BEFORE THE OFFICE OF JUDGES

IN RE: STONEWALL JACKSON MEMORIAL HOSPITAL, COMPANY

CON FILE NO.: 21-7-12157-H
AP OC. NO.: 20-HC-03

THE WEST VIRGINIA HEALTH CARE AUTHORITY'S RESPONSE BRIEF TO ST. JOSEPH'S REQUEST FOR REVIEW

Comes now the West Virginia Health Care Authority ("Authority"), by counsel, B. Allen Campbell, Senior Assistant Attorney General, pursuant to the Office of Judges' ("OOJ") Scheduling Order dated July 27, 2022, and submits the following Response Brief in the above-styled matter. The Authority responds to the cross assignment of error raised in St. Joseph's Hospital of Buckhannon d/b/a St. Joseph's Hospital's ("SJB") Response Brief. In its Response Brief, SJB asserts the Authority erred because it did not determine the Application was inconsistent with the Accessibility Criteria of the Renovation-Replacement SHP Standards. The Authority correctly held that "30-minute access" means the average drive time from one location to another and the "critical access hospitals" as this term is used in the Standard means 30-minute access to a critical access hospital. For these reasons, and the reasons stated more fully below, the Authority respectfully requests the June 13, 2022, Decision of the Authority denying a Certificate of Need be Affirmed.

ARGUMENT

SJB's assignment of error regarding the Renovation-Replacement SHP Standards is without merit. In its Response Brief, SJB details a substantial analysis of the standard of review for appellate courts in determining the scope of review with respect to questions of law. SJB correctly sets forth that while the general standard of review of an administrative appeal under W. Va. Code § 29A-5-4(g) is considered *de novo* with respect to questions of law, it has also been held that this review 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. *See Princeton Community Hospital v. SHPDA*, 328 S.E.2d 164 (W.Va. 1985). Our Supreme Court of Appeals has stated that a determination of matters within an agency's area of expertise is entitled to substantial weight. *Princeton,* 328 S.E.2d at 171. Citing *Ethyl Corporation v. EPA*, 541 F.2d 1 (D.C. Cir. 1979), *cert. denied*, 426 U.S. 941, 96 S.Ct. 2663, 49 L.Ed.2d 394 (1976), the Court further stated:

> But that function must be performed with conscientious awareness of its limited nature. The enforced education into the intricacies of the problem before the agency is not designed to enable the court to become a superagency that can supplant the agency's expert decision maker. **To the contrary, the court must give due deference to the agency ability to rely on its own developed expertise.** The immersion in the evidence is designed solely to enable the court to determine whether the agency decision was rational and based on consideration of the relevant factors.

Princeton, 328 S.E.2d at 171. (emphasis added); SJB Response Brief, p. 9.

SJB goes on to note that our Supreme Court of Appeals has clarified that judicial review of an agency's decision-making authority involves two separate but interrelated questions, the second of which furnishes an occasion for agency deference. A reviewing court first must ask whether the Legislature has directly spoken to the precise question at

issue. *Chevron W.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); Syl. Pt. 3, *Appalachian Power Co. v. State Tax Department*, 466 S.E.2d 424 (W.Va. 1995); *W. Va. Health Care Cost Review Auth. V. Boone Mem'l Hosp.*, 472 S.E.2d 411, 421-422 (W.Va. 1996); *Amedysis W. Virginia, LLC v. Pers. Touch Home Care of W.Va., Inc.*, 859 S.E.2d 341, 351 (W.Va. 2021). 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. No deference is due an agency's actions at this stage. SJB Response Brief, p.10

SJB notes, However, if legislative intent is not clear, a reviewing court may not simply impose its own construction in it review of a statute, legislative rule, or other rule carrying the force of law. *Chevron,* 467 U.S. at 842-43; Syl Pt. 3, *Appalachian Power Co v. State Tax Department*, 466 S.E.2d 424 (W.Va. 1995); *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); *Amedisys*, 859 S.E.2d at 351. 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 aforementioned 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.* SJB Response Brief, p. 10.

SJB notes that our Supreme Court of Appeals has emphasized the importance of recognizing an administrative agency's expertise in interpreting ambiguous statutes that it is charged with administering:

> Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous . . . Of course, when there is more than one reasonable interpretation, the court ordinarily should follow [the interpretation] of the administrative board. Adherence to the practice described above is particularly important in cases where the agency has some expertise in making these determinations.

Martin V. Randolph County Bd. of Educ., 465 S.E.2d 399, 415 (W.Va. 1995), (citing Syl. Pt. 2, *West Va. Dept. of Health and Human Resources/Welch Emergency Hosp. v. Blankenship*, 431 S.E.2d 681 (W. Va. 1993); *Boley v. Miller*, S.E.2d 352 (W. Va. 1992); *Blennerhassett Historical Par Comm'n v. Public Serv. Comm'n of W.Va.*, 366 S.E.2d 758 (W. Va. 1988). SJB Response Brief, p. 11.

SJB correctly concludes that ultimately, to the extent that the Legislature has not "directly spoken to the precise question at issue" through a statutory or regulatory provision, the Authority's interpretation of a statute or regulation must be accorded great deference and weight, as it is the agency charged with administrating the CON law and has vast expertise in such matters. *Chevron*, 467 U.S. at 842-43; *Amedisys*, 859 S.E.2d at 351; *Martin*, 465 S.E.2d 399 at 415. SJB Response Brief, p. 11.

The Legislature has not "directly spoken to the precise questions at issue" as it relates to the Accessibility criterion. As SJB so eloquently argued in its Response Brief, the Authority's interpretation of the criterion must be accorded great deference and weight, as it is the agency charged with administering the CON law and has vast expertise in such matters. Moreover, even though SJB attempts to persuasively argue what the "framers of the Accessibility Criterion" intended in choosing the wording of the criterion, it is important to note, that the "framers of the Accessibility Criterion" was the Authority. Consequently, there is no entity better equipped to interpret the criterion as the agency who wrote it.

A great deal of time was expended at the hearing below arguing over what constituted "30-minute access." Stonewall argued that 30-minute access should be given its plain meaning, i.e., the average drive time from one facility to another. SJB argued that "30-minute access" included a host of other factors, including traffic congestion, weather, ambulance response time, etc. The Authority expressly rejected SJB's interpretation of "30-minute access." To hold otherwise, would render the term "30-minute access" meaningless. In locations that are close to 30 minutes apart, as in the instant case, one day there would be 30-minute access and on another day where conditions are different, there would not be 30-minute access. The Authority found such an interpretation untenable.

SJB also argued that the criterion provided that no proposal shall adversely affect the continued viability of a critical access hospital regardless of population or access to time. The criterion in questions state "[t]he proposal shall not adversely affect the continued viability of an existing hospital or health care services that serves a population of at least 10,000 not having 30-minute access to another hospital or critical access hospitals (CAH)." SJB wants to diagram the sentence is such a manner that carves out critical access hospitals from the 30-minute access requirement. Such an interpretation would benefit SJB by eliminating the 30-minute access requirement and prohibit any proposals that would adversely affect the viability any critical access hospital.

The Authority found that "critical access hospitals" a used in this criterion means 30-minute access to a critical access hospital. Although SJB, disagrees with the Authority's interpretation it is the Authority's interpretation that must be given substantial deference and great weight where the interpretation is a rational interpretation of the

criterion. In reviewing the criterion, the question is whether the clause "30-minute access" modifies only "another hospital" or whether it also modifies "critical access hospitals." While SJB may disagree with the Authority's interpretation, the Authority's interpretation is a reasonable one that is not clearly erroneous. Consequently, the Authority's interpretation of the criterion must be given substantial deference.

WHEREFORE, the West Virginia Health Care Authority respectfully requests its Decision in the above-styled matter be AFFIRMED.

Respectfully submitted,

WEST VIRGINIA HEALTH CARE AUTHORITY

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL

B. ALLEN CAMPBELL
SENIOR ASSISTANT ATTORNEY GENERAL
WV BAR # 6557
West Virginia Health Care Authority
100 Dee Drive
Charleston, West Virginia 25311
(304) 558-7000
allen.b.campbell@wv.gov

BEFORE THE HEALTH CARE AUTHORITY/OFFICE OF JUDGES

IN RE: STONEWALL JACKSON MEMORIAL HOSPITAL COMPANY
CON FILE NO.: 21-7-12157-H
AP DOC NO.: 22-HC-03

CERTIFICATE OF SERVICE

I, B. Allen Campbell, Senior Assistant Attorney General, counsel for West Virginia Health Care Authority, do certify that on the 26th day of September, 2022, the foregoing "**The West Virginia Health Care Authority's Response Brief to St. Joseph's Request for Review**" was filed with the Office of Judges, via Hand Delivery, and served upon all parties by delivering true copies thereof, via First Class Mail and electronic mail, as follows:

Thomas G. Casto
Lewis Glasser
P.O. Box 1746
Charleston, WV 25326

James W. Thomas
Alaina Crislip
Jackson Kelly PLLC
500 Lee Street, East, Ste. 1600
P.O. Box 553
Charleston, WV 25322

B. Allen Campbell
Senior Assistant Attorney General