part, that the Office of Judges shall “review appeals in accordance with the provisions governing the judicial review of contested administrative cases in article five, chapter twenty-nine-a of this code.” *See also Princeton Community Hospital v. State Health Planning and Development Agency*, 174 W.Va. 558, 328 S.E. 2d 164 (1985). The specific standard of review is found in Section 29A-5-4(g), which reads as follows:

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

See W.Va. Code § 29A-5-4(g).

The Supreme Court of Appeals of West Virginia has previously held that findings of fact made by an administrative agency will not be disturbed on appeal unless such findings are contrary to the evidence or based on a mistake of law. In other words, the findings must be clearly wrong to warrant judicial interference. See *Billings v. Civil Service Commission*, 154 W.Va. 688, 178 S.E.2d 801 (1971). Accordingly, absent a mistake of law, findings of fact by an administrative agency supported by substantial evidence should not be disturbed on appeal. *West Virginia Human Rights Commission v. United Transportation Union*, 167 W.Va. 282, 280 S.E.2d 653 (1981); *Bloss & Dillard, Inc. v. West Virginia Human Rights Commission*, 183 W.Va. 702, 398 S.E.2d 528 (1990).

The Supreme Court has also cited Section 29A-5-3 of West Virginia Code, which requires that:

Every final order or decision rendered by any agency in a contested case shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. Prior to the rendering of any final order or decision, any party may propose findings of fact and conclusions of law. If proposed, all other parties shall be given an opportunity to except to such proposed findings and conclusions, and the final order or decision shall include a ruling on each proposed finding. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings....

See W.Va. Code § 29A-5-3. In light of this enactment, the Supreme Court concluded, in syllabus point 4 of *St. Mary's Hospital v. State Health Planning and Development Agency*, 178 W.Va. 792, 364 S.E.2d 805 (1987), as follows:

The requirement of West Virginia Code § 29A-5-3 that an administrative agency rule on the parties' proposed findings is mandatory and will be enforced by the courts. Although the agency does not need to extensively discuss each proposed finding, such rulings must be sufficiently clear to assure a reviewing court that all those findings have been considered and dealt with, not overlooked or concealed.

Finally, the Supreme Court has construed Section 29A-5-3 to require fully articulated bases for agency determinations, particularly where economic or scientific matters are at issue:

When W.Va. Code, 29A-5-3 says: “Every final order or decision rendered by any agency in a contested case shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law....” the law contemplates a reasoned, articulate decision which sets forth the underlying evidentiary facts which lead the agency to its conclusion, along with an explanation of the methodology by which any complex, scientific, statistical, or economic evidence was evaluated. In this regard if the conclusion is predicated upon a change of agency policy from former practice, there should be an explanation of the reasons for such change.

Syl. Pt. 2, *Citizens Bank of Weirton v. West Virginia Board of Banking and Financial Institutions*, 160 W.Va. 220, 233 S.E.2d 719 (1977).

IV. Argument

The Decision by the WVHCA in this matter is fundamentally flawed because it fails to include a reasoned, articulate decision which sets forth the underlying evidentiary facts which led the WVHCA to its conclusion, along with an explanation of the methodology by which the WVHCA evaluated the relevant evidence. In place of the articulate decision required by West Virginia law, the WVHCA summarily declares throughout the Decision that its findings are based on “careful review and consideration of the facts, evidence, and arguments of both parties.” (Decision, Apr. 29, 2021, p. 11, 18, 30, 37, 47). In making this declaration, the WVHCA arrogates its responsibility to examine and weigh the underlying evidentiary facts which led the agency to its conclusions, and it does not explain the methodology by which the WVHCA evaluated any complex, scientific, statistical, or economic evidence was.

MHHC is an existing provider with two approved¹ clinics in Arnoldsburg, Calhoun

¹ MHHC’s original clinic in Arnoldsburg is a school-based health center that was proposed on January 3, 1996 to provide acute and chronic primary care, physical exams, and health promotion at Arnoldsburg Elementary School in Arnoldsburg, Calhoun County, West Virginia. The proposal was determined “NOT SUBJECT to certificate of need review” in a Decision dated February 21, 1996. See *In re: Minnie Hamilton Health Care Center, Inc.*, CON File No.

County, West Virginia, a small rural community with a projected population of only 1,151 residents in 2021.² Yet, RGH has proposed to open what will become a third clinic in Arnoldsburg through the proposed relocation of its existing RHC.

RGH, as the applicant, indisputably had the burden of proof in this matter and was required to prove both that there is an unmet need for the proposed services in the proposed Service Area and that the proposed services are consistent with the Ambulatory Care Center Standards. After all, the WVHCA can only approve an application if the proposed health service is found to be needed and consistent with the State Health Plan, unless there are emergency circumstances that pose a threat to public health. *See* W.Va. Code 16-2D-12. The findings above are independent of each other and both must be met. *See Princeton Cmty. Hosp. v. State Health Plan.*, 174 W. Va. 558, 564, 328 S.E.2d 164, 171 (1985). The absence of one of the two findings requires the WVHCA to deny the application. *Id.*

The West Virginia Legislature created the certificate of need program and, in doing so, declared it to be the State's public policy "[t]hat the offering or development of all health services shall be accomplished in a manner which is orderly, economical and consistent with the effective development of necessary and adequate means of providing for the health services of the people of this state[.]" and further to "avoid unnecessary duplication of health services, and to contain or reduce increases in the cost of delivering health services." *See Amedisys W. Virginia, LLC v. Pers. Touch Home Care of W. Va., Inc.*, 245 W. Va. 398, 859 S.E.2d 341, 351 (2021).

96-5-5484-X. More recently, MHHC filed an exemption application for a community-based clinic at 80 Spring Run Road, Arnoldsburg, West Virginia on September 13, 2021, that was found to contain the required information in a subsequent letter dated September 14, 2021. *See In re: Minnie Hamilton Health Care Center, Inc.*, CON File No. 21-5-12162-X. This new location was approved but not yet opened at the time of the public hearing on December 14, 2021.

² The population for the Arnoldsburg ZIP code, 25234, is projected in the Application to be 1,151 in 2021. The Service Area in the Application combines the Arnoldsburg ZIP code with the ZIP codes for Chloe (25235) and Orma (25268) for a total Service Area population of 2,735 in 2021.

According to the Application, the proposed Service Area has a current projected population of only 2,735 — a population that is expected to decrease over the next ten years. RGH’s expert testified at the public hearing that the accuracy of her population data was very important to her analysis and to her resulting testimony that an unmet need exists in the Service Area. Yet, Ms. Kinneberg relied on an undisclosed internet source to obtain the population data, [unitedstateszipcodes.org](https://www.unitedstateszipcodes.org),³ despite misrepresenting the source of the population data in the Application. Although an applicant is permitted to propose using other, non-WVHCA data, the data must be stated, as well as the rationale for using it, and RGH’s expert supplied neither. She also conceded in her testimony that she does not know the underlying source of her online data or the date range or ranges for which it applies, and further that she made absolutely no efforts to confirm its accuracy. And yet, the WVHCA accepted this dubious explanation and resulting projection of unmet need without any explanation of the methodology by which the relevant evidence was evaluated. The WVHCA failed, for example, to explain what efforts it took to determine the accuracy of the evidence. Instead, the WVHCA simply states that “the existence/identity of zip code reference, as well as the rationale for its use to interpolate the [WVHCA] provided population data, was fully established in the record for consideration” without any indication of where such information is “fully established” or, more importantly, without any articulate discussion of how these evidentiary facts led the agency to its conclusion. (Decision, p. 18).

In fact, MHHC filed a Motion to Compel on December 1, 2021 and sought copies of all

³ The WVHCA should take notice that the Terms and Conditions of Use for [unitedstateszipcodes.org](https://www.unitedstateszipcodes.org) are available at <https://www.unitedstateszipcodes.org/policies.php> and limit use as follows: “Permission is granted to temporarily download one copy of the materials (information or software) on UnitedStatesZipCodes.org web site for personal, non-commercial transitory viewing only. This is the grant of a license, not a transfer of title, and under this license you may not...use the materials for any commercial purpose, or for any public display (commercial or non-commercial).”

information and documents containing the facts forming the basis for Ms. Kinneberg's opinions as a testifying expert in this matter. RGH opposed the motion citing the attorney-client privilege and the work product doctrine, among other objections and MHHC's motion was denied during the prehearing conference on December 7, 2021. Yet, Ms. Kinneberg is not a licensed West Virginia attorney, and the attorney-client privilege only protects communications made in confidence either by an attorney or a client to one another. *See e.g. State v. Fisher*, 126 W.Va. 117, 27 S.E.2d 581 (1943). MHHC only noted its opposition to the Application on August 26, 2021, so the work product doctrine should not be implicated by anything prior to that date, if at all. *See e.g. Syl. Pt. 7, State ex rel. United Hosp. v. Bedell*, 199 W.Va. 316, 484 S.E.2d 199 (1997) ("To determine whether a document was prepared in anticipation of litigation and, is therefore, protected from disclosure under the work product doctrine, the primary motivating purpose behind the creation of the document must have been to assist in pending or probable future litigation.").

As a testifying expert witness, Ms. Kinneberg should not have been permitted to invoke the attorney-client privilege or work product doctrine to shield relevant information and documents from disclosure – this is the antithesis of “fully established in the record for consideration.” MHHC contended that the questionable origins and accuracy of the population data cast doubt on the entirety of the unmet need projected in the Application, which is one of the two fundamental findings under Section 16-2D-12 of the West Virginia Code. Any inaccuracies in Ms. Kinneberg's methods or in the underlying source data that she found and used could dramatically change her projection of a minimal unmet need for primary care in the Service Area of Arnoldsburg, Chloe, and Orma. Without the information and documents provided to Ms. Kinneberg as a testifying expert in this matter, no examination of the underlying

evidentiary facts which led the WVHCA to its conclusions cannot be complete and the Decision is flawed.

Similarly, MHHC contended that RGH's financial projection were based on an inflated encounter rate due to the excessive expenses over revenues experienced by the RHC in recent years. Here, too, the WVHCA declared that "[a]fter careful review and consideration of the facts, evidence, and arguments of both parties, the [WVHCA] finds that the Financial Projection was based upon reasonable and historical utilization, expense, and revenue assumptions." (Decision, p. 37). Again, the WVHCA reached this conclusion without any explanation of the methodology by which the relevant evidence was evaluated and without any indication that is considered the state's public policy "[t]hat the offering or development of all health services shall be accomplished in a manner which is orderly, economical and consistent with the effective development of necessary and adequate means of providing for the health services of the people of this state[.]" and further to "avoid unnecessary duplication of health services, and to contain or reduce increases in the cost of delivering health services." *See Amedisys W. Virginia, LLC v. Pers. Touch Home Care of W.Va., Inc.*, 245 W. Va. 398, 859 S.E.2d 341, 351 (2021). Absent a reasoned, articulate decision which sets forth the underlying evidentiary facts which led the WVHCA to its conclusion, the Decision is flawed.

For the foregoing reasons, the Decision is in violation of constitutional and statutory provisions; is in excess of the statutory authority or jurisdictions of the WVHCA; is made upon unlawful procedures; is affected by other errors of law; is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; and is arbitrary, capricious, characterized by abuse of discretion and characterized by clearly unwarranted exercise of discretion.

V. Conclusion

WHEREFORE, for the foregoing reasons, Minnie Hamilton Health Care Center, Inc. dba Minnie Hamilton Health System respectfully requests that the Office of Judges review and reverse the Decision issued by the WVHCA on April 29, 2022, because the Decision is in violation of statutory provisions as set forth in W.Va. Code § 29A-5-4(g), and grant such other relief as it deems necessary.

Respectfully submitted this June 24, 2022.

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CERTIFICATE OF SERVICE

I, the undersigned counsel for Minnie Hamilton Health Care Center, Inc. dba Minnie Hamilton Health System, do certify that on the 24th day of June, 2022, the foregoing "*Brief of Minnie Hamilton Health Care Center, Inc.*" was filed with the West Virginia Health Care Authority/Office of Judges and served upon all parties by delivering true copies thereof, as follows:

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