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No. 20-0901

21-0901



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

FILE COPY

WAR MEMORIAL HOSPITAL, INC., Petitioner Below,
Petitioner,

v.

THE WEST VIRGINIA HEALTH CARE AUTHORITY, Respondent Below,
Respondent.

From the Circuit Court of Kanawha County, West Virginia
Civil Action No. 20-AA-69

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

1. The Circuit Court of Kanawha County erred when it affirmed an administrative decision by Respondent the West Virginia Health Care Authority (the “WVHCA”)¹ dated February 3, 2020, and a subsequent appeal decision by the West Virginia Office of Judges (the “Office of Judges”) dated August 17, 2020. As explained herein, the WVHCA incorrectly denied a certificate of need exemption application by War Memorial Hospital, Inc. (“WMH”) that would have allowed WMH to acquire one fixed magnetic resonance imaging (“MRI”) scanner to be located at 5524 Williamsport Pike, Martinsburg, Berkeley County, West Virginia. Such an MRI acquisition by a hospital is expressly exempt from certificate of need review as stated in W.Va. Code § 16-2D-11(c)(27) and the WVHCA decision denying WMH the benefit of the statutory exemption was in error. The Office of Judges erroneously affirmed the underlying WVHCA decision.

2. In affirming the two lower tribunals, the Circuit Court of Kanawha County erred by ignoring the clear and conclusive language in W.Va. Code § 16-2D-11(c)(27) and by accepting the WVHCA’s incorrect and impermissible interpretation of the statutory exemption.

3. The Circuit Court of Kanawha County erred by affirming and deferring to the WVHCA's interpretation of W.Va. Code § 16-2D-11(c)(27), which is clearly wrong, arbitrary, capricious and characterized by abuse of discretion.

¹ The Health Care Cost Review Authority (“HCCRA”) was created by the Legislature in 1983 and HCCRA became known as the WVHCA in 1997. The certificate of need program was adopted to provide for the orderly, economical and consistent offering or development of health services, to avoid unnecessary duplication of health services, and to contain or reduce increases in the cost of delivering health services. *See* W.Va. Code § 16-2D-1.

STATEMENT OF THE CASE

1. Introduction.

This matter is an appeal of an administrative decision issued by Respondent the WVHCA, which is the agency responsible for health planning, the development of health services, and administering the certificate of need program in West Virginia. *See* W. Va. Code § 16-2D-1, *et seq.*; *see also* W.Va. Code § 16-29B-1, *et seq.*

West Virginia's certificate of need law, found in W.Va. Code § 16-2D-1, *et seq.*, provides that any proposed new health service shall be subject to review by the WVHCA prior to the offering or development of the service. W.Va. Code § 16-2D-8. The WVHCA's purpose is explicitly stated in the "Legislative Findings" preamble to the certificate of need law, wherein it is declared to be the public policy of West Virginia "[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 to avoid unnecessary duplication of health services, and to contain or reduce increases in the cost of delivering health services." *See* W.Va. Code § 16-2D-1(1); *see also* W.Va. Code § 16-29B-1.

Until recently, the certificate of need law included a process for an applicant to seek approval of an exemption from certificate of need under W.Va. Code § 16-2D-11.² The procedure required the filing of an exemption application, paying a \$1,000 application fee and

² The certificate of need exemption statute was revised during the 2020 Legislative Session by the passage of House Bill 4108 on March 6, 2020, which removed the exemption application requirement in W.Va. Code § 16-2D-11 and removed the WVHCA's role in deciding whether to approve or deny exempt health services entirely. As of June 4, 2020, exempt health services only require a notice filing with the WVHCA, not an exemption application. *See* W.Va. Code § 16-2D-11.

providing a “statement detailing which exemption applies and the circumstances justifying the approval of the exemption.” W.Va. Code § 16-2D-11(a).

As explained herein, the WVHCA and Office of Judges both erred in determining that the exemption in W.Va. Code § 16-2D-11(c)(27) did not apply and in denying WMH a certificate of need exemption that should have permitted WMH to acquire one fixed magnetic resonance imaging (“MRI”) scanner to be located at 5524 Williamsport Pike, Martinsburg, Berkeley County, West Virginia. Such an acquisition by a hospital is expressly exempt from certificate of need review as stated in W.Va. Code § 16-2D-11(c)(27).

2. Background and Procedural History

Petitioner, WMH, is a West Virginia licensed critical access hospital that proposed in an exemption application dated December 18, 2019, to acquire and use an MRI scanner with a purchase price less than \$750,000. J.A. at 2. In doing so, WMH sought to avail itself of statutory exemption cited above to purchase an MRI scanner and locate it at 5524 Williamsport Pike, Martinsburg, Berkeley County, West Virginia. *Id.* Respondent WVHCA denied WMH’s exemption application in a decision dated February 3, 2020, and the Office of Judges affirmed that denial in a subsequent appeal decision dated August 17, 2020. J.A. at 11; J.A. at 46. On September 16, 2020, Petitioner filed an administrative appeal before the Circuit Court of Kanawha County and requested that the Office of Judges decision be reviewed. J.A. at 52, W.Va. Code § 16-2D-16. The appeal was assigned to the Honorable Jennifer F. Bailey in the Circuit Court of Kanawha County and assigned Civil Action No. 20-AA-69. *Id.* The Circuit Court established a briefing schedule and then issued its decision affirming the WVHCA and the Office of Judges on October 5, 2021. J.A. at 139.

SUMMARY OF ARGUMENT

The WVHCA erred by determining that the acquisition and use of one fixed MRI scanner by WMH to be located at 5524 Williamsport Pike, Martinsburg, Berkeley County, West Virginia was not exempt from certificate of need review, and the Office of Judges and Circuit Court of Kanawha County erred by affirming that decision. Pursuant to W.Va. Code § 16-2D-11(c)(27): “Notwithstanding section eight and ten and except as provided in section nine of this article, the Legislature finds that a need exists, and these health services are exempt from the certificate of need process . . . (27) The acquisition and utilization of one computed tomography scanner and/or magnetic resonance imaging scanner with a purchase price up to \$750,000 by a hospital.” See W.Va. Code § 16-2D-11(c)(27) (emphasis added). This statute clearly outlines the criteria for the applicable exemption and WMH’s exemption application should have been approved because WMH is hospital licensed and located in West Virginia that planned to acquire and utilize an MRI for a purchase price of less than \$750,000. The WVHCA only denied the exemption application because it created an additional condition – requiring that the acquired MRI be located at the hospital’s primary hospital location once acquired. J.A. 11–16. The WVHCA manufactured this new criterion by adding an additional location-specific condition to the exemption statute which plainly does not otherwise exist.

Such interpretation is unwarranted, in error, and in direct conflict with the West Virginia Legislature’s clear intent. The West Virginia Legislature during the 1st Executive Session passed House Bill 117 on June 13, 2017, which added W.Va. Code § 16-2D-11(c)(27) to the list of health services that qualify for an exemption from certificate of need review. Nowhere does the West Virginia Legislature further qualify this exemption by requiring that the MRI is required to be located at the hospital’s primary location or even on the hospital’s campus once acquired. It

ignores the reality that many West Virginia hospitals also have medical office buildings, both on and off the hospital campuses.³ If the West Virginia Legislature had desired to include an additional location-specific requirement in the statute, it could easily have done so. Yet, WMH's exemption application was denied because WMH's exemption application did not satisfy the WVHCA's arbitrary additional requirement regarding the location of the MRI at the hospital's primary location. For this reason, the WVHCA decision is in violation of statutory provisions as set forth in W.Va. Code § 29A-5-4(g), the two appellate decisions affirming the WVHCA decision must be reversed.

STATEMENT REGARDING ORAL ARGUMENT

Petitioners decline to request oral argument on this matter.

ARGUMENT

1. Question Presented.

Is the WVHCA permitted to impose requirements on an applicant for a certificate of need exemption in addition to those in the relevant statutory exemption?

2. Standard of Review.

This appeal is taken on a question of law with respect to the legality of the WVHCA's imposition of certain requirements on WMH in addition to those in the relevant statute. The standard for this Court's review is found in W.Va. Code § 29A-5-4(g). *See* W. Va. Code § 16-2D-10; *St. Mary's Hospital v. SHPDA*, 178 W.Va. 792, 364 S. E.2d 805 (1987). That section provides as follows:

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

³ "Campus" is defined by the certificate of need statute to mean "the adjacent grounds and buildings, or grounds and buildings not separated by more than a public right-of-way, of a health care facility" in W.Va. Code § 16-2D-1(9).

petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions 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 unlawful 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.

See W.Va. Code § 29A-5-4(g). Although the subject of WVHCA deference is discussed in more detail *infra*, the task of the circuit court and now this Court is to determine “whether the [WVHCA’s] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Frymier-Halloran v. Paige*, 193 W.Va. 687, 458 S.E.2d 780, 788 (1995). “The ‘clearly wrong’ and the ‘arbitrary and capricious’ standards of review are deferential ones which presume the agency’s actions are valid as long as the decision is supported by substantial evidence or by a rational basis.” *Id.* Under this review, “an agency’s determination of matters within its area of expertise is entitled to substantial weight.” *Princeton Community Hosp. v. State Health Planning*, 174 W.Va. 558, 328 S.E.2d 164, 171 (1985). However, “[t]his does not mean a court should shirk its obligation to make a searching and careful inquiry into the facts ...” *Id.* An agency cannot exceed its authority. See e.g. *Rowe v. West Va. Dept. of Corrections*, 170 W.Va. 230, 292 S.E.2d 650 (1982).

Although the WVHCA is entitled to deference by this Court with respect to factual and evidentiary issues, this appeal rests solely on the question above, namely, whether the WVHCA’s denial of the exemption application under W.Va. Code § 16-2D-11 was in violation of statutory provisions, was arbitrary, capricious, an abuse of discretion, and was otherwise not

in accordance with law. See *West Virginia Health Care Cost Review Auth. v. Boone Mem. Hosp.*, 196 W.Va. 326, 472 S.E.2d 411 (1996).

The Supreme Court has clarified that review of an agency decision involves two separate but interrelated questions, the second of which furnishes an occasion for agency deference. However, in this case the Court does not need to address the second question. Instead, the Court must first ask whether the West Virginia Legislature has directly spoken to the precise question at issue. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984); see also *Appalachian Power Co., v. State Tax Depart. of West Virginia*, 195 W.Va. 573, 466 S.E.2d 424 (1995); *West Virginia Health Care Cost Review Auth. v. Boone Mem. Hosp.*, 472 S.E.2d 411. If the intention of the West Virginia Legislature is clear, as it is here, that is the end of the matter and the WVHCA's position must conform to the West Virginia Legislature's expressed intent. *Id.* That is, no deference or weight is due to an agency's decision if a statute, legislative rule, or other rule speaks to the issue.

3. WMH's exemption application should have been approved because it meets all the criteria in the statutory exemption, W.Va. Code § 16-2D-11(c)(27).

Any discussion of statutory interpretation must begin with the language of the statute, for "[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. Pt. 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951); Syl. Pt. 1, *State v. Jarvis*, 199 W.Va. 635, 487 S.E.2d 293 (1997); Syl. pt. 2, *Mace v. Mylan Pharm., Inc.*, 227 W.Va. 666, 714 S.E.2d 223 (2011). Moreover, a statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning." *Hereford v. Meek*, 132 W.Va. 373, 386, 52 S.E.2d 740, 747 (1949). Only when

there is uncertainty as to the meaning of a statute is the statute subject to evaluation or interpretation. Syl. pt. 4, *Mace*, 227 W.Va. 666, 714 S.E.2d 223. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed. *Appalachian Power Co.*, 195 W.Va. at 587.

Pursuant to W.Va. Code § 16-2D-11(c)(27): “Notwithstanding section eight and ten and except as provided in section nine of this article, the Legislature finds that a need exists, and these health services are exempt from the certificate of need process . . . (27) The acquisition and utilization of one computed tomography scanner and/or magnetic resonance imaging scanner with a purchase price up to \$750,000 by a hospital.” See W.Va. Code § 16-2D-11(c)(27) (emphasis added). Of the sections cited in the excerpt above, section eight refers to W.Va. Code § 16-2D-8 and is the general certificate of need requirement, titled “Proposed health services that require a certificate of need.” See W.Va. Code § 16-2D-8. Section ten refers to W.Va. Code § 16-2D-10, titled “Exemptions from certificate of need”, and is a list of exemptions that do not require the WVHCA’s written approval. See W.Va. Code § 16-2D-10. Finally, section nine refers to W.Va. Code § 16-2D-9, titled “Health services that cannot be developed” and includes a list of prohibited health services. See W.Va. Code § 16-2D-9.

Setting those health services aside, section eleven includes a list of exempt services that did require WVHCA approval, and included: “[t]he acquisition and utilization of one computed tomography scanner and/or magnetic resonance imaging scanner with a purchase price up to \$750,000 by a hospital.” See W.Va. Code § 16-2D-11(c)(27). That statutory provision is clear and unambiguous and plainly expresses the legislative intent with no obscurity or opportunity for multiple constructions. It should have been given full force and effect by the WVHCA. This statute clearly outlines the criteria for the applicable exemption and WMH’s exemption

application should have been approved. As specified in the exemption application, WMH is a critical access hospital licensed and located in West Virginia that had planned to acquire and utilize an MRI for a purchase price of less than \$750,000. However, the WVHCA improperly decided to add an additional requirement to the exemption by requiring that WMH's MRI scanner be located at WMH's primary hospital location. J.A. 11–16. The WVHCA manufactures this new criterion by adding an additional location condition to the exemption which does not exist. Such interpretation is unwarranted, in error, and in direct conflict with the West Virginia Legislature's clear intent. The West Virginia Legislature during the 1st Executive Session passed House Bill 117 on June 13, 2017, which added W.Va. Code § 16-2D-11(c)(27) to the list of health services that qualify for an exemption from certificate of need review. Nowhere does the West Virginia Legislature further qualify this exemption by stating that the MRI is required to be located at the hospital's primary location or on the hospital's campus.

The Circuit Court notes in its order that “it is clear the Legislative intent was to allow hospitals to add MRI devices below a certain threshold price at their facility without the necessity and expense of CON review.” J.A. at 144. Yet, that feigned clear “intent” is not expressed anywhere and is wholly unsupported by reference to anything. The Circuit Court also stated that “WMH's interpretation of the code would allow a hospital to acquire and utilize MRI scanners in any location without regard to whether there is a need for the service or considering the impact such additional services would have on existing MRI services located at other hospitals already established in an area.” J.A. at 145. That is exactly what the exemptions in W.Va. Code § 16-2D-11 are designed to permit, however, by alleviating the time and expense related to full review under the certificate of need statute. Of particular note, the concern identified by the Circuit Court, i.e. that a hospital could acquire and utilize an MRI scanner

without regard to need or impact, still exists whether the MRI scanner acquired under the exemption is located within the hospital's facility or located off-campus. That is, the Circuit Court has seized on a distinction without a difference to justify its support for the WVHCA's arbitrary location-specific requirement. The WVHCA decision is clearly in violation of statutory provisions, to wit, W.Va. Code § 16-2D-11(c)(27) and must be reversed.

4. There is no "primary hospital location" requirement in the statutory exemption, W.Va. Code § 16-2D-11(c)(27), and the WVHCA cannot create one.

As explained above, WMH's exemption application clearly satisfied the criteria in the statutory exemption, W.Va. Code § 16-2D-11(c)(27). In order to deny WMH's application, the WVHCA had to create a new requirement that the proposed scanner be located at the "primary hospital location." J.A. at 15 ("The [WVHCA] finds that in creating W.Va. Code § 16-2D-11(c)(27), the Legislature intended to create an exemption for a hospital to acquire and utilize a CT scanner at its primary hospital location. The Legislature did not intent for hospitals to purchase and utilize CT scanner in medical office buildings that are not part of a hospital's primary location. Such an interpretation would lead to absurd results."). This quoted language from the decision is plagued by at least three serious errors. First, the WVHCA misstates WMH's application as proposing a computed tomography scanner or CT, when WMH proposed in its exemption application to acquire and use an MRI scanner.⁴ Second, the WVHCA attempts to explain its interpretation of the statutory exemption, despite the exemption being abundantly clear and therefore incapable of interpretation as a matter of law. After all, a statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that

⁴ The decision issued by the WVHCA and dated February 3, 2020 incorrectly states that WMH is seeking an exemption for a computed tomography ("CT") scanner instead of an MRI scanner. WMH assumes this error in the decision is a typographical error, but wanted to clarify that WMH sought an exemption for an MRI scanner.

reasonable minds might be uncertain or disagree as to its meaning.” *See e.g. Meek*, 132 W.Va. at 386, 52 S.E.2d at 747.

Finally, and most problematic for purposes of this matter, the WVHCA uses its improper interpretation of the statute as justification to arbitrarily add a “primary hospital location” requirement to the statute that simply does not exist. This term “primary hospital location” is not defined anywhere in the certificate of need statute or regulations and is plainly an arbitrary construction by the WVHCA. If the West Virginia Legislature had intended to include a location requirement in the exemption statute, it easily could have done so. *See e.g.* W.Va. Code § 16-2D-1(9) (providing a definition for the term hospital “campus” used elsewhere in the certificate of need law); *see also* W.Va. Code § 16-2D-11 (limiting certain renovations “within a hospital” without first obtaining a certificate of need). Clearly, the West Virginia Legislature is well equipped to add a location limitation such as on the hospital “campus” or “within a hospital” when necessary to achieve its intended result and chose not to do so here.

In fact, the addition of this requirement unquestionably leads to uncertainty with regard to the exemption and the possibility of absurd results. Hospitals that otherwise satisfy the statutory exemption criteria are left to speculate what criteria the WVHCA will use to determine whether the “primary hospital location” requirement is satisfied. Does “primary hospital location” mean on the hospital campus? On the same street? Within a mile?

On review by the Office of Judges, it was determined that “[a]voiding the CON review process would deny other hospitals the opportunity to contest the proposed service” and, based on this, “[t]he more logical interpretation is that the exemption applies only to the purchase of the CT/MRI for use in the hospital’s own facility.” J.A. at 15. And yet, no interpretation is permitted here where the applicable exemption plainly does not include any such limitation. That

is, it is immaterial whether competing hospitals can or cannot contest the service proposed by WMH, because WMH qualified for the exemption in the statute.

As explained above, WMH proposed to locate the MRI scanner at 5524 Williamsport Pike, Martinsburg, Berkeley County, West Virginia. The building at that location is a new medical office building owned by WMH's parent non-profit corporation, East Mountain Health Advantage, Inc. and is located approximately twenty miles from WMH's facility. If approved, the MRI scanner offered by WMH in that location would have been staffed by WMH employees and treated as an outpatient, off-campus department of WMH. There is simply no requirement in the applicable statutory exemption that the MRI scanner be located at the "primary hospital location" of the hospital, whatever that definition is intended to mean. The Legislature did not add such a limitation to the statutory exemption, and the WVHCA arbitrarily added a new requirement, which the Office of Judges affirmed after determining that it was a "reasonable and lawful construal" by the WVHCA. J.A. at 50. However, in performing the first part of the *Chevron* analysis, no deference is due to the WVHCA. The WVHCA does not have the authority to add a new location requirement where the West Virginia Legislature did not; the *Chevron* case simply does not allow it. Instead, the Court must look primarily to the plain meaning of the statute, drawing its essence from the "particular statutory language at issue, as well as the language and design of the statute as a whole." *Appalachian Power Co.*, 195 W. Va. at 586; citing *Kmart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811, 1818 (1988). Under the plain meaning of the statutory exemption above, WMH satisfied the criteria and its application for an MRI should have been approved.

On review by the Office of Judges, it was determined that "[a]voiding the CON review process would deny other hospitals the opportunity to contest the proposed service" and, based

on this, “[t]he more logical interpretation is that the exemption applies only to the purchase of the CT/MRI for use in the hospital’s own facility.” J.A. at 50. The WVHCA has offered a similar justification. This justification is unavailing, however. The exemption process does not permit the WVHCA to consider the impact of an MRI device by one provider as compared to other facilities – that is the role of the WVHCA when weighing other (non-exempt) proposals under W.Va. Code § 16-2D-8. The WVHCA decision and two appeal decisions affirming the WVHCA decision must be reversed.

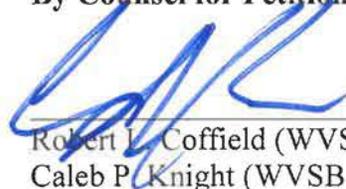
CONCLUSION

WHEREFORE, for the foregoing reasons, War Memorial Hospital, Inc. respectfully requests that this Court review and reverse the WVHCA decision issued on February 3, 2020 as well as the resulting two appellate decisions because both are 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,

WAR MEMORIAL HOSPITAL, INC.

By Counsel for Petitioner,



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THE WEST VIRGINIA HEALTH CARE AUTHORITY, Respondent Below,
Respondent.

CERTIFICATE OF SERVICE

I, Caleb P. Knight, counsel for the Petitioner, War Memorial Hospital, Inc., do hereby certify that I have served the foregoing *Petitioners' Brief and Appendix* upon counsel of record this 7th day of February, 2022, addressed as follows:

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