IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 24-ICA-99

FAYETTE COUNTY SENIOR PROGRAMS
and **SUMMERS COUNTY COUNCIL ON AGING,**

Affected Parties Below, Petitioners,

vs. CON File No. 23-1/4-12694-PC

PANHANDLE SUPPORT SERVICES, INC.,

Applicant Below, Respondent,

and

WEST VIRGINIA HEALTH CARE AUTHORITY,

Respondent.

BRIEF OF RESPONDENT
PANHANDLE SUPPORT SERVICES, INC.

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I. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On April 27, 2023, Governor Jim Justice approved new standards for determining the need for Personal Care Services (the "2023 PC Standards"). These 2023 PC Standards apply to services available to assist eligible Medicaid recipients in activities of daily living in the recipient's home, place of employment, or community ("PC Services"). On June 1, 2023, Respondent Panhandle Support Services, Inc. ("Panhandle") submitted a Letter of Intent to the West Virginia Health Care Authority ("WVHCA") to provide PC Services in Fayette, Raleigh, Summers, Monroe, Mercer, and Greenbrier Counties, each of which was deemed to have existing need for PC Services based on the need methodology outlined by the approved 2023 PC Standards. *See* D.R.0006. On June 12, 2023, the Certificate of Need ("CON") Application and appropriate filing fee were received by the WVHCA. *See* D.R.0020-D.R.0151. The CON Application ("Application") was deemed complete on June 15, 2023, and a Notice of Review was issued on June 16, 2023. *See* D.R.0152, D.R.0154-D.R.0158.

On or before the filing deadline of July 17, 2023, the WVHCA received letters from the Petitioners ("Petitioner Fayette" and "Petitioner Summers," respectively), requesting they be afforded affected party status and that an administrative hearing be held in the matter. See D.R.0153, D.R.0167. An initial scheduling conference was held on August 6, 2023, and the Petitioners were given notice of that hearing. D.R.0173-D.R.0178. During that scheduling conference, a public hearing on the Application was scheduled for October 13, 2023. A prehearing conference was scheduled for October 6, 2023, for the hearing of dispositive and preliminary motions. *See* D.R.0176. During that same scheduling conference, the WVHCA issued other deadlines relating to this matter, including the dates upon which discover requests were due (September 1, 2023) and upon which discovery would be completed (September 21, 2023). *See* D.R.0175.

On October 2, 2023, Panhandle filed its "Motion for Summary Judgment on Behalf of Applicant, Panhandle Support Services, Inc." *See* D.R.0207-D.R.0215. On October 4, 2023, Panhandle filed its "Amended Motion for Dismissal of Affected Party and/or Summary Judgment on Behalf of Applicant, Panhandle Support Services, Inc." *See* D.R.0220-D.R.0232. The Petitioners hand delivered their responses to Panhandle's Motions on October 6, prior to the commencement of the pre-hearing conference. See D.R.0233-D.R.0248. The motions were argued by the parties at the prehearing conference on October 6, 2023, before Hearing Examiner Heather Connolly. *See* D.R.1362-D.R.1404.

Following arguments on the motion, Hearing Examiner Connolly, on her own motion, removed affected party status from Petitioner Fayette, effectively dismissing it from the preceding, finding that Fayette County Aging Programs did not qualify for "affected party" status under West Virginia Code § 16-2D-2. *See* D.R.1377-D.R.1378. Then, turning to Petitioner Summers, Hearing Examiner Connolly granted Panhandle's Motion for Summary Judgment. *See* D.R.1402-D.R.1404. The Order reflecting the granting of summary judgment was entered on February 8, 2024. *See* D.R.1420-D.R.1427.

In addition to the procedural events of the matter before this Court, it should be noted that, on October 13, 2023, an evidentiary deposition was taken of Timothy Adkins, Director of the CON Program within the WVHCA. Although contrary to the historical practices of the WVHCA, Director Adkins was made available for deposition in this case for purposes of allowing the Petitioners the opportunity to build a record relating to an attack on the promulgation of the 2023 PC Standards and its underlying need methodology. A consolidated deposition was permitted to allow for Director Adkins to be deposed just a single time, rather than at each individual hearing. From a procedural perspective, Panhandle argued that this separate deposition was irrelevant to its Application and the hearing on the merits of that Application, as a successful challenge to the underlying PC Standards could undermine any CON that might be granted.

On March 7, 2024, Petitioners noticed its appeal of the underlying decision made by the WVHCA. The WVHCA filed the Designated Record for this appeal on April 12, 2024, and Petitioners perfected their

appeal by filing its brief in support of its appeal on June 10, 2024. In accordance with this Court's scheduling order, Panhandle now files its brief in opposition, asserting that the WVHCA was correct in its handling of Panhandle's Application and in its granting of the requested CON in this case.

B. STATEMENT OF FACTS

On or about June 12, 2023, following Governor Jim Justice's approval of the 2023 PC Standards, Panhandle filed its Application for a CON for the provision of PC Services within the proposed Service Area. For purposes of this Application, the proposed Service Area included Fayette, Raleigh, Summers, Monroe, Mercer, and Greenbrier Counties. Utilizing the Governor-approved 2023 PC Standards and the need methodology adopted by the WVHCA, Panhandle asserted that there were additional Medicaid recipients, residing within Fayette County (343.00), Raleigh County (645.00), Summers County (59.00), Monroe County (92.00), Mercer County (552.00), and Greenbrier County (279.00), who had an unmet need for the PC Services proposed its Application. For many years, Panhandle has been a provider of PC Services within this target Service Area, including both Fayette and Summers Counties, albeit as a subcontractor of an approved provider of PC Services and not as a direct CON holder. Panhandle has provided these PC Services alongside the Petitioners in those counties. Given the opportunity to seek its own CON under the new 2023 PC Standards, Panhandle sought to gain business independence and eliminate the need for the existing subcontracts.

II. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, oral argument is unnecessary for this appeal because (i) the dispositive issue or issues have been authoritatively decided by the Supreme Court of Appeals of West Virginia, (ii) the facts and legal arguments are adequately presented in the briefs and the record on appeal, and (iii) oral argument would not significantly aid this Court's decision.

III. SUMMARY OF ARGUMENT

The Petitioners raise numerous alleged errors, and Panhandle will respond to each one briefly in the order they were raised. First, the Petitioners assert that the WVHCA, and Heather Connolly in her capacity as a Hearing Examiner, erred in granting Panhandle's Motion for Summary Judgment. Specifically, the Petitioners assert that Ms. Connolly did not have the authority to entertain dispositive motions under the Administrative Procedures Act ("APA"), W.Va. Code § 29A-5-1, et. seq. In response, Panhandle asserts that the WVHCA not only had the authority to address a motion for summary judgment but that the WVHCA was correct in granting such a motion under the facts of this case.

Second, the Petitioners assert that the WVHCA erred when it "prematurely" granted Panhandle's Motion for Summary Judgment while "a substantial portion of discovery was left unfinished." Panhandle asserts that this argument is patently wrong. Discovery had been completed as of September 21, 2023 (*See* D.R.0175), and the remaining public hearing was meant to serve as a de facto trial of the case. The Petitioners, even when directly questioned, could not state any material issues of disputed fact it hoped to present at the public hearing. Panhandle filed its Motion for Summary Judgment for the purpose of preventing Petitioners from wasting valuable resources on a fishing expedition that was not reasonably likely to elicit any new information that was not already presented through the discovery procedures. The fact that summary judgment was granted prior to the deposition of CON Director Adkins is a red herring, as the WVHCA had already stated that it was allowing the deposition solely for the purposes of allowing the Petitioner to make its record for purposes of its attack on the way the 2023 PC Standards were approved. That issue was not one that would have been decided in the Petitioners' favor at a public hearing, based on the clear statements of the WVHCA, and the granting of Panhandle's Motion for Summary Judgment did not prevent the Petitioners from questioning Mr. Adkins and making their record.

Third, the Petitioner has argued that the WVHCA improperly prohibited Petitioner Summers from creating a genuine dispute of material fact, including but not limited to disputes regarding the unmet need and the negative impact of granting the Application. In response, Panhandle asserts that these disputes are not with Panhandle's Application but with the opening up of the CON process. The Petitioners are aggrieved that their historic stranglehold within the PC Services market is being broken. While Panhandle will address each of the Petitioners' points of error in greater detail below, there simply is no genuine question of fact as to whether Panhandle properly utilized the 2023 PC Standards as they were promulgated and approved by Governor Justice. Nor is there any question as to whether Panhandle was already present and providing PC Services, through a subcontractor agreement, throughout the proposed Services Area, including both Fayette and Summers Counties. As such, all the Petitioners could have offered at the public hearing were the same arguments it raised in resistance to Panhandle's motions at the prehearing conference. The WVHCA properly rejected those as not relevant or appropriate to be raised at the public hearing on Panhandle's Application.

Fourth, the Petitioners allege that the WVHCA erred in finding that Petitioner Fayette did not qualify for protected party status. While the Petitioners argue that this decision was clearly wrong in light of Fayette's arguments that Fayette County Senior Programs and Fayette County Aging Program are "one and the same," Panhandle asserts that the Hearing Examiner properly applied the statute to determine that Petitioner Fayette was not a legal entity of any kind, despite having held itself out as such in this and other CON proceedings. Regardless, however, even if this Court were to agree that Petitioner Fayette should have been afforded affected party status, this error is harmless. Given the remainder of the prehearing conference, as well as the disposition of Putnam County Senior Programs through summary judgment in CON File No. 23-2/3-698, it is clear that Petitioner Fayette could not have survived the motion for summary judgment, which would have led to the same result.

IV. ARGUMENT

A. STANDARD OF REVIEW

Pursuant to West Virginia Code §§ 16-2D-16a (2021) and 29A-5-4(g) (2021), this Court's standard of review is 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 constitutional or statutory provisions;
> (2) In excess of the statutory authority or jurisdictions 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.

See Minnie Hamilton Health Care Ctr., Inc. v. Hosp. Dev. Co., 2023 WL 2424614 (W.Va. Ct. App. Mar. 9, 2023). "Further, the factfinding determinations of an agency are entitled to deference unless clearly wrong." *Id.*

B. THE HEARING EXAMINER CORRECTLY GRANTED PANHANDLE'S MOTION FOR SUMMARY JUDGMENT BECAUSE, AFTER AFFORDING THE PETITIONERS THE OPPORTUNITY TO DEVELOP THEIR CASE, THERE WAS NO GENUINE ISSUE OF DISPUTE AS TO ANY MATERIAL FACT JUSTIFYING THE HOLDING OF THE ADMINISTRATIVE HEARING.

With regard to the granting of a Motion for Summary Judgment, the standard is well established. Rule 56 of the West Virginia Rules of Civil Procedure provides, in part, that:

> [Summary judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact that the moving party is entitled to a judgment as a matter of law. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of its pleadings, but as a response by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a

> genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

W.Va. R. Civ. P. 56 (c) and (e).

The Court strengthened its summary judgment jurisprudence with its decision in *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994), where the Court stated:

> To the extent that our prior cases implicitly have communicated a message that Rule 56 is not to be used, that message is hereby modified. When a motion for summary judgment is mature for consideration and is properly documented with such clarity as to leave no room for controversy, the non-moving party must take the initiative and by affirmative evidence demonstrate that a genuine issue of fact exists. Otherwise, Rule 56 empowers the trial court to grant the motion.

Id. at n.5, 192, 758. Since the *Painter* decision, the Court has stated that the "circuit court cannot try issues of fact; it can only determine whether there are issues to be tried." *Gentry v. Mangum*, 195 W. Va. 512, 519, 466 S.E.2d 171, 178 (1995). When a party fails to make a sufficient showing on an essential element of its case, summary judgment is appropriate. See *Varney et al. v. Gibson,* syl. pt. 1, 202 W. Va. 573, 505 S.E.2d 636 (1998) (quoting *Williams v. Precision Coil, Inc.,* 194 W. Va. 52, 459 S.E.2d 329 (1995)); *McGraw v. St. Joseph's Hospital*, 200 W. Va. 114, 488 S.E.2d 389 (1997); *St. Peter v. AmPak-Division of Gatewood Products, Inc.,* 199 W. Va. 365, 484 S.E.2d 481 (1997).

In fact, "[s]ummary judgment is mandated if the record, when reviewed most favorably to the nonmoving party, discloses '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.'" *Payne v. Weston*, 195 W. Va. 502, 506, 466 S.E.2d 161, 165 (1995). Essentially, summary judgment is appropriate where the non-movant fails to present evidence sufficient to allow a reasonable juror to conclude that his position, more likely than not, is true. See *Gentry*, 195 W. Va. at 518-19, 466 S.E.2d at 177-78 (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993)).

At the outset of this matter, a scheduling conference was held, and certain critical procedural dates and deadlines were established by the WVHCA. The establishment of such procedures is clearly within the authority of the WVHCA, consistent with the APA, which states, "[e]ach agency shall adopt appropriate rules of procedure for hearing in contested cases." *See* W.Va. Code § 29A-5-1(a). Accordingly, the WVHCA set the following dates and deadlines for this case: (i) filing of replacement pages due by August 18, 2023; (ii) discovery requests due by September 1, 2023; (iii) discovery completed by September 21, 2023; (iv) filing of dispositive motions and subpoenas by October 2, 2023; (v) a prehearing date (upon which motions could be heard) was set for October 6, 2023; and (vi) the final public hearing was set for October 13, 2023.

As of September 21, 2023, discovery in this matter was concluded. While the Petitioners would suggest that discovery continues through the date of the final hearing, this is inconsistent with the WVHCA's scheduling order (*See* D.R.0175) – and with general litigation practice within West Virginia. Discovery must have some end point, and, if a party has not either sought an extension of the discovery period or filed a motion to compel alleging the other party has failed to adequately respond to discovery requests, then the participants are entitled to assume that the Petitioners have received what they need to make their case, and the matter becomes ripe for a motion for summary judgment. In this case, Panhandle answered all of the discovery requests, which included requests for admission, interrogatories, and requests for the production of documents. The Petitioners did not file any request to extend the discovery deadline, they made no attempt to file supplemental discovery requests, and they presented no motion to compel. As such, this Court should agree that the WVHCA was correct in determining that discovery had been concluded.

The Petitioners assert that Hearing Examiner Connolly improperly granted Panhandle's Motion for Summary Judgment at the pre-hearing conference, but the Petitioner points to no authority that suggests the consideration of such a motion was improper. To the contrary, Rule 1 of the West Virginia Rules of Civil Procedure explicitly states that:

> These rules govern the procedure in all trial courts of record in all actions, suits, or other judicial proceedings of a civil nature whether cognizable as cases at law or in equity, with the qualifications and exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

See W.Va.R.C.P. Rule 1. Furthermore, Rule 81 goes on to state specifically that the Rules of Civil Procedure apply to administrative hearings such as the one before this Court. Similarly, the APA, to which the Petitioner cites, says that a hearing examiner has the authority to regulate the course of a hearing and to dispose of procedural requests or similar matters. *See* W.Va. Code § 29A-5-1(d). While the Petitioner's brief argues that "[n]owhere in the list of explicit statutory powers does it allow the hearing examiner to rule on a dispositive motion," Panhandle would point out that the rule does not prohibit such action either, and, where the totality of the applicable rules of procedure, including the administrative procedure established by the WVHCA at the outset of this case, all suggest that such a ruling is within the hearing examiner's power, this Court should not find that Ms. Connolly was clearly wrong in the exercise of her power.

As noted by the Petitioners, the WVHCA was required by law to approve Panhandle's Application for CON upon its making of several specific findings. 65 C.S.R. 32-10 et. seq. In this case, the WVHCA made all of the necessary factual findings, and Panhandle was entitled to judgment as a matter of law. At the prehearing conference (again, set for the express purpose of addressing dispositive motions), the Petitioners were given the opportunity to proffer what evidence they could elicit that would defeat the motion and the Petitioner could only reiterate their same immaterial arguments.

Otherwise, the Petitioner would simply have reiterated its arguments that the 2023 PC Standards were improperly promulgated and that the granting of Panhandle's Application for CON would adversely impact its food delivery program and other programs unrelated to health care or the purview of the WVHCA. In light of the Petitioner's incapability of stating even a single genuine issue of material fact that it could dispute, the WVHCA was not clearly wrong in granting Panhandle's Motion for Summary Judgment. To

the contrary, it acted in a fashion that is entirely consistent with the intent of Rule 56 and the guidance provided by applicable case law.

C. EVEN IF THE HEALTH CARE AUTHORITY HAD DENIED THE MOTION FOR SUMMARY JUDGMENT, THE PETITIONERS COULD NOT HAVE CREATED ANY MATERIAL ISSUE OF DISPUTED FACT TO JUSTIFY A DECISION DENYING PANHANDLE'S APPLICATION FOR CERTIFICATE OF NEED.

As the Petitioners correctly state, summary judgment is appropriate only after the non-moving party has enjoyed "adequate time for discovery." *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Similarly, the Petitioners are correct in stating that summary judgment prior to the completion of discovery is "precipitous." *See Williams v. Precision Coil, Inc.,* 194 W.Va. 52, 61, 459 S.E.2d 329, 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). The problem facing the Petitioners here is that discovery was over. The Petitioners had been given the full opportunity to avail themselves of the discovery process, and Panhandle provided responses to the Petitioners' requests, without the Petitioners objecting or seeking any remedy from the Hearing Examiner. Accordingly, as set forth above, it was entirely reasonable for all parties to understand that discovery was over – especially in light of the WVHCA's scheduling order which set the prehearing conference for the hearing of any dispositive motions.

In arguing that the granting of Panhandle's Motion for Summary Judgment was premature, the Petitioners continue to raise the red herring issue of the Tim Adkins deposition. The Petitioners assert that their purpose for holding the deposition of CON Director Adkins was to attack the WVHCA's establishment of its 2023 need methodology and, ultimately, the 2023 PC Standards. Again, there is a major problem with this argument that the Petitioners cannot overcome. The final hearing in this matter, had it been held, would have been to determine only whether Panhandle's Application met the legal standard for approval.

"In making the determination of whether a CON may be issued, the Authority utilizes Standards which were approved by the Governor and were thereafter in full force and effect from

the date of the Governor's approval." *Amedisys W. Virginia, LLC v. Pers. Touch Home Care of W.Va., Inc.*, 245 W. Va. 398, 408, 859 S.E.2d 341, 351 (2021); *see also* W.Va. Code § 16-2D-6. Here, it is undisputed that the Governor had already approved the 2023 PC Standards. Those standards affirmative state that there was unmet need for PC Services existing in Panhandle's proposed Service Area. Accordingly, the Petitioners' entire line of arguments that there was not any unmet need, or that some other standard not adopted by the Governor should have been applied, are completely irrelevant, immaterial, and should be excluded upon objection by Panhandle.

Moreover, the granting of summary judgment in this matter did nothing whatsoever to prevent the Petitioners from making its record for some potential attack on the underlying 2023 PC Standards. Mr. Adkins was deposed. The only actual impact of the WVHCA's action in this case was that counsel for Panhandle was barred from asking Mr. Adkins any questions at the deposition. Clearly, the WVHCA does not agree that it acted arbitrarily or capriciously in establishing the 2023 PC Standards approved by the Governor. It makes no difference how many times the Petitioners assert this same argument, it is entirely reasonable that the WVHCA would not arbitrarily and capriciously reverse its previous stance and suddenly agree that all its work in establishing the 2023 PC Standards was improper and thus statutorily invalid.

Indeed, Panhandle argued that the Petitioner's chief arguments in this matter had already been addressed by the WVHCA. The Petitioners asserts that "[w]ithout a doubt, making a ruling on evidence not in the record is clearly wrong. Not only is it improper to make this kind of reliance, but it is impossible for the WVHCA to predict what evidence Petitioner would enter and rely on in the underlying matter." However, the Petitioners' argument ignores two important facts. First, the chief arguments referenced by Panhandle are not relevant evidence for the reasons set forth above. As such,

Panhandle would have repeatedly objected to the introduction of any of this irrelevant information, and it is clear from the prior hearing that the WVHCA was inclined to sustain such objections.

Second, it is not at all impossible to predict what evidence Petitioner would enter. Had the public hearing occurred, Panhandle would have simply rested its case on its Application. It would have presented no witnesses or additional evidence, as it did not need to do so based on the 2023 PC Standards and need methodology. The Petitioners failed to subpoena any witnesses from Panhandle, so Panhandle would not have had any witnesses at the hearing to be called by the Petitioners. Accordingly, the only evidence the Petitioner would have had to provide would have been the same things they continued to argue throughout the proceedings, namely, that the WVHCA improperly promulgated the 2023 PC Standards, and that the granting of Panhandle's Application could have an adverse impact of Petitioners' other services, including the meal delivery programs. This Court can predict this result because when, at the prehearing conference, the Petitioners were asked what other relevant evidence they would be able to present, and the Petitioners were unable to point to anything.

Given all of these facts, the WVHCA properly found that "pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, there were no issues of material fact to be decided at the public hearing and that, even taking the facts in a light most favorable to Petitioners, Panhandle was entitled to judgment as a matter of law." While Petitioner Summers clings to its argument that it would have raised a genuine dispute of material fact at the public hearing, the reality is that it was virtually powerless to do so. In its brief, Petitioner Summers suggests it could have argued that (1) Panhandle would have been unable to show an actual unmet need and (2) Panhandle would be unable prove that the granting of a CON would not have a negative effect on "other service."

With regard to the former argument, Panhandle need only remind this Court that the unmet need was established by the 2023 PC Standards and its need methodology. The 2023 PC Standards were

approved by the Governor, so Panhandle had every right to rely on those standards in the filing of its Application. *See Amedisys W. Virginia, LLC v. Pers. Touch Home Care of W.Va., Inc.*, 245 W. Va. 398, 408, 859 S.E.2d 341, 351 (2021); *see also* W. Va. Code § 16-2D-6.

Regarding the Petitioner's latter argument, Panhandle addressed this point utilizing the undisputed fact that Panhandle was already present in the proposed target area, including both Fayette and Summers Counties, providing PC Services alongside the Petitioners through a subcontractor agreement with another approved provider of PC Services. As Panhandle was not seeking to offer any new PC Services in the target area, there is no legitimate argument that the granting of Panhandle's CON is likely to have any impact, negative or otherwise, on the community or on the Petitioners' other services. In theory, the only party that could reasonably argue it would be adversely impacted by Panhandle receiving its own CON is the entity with which Panhandle was subcontracting; however, that entity did not object to Panhandle's application. So, even if the adverse impact on other programs outside the authority of the WVHCA (i.e., food delivery programs) was an appropriate consideration, which it is not, the Petitioners would be unable to establish any adverse impact in this particular case.

Had it had any other relevant evidence or arguments to present, the Petitioners surely would have raised them at the prehearing conference when faced with Panhandle's dispositive motion. Because they each failed to issue any subpoenas for any Panhandle employees or representatives, the Petitioners were not going to be able to undertake the kind of fishing expedition that they argue they were entitled to conduct. Accordingly, the WVHCA appropriately determined that it had the relevant facts before it, that there was no genuine dispute regarding those relevant facts, and that Panhandle was entitled to have its Application granted as a matter of law. This determination was not only not clearly wrong, but it was legally correct.

D. THE HEARING EXAMINER PROPERLY FOUND THAT PETITIONER FAYETTE WAS NOT AN AFFECTED PARTY IN THE UNDERLYING PROCEEDING.

On or before July 17, 2023, Petitioner Fayette submitted a letter, signed by Ryan Alton, seeking to be recognized as an "affected party" in this case. In this same letter, Fayette County Senior Programs, through Mr. Alton, requested that a public hearing be held on this Application. This letter was not on the letterhead of Putnam County Aging Program, and it was not signed by Putnam's Executive Director Jennifer Sutherland. *See* D.R.0153.

Fayette County Senior Programs is a wholly fictional entity and, as such, does not qualify to be recognized as an "affected party," as such is defined by West Virginia Code § 16-2D-2, as amended.

Under West Virginia Code § 16-2D-2, an "affect party" means:

(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.

In this case, Fayette County Senior Programs is none of the above. Rather, it is a complete fiction, or as offered by Ms. Sutherland during her sworn testimony in an earlier public hearing (CON File # 23-2/3/4-12697-PC), Fayette County Senior Programs is nothing more than a "name on the door." It is not a company, an affiliate of another company, or even a "D/B/A" of a company that is licensed to do business within the State of West Virginia. Rather, the appropriate "affected

party," to the degree any party is actually affected by this Application, would have been Putnam County Aging Program, Inc.

Indeed, Putnam County Aging Program, Inc. filed to be an "affected party" on its own behalf in numerous other CON proceedings involving the 2023 Personal Care Standards ("2023 PC Standards"), including in CON File # 23-2/3-12689-PC, which involves this same Applicant. Interestingly, in the matter (CON File # 23-2/3/4-12697-PC) heard by the WVHCA on October 4, 2023, both Putnam County Aging Program and Fayette County Senior Programs filed their own respective letters seeking "affected party" status and a public hearing on the Application. In that matter, Ms. Sutherland admitted that it was a mistake for Fayette County Senior Programs to have filed on its own behalf and acknowledged that it was not an "affected party." The same must be true in this case, except there was no separate request filed by Putnam County Aging Program upon which it could fall back.

Because Fayette County Senior Programs is not a person or legal entity of any kind existing within the State of West Virginia, it cannot be recognized as an "affected party." Because it was not a proper Affected Party to stand in objection to Panhandle's Application, the WVHCA correctly ruled that Petitioner Fayette should not be granted the opportunity to participate as an "affected party" at the public hearing in this matter.

Moreover, even if this Court were to agree that Petitioner Fayette should have been afforded affected party status, this error is harmless. Given the remainder of the prehearing conference, as well as the disposition of Putnam County Senior Programs through summary judgment in CON File No. 23-2/3-698, it is clear that Petitioner Fayette could not have offered any genuine dispute of material fact so as to survive the motion for summary judgment. Because the result would have been the same, the rights of Petitioner Fayette were not prejudiced, even if the Court finds the Hearing Examiner overstepped by stripping it of its previously granted affected party status.

V. CONCLUSION

For all of the reasons set forth herein, this Court should affirm the decision of the WVHCA granting Panhandle's Application.

Respectfully submitted,

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Respondent, by counsel,

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CERTIFICATE OF SERVICE

I, Brock M. Malcolm, do hereby certify that on this 25th day of July, 2024, I filed the forgoing *"Brief of Respondent, Panhandle Support Services. Inc."* to be served on counsel of record via File & ServeXpress.

/s/ Brock M. Malcolm
Brock M. Malcolm (WVSB No. 7994)