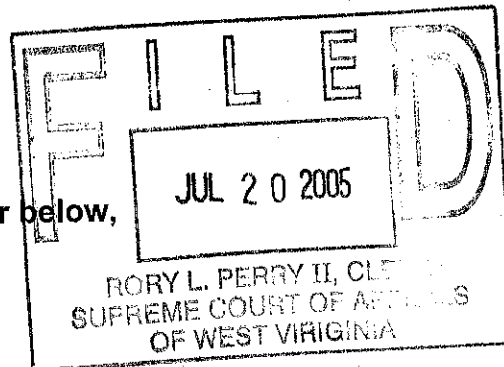


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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.

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REPLY BRIEF OF APPELLANT WEST VIRGINIA HEALTH CARE AUTHORITY

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Marianne Kapinos (WVSB # 1781)  
Cynthia H. Dellinger (WVSB # 7452)  
West Virginia Health Care Authority  
100 Dee Drive  
Charleston, West Virginia 25311-1600  
*Counsel for Appellant*

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## I. INTRODUCTION

Appellee's brief highlights the error that has occurred in this matter, by continuing to the argument that the definition of "consistent" contained in Webster's Dictionary should trump the definition of "consistent with the State Health Plan" contained in W.Va. 65 C.S.R. § 7-2.7. This legislative rule defines this term as "a determination made by the board that the preponderance of the evidence supports the achievement of the State Health Plan..." Based upon the language of the legislative rule, the West Virginia Health Care Authority's Board determined that the preponderance of the evidence supported finding that United Hospital Center (hereinafter "UHC") was entitled to a Certificate of Need (hereinafter "CON") to build a replacement facility despite the fact that the proposed location for this facility was eight, as opposed to five, miles from its current location.

The Appellee contends that the Authority should have denied UHC's request for a CON since the Renovation and Replacement of Acute Care Facilities and Services, State Health Plan Standards, approved by the Governor January 7, 1997 (hereinafter "Standards") state, among other things, that a replacement facility must be located within five miles of the hospital proposing the relocation. UHC submitted evidence that no suitable site existed within this five mile radius and complied with all other aspects of the applicable Standards. The Authority determined that exact compliance with the Standards was not required, but rather that a preponderance of the evidence supported the approval of the project.

There are two main issues in this matter. First, whether the Marion County Circuit Court applied the appropriate standard of review. Second, whether the Authority properly acted within its discretion in approving UHC's CON. This Court should overturn the Marion County Circuit Court because the Marion County Circuit Court failed to properly apply the standard of review and the Authority acted within its discretion in approving UHC's CON.

## II. ARGUMENT

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

The Marion County Circuit Court did not apply the appropriate standard of review as set forth in W.Va. Code § 29A-5-4 and the W.Va. Supreme Court decisions in the Princeton Community Hospital v. State Health Planning and Development Agency, 174 W.Va. 558, 328 S.E.2d 164 (1985); West Virginia Health Care Cost Review Authority v. Boone Memorial Hospital, 196 W.Va. 326, 472 S.E.2d 411, 419 (1996). Accordingly, the Marion County Circuit Court's decision should be reversed.

Pursuant to W.Va. Code § 16-2D-10, the Authority's decisions are to be reviewed in accordance with W.Va. Code § 29A-5-4. This Court established in Princeton that W. Va. Code § 29A-5-4 "grants only limited review capacity" and that this review function "must be performed with conscientious awareness of its limited nature." 328 S.E.2d at 169, 171. The extent of such limited review is set forth in W.Va. Code § 29A-5-4(g) which states:

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, decisions or order 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 by abuse of discretion or clearly unwarranted exercise of discretion...

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 (W.Va. 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.

In addition, when statutory construction is at issue, this Court has previously held that it "must give due deference to the [Authority's] ability to rely on its own developed expertise." Princeton, 328 S.E.2d at 171. In Boone, a more recent case concerning the Authority's discretion, 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 present case, the Marion County Circuit Court substituted its own judgment for that of the HCA and in doing so, failed to follow the appropriate standard of review.

**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 as in the instant case.

Rather than rely on the definition of "Consistent with the State Health Plan" contained in the legislative rule, the Marion County Circuit Court decided to apply a new definition to this case. It determined that the definition contained in Webster's Dictionary should control the outcome of this matter, rather than the legislatively approved definition. While it is permissible in some cases to refer to such authoritative texts in conducting legal analysis, as pointed out by the Appellee's in their brief, this should certainly not take place when such a definition conflicts with the plain language of a valid legislative rule.

For example, the Marion County Circuit Court determined that "the term 'consistent' is colloquially defined as 'free from irregularity, variation, or contradiction'." Decision of the Marion County Circuit Court at p. 6. The use of this definition applied a stricter scrutiny to a CON matter than is warranted under the preponderance of the evidence standard. Thus, the use of this definition should not be permitted. In addition, by looking outside the record and ignoring the relevant language of the legislative rule, the Marion County Circuit Court failed to afford the Authority deference to interpret and apply this language. 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.

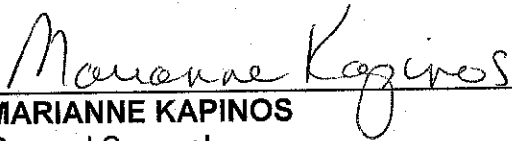
Clearly, the Marion County Circuit Court did not give the definition of "Consistent with the State Health Plan" any deference, much less controlling weight.


III. 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,

  
\_\_\_\_\_  
**MARIANNE KAPINOS**  
General Counsel  
State Bar ID #1781

  
\_\_\_\_\_  
**CYNTHIA H. DELLINGER**  
Assistant General Counsel  
State Bar ID #7452

West Virginia Health Care Authority  
100 Dee Drive  
Charleston, West Virginia 25311-1600  
(304) 558-7000

**CERTIFICATE OF SERVICE**

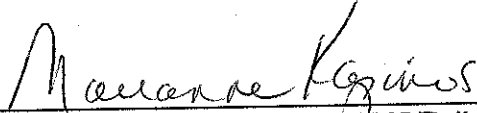
I, Marianne Kapinos, General Counsel, do hereby certify that on the 20<sup>th</sup> day of July, 2005, I caused true and correct copies of the "Reply Brief of Appellant West Virginia Health Care Authority" to which this Certificate is attached, to be delivered via first class mail to the following:

Thomas G. Casto  
Lewis, Glasser, Casey & Rollins, LLP  
300 Summers Street, Suite 700  
P.O. Box 3394  
Charleston, WV 25326-1746

Robert J. O'Neil  
Jill C. Bentz  
Michael S. Garrison  
Spillman, Thomas & Battle, PLLC  
300 Kanawha Boulevard, East  
P.O. Box 273  
Charleston, WV 25321-0273

Thomas R. Goodwin  
Johnny M. Knisely II  
Goodwin & Goodwin, LLP  
300 Summers Street, Suite 1500  
P.O. Box 2107  
Charleston, WV 25328-2107

Stephen B. Farmer  
Farmer, Cline & Campbell, PLLC  
746 Myrtle Road  
P.O. Box 3842  
Charleston, WV 25338

  
**MARIANNE KAPINOS (WVSB # 1781)**  
West Virginia Health Care Authority  
100 Dee Drive  
Charleston, West Virginia 25311  
(304) 558-7000