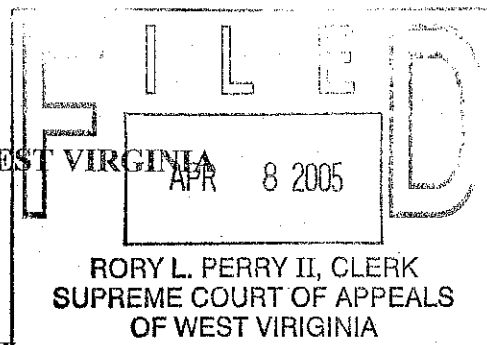


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 050368 and 050369



FAIRMONT GENERAL HOSPITAL, INC., Appellant below,

Respondent,

v.

**UNITED HOSPITAL CENTER, INC., and
WEST VIRGINIA UNITED HEALTH CARE SYSTEM, INC., Appellees below,**

Petitioners,

and

WEST VIRGINIA HEALTH CARE AUTHORITY, Appellee below,

Petitioner.

Amicus Curiae Brief of the Affiliated Construction Trades Foundation

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I. Proceedings at the Circuit Court

On November 24, 2004 the Honorable Fred L. Fox, II, Judge, Circuit Court of Marion County entered a *Judgment Opinion/Order Reversing the Decision of the West Virginia Health Care Authority/Office of Judges* in this matter. That *Opinion/Order* is the subject of two Petitions to this Court, one by the United Hospital Center, Inc. ("UHC") and the West Virginia United Health Systems, Inc. ("United") and the other by the West Virginia Health Care Authority ("HCA"). On March 11, 2005 this Court Granted the Affiliated Construction Trades Motion for leave to file a brief *Amicus Curiae* in these consolidated matters¹. This is the *Amicus Curiae Brief of the Affiliated Construction Trades Foundation* in support of those two petitions.

II. Introduction and Statement of Facts

The simple and bottom line question before this Court is whether the Circuit Court of Marion County erred in *reversing* the decision of the Health Care Authority at both the Authority level as well as at the Office of Judges, that held that the proposed construction of a replacement hospital eight miles from the existing hospital is *consistent* with the State's Health Plan even though at the time of the instant application the State Health Care Plan called for replacement hospitals to be within five miles of the facility that is being replaced.

The Circuit Court held, in essence, that the HCA, by determining that the placement of the UHC replacement facility was consistent with the State's Health Plan,

¹ The Court consolidated these matters in an Order dated March 14, 2005. ACT did not receive a copy of the Order granting its Motion to file this Brief until March 22, 2005.

exceeded its authority, was clearly wrong based upon the evidence as a whole and undertook an arbitrary and unwarranted exercise of its discretion.

In this regard the Court should note two things. First, in reversing the HCA the Circuit Court overstepped its statutory authority to review the determinations of the HCA and, for that reason alone, this Court should accept the Petitions currently pending before it. Secondly, the effect of the Circuit Court's three mile decision will be to negatively impact the health care available in the local area, undercut the economic development of the local area and cause the government and the Petitioners to undertake useless and expensive action to re-file and reargue an issue that has had a full and fair hearing and has previously been determined.

The Affiliated Construction Trades Foundation ("ACT") is therefore filing this *Amicus Curia* Brief to urge this Court to accept the Petitions currently pending before it.

Standard of Review

As this Court is well aware, West Virginia Code § 29A-5-4(g) provides that a circuit court shall reverse or vacate the decision of an agency if the "substantial rights of the petitioner have been prejudiced" because the "findings, inferences, conclusions, decision or order" of the administrative agency are:

- in violation of the constitution or statutory provisions;
- in excess of the agency's statutory authority or jurisdiction;
- made upon unlawful procedures;
- affected by other error of law;
- clearly wrong in view of the reliable, probative or substantial evidence on the whole record; or
- arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

This Court in *Princeton Community Hospital v. State Health Planning and Development Agency*, 174 W.Va. 558,562, 328 S.E.2d 164, 169 (1986) held in the context of Circuit Court review of certificates of need, “the fundamental question presented is whether the circuit court, under its limited review capacity, was correct in reversing the final agency determinations and granting the certificates of need. The circuit court’s decision may only be upheld if the agency determinations were contrary to the standards set forth in West Virginia Code section 29A-5-4(g).”

It is clear from the Petition and the record in this matter that the Circuit Court in the instant matter erred in finding that the HCA’s determination was contrary to that standard.

Discussion of the Law and Argument

In both law and fact there are a number of key issues in this matter that are fundamental to this Court’s consideration and are uncontested. ACT will briefly discuss these matters.

It is clear in the statute that the Legislature provided the discretion to the HCA to consider applications for certificates of need pursuant to a two-pronged standard. West Virginia Code § 16-2D-9(b) states as follows:

- (b) A certificate of need may only be issued if the proposed new institutional health service is:
 - (1) Found to be needed; and
 - (2) Except in emergency circumstances that pose a threat to public health, consistent with the state health plan.

It is clear that the HCA has defined, through consideration and issuance of legislative rules, key terms including what it intends the words “consistent with the state health plan” to mean in the context of its consideration of an application for a certificate of need. It has stated that (at section 65-7-2.7)”

"Consistent With The State Health Plan" means a determination made by the board that the preponderance of the evidence supports the achievement of the applicable provisions of the State Health Plan unless the Plan is in conflict with any statute or this rule.

In coming to a determination regarding the issuance of a certificate of need the statute requires the HCA to consider some twenty three matters to the extent they are "applicable" to the application before it. (West Virginia Code § 16-2D-6). Among these matters are the cost and methods of the proposed construction and the probable impact of the construction to the costs of health services charged to the public (West Virginia Code § 16-2D-6(12)).

It has long been the law of this state that the Courts are required to give great weight to the interpretations of statutes by the agencies charged with their administration. This Court placed a very high hurdle to overcome in substituting a Court's interpretation for an agency's. In this regard this Court has stated in Hardy County Board of Education v. West Virginia Division of Labor, Syl. Pt. 2, 191 W.Va. 251, 44 S.E.2d 192 (1994),

'Interpretations of statutes of bodies charged with their administration are given great weight unless clearly erroneous.' Syllabus Point 4, Security National Bank & Trust Co. v. First W.Va. Bancorp., Inc. [166] W.Va. [775], 277 W.E.2d 613 (a981) appeal dismissed, 454 U.S. 1131, 102 S.Ct. 986, 71 L.Ed.2d 284 [919720]. Syl. Pt. 1, Dillon v. Board of Educ., 171 W.Va. 631, 301 S.E.2d 588 (1983)

In this instant matter, the Circuit Court ignored this Court's long-standing holdings and instead substituted its own interpretation, based upon its interpretation of a definition in the Webster's New Collegiate Dictionary, for that of the HCA. It is an error that not only forms more than a sufficient basis for this Court to accept the Petition pending before it but, if left unchallenged, will have a direct and negative impact on the

determinations in this matter – that the proposed replacement facility is needed and meets the requirements of the statute.

The Affiliated Construction Trades Foundation has supported the construction of this replacement facility throughout its consideration by the HCA. It has done so not only because of the employment opportunities that the construction costs of \$174,000,000 will bring but, for the positive impact the investment in health care of the new facility will have on health care and the costs associated with health care for its members and the public.

The record is clear that UHC is a low cost/high quality provider of health care services and there is a serious need to replace its existing facility. The HCA considered, as it is required to do under the statute, numerous issues including those regarding construction and cost and found that, “The proposed project represents a superior alternative in terms of operating and cost-efficiencies relating to the cost of the project and the facility’s functionality than renovation of UHC’s existing facility” and has been designed, to “ensure the efficient delivery of high quality health care services over the next forty to fifty years.” (Decision, page 36).

If this Court were to Deny this Petition and to require UHC to submit a new application, the cost in time, funds and negative impact on health care would increase unnecessarily. Such a result this Court should not allow.

III. Conclusion

In the Circuit Court’s Opinion/Order in this matter, the Court reversed the Decision by the HCA because it believed to do otherwise would only serve to embark down a “slippery slope” to a society “in which regulations, and perhaps even statutes,

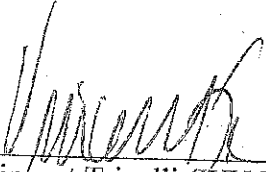
could be disregarded at will.” There is nothing in this matter that approaches such a slope.

The Affiliated Construction Trades Foundation, in its efforts to protect the interests of its members, operates everyday before agencies of this state where reasoned decisions and interpretations of law are the rules of the road. Certainly, there are occasions where agencies have made errors in interpreting their statutes and regulations and agencies have made errors in applying those statutes and regulations to the facts in a particular matter. In those situations, ACT and others have in the past and will undoubtedly in the future appeal for consideration and review by this Court. The issues before this Court in the instant matter, however, do not rise to the level of one of those situations. The HCA fully considered the issues before it, has interpreted its statute in a manner that cannot be said to be erroneous and has undertaken a permissible construction of its rule in the matter before it (see West Virginia Health Care Cost Review Authority v. Boone Memorial Hospital, 196 W.Va. 326, 472 S.E.2d 411, 419 (1996)). In the instant matter, the agency has taken the appropriate steps and it is the actions of the Circuit Court that require this Court’s consideration and review.

For these reasons, as well as those presented in the pending Petitions, ACT respectfully requests that this Court Grant the Petitions in this matter and permit a full consideration of the important matters raised therein.

The Affiliated Construction Trades Foundation, a
division of the West Virginia State Building and
Construction Trades Council, AFL-CIO

By Counsel.



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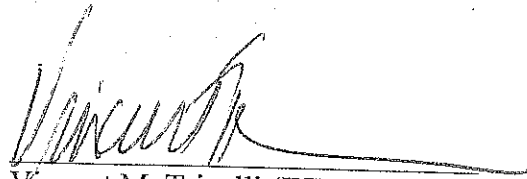
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on April ^{6th}, 2005 a true and correct copy of **Amicus Curiae Brief of the Affiliated Construction Trades Foundation** was sent by U.S. mail, postage prepaid, addressed to the following:

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