

No. 34249-9

DIVISION II, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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DAVITA INC.,

Petitioner-Appellant

v.

WASHINGTON STATE DEPARTMENT OF HEALTH,

Respondent-Appellee,

OLYMPIC PENINSULA KIDNEY CENTER,

Intervenor-Respondent

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ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT  
(Hon. Gary R. Tabor)

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APPELLANT'S REPLY BRIEF

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## **I. INTRODUCTION**

Respondents fail in their attempt to demonstrate that the final order issued by the Health Law Judge (“HLJ”) and upheld by the trial court complied with constitutional, statutory and regulatory provisions governing the issuance of certificates of need (“CONs”) and appeals. The HLJ erred by failing to correctly assign the burden of proof and apply the legally mandated standard of proof and standard of review. The HLJ also deprived Petitioner DaVita, Inc. (“DaVita”) of its constitutional right to procedural due process of law by creating and imposing post-hearing new standards for determining which of two CON applicants is superior. Finally, the crucial factual findings contained in the HLJ’s decision are not supported by substantial evidence.<sup>1</sup> For any and all of these reasons, the decisions of the trial court and the HLJ should be reversed.

The HLJ decision dramatically indicates a lack of guidance regarding the proper role of Department of Health HLJs in CON adjudicative proceedings and warrants this court’s attention.

## **II. ARGUMENT**

### **A. The HLJ Failed to Place the Burden of Proof on OPKC and Applied the Incorrect Standard of Review**

Both respondents share the HLJ’s fundamental misconception of the nature of Program CON determinations and adjudicative proceedings arising from appeals. Significantly, they do not dispute that the HLJ failed

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<sup>1</sup> For the most part, DaVita will not address the substantive errors in the HLJ’s decision as those issues were covered thoroughly in DaVita’s opening brief.

to assign the burden of proof to respondent Olympic Peninsula Kidney Center (“OPKC”). Nor do they disagree that she applied an incorrect standard of review by (1) failing to evaluate whether OPKC had met its burden of proving that the Program’s decision lacked support by a preponderance of evidence as required by WAC 246-10-606; and (2) resting her independent findings that OPKC was the superior applicant upon a mere substantial evidence standard rather than the mandatory preponderance of the evidence standard. These errors require reversal.

1. The Certificate of Need Review Process

To clearly comprehend the HLJ’s error and the fallacies in the respondents’ arguments it is useful to review the CON review process. Most of this process takes place before the adjudicative proceeding (if there is one) even begins. The Program usually makes a decision on a CON application at the end of the process called “regular review,” which was used in this case. WAC 246-310-160(b). The applicant submits an application and extensive information to the Program in an effort to establish its project meets the various CON criteria. There is an opportunity for a public hearing. WAC 246-310-180. Ultimately, the Program (the Secretary’s “designee”) makes written findings that “include the basis for the decision . . . as to whether a certificate of need is to be issued or denied” using “all criteria contained in chapter 246-310 WAC applicable to the proposed project.” WAC 246-310-490(1)(a)-(b). If the Program finds that the application meets all of the criteria, it issues a CON to the applicant. WAC 246-310-500. Otherwise, it denies the application.

If there is an adjudicative proceeding, it does not commence until after the Program has made its decision on the application. “An applicant denied a certificate of need ... has the right to an adjudicative proceeding.” WAC 246-310-610(1). Such proceedings are governed by the Administrative Procedure Act (“APA”), chapter 246-310 WAC and chapter 246-10 WAC. WAC 246-310-610(3).

2. The Burden of Proof in a CON Adjudicative Proceeding Is on the Applicant Whose Application Was Denied

Both the standard and burden of proof in an adjudicative proceeding involving an appeal of a Program decision to deny a CON are governed by WAC 246-10-606:

In all cases involving an application for license the burden shall be on the applicant to establish that the application meets all applicable criteria. In all other cases the burden is on the department to prove the alleged factual basis set forth in the initiating document. Except as otherwise provided by statute, the burden in all cases is a preponderance of the evidence.

Thus, the standard of proof the HLJ should apply to all issues in a CON adjudicative proceeding is a preponderance of the evidence. Since CONs are licenses, St. Joseph Hospital v. Department of Health, 125 Wn.2d 733, 736, 887 P.2d 891 (1995), the burden is on the applicant to establish by a preponderance of the evidence that the application it filed with the Program meets the applicable CON criteria. In essence, then, the issue in the adjudicative proceeding is whether the applicant proves that the

Program's findings were not supported by a preponderance of the evidence.

In this case, the Program was required to make three essential determinations based upon a preponderance standard: (1) whether DaVita's application satisfied the applicable CON criteria; (2) whether OPKC's application met those same criteria; and (3) if both applications were satisfactory, which application was superior. The Program found that both applications were satisfactory and that DaVita's was superior. It then issued a CON to DaVita. Thereafter, OPKC appealed the Program's decision under WAC 246-310-610(1).

Having been awarded the CON, DaVita had no right to an adjudicative proceeding under WAC 246-310-610(1). The agency action being appealed was the Program's issuance of the CON to DaVita and denial of a CON to OPKC. Thus, DaVita had the option, but not the obligation, to participate in the appeal only as an intervenor in support of the Program's decision. Since DaVita did not need to participate in the adjudicative proceeding, it could not be the "applicant" for purposes of WAC 246-310-610. Thus, the regulations logically must be read so as to place the burden of proof squarely on OPKC.<sup>2</sup>

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<sup>2</sup> The HLJ recognized that OPKC was the appealing "Applicant" on the first page of her Amended Final Order. AR 722.

In sum, in order to prevail in the adjudicative proceeding, OPKC had to show, and the HLJ had to find, that a preponderance of the evidence did not support the Program's decision to award the CON to DaVita.

3. The HLJ Failed Altogether to Assign the Burden of Proof and then Applied the Wrong Standard of Proof

The HLJ's initial task was to determine whether OPKC had met its burden of proving that the Program's decision was not supported by a preponderance of the evidence. Although she recited the applicable preponderance standard, she failed entirely to apply it. See AR 739. Instead, the HLJ: (1) made no finding as to which party bore the burden of proof; (2) made no determination of whether OPKC met its burden of proving that the Program's findings were not supported by a preponderance of the evidence; (3) made her own determination based on novel factors never before used by the Program; and (4) found that OPKC's application was superior based on a mere "substantial evidence" standard. AR 739. Any or all of these mistakes constitute reversible error. Neither respondent disputes that the HLJ made these errors. Rather, they ignore them completely.

*a. Burden of Proof*

Respondents advocate an adjudicative process that is contrary to both the Department's own rules and also the APA. OPKC makes the nonsensical argument that somehow both OPKC, the "applicant," and DaVita, the intervenor, had the burden of proving in the adjudicative proceeding that their applications satisfy the CON criteria. OPKC's

Intervenor-Respondent's Brief ("OPKC brief") at 43. This argument is nonsense because DaVita was the beneficiary of the Program order under appeal and had no burden in OPKC's adjudicative proceeding. Under WAC 246-310-610(1), only the party whose application was denied is an "applicant" who has the right to an appeal. The respondents' process would require both successful and unsuccessful "applicants" to re-prove their entitlement during adjudicative review, rendering the Program's detailed factual determinations meaningless.

*b. Standard of Proof*

Instead of applying the preponderance of evidence standard as required, the HLJ instead found OPKC was the superior applicant based on only the lesser substantial evidence standard. AR 739. Substantial evidence is defined as "more than a mere scintilla, but less than preponderance." Aukland v. Massanari, 257 F.3d 1033, 1035 (9<sup>th</sup> Cir. 2001). Remarkably, OPKC actually argues that it was appropriate for the HLJ to review the Program's decision based on a "substantial evidence" standard. OPKC brief at 44. However, the "substantial evidence" standard has absolutely no applicability to the HLJ's review of the Program's decision. Substantial evidence is a concept generally used by appellate courts in evaluating the sufficiency of factual findings made by triers of fact.

Appellate courts determine only whether factual findings are supported by substantial evidence and, if so, whether the findings in turn support the conclusions of law and judgment.

Nguyen v. State, Dept. of Health Medical Quality Assurance Commission,  
144 Wn.2d 516, 530, 29 P.3d 689 (2001).

In the APA context, this concept is found in RCW 34.05.570(3)(e), a judicial review provision that states judicial relief will be granted if the “order is not supported by evidence that is substantial when viewed in light of the whole record before the court....” If the HLJ had correctly applied the preponderance of the evidence standard to determine whether OPKC had met its burden of proof, this Court would then apply the APA’s judicial review substantial evidence standard in assessing the validity of the HLJ’s factual findings. It is undisputed that the HLJ applied a mere substantial evidence standard, clearly the wrong standard of proof and a clear error of law for which the HLJ’s decision should be reversed.

*c. Standard of Review*

The HLJ also applied the wrong standard of review for an adjudicative proceeding. The error originates in Conclusion of Law 2.8, in which she mischaracterizes the Program’s “agency action”<sup>3</sup> in issuing a CON as an “initial decision.” AR 739. The HLJ is the adjudicator of CON appeals and has received final decision making authority under RCW 34.05.461 from the agency head, the Secretary of the Department of Health. If, as the HLJ states, CON adjudicative proceedings are “intra-

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<sup>3</sup> “Agency action” means licensing, the implementation or enforcement of a statute, the adoption or application of an agency rule or order, the imposition of sanctions, or the granting or withholding of benefits. RCW 34.05.010(3).

agency appeals” with the initial decisions being rendered by the Program, then there would be no “agency action” giving rise to an adjudicative appeal. The Program’s CON decision is the agency action. It is this action that provides the basis for an adjudicative proceeding. See RCW 34.05.422(1)(b), RCW 70.38.115. The decision to issue a CON is not and cannot be part of the adjudicative process and therefore cannot be an initial decision under RCW 34.05.461. Indeed, if the Program’s written decision to issue a CON was found to be an “initial decision,” then the HLJ’s role would be solely to review the “hearing record” and issue the final order. In this nonsensical scenario, there would be no hearing at all. See RCW 34.05.464(5).

Since initial decisions are not part of CON appeals, respondents’ reliance on Tapper v. Employment Security Dept., 122 Wn.2d 397, 858 P.2d 494 (1993) is misplaced. Tapper involved an appeal of an unemployment compensation decision by an ALJ who had been delegated initial decision-making authority as part of the adjudicative process pursuant to RCW 34.05.461 and .464. The ALJ heard testimony, and appropriately made initial findings and conclusions that the employee was entitled to compensation. The company (Boeing) appealed the ALJ’s adverse initial decision to the Commissioner, the reviewing officer who had the authority to make final findings and conclusions. The Commissioner reversed the decision and found for Boeing. Tapper at 401. This is a typical APA initial decision-making case. It has no relevance to

this case where the HLJ conducts the adjudicative proceeding and issues a final order.

4. The Absence of a Finding that OPKC Met Its Burden of Showing that the Program's Decision Was Not Supported by a Preponderance Compels a Reversal and Issuance of the CON to DaVita

In the absence of a contrary finding by the HLJ, the Program's factual findings should be deemed to be supported by a preponderance of the evidence and, therefore, legally sufficient to warrant issuance of the CON to DaVita. The absence of a necessary finding is construed "against the party who has the burden of proof on the issue." Stuewe v. State Department of Revenue, 98 Wn. App. 947, 952, 991 P.2d 634 (2000). Thus, the HLJ's failure to include a finding that the Program's decision was not supported by a preponderance of the evidence leads to the presumption that OPKC failed to sustain its burden on the issue. Smith v. King, 106 Wn.2d 443, 451, 722 P.2d 796 (1986). Accordingly, this Court should find OPKC failed to meet its preponderance of the evidence burden and reinstate the Program's original findings that DaVita, as the superior applicant, is entitled to the CON.

**B. DaVita's Procedural Due Process Rights Were Violated Because It Was Denied an Opportunity to Be Heard at a Reasonable Time and in a Meaningful Manner**

Neither the Department nor OPKC challenge DaVita's assertion that a CON is a license or that DaVita has a property right interest in the CON it was granted. Nor is there any dispute over whether DaVita was entitled to notice and the opportunity to be heard before it could be

divested of its property right in its CON, or that such notice and hearing had to be given at a meaningful time and in a meaningful manner. Thus, the only issue before this Court on DaVita's procedural due process claim is whether DaVita was denied that "full and fair opportunity to be heard" when the HLJ essentially revoked DaVita's CON based on newly created tie-breaking criteria for determining the superior applicant. As explained below, DaVita did not receive proper notice and a fair hearing.

1. Constitutional Principles of Procedural Due Process Preclude an Agency from Relying on New Evidence or Changing Its Theories so a Litigant Has No Opportunity to Prepare or Respond

At a minimum, due process requires notice and an opportunity to be heard. Soundgarden v. Eikenberry, 123 Wn.2d 750, 768, 871 P.2d 1050 (1994), *cert. denied*, 513 U.S. 1056, 115 S. Ct. 663, 130 L. Ed. 2d 598. These two entitlements include the right to know the reasons behind government action:

[T]wo essential—and minimal—components to procedural due process are evident. When an individual has a constitutionally protected interest at risk of loss, due process requires first, that he have timely notice of the proceedings that is appropriate to the case and provides the ability to discover the reasons for the risk of loss, and second, a meaningful opportunity to argue the strengths of his position and to attack the position of the party who seeks to deprive the individual of his interest.

Harris v. Blodgett, 853 F. Supp. 1239, 1287 (W.D. Wash. 1994).

Having the "reasons for the risk of loss" explained is critical. The U.S. Supreme Court has said that due process principles "require timely and adequate notice detailing the reasons for a proposed ..." action.

Goldberg v. Kelly, 397 U.S. 254, 267-68, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) (emphasis added). The Washington courts have strictly applied these due process guarantees of notice and fair hearings and have not tolerated “surprises” from new grounds or issues disclosed for the first time during administrative hearings. Thus, the Washington Supreme Court has stated:

The central purpose of providing a person with ‘notice’ is to ‘apprise the affected individual of, and permit adequate preparation for, an impending “hearing”’. . . . To accomplish this purpose, the notice must indicate the issues which will be addressed at the hearing.

In re Cross, 99 Wn.2d 373, 382, 662 P.2d 828 (1983) (citations omitted). In the same vein, agencies must ensure that the parties have sufficient notice of the reasons for a decision so that cases cannot be decided on unexpected or surprising grounds. Levinson v. Washington Horse Racing Commission, 48 Wn. App. 822, 829, 740 P.2d 898 (1987). These same principles apply in the federal courts:

It is well-established that ‘[a] party is entitled . . . to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed, the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation.’ Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 288 n.4 (1974).

Williston Basin Interstate Pipeline Co. v. Federal Energy Regulatory Commission, 165 F.3d 54, 63 (D.C. Cir. 1999) (emphasis added). In short, agency decisions may be based only on matters that are fully disclosed and fairly litigated. City of Marysville v. Puget Sound Air

Pollution Control Agency, 104 Wn.2d 115, 120, 702 P.2d 469 (1985) (citation omitted).

Based on these well-established principles of due process, DaVita was entitled to full and accurate notice of each criterion against which its CON application would be evaluated and subsequently reviewed in an administrative hearing. It was entitled to know the issues or grounds “on which the decision [would] turn” so that it could fully prepare for and defend its CON. Id. This, however, did not happen and as a result, DaVita’s CON was revoked without due process.

2. The HLJ’s Post-Hearing Adoption and Application of New CON Tie-Breaking Criteria Deprived DaVita of Its Right to Full Notice and Opportunity to Be Heard

Having been denied the CON, OPKC requested an adjudicative proceeding and identified the issues to be addressed in the appeal. AR 001-033. The adjudicative hearing proceeded before the HLJ based on these issues. As intervenor, DaVita prepared for those same issues, as did the Program. As stated, since the Program had taken the agency action of issuing the CON to DaVita (and not OPKC), it had the responsibility to defend its action in the adjudicative proceeding.

The HLJ could not revoke DaVita’s CON using different criteria than the Program without first providing DaVita full pre-hearing notice of the criteria that could form the basis for that decision, as well as the opportunity for a meaningful hearing on those criteria. DaVita, however, did not receive these due process rights because at the end of the hearing, the HLJ issued a written decision applying wholly new criteria to DaVita’s

and OPKC's applications. The standards varied widely from those set out in the Program's Analysis as well as the previous standards and practices of the Program. Again, an "agency may not change theories in midstream without giving respondents reasonable notice of the change." Yellow Freight System Inc. v. Martin, 954 F.2d 353, 357 (6th Cir. 1992) (authority quoted in case omitted). The HLJ's post-hearing findings and order obviously did not provide DaVita any notice or opportunity to prepare for the change in criteria. Id.; see also In re Cross at 382.

*a. The HLJ Violated the Department's CON Rules*

The HLJ not only violated due process by basing her decision on information and factors beyond those prescribed, published and previously relied upon by the Program, but in so doing she also violated the Department's rules. Under chapter 70.38 RCW and chapter 246-310 WAC, the Program must publish the information it prescribes for a CON application and may not request any information it has not identified in its regulations or other publications. See RCW 70.38.115(6) and WAC 246-310-090(1)(a)(i), (d). Additionally, the Program's review of CON applications and determinations must be based on whether the proposed project meets the four CON criteria set forth in WAC 246-310-210, WAC 246-310-220, WAC 246-310-230 and WAC 246-310-240. See also WAC 246-310-200(1). Finally, the Program must state in writing its findings on whether an application meets these criteria and include the basis for the decision, which the Program does by issuing its analysis

along with a CON. WAC 246-310-490(1)(a); see also WAC 246-310-490(1)(c).

Since the Secretary has delegated to the Program the authority to issue a CON on behalf of the Department, simple logic dictates that the HLJ's review of the grant or denial of a CON must be limited to whether the written findings and decision made by the Program are supported by a preponderance of the evidence. See WAC 246-310-500; see also WAC 246-10-606. To allow an HLJ to impose new standards, after the hearing appealing the Program's determination, would constitute a violation of the Department's own regulations, as well as strict standards of due process. See In re Cross at 382; Harris v. Blodgett at 1287.

*b. The HLJ Imposed New CON Review Criteria After the CON was Issued and After the Hearing*

The Program found that DaVita was the superior applicant based on factors discussed in detail in DaVita's opening brief. The HLJ, however, rejected these findings by the Program, revoked DaVita's CON, and found OPKC was the better applicant based on six totally new criteria that were not addressed in the applications and not argued during the hearing. See AR 729-36.

One of these new factors unilaterally invented by the HLJ, the isolation unit criterion, can be summarily rejected since DaVita's application specifically stated that its proposed facility would include an isolation unit. This has been conceded by OPKC and the Department. AR 1045. Thus, not only did the HLJ err in making this a criterion, but her

finding illustrates the very reason HLJs are not allowed to establish such new criteria. The HLJ is the quasi-judicial reviewer of Program decisions. She lacks the programmatic and regulatory knowledge to change Program policies or impose new or different criteria simply because she subjectively believes her view is better. It is the HLJ's job to ensure the Program's CON decisions are supported by a preponderance of the evidence. As the HLJ concedes, her role is "to assure that the procedural and substantive rights of the parties are protected and that the evidence supports the Program's analysis/decision." AR 739.

In this case the HLJ decided entirely on her own that an isolation unit should be required and should be a tie-breaker. She obviously did so without a complete review of the applications and without the isolation unit ever being raised by the Program or the parties as an issue. The Program had carefully and thoroughly reviewed the record and knew DaVita planned to have a "100 square foot" isolation unit. See AR 1045. This error could have been avoided if the HLJ had kept to her role as the adjudicator and properly limited her review to whether OPKC had met its burden of showing that the Program's decision was not supported by a preponderance of the evidence.

The HLJ's unwarranted and unnecessary decision to reject the Program's findings, established review criteria, and policy in favor of a new "isolation station" standard is the most egregious example of how DaVita was denied procedural due process. DaVita did not receive pre-hearing notice of this departure and therefore was precluded from

addressing this new criterion. If it had been given such notice, DaVita would have readily pointed to the section of its application materials containing its plan for an isolation unit.

3. DaVita Did Not Have Sufficient Notice of the HLJ's Newly-Established Criteria to Satisfy Due Process

The Department's claim that the six criteria adopted by the HLJ were identified and argued during the adjudicative proceeding<sup>4</sup>, is both untrue and beside the point. Indisputably, these six new tie-breaking criteria were not identified prior to the hearing, thus preventing DaVita from fully litigating them at the hearing. Again, parties to governmental adjudicative proceedings must be apprised of the standards that applied to the agency action before the hearing so that the issues can be prepared and fully litigated at the hearing. Williston, 165 F.3d at 63. Each of the five remaining criteria (in addition to the isolation station discussed above) adopted by the HLJ failed to meet this fundamental due process requirement.

a. *Simplistic Examination of Projected Total Costs*

Neither the Department nor OPKC can point to a projected operating expense comparison criterion in the Program's CON review methodology. As the Department previously pointed out to the HLJ, it has long been the Program's practice to examine costs simply to determine financial feasibility:

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<sup>4</sup> See Department Brief at 23.

The Program does not take the simplistic position that the CN should be awarded to the applicant who projects lower costs. As DaVita points out, the Program has no reason to believe that higher facility costs translate into higher charges to patients. The Program examines costs simply to determine whether a project is financially feasible. ...

In any event, for reasons pointed out by DaVita, the simplistic cost comparison undertaken by the HLJ fails to take into account the many differences in the two applications—including services and patient volumes—that would explain the differing costs.

AR 430, 431.

The criterion created by the HLJ involved a simplistic comparison of pro forma operating costs as the tie breaker even though the Program had determined that such operating costs are not comparable. DaVita had no opportunity to address this criterion. Even OPKC was unaware that a pro forma cost comparison was a tie-breaking factor, as shown by the fact that OPKC did not even make the argument in its post-hearing brief. The HLJ's decision after the hearing to make simplistic cost projections a criterion for determining which of two applications is superior denied DaVita the notice required by due process.

*b. Imposition of a maximum 20-minute drive standard*

Before and during the hearing, the Program took the position that what is an acceptable drive time varies from area to area. AR 434, 1898-99, 2069-70; see also AR 272. The Program had not established a definite drive time standard and instead evaluated patient access on a case by case basis, taking into account a variety of factors, only one of which was drive time. As the Program stated:

However, a bright-line 20-minute standard has not been adopted by the Department, and no evidence supports such a standard in this case. In particular, no evidence exists that patients from Bremerton, especially from the city's north section, would not drive slightly longer than 20 minutes in order to access a preferred facility in Poulsbo. In adopting a hard-and-fast 20-minute standard, the HLJ went beyond the record and failed to defer to the Program's expertise and experience on the 'choice' issue.

AR 434.

The HLJ exceeded her authority in adopting a standard that is such a significant departure from the experience-based determination by the Program that no such bright line should be set. The Program had not asked the applicants to undertake any analysis of the number of patients who would be within a 20-minute drive because it had no idea the HLJ would usurp its authority and adopt this new standard. What's worse, the HLJ adopted this 20-minute drive time standard without giving the Program or DaVita any notice that this would now become the applicable criteria. Since DaVita and the Program did not know that this potentially was going to be a deciding factor prior to the beginning of the adjudicative proceeding, they could not develop and present evidence as to what the impact of a 20-minute drive time would be on patients in the service area.

*c. Comparison of projected commercial rates*

The Program argued on reconsideration that the HLJ should not adopt speculative commercial rates as a tie-breaker. The Program had never asked applicants to project their commercial rates:<sup>5</sup>

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<sup>5</sup> The Program's CON application asks only for "Sources of patient revenue (Medicare, (continued . . .))

The Program does not require an applicant to identify commercial rates. As DaVita points out, rates are not accurately predictable because of the unknown payer mix for a new facility, a mix which significant (sic) influences rates . . . As it routinely does on applications, the Program in evaluating financial feasibility examined DaVita's 'gross revenue' projections and found them reasonable in light of its experience on other applications. Any suggestion that DaVita's rates are too high is complete speculation.

AR 431 (footnotes omitted). The Program therefore does not attempt to project future commercial rates in order to assess the financial feasibility of a proposed project because they are unpredictable. Id. DaVita did not provide projected rates because the Program does not request or consider this information. As stated, the provisions of chapter 70.38 RCW and the Department's own regulations provide that CON decisions can only be based on information requested (and published) by the Department. RCW 70.38.115(6); WAC 246-310-090(1)(a)(i); (d). Thus, the fact that OPKC may have provided this information regarding its own commercial rates in its rebuttal materials is irrelevant. See OPKC brief at 37-38.

Not only was due process denied when the HLJ adopted - post-hearing - projected rates as a criteria, her conclusion that OPKC's calculations showed DaVita's rate would be higher was wrong.<sup>6</sup> DaVita's commercial rates have still not been established because its commercial contracts have not been negotiated. See AR 1772. The HLJ had

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(. . . continued)  
etc.) with anticipated percentage of revenue from each source." AR 1176.

<sup>6</sup> See the detailed discussion at pages 35-36 of DaVita's opening brief.

absolutely no accurate way of determining these rates. If this is now a criterion, DaVita had a due process right to provide its estimated rates to the Program and to be advised that the criteria would be at issue in any subsequent adjudicative proceeding.

*d. Comparison of estimated facility opening dates*

The HLJ also summarily decided to use DaVita's and OPKC's respective projected opening dates as a criterion for determining the superior application. The use of the opening date of the facility has also never been identified by the Program as a CON review criterion. Neither DaVita, nor any other applicant, could have anticipated that the opening date would be considered as a criterion since the CON application process is based on three-year projections and the corresponding requirement that the proposed facility be fully operational within two years. RCW 70.38.125. Indeed, the wisdom of the Program's approach is well illustrated by what occurred in this very case. Since OPKC's application was initially denied and DaVita's granted, OPKC's estimated start date of July 2004 had come and gone by the time the administrative hearing was held in October 2004.<sup>7</sup> AR 428–30. Thus, no evidence was submitted showing OPKC would actually have opened its facility earlier than DaVita, especially when DaVita had the CON and several months (before the HLJ reversed the CON) in which to prepare for the opening of its own

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<sup>7</sup> The adjudicative proceeding was held October 4 and 7, 2004, and the HLJ issued her decision on February 28, 2005.

facility. The Program's policy not to consider opening dates as a factor to be used in comparing competing applications is based on its extensive experience. Estimated opening dates have nothing to do with determining which of two applicants is "superior" pursuant to WAC 246-310-240(1). Indeed, the Program even informed the HLJ that it has no authority to enforce projected opening dates because of the two-year implementation period provided in RCW 70.38.125. AR 428-29.

DaVita appropriately prepared for the adjudicative proceeding with no inkling that opening date would be a criterion at issue. DaVita simply had no notice or opportunity to attack the HLJ's post-hearing imposition of opening dates as a review criterion. This was a further denial of due process. See Harris v. Blodgett at 1287.

*e. Indications of support in the community*

As explained in DaVita's opening brief, the Program does not ask for indications of patient or community support in the CON application materials. Appellant's Opening Brief at 11. Indeed, the Department vigorously opposed the HLJ's decision to rely on the handful of letters in support of OPKC as a tie-breaker. AR 427-428, 678-79; see also AR 421. DaVita did not and could not know that, for the first time, evidence of such support had become a tie-breaking criterion until the HLJ made it so in her decision.

4. The Authority Cited by Respondents Does Not Establish the HLJ May Adopt and Apply Her Own New CON Standards

The cases cited by Respondents do not support the proposition that the HLJ may create and apply new standards during or at the end of the adjudicative proceeding. State ex rel Standard Mining & Development Co. v. City of Auburn, 82 Wn.2d 321, 510 P.2d 647 (1973) involved (in part) whether the city's zoning ordinance should spell out specific standards for granting a special use permit. Standard Mining at 327. The court merely said that precise agency standards are not required in all administrative actions, including the grant of a special use permit. Id. at 330, 331. Moreover, the proposition in Standard Mining that OPKC points to is based on Barry & Barry, Inc. v. State Department of Motor Vehicles, 81 Wn.2d 155, 500 P.2d 540 (1972), a case that does not support the position taken by OPKC.

In Barry & Barry, the court established standards for determining when a legislative delegation of power to an administrative agency is constitutional. The court held:

. . . that the delegation of legislative power is justified and constitutional, and the requirements of the standards doctrine are satisfied, when it can be shown (1) that the legislature has provided standards or guidelines which define in general terms what is to be done and the instrumentality or administrative body which is to accomplish it; and (2) that procedural safeguards exist to control arbitrary administrative action and any administrative abuse of discretionary power.

Barry & Barry at 159. The case at bar has nothing to do with whether the Legislature's delegation of CON power to the Department was constitutionally valid. Rather, the issue here is whether, in an adjudicative proceeding to review the grant or revocation of a license, an administrative agency, and specifically the adjudicator designated by that agency, can retroactively apply standards for the decision in such a way that denies a party the opportunity to present evidence relevant to those new standards. Barry & Barry simply does not apply.

Similarly, this Court should reject the Department's strained effort to distinguish Levinson v. Washington Horse Racing Commission, 48 Wn. App. 822, 740 P.2d 898 (1987). The key holding in Levinson was that an administrative agency must notify a litigant of the issues and claims to be heard far enough in advance of the hearing so that the party has a reasonable amount of time to prepare its case. Levinson at 828. Without any explanation, the Department maintains that this holding does not apply to this case simply because this case is not "disciplinary" in nature. Washington State Department of Health's Response Brief ("Department brief") at 21-22. But there is nothing in Levinson that even suggests that the due process guaranties spelled out therein only apply to a proceeding involving discipline or misconduct. In both Levinson and this case, the result of the adjudicative proceeding has been the revocation of a license. There is no sound reason in law or policy to deny DaVita the same due process protections afforded to the appellant in Levinson.

5. The HLJ's Decision Must Be Reversed Because DaVita's Constitutional Due Process Rights Were Violated

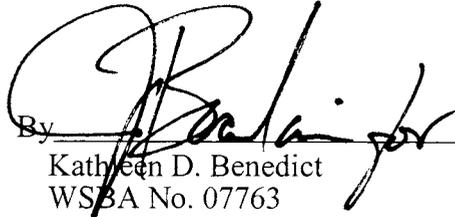
As the procedure leading to the HLJ's final order violated DaVita's constitutional procedural due process protections, this order should be reversed. RCW 34.05.570(3)(a). At a minimum, the matter should be remanded for additional proceedings giving DaVita the opportunity to present evidence on the new tie-breaker factors adopted by the HLJ at the end of the hearing. Alternatively, if the new factors are upheld as valid, the HLJ should be directed to remand the matter to the Program to gather evidence and produce its own analysis of the factors.

**III. CONCLUSION-RELIEF SOUGHT**

Because OPKC failed to prove the Program's decision was not supported by a preponderance of evidence, this Court should reverse the decisions of the superior court and the HLJ and order the issuance of the CON to DaVita. Alternatively, this Court should reverse the decisions below and remand the matter to the HLJ for a new hearing in which she (a) correctly assigns the burden of proof to OPKC, (b) applies the preponderance of the evidence standard of review and (c) applies the "tie-breaker" standards previously established by the Program. If the court decides that the HLJ may apply her new tie-breaker standards, it should remand to give DaVita the opportunity to produce evidence and otherwise be heard on those factors. In addition, if the HLJ finds that the Program failed to consider facts it was required to consider, then she should be ordered to remand the matter for further analysis by the Program.

RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of July, 2006.

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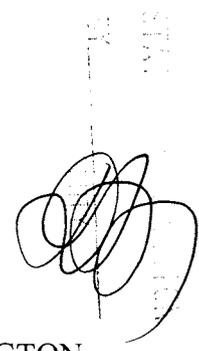
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COURT OF APPEALS

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COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

DAVITA INC.,  
Petitioner,

v.

WASHINGTON STATE DEPARTMENT  
OF HEALTH,  
Respondent-Appellee and,

OLYMPIC PENINSULA KIDNEY  
CENTER,  
Intervenor-Respondent.

NO. 342-49-9

**PROOF OF SERVICE**

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I, Jane Courage, hereby certify that on the 24<sup>th</sup> day of July, 2006 I caused to be served true and correct copies of the foregoing Appellant's Reply Brief and Proof of Service to the following person(s) in the manner indicated below:

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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.

  
\_\_\_\_\_  
Jane Courage