

NO. 66304-6-I

**COURT OF APPEALS, DIVISION
OF THE STATE OF WASHINGTON**

KING COUNTY PUBLIC HOSPITAL DISTRICT NO. 2, d/b/a
EVERGREEN HEALTHCARE, a Washington public hospital district,
SWEDISH HEALTH SERVICES, d/b/a SWEDISH VISITING NURSE
SERVICES, a Washington non-profit corporation, PROVIDENCE HOSPICE
AND HOME CARE OF SNOHOMISH COUNTY, a Washington non-profit
corporation, and HOSPICE OF SEATTLE,

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH, a Washington
governmental agency, SECRETARY MARY SELECKY, Secretary of
Washington's Department of Health in her official and individual capacity,
ODYSSEY HEALTHCARE OPERATING B, LP, a Delaware corporation,
and ODYSSEY HEALTHCARE INC., a Delaware corporation,

Appellants.

REPLY BRIEF OF WASHINGTON STATE DEPARTMENT OF
HEALTH AND MARY SELECKY

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I. INTRODUCTION

RCW 70.38 and WAC 246-310 require Certificate of Need (CN) approval from the Department of Health (Department) to establish health care facilities in Washington. Respondents (Existing Hospices) are current King County hospice providers opposing Appellant Odyssey's Certificate of Need application to establish its own hospice in King County. Contrary to argument of Existing Hospices, in approving Odyssey's application, the Department: (A) correctly found need for an additional hospice in King County; (B) correctly found that Odyssey satisfied all applicable criteria for obtaining a Certificate of Need; and (C) allowed Existing Hospices an opportunity to comment prior to approval of the application.

II. ARGUMENT

A. **The Department's Finding Of Need In King County For Odyssey's Hospice Should Be Upheld**

WAC 246-310-210 and 246-310-290 require that a hospice Certificate of Need applicant show "need" for the proposed hospice in the county where it would be located. Existing Hospices make three main contentions that Odyssey's application should be denied because Odyssey failed to show need for another hospice in King County. These contentions lack merit.

1. The Health Law Judge Was Permitted To Use Updated Data In Performing The WAC 246-310-290 Methodology

For hospice applications, need is determined in part under a six-step methodology in WAC 246-310-290(7). Dep't Br. at 10-12. Using data for 2003-05, the Department initially denied Odyssey's 2006 application because the methodology showed no need for an additional hospice in King County. Dep't Br. at 12. After Odyssey requested an adjudicative proceeding to contest the denial, the Department re-performed the methodology, using updated 2007 data, which showed need existed, resulting in approval of Odyssey's application by the Health Law Judge. Dep't Br. at 13.

Contrary to Existing Hospices' contention, *Univ. of Wash. Med. Ctr. v. Dep't of Health*, 164 Wn.2d 95, 187 P.3d 243 (2008), did not hold it was necessarily improper for an Health Law Judge to consider information (i.e., the 2007 data) that did not exist when the Department made its initial decision. Resp. Br. at 26-27. To the contrary, in that case, the court held that whether to exclude or admit new information was

subject to the Health Law Judge's "considerable discretion." *Id.* at 104.¹

In other words, the Health Law Judge may decide to admit new information based on the circumstances of the particular case.

Although a Health Law Judge ordinarily will not consider new information in an adjudicative proceeding, the Certificate of Need Program identified four special circumstances justifying the consideration of new data in Odyssey's case: the lack of current data at the time of application, Odyssey's earlier applications, the three-year window showing need, and the lack of competing new applications. These circumstances are fully explained in the Department's opening brief. Dept. Br. at 15-16.

In their response brief, Existing Hospices do not deny the existence of these four circumstances. These circumstances show that admission of

¹ To support their argument, Existing Hospices reference a 2007 letter from the Department Secretary indicating that Certificate of Need decisions should be based on information from the time of application. App. Br. at 24; AR 1260. Of course, this letter does not have the force of law. Moreover, in deciding the Odyssey case in 2009, the Health Law Judge was the Secretary's "designee," and as such, cannot be held to have acted against the will of the Secretary in allowing the admission of new information. WAC 246-10-102 (defining "presiding officer"). Finally, this 2007 letter lacks relevance because it was written prior to the 2008 State Supreme Court decision in *Univ. of Wash. Med. Ctr.*, which held that admission of new information is within the Health Law Judge's "considerable discretion."

the updated data was not a reversible abuse of discretion.²

2. Using Updated Data, The Department Properly Performed The Methodology

Besides objecting to the updated data, Existing Hospices contend that the Department committed two other material errors in performing the methodology. This contention also lacks merit.

a. The Decision Not To Count Kline Galland In The Supply Of Existing Agencies Should Be Upheld

In performing the methodology, under WAC 246-310-290(7)(f), the Department must count the patient volume of all existing hospice agencies within a county, as one step in determining whether there is need for an additional agency in the county. Existing Hospices contend the Department erred by not counting the entity known as “Kline Galland” as an existing agency. Resp. Br. at 35-36. Had Kline Galland been counted, the methodology may have shown no need for an additional hospice in King County.

² In *Univ. of Wash. Med. Ctr.*, the court adopted the abuse of discretion (“manifestly unreasonable”) standard for reviewing evidentiary rulings. Existing Hospices contend that the standard should be “arbitrary and capricious,” the standard in RCW 34.05.570(3)(i). Resp. Br. at 21, 23. Like abuse of discretion, arbitrary and capricious is a highly-deferential standard that is met only when an agency decision is willful and unreasoning, without consideration, in disregard of the facts and circumstances. *Sparks v. Douglas Co.*, 127 Wn.2d 901, 904 P.2d 738 (1995). For argument sake, if the arbitrary and capricious standard applied, the Health Law Judge’s decision to admit the updated data is not reversible under that standard.

Enacted in 2009, RCW 70.38.111(9) exempts from Certificate of Need review a hospice that serves no more than 40 patients from a religious/ethnic group. Although such agencies are exempt from Certificate of Need review, their “patient census” must be counted in performing the methodology. RCW 70.38.111(9)(b)

However, according to the record, Kline Galland is merely a *proposed* King County hospice that one day may become a hospice exempt from Certificate of Need under RCW 70.38.111(9). In the adjudicative proceeding, the Certificate of Need Program presented three cogent reasons for not counting Kline Galland in performing the methodology is Odyssey’s case:

First, the legislation was approved after Odyssey’s 2006 application and even after the Program surveyed for the 2008 methodology. Second, Kline Galland is still not operating a King County hospice. In fact, the company has not yet received from the Department an exemption under ESHB 1926 to operate a hospice without CN approval. Third, Kline Galland itself is not asking that its potential hospice agency be included in the 2008 methodology.

AR 2014. (Emphasis original.) Given these undisputed facts, the Department’s decision not to include Kline Galland as an existing hospice should be upheld under the “substantial evidence” judicial review standard

in RCW 34.05.570(3)(e).³

b. The Department Used The Proper “Planning Horizon” To Determine Need Under The Methodology

The methodology, WAC 246-310-290(6), states that a hospice applicant “must demonstrate that they can meet a minimum average daily census (ADC) of thirty-five patients *by the third year of operation.*” (Emphasis added.) This three-year projection period is known as the “planning horizon” for determining whether a new agency is needed. Using the 2007 data, Existing Hospices contend that Odyssey cannot show need within the three-year planning horizon. Resp. Br. at 36-37.

This contention lacks merit. As stated, WAC 246-310-290(6) projects forward to the “third year of operation” to determine whether an applicant can show an unmet need of at least 35 ADC. The Health Law Judge approved the settlement in 2009, making 2012 the earliest possible third year of operation. For 2012, the methodology showed an unmet need of 64 ADC (AR 1101), which is greater than 35 ADC and therefore

³ “Substantive evidence” is evidence sufficient to persuade a fair-minded and rational person. *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007). In other words, the standard is not whether the court agrees with the agency, but whether the agency findings are rational.

indicates need for another hospice in King County. In fact, the unmet need of 35 ADC actually developed three years earlier.⁴

In summary, contrary to Existing Hospices' contention, Odyssey demonstrated need within the applicable three-year planning horizon in WAC 246-310-290(6).

B. Odyssey's Application Should Not Be Denied Under WAC 246-310-220, -230, Or -240

In addition to demonstrating need under WAC 246-310-210, a Certificate of Need applicant must demonstrate satisfaction of three other criteria: WAC 246-310-220 (Financial Feasibility); WAC 246-310-230 (Structure and Process of Care); and WAC 246-310-240 (Cost Containment).

Existing Hospices contend that, when the Department on settlement approved Odyssey's application, the Department failed to consider whether Odyssey satisfied these three non-need criteria. Resp. Br. at 31-34. That is untrue. In the adjudicative proceeding, the Certificate of Need Program noted that, based on its previous evaluation, *if* need was demonstrated, then the three non-need criteria also would be satisfied. AR 1020-21; Dep't Br. at 17. Based on that information, after

⁴ Odyssey applied in 2006. Even if 2009 is considered the third year of operation, the methodology showed an unmet of 37 ADC in 2009, which still is greater than 35 ADC and indicates need for another hospice in King County. AR 1101.

finding that need existed, the Health Law Judge further found that the three non-need criteria also were satisfied. AR 1722.

In any event, in the adjudicative proceeding, Existing Hospices did not challenge whether Odyssey had demonstrated the three non-need criteria. Dep't Br. at 17. Failure to raise this issue before the Health Law Judge bars Existing Hospices from raising this issue for the first time on judicial review. Dep't Br. at 20-21.⁵

C. The Conditions On Odyssey's Certificate Of Need Apply

Existing Hospices contend that approval of the application on settlement was arbitrary and capricious because the Department did not re-impose certain minor "conditions" that would have been imposed had the Department initially approved Odyssey's application. Resp. Br. at 34.

These conditions included requiring Odyssey to provide copies of vendor agreement and charges, and to identify a clinical director and a backup. *Id.*

The settlement approval did not expressly re-impose these minor conditions on Odyssey's Certificate of Need. However, no remand is needed under RCW 34.05.574(1) for the Department to expressly re-

⁵ Regarding the three non-need criteria, Existing Hospices make only one abbreviated argument, questioning some of the data relied on by Odyssey. Resp. Br. at 33-34. Existing Hospices have the burden to show that the Department's decision was invalid. RCW 34.05.570(1)(a). They fail to carry their burden of showing the questioned data was invalid or would materially affect the decision to approve Odyssey's application.

impose these conditions, as they impliedly still apply and must be met before Odyssey receives its Certificate of Need. In its reply brief, Odyssey agrees that the conditions still apply.

D. In Approving Odyssey's Certificate Of Need Application, The Department Properly Followed The Settlement Procedure In RCW 70.38.115(10)(c) And Afforded Existing Hospices An Opportunity To Comment

Existing Hospices incorrectly contend they were denied an opportunity to comment in advance on the Department's approval of Odyssey's application. Resp. Br. at 21, n.8. This contention is untrue and reflects a misunderstanding of the settlement process.

The Department initially denied Odyssey's application. AR 1033-58. Odyssey requested an adjudicative proceeding under RCW 34.05 to contest the denial. AR 1-40. RCW 70.38.115(10)(c) states:

If the department desires to settle with the applicant prior to the conclusion of the adjudicative proceeding, the department shall so inform the health care facility or health maintenance organization and afford them an opportunity to comment, in advance, on the proposed settlement.

Under this statute, the Department Certificate of Need Program proposed a settlement to approve Odyssey's application, and offered Existing Hospices an opportunity to comment on the proposal. AR 1093-95. Existing Hospices submitted comments opposing settlement.

AR 1104-1129. After reviewing the comments, the Certificate of Need Program decided to recommend approval of the proposed settlement to the Health Law Judge. AR 1018-1060. Existing Hospices then received another opportunity to comment against the proposed settlement. AR 1179-1527. After reviewing all comments, the Health Law Judge decided to approve the settlement, resulting in approval of Odyssey's application. AR 1721-22.

In summary, contrary to Existing Hospices' contention, in approving Odyssey's application, the Department followed the settlement procedures in RCW 70.38.115(10)(c) and in fact afforded Existing Hospices *two* different opportunities to comment on the proposed settlement before the settlement was approved by the Health Law Judge.⁶

Finally, Existing Hospices inaccurately attempt to discredit approval of the settlement on the basis that a proposal for potential settlement arose from resolution of a federal lawsuit Odyssey brought against the Department over the initial denial of its application.

⁶ Upon motion, the Health Law Judge issued the Final Order, approving the settlement and the application, after Existing Hospices were given a full opportunity to challenge the settlement through written submissions. Dep't Br. at 6. Odyssey argues that Existing Hospices were not entitled to a full adjudicative proceeding to contest the settlement and approval. Odyssey Br. at 31-38. The court need not address this issue because Existing Hospices fail to claim such a right. In fact, the Health Law Judge entered the Final Order in an adjudicative proceeding *upon motion*. Certificate of Need proceedings may be decided on motion. WAC 246-10-403. Before the Health Law Judge, Existing Hospices never argued that the case required a full hearing or could not be decided upon motion. Dep't Brief 21-22. Nor do Existing Hospices make such an argument in their response brief.

Dep't Br. at 4. However, the eventual approval of Odyssey's application by the Health Law Judge was not mandated by the federal lawsuit. Indeed, the Health Law Judge had authority to reject the proposed settlement and to deny Odyssey's application. Existing Hospices in fact urged him to do so. Dep't Br. at 19-20. The issue on appeal is whether Odyssey's application should be approved under RCW 70.38 and WAC 246-310 based on the merits of the application. The federal lawsuit is not relevant to that issue.

III. CONCLUSION

Based on the foregoing, the Department of Health requests that its approval of Odyssey to establish a hospice agency in King County be upheld.

RESPECTFULLY SUBMITTED this 18 day of May, 2011.

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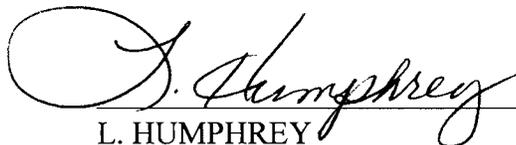
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 18 day of May, 2011, at Olympia, WA.


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