IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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Fayette County Senior Programs,
And Summers County Council on Aging,
Affected Parties Below, Petitioners,

vs.) NO: 24-ICA-99

Panhandle Support Services, Inc.,
Applicant Below, *Respondent*

And

West Virginia Health Care Authority,
Respondent

PETITIONERS' BRIEF IN SUPPORT OF APPEAL

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ASSIGNMENTS OF ERROR

1. In plain error, the hearing examiner, Heather Connolly, erred in granting Panhandle's Motion for Summary Judgment because as hearing examiner, she had no authority to grant such a motion.

2. The hearing examiner's granting of Panhandle's Motion for Summary Judgment was premature as discovery in the proceeding had not been completed. Panhandle filed its "Motion for Summary Judgment on Behalf of Applicant, Panhandle Support Services, Inc." on October 2nd, 2023. An "evidentiary hearing" was scheduled to take place on October 13th, 2023. At the evidentiary hearing, Summers would have been afforded the opportunity to question witnesses and offer that testimony into the record. However, during the pre-hearing on October 6th, 2023, the Authority erroneously found that no evidence could be introduced at the Hearing that would create a dispute of material fact.

3. The hearing examiner's decision to prematurely grant Summary Judgment prevented Summers from creating a genuine dispute of material fact regarding unmet need and negative effect on other services.

4. In plain error, the WVHCA erred when it found that Petitioner Fayette was wrongfully provided "affected party" status.

STATEMENT OF THE CASE

I. PROCEDURAL AND FACTUAL BACKGROUND

On June 12th, 2023, the West Virginia Health Care Authority ("WVHCA") received an application from Respondent Panhandle Support Services, Inc., ("Panhandle") for a Certificate of Need requesting permission to start providing Medicaid In-Home Personal Care Services within a proposed service area. (*See* D. R. 20-149). The proposed service area includes Fayette, Raleigh, Summers, Monroe, Mercer, and Greenbrier County. (*See* D.R. 39). On June 7th, 2023, the WVHCA received Summers County Council on Aging, Inc.'s ("Summers"), letter setting forth reasons why Panhandle's application should not be granted. (*See* D.R. 18). On June 16th, 2023, the WVHCA received Fayette County Senior Programs' ("Fayette") letter setting forth reasons why Panhandle's application should not be granted. (*See* D.R. 153). On July 13th, 2023, the WVHCA received Summers' filing for affected party status contesting that the requirements of a CON were not met by Panhandle and requested an evidentiary hearing. (*See* D. R. 167). On July 17th, 2023, the WVHCA received Fayette's filing for affected party status contesting that the requirements of a CON were not met by Panhandle and requested an evidentiary hearing. (*See* D. R. 169).

Once a party is granted affected party status, the party is guaranteed an evidentiary hearing that is governed by the State Administrative Procedures Act ("APA"). *W. Va. Code* § 29A-5-1 et. seq. Under the APA, each party will have the opportunity to cross examine testifying witnesses and submit rebuttal evidence. *W. Va. Code* § 29A-5-2(C). The hearing shall be conducted in an impartial manner and the agency may appoint an impartial hearing examiner to oversee the hearing. *W. Va. Code* § 29A-5-1(d). The hearing

examiners' only role is to foster the effective gathering of evidence into the record, so that the agency board can consider the evidence and come to a conclusion. *Id.*

On October 2nd, 2023, Panhandle filed a motion for Summary Judgment asking the WVHCA to cancel the evidentiary hearing that was originally scheduled to take place on October 13th, 2023. (*See* D.R. 208-214). On October 6th, 2023, a pre-hearing conference was held before the WVHCA, and was presided over by Heather Connolly in the capacity of the Hearing examiner. (*See* D.R. 1353-1419). Both Petitioners hand delivered a response to Panhandle's Motion for Summary Judgment on October 6th, 2024, prior to the commencement of the pre-hearing conference. (*See* D.R. 234-248). During the Pre-hearing, Ms. Connolly granted Panhandle's Motion for Summary Judgment. (*See* D.R. 1403:24; 1404:1-3). Also, during the pre-hearing, Ms. Connolly granted Panhandle's Motion to Dismiss Fayette. An Order reflecting Ms. Connolly's decision was entered into the record on February 8th, 2024. (*See* D. R. 1377:21-24; 1378:1-8).

As a result of Ms. Connolly's premature granting of Panhandle's Motion for Summary Judgment, no evidentiary hearing was held, and no witness testimony was entered into the record. Naturally, no post hearing briefing was conducted. Furthermore, on October 13th, 2023, after Petitioner's CON proceeding was dismissed, an evidentiary deposition was taken of Timothy Adkins, the Director of the Certificate of Need Program within the West Virginia Health Care Authority. Mr. Adkins deposition was taken to build the record in all the CON proceedings which Petitioners had in front of the WVHCA. The testimony of Mr. Adkins was intended to be entered and considered in this record. However, because of the premature Order, this testimony was not considered or entered

in the record. Significantly, Ms. Connolly's Order granting Summary Judgment deprived the WVHCA board from considering the underlying facts.

On March 7th, 2024, Petitioners noticed their appeal of the underlying decision made by the WVHCA. The WVHCA filed the Designated Record for this appeal on April 12th, 2024. Petitioners now file this Brief for the purpose of perfecting their appeal, and to highlight portions of the record which show the WVHCA erred in its decision to grant a Certificate of Need to Panhandle.

SUMMARY OF ARGUMENT

Petitioner's first assignment of error: The WVHCA, and Heather Connolly in her capacity as an "unbiased hearing examiner," erred in prematurely granting Panhandle's Motion for Summary Judgment. The WVHCA, nor Panhandle, cite any authority in the underlying argument, or in the underlying decision, to support the hearing examiners authority to rule on dispositive motions. In fact, the Administrative Procedures Act (APA) provides an explicit list of powers entrusted to the hearing examiner. None of the listed powers permit the hearing examiner to consider or rule on dispositive motions. *W. Va. Code* §29A-5-1(d).

Petitioner's Second assignment of error: The WVHCA erred when it prematurely granted Panhandle's Motion for Summary Judgment while a substantial portion of discovery was left unfinished. Panhandle filed its Motion for Summary Judgment for the purpose of preventing Summers from entering additional evidence into the record at the scheduled evidentiary hearing. Furthermore, a second evidentiary hearing was scheduled in the underlying proceeding for the purpose of entering Tim Adkins testimony into the

record. Neither Tim Adkins' testimony nor the evidence Summers would have provided at the evidentiary hearing were allowed to be considered by the board.

By granting this Motion prior to an evidentiary hearing, the WVHCA found that there was no evidence that Summers could have entered into the record that would create a genuine dispute of material fact. Whether it is just extreme bias, or that the decision to grant the application was made prior to the beginning of the proceeding, it is clearly wrong to find that there is no possible fact that could ever affect the outcome of Panhandle's Application. Furthermore, Ms. Connolly granted Panhandle's Motion for Summary Judgment without even reading Summers' or Fayette's Response to the motion.

Petitioner's third assignment of error: The WVHCA improperly prohibited Summers from creating a genuine dispute of material fact. Summers intended to challenge a variety of requirements within Panhandle's application. This included, but is not limited to, the unmet need and negative affect requirements.

Petitioner's fourth assignment of error: The WVHCA found that Petitioner Fayette did not qualify for affected party status. This finding is clearly wrong as evidence in the record, as well as Fayette's arguments, shows that Putnam County Aging Program and Fayette County Senior Programs are one in the same. These two organizations, although synonymous with each other, provide services in Fayette County and fit squarely within the definition of an affected party.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners believe that this Court will benefit from oral arguments on the assignments of error addressed in this brief. This matter involves: (1) "…assignments of error in the application of settled law…"; (2) claims of "…unsustainable exercise of

discretion where the law governing that discretion is settled…"; and (3) a claim of "…insufficient evidence or a result against the weight of the evidence…" (*See* W. Va. R. App. P. 19). For these reasons, Petitioners request oral arguments in this matter under West Virginia Rule of Appellate Procedure 19.

ARGUMENT

I. Standards.

i. Appellate Review

When "reviewing the decision of an administrative agency's factfinder . . . the [appellate] court is required to accord deference to the hearing examiner's findings of fact unless they are '[c]learly wrong in view of the reliable, probative, and substantial evidence on the whole record[.]'" *Minnie Hamilton Health Care Ctr., Inc. v. Hosp. Dev. Co.*, 2023 W. Va. App. LEXIS 92, 5 (W. Va. App. 2023). If this Court finds that the WVHCA was clearly wrong under the applicable law and relevant facts, it has the option of various remedies:

> 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;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedures;
>
> (4) Affected by other error of law;
>
> (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.

Id.

ii. Summary Judgment Standard

The WVHCA in the underlying proceeding disposed of the matter through a Motion for Summary Judgment. Therefore, this Court must find that WVHCA's application of the Summary Judgment standard was "clearly wrong."

"Rule 56(c) [of the West Virginia Rules of Civil Procedure] establishes the standard for determining whether a summary judgment in a given situation is proper and should be granted." *Aetna Casualty and Surety Co. v. Fed. Ins. Co. of N.Y.*, 148 W. Va. 160, 170-71, 133 S.E.2d 770, 777 (1963). Pursuant to Rule 56(c), "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. W. Va. R. C. P. Rule 56(c) (2011) (emphasis added).

A "genuine issue" arises when there is sufficient evidence in favor of the nonmoving party that a reasonable jury would return a verdict in their favor on that particular issue. *Jividen v. Law*, 194 W. Va. 705, 461 S.E.2d 451 (1995). A "material fact" is a fact which has the capacity to sway the outcome of the litigation under the applicable law. *Id.* The nonmoving party must show that there is one or more disputed "material facts" to withstand a motion for summary judgment. *Id.*

The West Virginia Supreme Court of Appeals stated "a motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to

be tried and inquiry concerning the facts is not desirable to clarify the application of the law." *Aetna*, 148 W. Va. at 171 (emphasis added). "A party is not entitled to summary judgment unless the facts established show a right to judgment with such clarity as to leave no room for controversy and show affirmatively that the adverse party can not prevail under any circumstances." *Id.* at 172 (emphasis added). "A motion for summary judgment must be denied if varying inferences may be drawn from evidence accepted as true." *Id.*

Under West Virginia law, the moving party has the burden of proof to show they are entitled to summary judgment. "A party who moves for summary judgment has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment." *Id.* (emphasis added). The nonmoving party does not have the burden to show that he would prevail on the issue should it be presented to a jury, instead, the burden is on the movant to show there is no genuine issue as to any material fact. *See Lengyel v. Lint*, 167 W. Va. 272, 280 S.E.2d 66 (1981).

II. The hearing examiner improperly, and without any authorization, granted Panhandle's Motion for Summary Judgment.

Heather Connolly, in her capacity as a hearing examiner, improperly granted Panhandle's Motion for Summary Judgment at the pre-hearing conference in the underlying matter. The hearing examiner's purpose is to conduct the hearings in a way so that the parties may effectively enter evidence into the record, so that the WVHCA Board may make a ruling on the findings. The hearing examiner has a list of explicit statutory powers:

> (d) All hearings shall be conducted in an impartial manner. The agency, any member of the body which comprises the agency, or any hearing examiner or other person permitted by statute to hold any such hearing for such agency, and duly authorized by such agency so to do, shall have the power to: (1) Administer oaths and affirmations, (2) rule upon offers of proof and receive relevant evidence, (3) regulate the course of the hearing, (4) hold conferences for the settlement or simplification of the issues by consent of the parties, (5) dispose of procedural requests or similar matters, and (6) take any other action authorized by a rule adopted by the agency in accordance with the provisions of article three [§§ 29A-3-1 et seq.] of this chapter.

W. Va. Code §29A-5-1(d). Nowhere in the list of explicit statutory powers does it allow the hearing examiner to rule on a dispositive motion, and thereby deprive the WVHCA Board of performing its role.

In fact, the WVHCA is required by law to approve applications for CON only if it makes several specific findings. 65 C.S.R. 32-10 et. seq. In essence, Panhandle's Motion for Summary Judgment is a motion asking the hearing examiner to prevent Summers from developing evidence at an evidentiary hearing to assist the Authority in its decision. With the granting of Panhandle's motion, the hearing examiner removed Summers as an affected party solely because the hearing examiner had already determined that Panhandle's CON application should be approved regardless of what evidence could have been produced. It is not the hearing examiner's role to grant or deny a CON application, it is her role to gather evidence for the Board. As such, the hearing examiner acted outside of her statutory authority, and therefore, her granting of Panhandle's Motion for Summary Judgment was clearly wrong.

III. The WVHCA improperly and prematurely granted Panhandle's Motion for Summary Judgment prior to allowing Summers to develop its case or make supporting arguments.

West Virginia Supreme Court precedent holds:

> **Summary judgment is appropriate only after the non-moving party has enjoyed "adequate time for discovery**." *Celotex Corp. [v. Catrett]*, 477 U.S. [317] at 322, 106 S.Ct. [2548] at 2552, 91 L. Ed. 2d 265 [1986]; *Anderson [v. Liberty Lobby Inc.],* 477 U.S. [242] at 250 n. 5, 106 S.Ct. [2505] at 2511 n. 5, 91 L. Ed. 2d 202 [1986]. **As this Court has recognized, summary judgment prior to the completion of discovery is "precipitous."** *Williams [v. Precision Coil, Inc.],* 194 W.Va. [52] at 61, 459 S.E.2d [329] at 338 [1995], quoting *Board of Educ. of the County of Ohio v. Van Buren and Firestone, Arch., Inc.,* 165 W.Va. 140, 144, 267 S.E.2d 440, 443 (1980).

Conley v. Stollings 679 S.E.2d 594, 599 (W. Va. 2009) (*Citing Payne's Hardware & Bldg. Supply, Inc. v. Apple Valley Trading Co. of W. Va.,* 200 W. Va. 685, 690, 490 S.E.2d 772, 777 (1997)). Granting a summary judgment motion prior to the completion of discovery is inherently risky for obvious reasons. Having an incomplete evidentiary record greatly increases the probability of improperly dismissing a case on the present evidence. The more evidence that can be shown to be missing from the record, the more likely the granting of the same will be improper. That is exactly what happened here.

Even in the WVHCA's decision, it cites case law that highlights the improper timing of Panhandle's Summary Judgment. Summary judgment is only proper "[w]hen a motion for summary judgment is mature for consideration and is properly documented with such clarity as to leave no room for controversy…" (*See* D.R. 1424). At the time this motion was granted, there were two evidentiary hearings scheduled in this matter. One was the evidentiary hearing scheduled for October 13th, 2023, where the parties are normally afforded the opportunity to present testimony from any relevant witness, and to cross-

exam the other parties' witnesses. (*See* D.R. 175). The purpose of the other hearing was to gather the testimony of Tim Adkins, Director of the Certificate of Need Program at WVHCA, for the record. Mr. Adkins not only was central in establishing the 2023 Need Methodology, but he had direct knowledge of the unmet need in West Virginia. Due to this premature granting of Summary Judgment, none of the above testimony was entered in this record. It appears near impossible that the WVHCA could find enough clarity as to leave no room for controversy when not a single key witness had submitted evidentiary testimony.

In fact, WVHCA made this ruling on nothing more than unexplained documents. Summers was prevented from entering evidence in the record through testimony or questioned Panhandle about its CON application. Not only was Summers stripped of the opportunity to explain the submitted documents through testimony, but it was also prohibited from making any arguments on the evidence. Panhandle filed its Motion for Summary Judgment just four days prior to the pre-hearing. (*See* D.R. 208-214). As such, both Petitioners drafted a response discussing the premature nature of the Motion and hand delivered it on the day of the pre-hearing. (*See* D.R. 234-248). However, Ms. Connolly never read the Responses, and granted the Motion for Summary Judgment against Summers during the preohearing conference. (*See* D.R. 1403-1404).

Surprisingly the WVHCA cited, "[i]n support of its motion, Panhandle argued that the Affected Parties' chief arguments in this matter had already been addressed by the Authority in prior hearings." (*See* D.R. 1421). Without a doubt, making a ruling on evidence not in the record is clearly wrong. However, PCAP is not Summers. These agencies are not related and were represented by separate counsel at the pre-hearings. The hearing examiner improperly relied upon "chief arguments…addressed…in prior

hearings." Summers had no prior evidentiary hearings, the arguments the hearing examiner relied upon were PCAP's arguments. **It is clearly wrong to grant a summary judgment motion against Summers based upon arguments made by an unrelated entity in an unrelated matter.** Not only is it improper to make this kind of reliance, but it is impossible for the WVHCA to predict what evidence Summers would enter and rely on in the underlying matter. To grant summary judgment not on the evidence in the record, but what evidence the WVHCA believes will be entered is clearly wrong.

Here, a ruling on summary judgment is clearly premature, and therefore improper, as most of the evidentiary record had yet to be developed. A hearing was scheduled in this matter for October 13th, 2023. At which point, multiple witnesses would have testified under oath to matters not yet disclosed by either side. Panhandle's untimely filing of a Summary Judgment is equivalent to requesting a judge to dismiss a plaintiff's case prior to affording them an opportunity to depose key witnesses. The WVHCA found that Summers failed to establish sufficient evidence to overcome the Summary Judgment standard, yet even the WVHCA was wholly unaware of the evidence in the record as it was not complete. The proper time for Panhandle to make these arguments are in the post-hearing briefs, after the evidentiary record is complete. Although Summers already had sufficient evidence to overcome summary judgment, the Motion was blatantly premature and thus improper. Therefore, the WVHCA's granting of Panhandles Motion for Summary Judgment is clearly wrong.

IV. Summers was improperly prohibited from creating a genuine dispute of material fact.

It is difficult to fathom every possible argument that could be made based off of testimony that does not exist. However, Summers believes it would have been able to develop the below arguments if it was provided the opportunity to provide evidence.

Unmet Need

First, was Summers intent to create a genuine dispute of material fact regarding the CON unmet need requirement. West Virginia Code establishes a minimum criterion for Certificate of Need reviews. More specifically, "[a] certificate of need may only be issued if the proposed health service is…[f]ound to be needed; and [c]onsistent with the state health plan, unless there are emergency circumstances that pose a threat to public health." *W. Va. Code* § 16-2D-12(a). As discussed below, the WVHCA promulgated a rule consistent with the statute requiring an applicant to show with **specificity** that there is an unmet need for the proposed service in the proposed service area. The WVHCA was clearly wrong in its finding that there was an unmet need in Panhandle's six (6) county proposed service area.

A finding of unmet need is both required and necessary to comply with the legislative findings of the CON statute: preventing duplication of services and unnecessary waste of resources. (*W. Va. Code* § 16-2D-1). On April 27th, 2023, the WVHCA promulgated the following calculation for determining the need in any given county:

> 1. Total Number of Residents receiving Medicaid per county.
>
> 2. Total Number of Residents receiving Medicaid per county multiplied by 3% (this will give the total number of residents who may be receiving In-Home Personal Care services or who may benefit from receiving services).

> 3. The total Number of Residents, as reported by BMS, who are receiving In-Home Services is subtracted from the Total Number of residents in step two.
>
> 4. If there is an unmet need of 25 or more then the County is considered open to additional providers.
>
> 5. If a new provider has been approved within the previous 12 months, the Authority will subtract 25 from each applicable county proposed.

(*See* D.R. 1101). The previous standards that were promulgated in 2016 are similar, with the primary difference being that the multiplier in the second step was 1.25% in 2016 and was increased to 3% in April of 2023. https://hca.wv.gov/certificateofneed/Documents/IN_HOME_PER_C.pdf at pg. 2-3.

Summers was meant to participate in two separate evidentiary hearings and was deprived of both. One of these hearings was that of Timothy Adkins, the Director of the Certificate of Need Program within the West Virginia Health Care Authority. Summers was meant to have the opportunity to depose Mr. Adkins on October 10th. (*See* D.R. 216). However, Ms. Connolly, as hearing examiner, granted Summary Judgment in this matter on October 6th, 2023, and therefore, Mr. Adkins' testimony was not taken into consideration. Although the testimony of Mr. Adkins was not considered in the underlying proceedings, the deposition of Mr. Adkins still took place for the purpose of building the record in other CON proceedings. Obviously, for this reason, Mr. Adkins' testimony is not in this record. However, his comments made at the subsequent deposition highlight not only the creation of genuine disputes of material fact but is one example of why the premature granting of Summary Judgment was clearly wrong.

Mr. Adkins was asked about is personal knowledge on unmet need he testified that he was unaware of any:

Q: …presenting this change to three percent, was there any data that you have that showed that there was eligible --- eligible individuals out there who could not receive services?

A: No.

Q: Were you aware of any waiting lists for any in-home personal care services?

A: I don't know that there's a waiting list…

Furthermore, in an email from the Bureau of Medical Services ("BMS"), Teresa McDonough, Program Manager for TBI Waiver and Personal Care Services, adamantly takes the position that there "never has been or ever will be a 'wait list' for the Personal Care Services program." (*See* D.R. 947 – BMS e-mail).

Furthermore, Summers would have entered additional testimony at the scheduled hearing in this matter to challenge the requirements of unmet need.

Negative affect

One of the few argument Summers was permitted to argue during the pre-hearing is that its "other services" would be negatively affected if the application was granted. (*See* D.R. 1391:88-15). More specifically, granting of this CON would "have a direct negative impact on the citizens by jeopardizing its ability to off other services to seniors, including but not limited to nutrition, transportation that are significantly funded with profits from the in-home personal care service." *Id*. The WVHCA erred in finding "…it is unnecessary to hold a public hearing to allow an affected party to attack the Application's purported potential impact on "other services," such as food delivery services, which are wholly unrelated to the PC Services at issue here." (*See* D.R. 1007).

However, Tim Adkins, the Director of the Certificate of Need Program within the West Virginia Health Care Authority testified that the language "other services" does in fact anticipate these services:

> Q: **...So read that, and tell me what you're referring to.**
>
> A: Will the loss of revenue prevent other services from being provided? We know that --- that the providers use those dollars for other services.
>
> Q: **And that's, and obviously then it was concern of yours?**
>
> A: It --- it's still a concern of mine.
>
> Q: **And we don't have the transcript of it, bit when we were --- when you were in that meeting, you were walking through the --- three elements for a CON application. You talked about need, and then when you got to the second element and it's in the standards got there. On page three, post services will not have a negative effect on the community by significantly limiting the availability and viability of other services. You --- brought that up again, and I think your specific comment was you don't want to be in a situation where you're robbing Peter to pay Paul.**
>
> A: That's exactly right.
>
> Q: **And you're referring about the same thing. Those...fees that they're using to provide the other services?**
>
> A: Right.
>
> Q: **And --- and that applies to other services in number 2?**
>
> A: That's exactly right.

Mr. Adkins heads the Certificate of Need program and is the proper person to interpret these standards. There is zero doubt that Mr. Adkins interprets other services to include those underfunded transportation and nutrition services provided by Summers.

Therefore, Panhandle's argument that these other services don't not fall under "other services" is incorrect and WVHCA erred in making that finding. This may be one of the clearest examples of why ruling on Summary Judgment prior to an evidentiary hearing is clearly wrong. Heather Connolly independently found that transportation and meal services did not fall under the category of "other services." However, Mr. Adkins, the true authority on the matter, found the complete opposite, completely invalidating the Summary Judgment Order in this matter. This contradictory finding between the hearing examiner and the Authority are the perfect example of why it is improper for the hearing examiner to grant dispositive motions. Especially when the non-moving party has been deprived of its ability to develop the record. These are only two examples. Through testimony of all the key witnesses, it is expected that many more genuine disputes of material fact would materialize.

V. The hearing examiner improperly found that Petitioner Fayette was not an affected party in the underlying proceeding.

Fayette County Senior Programs is owned and operated by Putnam County Aging Program, Inc. When Putnam filed for affected party status, it listed Fayette County Senior Programs because the affected county was Fayette County. The letter submitted by Fayette County Senior Programs clearly states that is owned by Putnam County Aging Program. As such, it was accepted by the WVHCA.

An affected person is defined by statute as:

> (A) The applicant;
>
> (B) An agency or organization representing consumers;
>
> (C) An individual residing within the geographic area but within this state served or to be served by the applicant;

(D) An individual who regularly uses the health care facilities within that geographic area;

(E) A health care facility located within this state which provide services similar to the services of the facility under review and which will be significantly affected by the proposed project;

(F) A health care facility located within this state which, before receipt by the authority of the proposal being reviewed, has formally indicated an intention to provide similar services within this state in the future;

(G) Third-party payors who reimburse health care facilities within this state; or

(H) An organization representing health care providers.

W. Va. Code §16-2D-2. Clearly, who can identify as an affected party is defined very broadly under this statute.

Petitioner Fayette timely filed its request for a hearing on July 17th, 2023. (*See* D.R. 169). As discussed below, Putnam County Aging Program, Inc., and Fayette Senior Programs are one in the same. In fact, upon inspection of Petitioner Fayette's affected party request, there are multiple indications that the two are synonymous. The letter head of the hearing request includes both Putnam Aging and Fayette Senior Programs. As stated at the bottom of the hearing request "Fayette Senior Programs is owned and operated by Putnam County Aging Program, Inc."

Putnam County Aging Program Inc. began business operations in 1975, as an extension to the Putnam County Commission, to provide services to senior citizens under the Older American's Act. In 1985, Putnam Aging separated from the Putnam County Commission and formed a private, 501(c)(3) non-profit agency, with the purpose of administering aging program services in Putnam County. Subsequent to the establishment of the Medicaid In-home Personal Care program, the entity operating

services in Fayette County went bankrupt. As a result, the West Virginia Bureau for Senior Services approached Putnam County Aging Program Inc. and asked if it would assume the responsibility of serving the elder population in Fayette County. PCAP agreed.

All of the Affected Party's business is conducted by Putnam County Aging Program, Inc. Fayette County Senior Programs is a term used to refer to the collective group of aging program services offered by Putnam County Aging Program, Inc. in Fayette County. Putnam County Aging Program, Inc. and Fayette County Senior programs are one in the same and can be used synonymously. As such, not only does Fayette County Senior Programs qualify as an Affected Party, but it qualifies under the statue defining an affected party. Therefore, the WVHCA was clearly wrong when it granted Panhandle's Motion to Dismiss Petitioner Fayette.

CONCLUSION

First, the WVHCA erred in granting summary judgment prior to the scheduled evidentiary hearing. Second, the WVHCA erred when it allowed Heather Connolly, in her capacity as a hearing examiner, to grant a dispositive motion. Third, WVHCA erred in finding there was no material dispute of fact, or any evidence that could be developed to create a material dispute of fact. Lastly, the WVHCA was clearly wrong when it granted Panhandle's Motion to Dismiss Petitioner Fayette.

Petitioners ask that the WVHCA's decision granting Panhandle's Motion for Summary Judgment and Motion to Dismiss be vacated, and the matter be remanded for further fact finding. Petitioners further request any other remedy this Court finds proper.

FAYETTE COUNTY SENIOR PROGRAM, and SUMMERS COUNTY COUNCIL ON AGING

***Petitioners*,**

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CERTIFICATE OF SERVICE

I, Ryan W. Walters, do hereby certify that on this 10th day of June, 2024, I filed the forgoing "*Petitioners' Brief in Support of Appeal*" to be served on counsel of record via File & ServeXpress.

/s/ Ryan W. Walters
Ryan W. Walters (WVSB#14113)