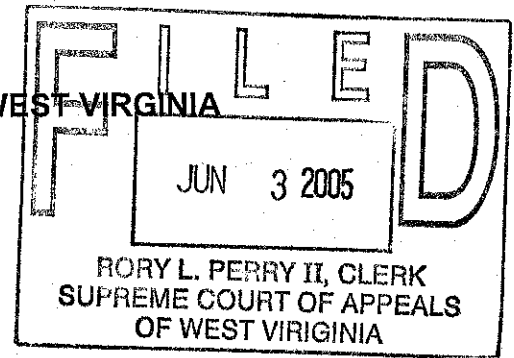


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. ~~32669~~
No. 32670



FAIRMONT GENERAL HOSPITAL, INC., Petitioner below,

Appellee,

v.

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

Appellants,

and

WEST VIRGINIA HEALTH CARE AUTHORITY, Respondent below,

Appellant.

INITIAL BRIEF OF APPELLANT WEST VIRGINIA HEALTH CARE AUTHORITY

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I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

This proceeding is an appeal by the West Virginia Health Care Authority ("Authority") of an order issued by the Circuit Court of Marion County on November 24, 2004, which reversed the Authority's decision approving a certificate of need ("CON") for United Hospital Center, Inc. ("UHC") and West Virginia United Health System, Inc. ("WVUHS") to construct a replacement hospital. The Marion County Circuit Court order also reversed the decision of the Office of Judges ("OOJ") which affirmed the Authority's decision.

II. STATEMENT OF THE CASE

The Health Care Cost Review Authority ("HCCRA") was created by the Legislature in 1983 as an autonomous agency within state government. W.Va. Code § 16-29B-5. It was charged with the responsibility of collecting information on health care costs, developing a system of cost control, and ensuring accessibility to appropriate acute care beds.

This same legislation expanded HCCRA's responsibilities to include the administration of two previously enacted cost containment programs: the certificate of need program, codified at W.Va. Code §§ 16-2D-1, *et seq.* and the health care financial disclosure program, codified at W.Va. Code §§ 16-5F-1, *et seq.* In 1997, the Legislature renamed the agency the West Virginia Health Care Authority. W. Va. Code § 16-29B-2. Pursuant to W. Va. Code § 16-2D-5, the Authority has been empowered by the Legislature to coordinate and develop the State Health Plan, including the

Certificate of Need Standards. These include the Renovation and Replacement of Acute Care Facilities and Services Standards ("Renovation-Replacement")¹ approved by the Governor on January 7, 1997, which are at issue in this matter.

With respect to the instant case, on July 30, 2002, UHC and WVUHS filed a letter of intent with the Authority to construct a hospital in Bridgeport, Harrison County, West Virginia to replace UHC's existing hospital. UHC is a not-for-profit corporation which owns and operates a 375 bed hospital in Clarksburg, West Virginia. WVUHS is a not-for-profit corporation which serves as the sole member of UHC and West Virginia University Hospitals, Inc. On July 18, 2002, UHC and WVUHS filed their application for a certificate of need to build a replacement facility.

On November 5, 2002, FGH and Triad Hospitals, Inc. requested a public hearing on the proposed project. On November 9, 2002, the West Virginia Consumer Advocate also requested a public hearing. On November 19, 2002, Associated Builders and Contractors requested affected party status. The parties conducted discovery and a public hearing took place on June 16, 17, and 18, 2003 during which a massive record was developed.

¹ In pertinent part, the Renovation-Replacement Standards provide the following:

- W. A project for the erection, construction, creation or other acquisition of a physical plant or facility as a result of which:
1. The number of hospital beds currently licensed to the applicant at the licensed site prior to the project are not increased as the result of the project; and
 2. All hospital beds are, or will be, located within five miles of the original facility following completion of the project. (emphasis added, hereinafter "five mile rule").

UHC and WVUHS presented evidence which indicated that there were deficiencies with UHC's existing hospital, site and location and that plans to renovate the existing hospital would not correct all of the existing deficiencies. UHC and WVUHS also put forth testimony indicating that there was no suitable site within five miles to build a new hospital. UHC and WVUHS further indicated that the construction of a new facility would alleviate all existing facility and access issues.

In order to approve an application for a certificate of need, the Authority must make the following required findings:

1. The project is needed. W. Va. Code § 16-2D-9(b)(1).
2. The project is consistent with the State Health Plan. W. Va. Code § 16-2D-9(b)(2).
3. Patients will experience serious problems in obtaining care of the type proposed in the absence of the project. W. Va. Code § 16-2D-6(e)(4).
4. Existing facilities providing services similar to those proposed are being used in an appropriate and efficient manner. W. Va. Code § 16-2D-6(e)(2).
5. Superior alternatives to the project in terms of cost, efficiency, and appropriateness do not exist and the development of alternatives is not practicable. W. Va. Code § 16-2D-6(e)(1).
6. Alternatives to new construction, such as modernization or sharing arrangements, have been considered and implemented to the maximum extent possible. W. Va. Code § 16-2D-6(e)(3).

7. The project will be accessible to the medically underserved. W. Va. Code § 16-2D-9(e)(1).

FGH only contested the second required finding, consistency with the State Health Plan, and did not challenge, among other things, that this project is needed, financially feasible, or the superior alternative. On October 24, 2003, the Authority issued a decision approving UHC and WVUHS' application. In this decision the Authority determined, in part, that:

The West Virginia Certificate of Need Rule, 65 C.S.R. §§ 7-1, *et seq.* does not require an application for a certificate of need to be perfectly consistent with the [State Health Plan]. Rather, the CON Rule defines the term "consistent with the State Health Plan" to mean "a determination made by the board that the preponderance of the evidence supports the achievement of the applicable provisions of the State Health Plan.... The development of the applicant's proposed replacement hospital eight miles rather than five miles from the existing hospital is not materially inconsistent with the definition of a "replacement" facility....

On November 27, 2003, FGH filed a request for review with the OOJ contending that the UHC's project was not consistent with the State Health Plan since the replacement facility would be located eight, not five, miles from the current UHC location. On May 3, 2004, the OOJ affirmed the Authority's October 24, 2003 decision. The OOJ held that the law "does not require that an application mirror the identical language of the State Health Plan to be consistent." Decision at p. 5. Rather, the OOJ determined that the applicable rule defined "consistent with the State Health Plan" as a determination made by the board that the preponderance of the evidence supports the achievement of the applicable provisions of the State Health Plan." Id.

On May 27, 2004, FGH filed a petition for appeal in the Circuit Court of Marion County and, after a venue issue was decided by the Kanawha County Circuit Court, a briefing schedule was entered on August 26, 2004. On November 24, 2004, the Circuit Court of Marion County reversed the Authority's decision granting a certificate of need to UHC and WVUHS to construct a replacement hospital; and, further reversed the OOJ decision dated May 3, 2004.

III. STANDARD OF REVIEW

The standard of review applicable in this appeal is set forth in W.Va. Code § 16-2D-10. This statute provides that the "reviewing agency" shall review appeals from the Authority in accordance with the provisions governing the judicial review of contested administrative cases in W.Va. Code § 29A-5-4.

Thus, the review of the Authority's decisions "at both the administrative level and circuit level, is to be conducted in accordance with W.Va. Code § 29A-5-4." Princeton Community Hospital v. State Health Planning and Development Agency, 174 W. Va. 558, 328 S.E.2d 164, 168 (1986). See also, West Virginia Health Care Cost Review Authority v. Boone Memorial Hospital, 196 W. Va. 326, 472 S.E.2d 411, 419, (1996). The Court points out in Princeton that the statute grants only "limited review capacity." 328 S.E.2d at 169. The extent of such limited review is set forth in W.Va. Code § 29A-5-4(g).

The Court must evaluate the Authority's decisions based upon the record of the Authority's proceedings to determine whether there is evidence to support the

Authority's Order and the Court shall evaluate the decision upon the Authority's findings of fact, "regardless of whether the [Court] would have reached a different conclusion on the same set of facts." Ruby v. Insurance Commission, 197 W. Va. 27, 475 S.E.2d 27, 32 (1996). The Court may not re-weigh the evidence, but may only inquire into the existence of substantial evidence to support the Authority's prior determination. Only if the evidence does not, in any reasonable way, support the findings of fact or if the findings of fact do not support the conclusions of law, may the reviewing agency find the decision to be clearly erroneous and subject to reversal. Boone, 472 S.E.2d at 420; Appalachian Power Company v. State Tax Department, 195 W. Va. 573, 466 S.E.2d 424 (1995).

In Princeton, the Supreme Court of Appeals held that the Authority's determination of matters within its area of expertise is entitled to substantial weight. Princeton, 328 S.E.2d at 171. Further, the Court, restating prior authority, held that the review function "must be performed with conscientious awareness of its limited nature...the court must give due deference to the [Authority's] ability to rely on its own developed expertise..." Princeton, 328 S.E.2d at 171.

The task of the Court is to determine whether the Authority's decisions are based on a consideration of the relevant factors and whether there has been a clear error of judgment. Boone, 472 S.E.2d at 420. Absent a showing of prejudice to the substantial rights of the appellant, the Court has no authority under W.Va. Code § 29-A-5-4(g) to reverse the Authority's decision. Smith v. Bechtold, 190 W. Va. 315, 438 S.E.2d 347, 351 (1993).

In Boone, the West Virginia Supreme Court articulated an analysis that a reviewing agency must undertake when the construction of a statute or legislative rule is at issue. The Court articulated a two part test. First, the Court must first ask whether the Legislature has directly spoken to the precise question at issue. Second, if legislative intent is unclear, a reviewing court must ask whether the agency's answer is based on a permissible construction of the statute. The Court went on to hold that "[a]n agency's interpretation of a statutory provision or regulation that it is charged with administering is entitled to a high degree of deference." Id at 420 and 423.

IV. ASSIGNMENTS OF ERROR

The Authority assigns the following as error:

1. The Circuit Court of Marion County erred by failing to review the Authority and the OOJ's decisions in accordance with the appropriate standard of review.
2. The Circuit Court of Marion County erred by failing to adhere to the Authority's legislative rule, 65 C. S. R. § 7-2.7.
3. The Circuit Court of Marion County erred by frustrating public policy and the public's best interests.

V. POINTS AND DISCUSSIONS OF LAW

A. THE CIRCUIT COURT OF MARION COUNTY ERRED BY FAILING TO REVIEW THE AUTHORITY AND THE OOJ'S DECISIONS IN ACCORDANCE WITH THE APPROPRIATE STANDARD OF REVIEW.

The Marion County Circuit Court did not apply the appropriate standard or review as set forth in W. Va. Code § 29A-5-4 and the W.Va. Supreme Court decisions in the Princeton and Boone cases.

This Court correctly pointed out in Princeton that W. Va. Code § 29A-5-4 grants only limited review capacity. Princeton, 328 S.E.2d at 169, 562. In addition, Princeton also states that the Authority's determination of matters within its area of expertise is entitled to substantial weight. Id at p. 171, 564. This Court further stated that this review function "must be performed with conscientious awareness of its limited nature...the court must give due deference to the [Authority's] ability to rely on its own developed expertise." Id.

In Boone, this Court further held that an agency's interpretation of a statutory provision or regulation that it is charged with administering is entitled to a high degree of deference. Id at 423.

In the instant case, the Court substituted its own judgment and defined the term "consistent" from the phrase "Consistent With The State Health Plan" based upon a definition from Webster's New Collegiate Dictionary although the Authority's own legislative rule defines this term differently.

In addition, to substituting its own judgment for that of the Authority, the Marion County Circuit Court failed to mention or even apply the two pronged analysis set forth in Boone which states:

. . . judicial review of an agency's legislative rule and the construction of a statute that it administers involves two separate but interrelated questions, only the second of which furnished an occasion for deference...The Court must first consider whether the Legislature has directly spoken to the precise question at issue. If the intention of the Legislature is clear, that is the end of the matter, and the agency's position can only be upheld if it conforms to Legislative intent...If Legislative intent is not clear, a reviewing court may not simply impose its own construction of the statute in reviewing the legislative rule. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. Boone, 196 W.Va. at 328, 472 S.E.2d at 414.

With respect to the first prong of this test, the Legislature has not directly spoken to the precise issue concerning whether the UHS and WVUHS project is consistent with the State Health Plan. The Legislature has not addressed this issue and rather has empowered the Authority to consider such matters pursuant to W.Va. Code §§ 16-2D-1, *et seq.* Therefore, an analysis of the second prong of the test must be undertaken. This prong requires the Court to address whether the agency's answer is based on a permissible construction of 65 C.S.R. § 7-2.7's definition of "Consistent With The State Health Plan." The Authority's construction of this provision is permissible since the language of the legislative rule itself supports the finding that an application does not need to be perfectly consistent with the State Health Plan in order to be approved.

B. THE CIRCUIT COURT OF MARION COUNTY ERRED BY FAILING TO ADHERE TO THE AUTHORITY'S LEGISLATIVE RULE, 65 C.S. R. § 7-2.7.

A valid legislative rule is entitled to substantial deference by a reviewing court. As a properly promulgated legislative rule, the rule can only be ignored if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious. W.Va. Code 29A-4-2 (1982); Syllabus Pt. 14, Boone. In the instant case, the legislative rule in question expressly defines the phrase "Consistent With The State Health Plan" to mean "a determination made by the board that the preponderance of the evidence supports the achievement of the State Health Plan..." Based upon this language, an application need not be perfectly consistent to be approved.

The Authority found in its decision approving the CON that "the development of the applicant's proposed replacement hospital eight miles rather than five miles from the existing hospital is not materially inconsistent with the definition of a replacement facility." The Authority further noted that the existing Renovation-Replacement Standards have increased this mileage requirement from five to fifteen miles. Thus, acting within its discretion, the Authority determined that the three mile difference did not warrant the dismissal of an otherwise approvable application. The OOJ properly deferred to the Authority's expertise in this area and affirmed the Authority's decision.

The Circuit Court of Marion County, however, substituted another definition of "consistent" taken from Webster's New Collegiate Dictionary which is different from the legislative rule.

In the Boone case, this Court stated that once a regulation is legislatively approved, it has the force of a statute itself. It is entitled to more than mere deference and is entitled to controlling weight. Id at 413.

Clearly, the Marion County Circuit Court did not give the definition of "Consistent with the State Health Plan" any deference, much less controlling weight.

C. THE CIRCUIT COURT OF MARION COUNTY ERRED BY FRUSTRATING PUBLIC POLICY AND THE PUBLIC'S BEST INTERESTS.

As noted in both the Authority's October 24, 2003 decision and the May 3, 2004 OOJ decision, the applicant had the option of withdrawing this application and filing the exact same application under the revised Renovation-Replacement Standards which increases the mileage from five to fifteen miles. Thus, the Authority would be forced to consider the exact same application for a second time at great financial cost to UHC and WVUHS and cost to the public.

The mileage issue is the only error raised by FGH. Thus, if a second application were filed, there would be no contested issues, by FGH's own admission, and the project would be approvable.

In addition, the cost both to the public and the applicants far outweighs any benefit derived from refiling the application. Need for the project is not contested. The public is currently experiencing difficulty in obtaining services from UHC. There are existing facility problems that impact health and safety issues. The filing of a second application would only serve to further delay implementation of this project. In addition

to costs to the community, the applicants will experience a significant increase in costs. The filing of a new application will result in the applicants paying another filing fee. In addition to the payment of this fee, the applicants will face increases in litigation costs, construction costs, increased interest costs and loss of investment in UHC's existing hospital.

In summary, the filing of a second application is not in the public's best interest and defeats public policy.

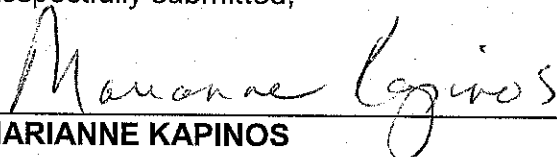
VI. RELIEF PRAYED FOR

On the basis of the foregoing, the Authority respectfully requests the Supreme Court to reverse the order issued by the Circuit Court of Marion County.

WEST VIRGINIA HEALTH CARE AUTHORITY

By Counsel,

Respectfully submitted,



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CERTIFICATE OF SERVICE

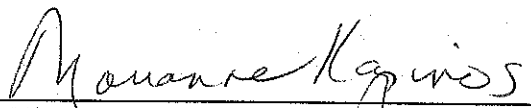
I, Marianne Kapinos, General Counsel, do hereby certify that on the 3rd day of June, 2005, I caused true and correct copies of the "Initial Brief of Appellant West Virginia Health Care Authority" to which this Certificate is attached, to be delivered via first class mail to the following:

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