NO. 92746-4

SUPREME COURT OF THE STATE OF WASHINGTON

DAVITA HEALTH CARE PARTNERS, INC.,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH, and NORTHWEST KIDNEY CENTERS,

Respondents.

RESPONDENT WASHINGTON STATE DEPARTMENT OF HEALTH'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION

When the plain language of a state agency's rule is clear and unambiguous, the court need not delve into legislative intent or the rules of statutory construction. The plain language of the Department of Health's rule requires competing kidney dialysis treatment center Certificate of Need applications to meet all applicable review criteria before triggering the "tie breaker" criteria. Because Petitioner DaVita did not satisfy all the review criteria, it was not necessary to apply the tie breaker criteria before granting the Certificate of Need to Northwest Kidney Centers. The Court of Appeal's decision was well-reasoned and supported by case law and the interpretation of the Department's rule does not present an issue of substantial public interest that should be determined by the Supreme Court.

II. IDENTITY OF RESPONDENT

Respondent is the Department of Health (Department), State of Washington. Respondent Northwest Kidney Centers (NKC) will file a separate answer to the Petition for Discretionary Review.

III. COUNTERSTATEMENT OF THE ISSUE

Review is not warranted in this case; however, if the Court were to accept review, the issue would be whether Certificate of Need applications for kidney dialysis facilities must meet all of the review standards

regarding need, financial feasibility, structure and process of care, and cost containment under WAC 246-310-210, -220, -230, and -240 *before* application of the tie breaker criteria in WAC 246-310-288.

IV. COUNTERSTATEMENT OF THE CASE

A. Regulatory Background

The Department administers the Washington Certificate of Need law in RCW 70.38 and WAC 246-310. The law requires health care providers to obtain a Certificate of Need prior to establishing or expanding certain facilities, including kidney dialysis treatment centers. RCW 70.38.105(4)(a) and (h); RCW 70.38.025(6). An applicant must demonstrate that a proposed project meets four criteria: Need (WAC 246-310-210); Financial Feasibility (WAC 246-310-220); Structure and Process of Care (WAC 246-310-230); and Cost Containment (WAC 246-310-240). WAC 246-210-200(1).

B. Undisputed Facts

The essential facts have not been disputed by DaVita, therefore, they are verities on appeal. *Yuchasz v. Dep't of Labor & Indus.,* 183 Wn. App. 879, 886, 335 P.3d 998, 1001 (2014). In May 2011, DaVita submitted a Certificate of Need application to construct a new five-station kidney dialysis facility in Des Moines, with an estimated capital expenditure of $1,992,705. Clerk's Papers (CP) at 53, 57 ¶ 1.8. Also in

May 2011, NKC submitted a Certificate of Need application to increase from 25 to 30 the number of stations at its existing facility in SeaTac, with an estimated capital expenditure of $100,969. CP at 53, 57 ¶ 1.8. Because both applicants proposed to serve residents in the same planning area within King County, the Department reviewed the applications concurrently. Administrative Record (AR) at 2420-56; CP at 64 ¶ 1.23; WAC 246-310-280(3); WAC 246-310-282. Based on the tie breakers, the Department staff granted DaVita's application, and denied NKC's application. AR 2451-55; CP at 54, 64 ¶ 1.23.

NKC requested an adjudicative proceeding to contest the Department's decisions. A Department Health Law Judge found that NKC's application met all criteria for approval, and DaVita's application did not, making it unnecessary for him to apply the tie breakers to determine which application should be approved. Accordingly, he granted NKC's application and denied DaVita's application, issuing the Final Order reversing the Department. CP at 52-74.

DaVita petitioned for judicial review of the Health Law Judge's Final Order under RCW 34.05 and the superior court upheld the Order. CP at 185-186. DaVita appealed. The Court of Appeals, Division I unanimously affirmed the Order in a published opinion, concluding that the plain language of WAC 246-310-288 is clear that the tie breakers are

applied only if both applications first satisfy all other review criteria in WAC 246-310-210, -220, -230, -240. *See DaVita HealthCare Partners, Inc., v. Wash. State Dep't of Health,* 192 Wn. App. 102, 365 P.3d 1283 (2015).

V. REASONS WHY REVIEW SHOULD BE DENIED

DaVita seeks review only under RAP 13.4(b)(4), which provides that the Court will accept review only "[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court." As explained below, DaVita cannot meet this standard. There is no issue of substantial public interest presented by this appeal. The Court of Appeals correctly held that the tie breaker factors are only applied if the competing applications first satisfy all the other review criteria in WAC 246-310-210, -220, -230, and -240.

A. The Court Of Appeals' Correct Interpretation Of WAC 246-310-288 Does Not Present An Issue Of Substantial Public Interest

DaVita argues that the Court of Appeals should have looked beyond the plain language of the rule to decide this case, claiming there are principles of "regulatory interpretation" that somehow differ from the rules of statutory construction and would compel a different result. However, the cases cited by DaVita in support of its argument in fact conclude the opposite. Petition for Review (Petition) at 15-18. If an

administrative rule or regulation is clear on its face, its meaning is to be derived from the plain language of the provision alone and it is not subject to judicial construction. *Dep't of Licensing v. Cannon*, 147 Wn.2d 41, 56-57, 50 P.3d 627, 636 (2002).

If the meaning of a rule is unambiguous based on its plain language, the court will not resort to legislative history or other extrinsic sources to determine intent. *Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 51-52, 239 P.23d 1095, 1099 (2010) (If the meaning of a rule is plain and unambiguous on its face, the court gives effect to that plain meaning); *State v. Hirschfelder*, 170 Wn.2d 536, 543, 242 P.3d 876, 879-80 (2010) (If the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent); *N. Cent. Wash. Respiratory Care Servs., Inc. v. State, Dep't of Revenue*, 165 Wn. App. 616, 624-25, 268 P.3d 972, 976 (2011) (If the plain language is subject to only one interpretation, inquiry ends because plain language does not require construction); *In re Combs*, 176 Wn. App. 112, 117, 308 P.3d 763, 765 (2013) (where a statute's meaning is plain, the court gives effect to that meaning as expressing legislative intent); *Am. Legion Post #149 v. Wash. State Dep't of Health*, 164 Wn.2d 570, 585, 192 P.3d 306, 313-14 (2008) (where the language of an initiative is plain, unambiguous and well understood, it is not subject to judicial interpretation). Another

case cited by DaVita, *Olympic Healthcare Servs. II LLC v. DSHS,* 175 Wn. App. 174, 304 P.3d 491 (2013), did not discuss "plain language" at all. That case involved the interpretation of a term of art defined in rule; not the plain language of an ordinary word such as "if." *Olympia Healthcare Servs.,* at 186-187.

Petitioner DaVita seeks review simply to argue once more that the Court of Appeals should *not* have found the language of WAC 246-310-288 plain and unambiguous and should have applied additional principles such as: "A specific statute will supersede a general one *when* both apply." *Kustura v. Dep't of Labor & Indus.*, 169 Wn.2d 81, 88, 233 P.3d 853, 856 (2010). (Emphasis added). However, DaVita is unable to show either that the plain language of the rule is ambiguous or that WAC 246-310-288 applies when the competing applications are not "tied." Rather, as the Court of Appeals properly found, the plain language of WAC 246-310-288 ("If two or more applications meet all applicable review criteria") requires the Department to determine whether one applicant is superior to the other *before* applying the tie breakers. *DaVita v. Dep't of Health,* 192 Wn. App. at 115. Moreover, both WAC 246-310-200(2) and WAC 246-310-284 require the Department to apply the criteria in WAC 246-310-210, -220, -230, and -240. Thus, the language of the rule is clear. Only *if* both applicants satisfy all these

criteria would the tie breakers be used to decide which application is approved.

It is well-settled law that if the language of a rule is plain on its face, no inquiry into legislative intent or legislative history is required. "If the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Darkenwald v. State Emp't Sec. Dep't,* 183 Wn.2d 237, 245, 350 P.3d 647, 650 (2015). The language of WAC 246-310-288 is plain and unambiguous. Revisiting this issue is not an "issue of substantial public interest" that justifies this Court accepting discretionary review under RAP 13.4(b)(4).

B. Applying The Review Criteria Does Not Create A "Monopoly"

In its petition, DaVita asserts there is "substantial public interest" in this case because the Department's decision will result in a "monopoly" in King County Planning Area #4 and that this will harm the statewide healthcare system. DaVita argues that tie breaker points should have been awarded so that it would score the "provider choice" point. However, DaVita offers no analysis to substantiate any harm and does not address the fact that this is only one of eight factors in the tie breaker rule.

Moreover, as stated above, the language of the rule is plain that *before* the tie breakers in WAC 246-310-288 are applied, the applicants must satisfy the criteria in WAC 246-310-210, -220, -230, and -240. To

the extent WAC 246-310-288 would award a "tie breaker" point regarding provider choice, this factor would come into play only *if* the other criteria were satisfied first. In any event, the issue before this court does not extend to the issue of purported "monopolies" because the plain language of the tie breaker rule states that these tie breaker factors are not applied unless all other review criteria are satisfied.

It is true that NKC's approved application is for an expanded facility in a planning area surrounding the King County city of SeaTac, where NKC is currently the only provider. However, NKC's application was approvable over DaVita's application under the law due to its lower expenses and charges. The law does not compel approval of DaVita's application simply because NKC is currently the only provider in the planning area. Moreover, DaVita currently has 24 kidney dialysis facilities elsewhere in Washington, including four in King County. The question of whether the plain language of the rule should be disregarded because it might sometimes result in one provider in any planning area (a "monopoly") is not properly before the court.

The Washington Certificate of Need law, as a matter of public policy, promotes strategic health planning that is concerned with public health and health care financing, access, and quality, and emphasizing cost control of health services. RCW 70.38.015(5).

C. Not All Certificate Of Need Cases Involve Issues Of Substantial Public Interest

As shown above and by the ruling of the Court of Appeals, this case is not appropriate for discretionary review because there is no "substantial public interest" in rehearing DaVita's arguments. Rather, this case involves a straight-forward and easily-defensible Department interpretation of the Certificate of Need law that already has been upheld by a Health Law Judge, a superior court, and the Court of Appeals. Moreover, other than DaVita, no one else has expressed any interest in this case.

DaVita, however, claims that the Health Law Judge's decision, if current law applied then, could have been overturned on administrative review. That is pure speculation and does not indicate any error of law. The Health Law Judge was the agency's fact-finder and final decision maker, on delegated authority from the Department of Health. *DaVita, Inc. v. Wash. State Dep't of Health,* 137 Wn. App. 174, 182, 151 P.3d 1095, 1099 (2007). The claim that another result might have happened under a slightly different procedural pathway has no substance and, more to the point, does not convert DaVita's dispute into a matter of substantial public interest.

VI. CONCLUSION

DaVita's arguments were properly rejected by the Court of Appeals, Division I. The plain language of WAC 246-310-288 provides that the tie breakers shall be applied only *if* competing applications meet all applicable review criteria. The Court of Appeals correctly found the language of the regulation plain and unambiguous, and correctly affirmed the decision of the Health Law Judge. DaVita's petition raises no issue of substantial public interest. The Court should not accept review of the case under RAP 13.4(b)(4).

RESPECTFULLY SUBMITTED this 25th day of April, 2016.

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PROOF OF SERVICE

I, K. BERRY, certify that I served a copy of the ***Washington State Department of Health's Answer to Petition for Discretionary Review*** on the party listed below on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 25th day of April, 2016 at Olympia, Washington.

K. Berry

K. BERRY