**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**

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# REPLY BRIEF OF MINNIE HAMILTON HEALTH CARE CENTER, INC.

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The parties to this appeal plainly disagree with respect to the contents of the Decision by the West Virginia Health Care Authority (the "WVHCA") dated April 29, 2022 (the "Decision"). On the one hand, Minnie Hamilton Health Care Center, Inc. dba Minnie Hamilton Health System ("MHHC") maintains that the Decision falls short of providing the fully articulated basis required by W.Va. Code § 29A-5-3, among other errors, for the reasons explained in its ***Brief of Minnie Hamilton Health Care Center, Inc.*** filed on June 24, 2022. On the other hand, the WVHCA and Hospital Development Co. d/b/a Roane General Hospital ("RGH") disagree with MHHC's arguments with respect to the Decision, a point which RGH repeatedly seeks to underscore through its indignant and disparaging counterarguments.

The applicable law and standard of review are not in dispute, and Section 16-2D-16(b) of the West Virginia Code 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 relevant requirements for the WVHCA's decisions are also located in the West Virginia Administrative Procedures Act, in Section 29A-5-3:

> 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. A copy of the order or decision and accompanying findings and conclusions shall be served upon each party and his attorney of record, if any, in person or by registered or certified mail.

*See* W.Va. Code § 29A-5-3. This is the standard against which the contents of the Decision must be critically evaluated, and the standard which MHHC contends that the WVHCA failed to satisfy in authoring the Decision. *See generally*, MHHC Br., June 24, 2022.

RGH's ***Response Brief*** can be essentially summarized as follows: the Decision takes 54 pages to reach its conclusion so *of course* its legally sufficient. RGH's frequent recitation of the page count – 54 pages! – is offered as proof certain of its contents. In fact, the Decision does recite each statutory criterion and State Health Plan Standard for Ambulatory Care Centers (the "SHP Standard") criterion as each relates to the application and then recounts the specific arguments of the parties with respect to those criteria. However, time and time again, the WVHCA closes with the conclusory "careful review and consideration of the facts, evidence, and arguments of both parties" often with abbreviated or no meaningful analysis. Decision, Apr. 29, 2021, p. 11, 18, 30, 37, 47.

Perhaps most bewildering and illustrative among the examples of the WVHCA's glossing over important evidentiary issues is the WVHCA's acceptance of the population data in RGH's

application. The WVHCA determined: "[a]fter careful review and consideration of the facts, evidence, and arguments of both parties, the [WVHCA] determines that RGH reasonably and rationally calculated the service area population and properly established the expected utilization for the health services proposed by the application in accordance with the Ambulatory Care Centers Standards and the CON law." Decision, Apr. 29, 2022, at pp. 18-19. The text that follows in the Decision states that "MHHC failed to present any testimony or offer any evidence of record to refute the credibility of the zip code reference utilized by RGH to calculate the zip code population breakdown." *Id.* Of course, RGH all but concedes that the source of its data was *not* identified in the application and was only revealed in RGH's hearing exhibits and through testimony of its expert at the subsequent hearing. *See* RGH Br., July 26, 2022, at pp. 16-17. All hearing exhibits were due from the parties at the prehearing on December 7, 2021, so how could MHHC possibly "present any testimony or offer any evidence of record" to rebut RGH's specific population data when the data was not revealed by RGH until the parties exchanged exhibits on December 7, 2021? And yet, this is precisely the trap that RGH set and the Authority sprung in this matter.

Raymona Kinneberg, RGH's expert, relied on her obscure sources to present population data, despite misrepresenting her sources in the application. RGH had the burden of proof to explain why this information was accurate but failed, for example, to explain what efforts it took, if any, to determine the accuracy of the evidence. And yet, the WVHCA simply agreed that this evidence was satisfactory, saying "[t]hus, 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 meaningful discussion of how these evidentiary facts led the agency to its conclusion. *See* Decision, at p. 18.

MHHC was unjustly precluded from using rebuttal documents to rebut the population data sourced by Ms. Kinneberg because the sources of her data were obscured until the prehearing, an issue that was exacerbated by MHHC's inability to obtain any discovery from Ms. Kinneberg despite her being disclosed as a testifying expert for RGH. This was the focus of MHHC's Motion to Compel on December 1, 2021, which RGH dismissively refers to as "no more than a red herring" and "irrelevant." RGH Br., at p. 18. RGH claims, at different times, derivative work product doctrine and derivative attorney-client privilege and cites caselaw in support of both privileges that ignore the reality of Ms. Kinneberg's role as a *testifying* expert as opposed to a *consulting* expert. Moreover, the Decision glosses over a fundamental error by the WVHCA in accepting RGH's claimed work-product privilege: MHHC only noted its opposition to the RGH proposal 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."). The WVHCA has unwittingly determined that the entire process of preparing a certificate of need application is now protected by the work-product doctrine *without any indication that litigation is anticipated.* That is *not* how the work product doctrine is supposed to work, and the *State ex rel. United Hosp. v. Bedell* is entirely on point here.

As a testifying expert in this matter, information concerning the facts forming the basis for Ms. Kinneberg's opinions was discoverable pursuant to Rule 26 of the West Virginia Rule of Civil Procedure and the WVHCA's determination otherwise constitutes reviewable abuse of discretion. The Supreme Court of Appeals of West Virginia has previously noted that even an attorney loses the protection of the work product doctrine when named as an expert witness. *See Bedell*, 199 W. Va. 316 at 333, fn. 6, *citing Vaughan Furniture Co. Inc. v. Featureline Mfg., Inc.*, 156 F.R.D. 123, 128 (M.D.N.C. 1994) ("A party waives the opinion work product protection of its attorney by naming its attorney as an expert witness."). As an expert witness, Ms. Kinneberg and RGH were not entitled to invoke the work product doctrine to shield information and documents from disclosure, particularly before litigation was anticipated. Yet, all information and documents containing the facts forming the basis for Ms. Kinneberg's opinions as a testifying expert were obscured until the prehearing on December 7, 2021, and subsequent hearing on December 14, 2021, at which point *MHHC could not offer any rebuttal evidence.* MHHC was limited to cross examination of Ms. Kinneberg at the prehearing, during which Ms. Kinneberg *still* conceded that she obtained the population information from an unverified website, that the information was collected from unknown sources, from unknown years, and that she did not compare it against any other sources to determine its legitimacy. Far from being a red herring or irrelevant to the resulting Decision, those issues underscore the WVHCA's abuse of discretion in denying discovery to MHHC and declining to follow *State ex rel. United Hosp. v. Bedell* in this matter.

For the foregoing reasons and as further explained in MHHC's brief, 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.

**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 August 9, 2022.

**Minnie Hamilton Health Care Center, Inc. dba Minnie Hamilton Health System,**

**By Counsel,**

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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 9th day of August, 2022, the foregoing ***"Reply 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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