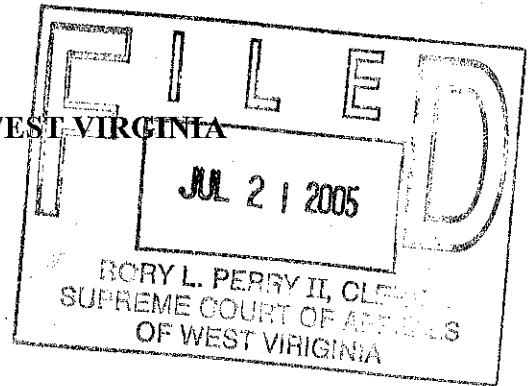


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 32669



FAIRMONT GENERAL HOSPITAL, INC., Petitioner Below,

Appellee,

v.

**WEST VIRGINIA HEALTH CARE AUTHORITY,
UNITED HOSPITAL CENTER, INC., and
WEST VIRGINIA UNITED HEALTH SYSTEM, INC.,** Respondents Below,

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

Appellants.

**REPLY BRIEF OF APPELLANTS UNITED HOSPITAL CENTER, INC. AND
WEST VIRGINIA UNITED HEALTH SYSTEM, INC.**

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I. INTRODUCTION

This reply brief is filed on behalf of Appellants United Hospital Center, Inc. (“UHC”) and West Virginia United Health System, Inc. (“WVUHS”) in response to the “Reply (sic)”¹ of Appellee Fairmont General Hospital, Inc.”

II. GENERAL RESPONSE

The “Initial Brief of Appellants United Hospital Center, Inc. and West Virginia United Health System, Inc.,” which UHC and WVUHS filed with this Court on June 3, 2005, addresses and rebuts all of the arguments asserted in the FGH’s brief. Rather than belabor the points made by UHC and WVUHS in their initial brief, UHC and WVUHS refer this Court to their initial brief and make the following additional points.²

III. FGH HAS MISSTATED THE STANDARD OF REVIEW

The single most glaring error in FGH’s brief is FGH’s misstatement of the standard of review applicable to the this Court’s review of the Circuit Court of Marion County’s (“Circuit Court’s”) order. FGH states:

¹ Under Rule 10 of the West Virginia Rules of Appellate Procedure, the “reply” is the brief that the appellant files in reply to the “appellee’s brief.” In order to avoid any confusion, UHC and WVUHS will refer to the “Reply (sic) of Appellee Fairmont General Hospital, Inc.” as FGH’s brief.

² In its brief, FGH repeatedly asserts that UHC and WVUHS have misinterpreted some statute, rule, or decision. Rather than engage in a long and tedious series of explanations why UHC and WVUHS’s interpretations are correct and FGH’s interpretations are incorrect, UHC and WVUHS respectfully suggest that this Court review these statutes, rules, and decisions and decide for itself whose interpretations are correct.

This Court has stated that the appellate court is to review a circuit court's decision concerning appeals from an administrative agency with "clearly wrong" and "arbitrary and capricious standards." The W.Va. Health Care Cost Review Authority v. Boone Memorial Hosp., 196 W.Va 326, 335, 472 S.E.2d 411, 420 (1996). While "interpreting a statute or an administrative rule or regulation presents a purely legal question subject to de novo review, [a]n agency's interpretation of a statutory provision or regulation it is charge with administering is entitled to a high degree of deference." Id. According to Justice Cleckley's opinion in Boone Memorial, a court reviewing the HCA's "legislative rules is limited to asking (1) whether they were enacted pursuant to the procedures required by law; and (2) whether [HCA]'s interpretation and application of the rules were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." Id.

Furthermore, in reviewing a decision of an administrative agency, this Court held in St. Mary's Hospital v. State Health Planning and Development Agency, 178 W.Va. 792, 364 S.E.2d 805, 808-809 (1987), that the circuit court should utilize the standard of judicial review applied under the Administrative Procedures Act:

[T]he circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court 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, decisions or orders are: '(1) In violation of constitutional or statutory provisions; or (2) In excess of the statutory authority or jurisdiction of the agency; or (3) Made upon unlawful procedures; or (4) Affected by other error of law; or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized an by abuse of discretion or clearly unwarranted exercise of discretion.'

Citing, Syl. Pt. 2, Shepherdstown Volunteer Fire Department v. Human Rights Commission, 172 W.Va. 627, 309 S.E.2d 342 (1983).

The Appellants have failed to demonstrate that the Marion County Circuit Court's decision was clearly wrong or arbitrary and capricious, thus their Appeal should be denied. The Order of the Circuit Court reaches a result which is fully supported by the evidence and the controlling case law, as discussed more fully, *infra*. (FGH's Brief, pp. 4-5.) (Underlining added.)

FGH is correct that this Court's review of the Circuit Court's order is *de novo*. However, it is the West Virginia Health Care Authority's ("Authority's") decision--not the Circuit Court's order--that is to be reviewed by "clearly wrong" and "arbitrary and capricious" standards. In The West Virginia Health Care Authority v. Boone Memorial Hospital, 196 W.Va. 326, 334-335, 472 S.E.2d 411, 419-420 (1996), this Court stated:

We review the circuit court's order *de novo*, applying the same "clearly wrong" and "arbitrary and capricious" standards as did the circuit court.

It is also that Authority--not the Circuit Court--whose expertise and discretion is entitled to a high degree of deference. In Boone, this Court, citing Appalachian Power Co. v. State Tax Department of West Virginia, 195 W.Va. 573, 466 S.E.2d 424 (1995), held:

. . . "[a]n inquiring court--even a court empowered to conduct *de novo* review--must examine a regulatory interpretation of a statute by standards that include appropriate deference to agency expertise and discretion." Boone, 196 W.Va. 335, 466 S.E.2d 420.

This Court also held that "[a]n agency's interpretation of a statutory provision or regulation it is charged with administering is entitled to a high degree of deference." Boone, 196 W.Va. 335, 466 S.E.2d 420.

IV. THE STATE HEALTH PLAN IS NEITHER A STATUTE NOR A LEGISLATIVE RULE

Another major error in FGH's brief is FGH's discussion of the State Health Plan as if the State Health Plan were a statute enacted by the Legislature or a legislative rule approved by the Legislature which "has the force of a statute" and "is entitled to controlling weight."

Boone, 196 W.Va. at 328, 472 S.E.2d at 413. (See, for example, FGH Brief, p. 4.) It is not. In 1997, when the Governor approved the former version of the Certificate of Need Standards for the Renovation-Replacement of Acute Care Services at issue in this case, the State Health Plan was “the document approved by the governor after preparation by the former statewide health coordinating council, or that document approved by the governor after amendment by the health care planning council or its successor.” W. Va. Code §§ 16-2D-2(dd) (1996).³ In other words, the State Health Plan is an expression of the executive branch’s health planning policies. It is not an expression of the legislative or judicial branch’s policies. Indeed, neither the legislature nor the judiciary has had even a remote role in the development or revision of the contents of the State Health Plan. As such, the executive branch is entitled to some degree of discretion in interpreting and implementing its own policies.

V. UHC AND WVUHS’S APPLICATION MUST BE CONSISTENT WITH,
NOT IDENTICAL TO, THE STATE HEALTH PLAN

Another major error in FGH’s brief is FGH’s discussion of the term “consistent with the State Health Plan” as if the term were defined as absolutely identical to each and every provision of the State Health Plan in each and every respect. (See, for example, FGH’s Brief, p. 7.) That is not the definition of “consistent with the State Health Plan.” The Authority’s legislative rule, 65 C.S.R. § 7-2.7--which was approved by the Legislature and therefore does have “the force of a statute” and “is entitled to controlling weight”--defines the term “Consistent

³ FGH has employed an interesting strategy in its brief. On occasion, when a statute or case particularly hurts FGH’s cause, FGH has acknowledged the statute or case in a footnote and then has proceeded in the text of its reply to act as if the statute or case does not exist. For example, FGH has acknowledged the definition of the State Health Plan in footnote 1; the two-pronged test set forth in The West Virginia Health Care Authority v. Boone

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” (Underlining added.) The words “a determination,” “made by the board,” “the preponderance of the evidence,” “supports,” and “the achievement” do not connote absolutely identical to each and every provision of the State Health Plan in each and every respect.

It also makes all the sense in the world that the Authority is not required to find that an application for a certificate of need is absolutely identical to each and every provision of the State Health Plan in each and every respect. Each year, the Authority reviews hundreds of applications for certificates of need from all over the state. If the Authority were required to find that each of these applications is absolutely identical to each and every provision of the State Health Plan in each and every respect, the Authority would never approve an application. The Authority must have some degree of discretion to determine whether an application as a whole “supports the achievement of applicable provisions of the State Health Plan[.]” *Id.* That is why all of the parties to this appeal, including FGH, took the position during the proceedings below that, in order for an application for a certificate of need to be approved, the application must be substantially, not perfectly, consistent with the State Health Plan. (See pp. 13-14 and 35-37 of the “Initial Brief of Appellants United Hospital Center, Inc. and West Virginia United Health System, Inc.”)

A similar error in FGH’s brief is FGH’s position that, in order for an application for a certificate of need to be approved, the application must be absolutely identical to each and every provision of the State Health Plan regardless of the materiality of the provision. (FGH Brief, pp. 8-9.) That cannot be the law in West Virginia. The law in West Virginia cannot be

Memorial Hospital, 196 W. Va. 326, 472 S.E.2D 411 (1996), in footnote 3; and the Circuit Court’s reliance on the definition of “consistent” set forth in Webster’s Dictionary in footnote 4.

that, in order for an application for a certificate of need to be approved, the application must be identical to each and every immaterial provision of the State Health Plan.

In its brief, FGH also suggests that it was entirely proper for the Circuit Court to rely on the definition of “consistent” set forth in Webster’s Dictionary. (FGH Brief, pp. 13-14.)

FGH states:

In fact, in a recent opinion, this Court referred to definitions in the Oxford English, Webster’s and Random House Dictionaries in support of defining a term contained in a statute. See Clifford K. and Tina B. v. Paul S., 2005 W. Va. LEXIS 58 (W. Va. June 17, 2005) at 6. (FGH Brief, pp. 13-14.)

However, FGH failed to mention the following language from Clifford K.:

In stating who may be a child’s “legal parent,” the Legislature has left undefined the qualification described as “other recognized grounds.” See W. Va. Code § 48-1-232. Absent precise legislative guidance, we must defer instead to the “common, ordinary and accepted meaning [of the terms] in the connection in which they are used.” Syl. pt. 1, in part, *Miners in Gen. Group v. Hix*, 123 W. Va. 637, 17 S.E.2d 810. The customary construction of the word “recognized” is [a]cknowledged, admitted; know.” VIII The Oxford English Dictionary 253 (1970 re-issue). More specifically, to “recognize” is “to acknowledge formally.” Webster’s Ninth New Collegiate Dictionary 984 (9th ed. 1983). *Accord* Random House Webster’s Unabridged Dictionary 1611 (2d ed.1998) (defining “recognize” as “to acknowledge or accept formally a specified factual or legal situation . . . to acknowledge or treat as valid.”) Clifford K. at 6. (Underlining added.)

In this case--unlike Clifford K.--the term “Consistent With The State Health Plan” has not been “left undefined” and there is “precise legislative guidance” regarding the meaning of the term. Specifically, in this case, the Legislature itself has approved the definition of the term “Consistent With The State Health Plan” set forth in 65 C.S.R. § 7-2.7: “a determination made by the board that the preponderance of the evidence supports the achievement of the applicable provisions of the State Health Plan”

VI. W. VA. CODE § 16-2D-9(b)(2) IS NOT IN CONFLICT
WITH W. VA. CODE § 16-29B-11

In its brief, FGH states that “W. Va. Code § 16-2D-9(b) is not in conflict with W. Va. Code § 16-2D-11 (sic)” and that “[t]hey can . . . be applied in harmony.” (FGH Brief, p. 11.) (In its brief, FGH mistakenly cited W. Va. Code § 16-2D-11 for W. Va. Code § 16-29B-11.)

UHC and WVUHS wholeheartedly agree.

W. Va. Code § 16-2D-9(b)(2) provides that “[a] certificate of need may only be issued if the proposed new institutional health services is . . . consistent with the State Health Plan.” (Underlining added.) W. Va. Code § 16-29B-11 in turn provides that “[i]n making decisions in the certificate of need process, the board shall be guided by the state health plan approved by the governor.” (Underlining added.) These statutes can and should be read in harmony and *in pari materia*. The terms “consistent with” and “guided” both connote substantial, rather than perfect, consistency with the State Plan, especially in light of the definition of “Consistent With The State Health Plan” set forth in 65 C.S.R. § 7-2.7.

VII. W. VA. CODE § 16-2D-11

W. Va. Code § 16-2D-11 also supports the proposition that an application for a certificate of need must be substantially, rather than perfectly, consistent with the State Health Plan.

W. Va. Code § 16-2D-11 provides that, after the Authority has approved an application for a certificate of need, the applicant may not obtain a license for, or use, the

approved new institutional health service until the Authority has issued a written notice that the applicant has developed the approved new institutional health service in “substantial compliance with the approved application[.]” W. Va. Code § 16-2D-11 provides in pertinent part as follows:

A certificate of need may no longer be in effect, and may no longer be required, after written notice of substantial compliance with the approved application . . . is issued to the applicant . . . The person proposing a new institutional health service may not be issued a license therefor until the state agency has issued a written notice of substantial compliance with the approved application . . . nor may a new institutional health service be used until such person has received such notice. (Underlining added.)

In other words, after the Authority has approved an application for a certificate of need, the applicant is required to develop its approved new institutional health services in substantial, rather than perfect, compliance with its approved application.

VIII. RETROACTIVE APPLICATION OF THE STATE HEALTH PLAN

In its brief, FGH asserts that:

. . . the argument put forth by United and the HCA actually is an argument that the amended Standards should be applied to this case on a retroactive basis. The retroactive application of the law is severely restricted by statute and by case law. Under W. Va. Code § 2-2-10(bb), a “statute is presumed to be prospective in its operation unless expressly made retrospective.” See State v. Bannister, 162 W. Va. 447, 453, 250 S.E.2d 53, 56 (1978) (holding that “the general rule in West Virginia is that there is a presumption that a statute is intended to operate prospectively, unless it appears, by clear, strong and imperative words or by necessary implication that the legislature intended to give the statute retroactive force and effect.”) and Wampler Foods v. Workers Comp. Div., 602 S.E.2d 805 (W.Va. 2004). Nothing contained in the W. Va. Code, the HCA’s Legislative Rules or the State Health Plan expressly support retroactive enforcement of the Standards.

There is a valid reason why laws should be applied prospectively. Participants in a case must know what the law of the case is. The law in this case

is the 1997 Standards, not the amended ones that were approved by the Governor after the filing of the Application. FGH prepared its case based upon the law of the case, the 1997 standards. The HCA never notified FGH that any other standards would be applied. (FGH Brief, pp. 15-16.)

UHC and WVUHS have five responses to this assertion.

First, the "Certificate of Need Standards for Renovation-Replacement of Acute Care Facilities and Services" approved by the Governor on January 7, 1997, are not a statute or legislative rule.

Second, UHC and WVUHS have not argued, and are not arguing, for the retroactive application of the "Certificate of Need Standards for the Renovation-Replacement of Acute Care Facilities and Services" approved by the Governor on October 9, 2002.

Third, what UHC and WVUHS have argued, and are arguing, for is the application of the plain meaning of the definition of "Consistent With The State Health Plan" set forth in 65 C.S.R. § 7-2.7; the use of the State Health Plan as a guide as contemplated by W. Va. Code § 16-29B-11; and recognition and application of the Authority's longstanding policy that an application for a certificate of need must be substantially, rather than perfectly, consistent with the State Health Plan.

Fourth, what UHC and WVUHS also argued, and are arguing, for is recognition that--in light of the abolition of the "five mile rule" of the "Certificate of Need Standards for Renovation-Replacement of Acute Care Facilities and Services" approved by the Governor on January 7, 1997, prior to the public hearing on UHC and WVUHS's application--the "five mile rule" could not be considered a material provision of the State Health Plan.

Fifth, FGH obviously had notice throughout the proceedings below of the definition of "Consistent With The State Health Plan" set forth in 65 C.S.R. § 7-2.7 and the

reference to the State Health Plan as a guide in W. Va. Code § 16-29B-11. FGH also has had notice of the Authority's longstanding policy that an application for a certificate of need must be substantially, rather than perfectly, consistent with the State Health Plan since at least 1984 when the Authority relied on this policy to approve FGH's application for a certificate of need to renovate its hospital. In re: Fairmont General Hospital, CON File ## 84-6-2006-H and 84-6-2067-H, p. 6 (West Virginia Health Care Cost Review Authority December 7, 1984).

IX. CONCLUSION

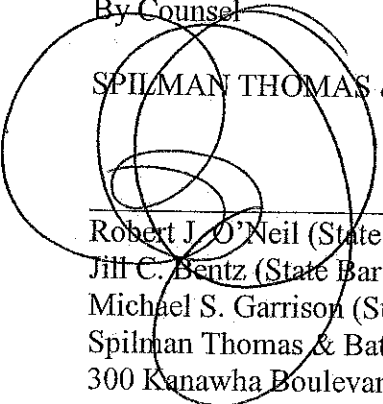
Accordingly, on the basis of the foregoing, UHC and WVUHS respectfully request this Court to reverse the Circuit Court's order and reinstate the Authority's decision.

Respectfully submitted,

UNITED HOSPITAL CENTER, INC. and
WEST VIRGINIA UNITED HEALTH SYSTEM,
INC.

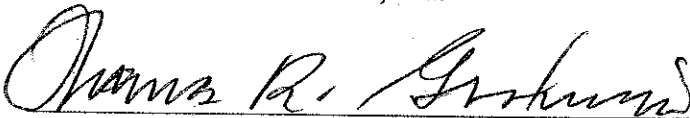
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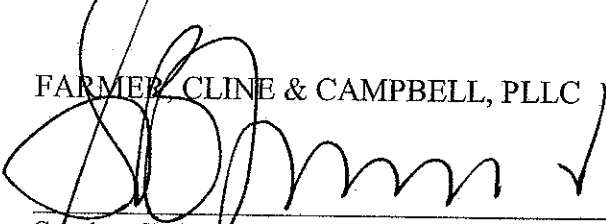
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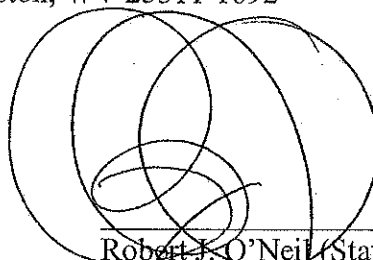
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CERTIFICATE OF SERVICE

I, Robert J. O'Neil, counsel for United Hospital Center, Inc. and West Virginia United Health System, Inc., do hereby certify that I have served the foregoing "Reply Brief of Appellants United Hospital Center, Inc. and West Virginia United Health System, Inc." upon the remaining parties herein by hand delivering true and accurate copies thereof to their respective counsel of record at the following addresses on this 21st day of July, 2005:

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