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No. 34249-9

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

DAVITA INC.,

Petitioner-Appellant

v.

WASHINGTON STATE DEPARTMENT OF HEALTH,

Respondent-Appellee,

OLYMPIC PENINSULA KIDNEY CENTER,

Intervenor-Respondent

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

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

1. The Thurston County Superior Court (“superior court”) erred in denying DaVita’s petition for review.
2. The Department of Health (“Department”) health law judge (“HLJ”) erred in finding Olympic Peninsula Kidney Center (“OPKC”), rather than DaVita Inc. (“DaVita”), is the superior applicant for a new dialysis facility in the North Kitsap/Jefferson County service area.
3. The superior court’s and the HLJ’s respective rulings denied DaVita due process of law.
4. The superior court and HLJ respectively erred by failing to apply the proper standards of review.

II. STATEMENT OF ISSUES

The following issues pertain to the Assignments of Error:

1. Whether the superior court erred in upholding the HLJ’s finding that OPKC should have been issued the certificate of need (“CON”) for a new dialysis facility in the North Kitsap/Jefferson County service area, instead of DaVita as the Department’s Certificate of Need Program (“Program”) had found.
2. Whether the HLJ denied DaVita due process of law by changing the criteria and standard of CON review after the administrative hearing was completed.
3. Whether the superior court erred by denying due process of law to DaVita when the HLJ changed the criteria and standards of CON review after the administrative hearing was completed.

4. Whether the superior court erred in upholding the HLJ's finding that the Program's determinations regarding the applicable "tie breakers" were not supported by substantial evidence.

5. Whether the superior court erred in finding substantial evidence supported the HLJ's decision reversing the Program's issuance of the CON to DaVita as the superior applicant.

6. Whether the superior court and the HLJ erred in finding that the tie-breakers of patient choice and price competition, which the Program determined made DaVita the superior applicant, were not based on proper facts.

7. Whether the superior court and the HLJ erred in finding the tie-breakers should have been lower cost, projected opening date and the presence of an isolation station, factors the Program had rejected.

8. Whether the superior court and the HLJ erred in finding the tie-breakers of lower cost, projected opening date and the presence of an isolation station were supported by substantial evidence.

9. Whether the superior court and the HLJ erred in finding that DaVita's ability to provide 10 stations to satisfy the 12 station need projected by the Program, while OPKC's application would support only 8 stations, was not a tie breaker in favor of DaVita.

10. Whether the superior court erred in finding no basis for remand even though the HLJ found the Program failed to obtain and review information the HLJ deemed necessary regarding costs and rates and then substituted her own opinion on these issues.

11. Whether the superior court and HLJ erred in finding that the HLJ could substitute her personal views for the technical expertise of the Program in deciding whether DaVita or OPKC is the superior applicant.

12. Whether the superior court erred in denying DaVita's petition for judicial review and thereby sustaining the HLJ's order that OPKC be issued the CON.

III. SUMMARY INTRODUCTION

The issue before the Court is whether the trial court erred in upholding the Health Law Judge's reversal of a decision by the Program granting a CON to DaVita, rather than OPKC, for a dialysis facility in Poulsbo. DaVita is the largest independent provider of dialysis services in the United States. Currently, OPKC is the only provider of such services in Kitsap County.

After extensive review and application of its customary standards, the Program found that, while both applications met the requirements for a CON, DaVita's was the superior application. OPKC appealed this determination. The HLJ reversed the Program's decision. In so doing, she applied factors not previously considered by the Program or fully litigated in the adjudicative proceeding and for which there was no basis in the record. She granted no deference to the expertise of the Program, totally substituting her own judgment for that of the Program.

By retroactively creating and imposing new standards and rules to be applied in granting a CON, the HLJ deprived DaVita of its

constitutional right to procedural due process of law. A CON is license and therefore a property right. Thus, DaVita had a right to know the factors that would be applied in determining whether its CON would be revoked and an opportunity to prepare to litigate those factors. Because it had no notice of these new standards the HLJ prevented DaVita from having a meaningful hearing and thus violated DaVita's constitutional right to due process.

The HLJ also erred by applying the wrong standard of review of the Program's decision to grant the CON to DaVita. The correct standard is set forth in WAC 246-10-606. The HLJ should have decided the appeal based on whether the Program had shown that a preponderance of the evidence supported its decision in favor of DaVita. The HLJ did not decide whether the Program had met this burden. Rather, she made an independent determination that OPKC was the superior applicant. In so doing, she refused to give any deference to the expertise of the Program.

Finally, the crucial factual determinations upon which the HLJ based her decision in favor of DaVita were not supported by substantial evidence when seen in light of all of the evidence in the record. These determinations also reflect the unprecedented extent to which the HLJ ignored the expertise and analysis of the Program and created new factors and tests that had no basis in the record.

IV. STATEMENT OF THE CASE

A. The Parties

DaVita was, at the time it filed its CON application, the second largest independent provider of kidney dialysis services in the United States. Clerk's Papers ("AR") 1262, 1007. DaVita provided dialysis services through more than 1,200 outpatient centers located in 32 states and the District of Columbia, serving approximately 41,000 patients. Id. It also provided acute inpatient dialysis services in 275 hospitals across the country. Id. DaVita owned and operated nine kidney dialysis facilities in the State of Washington. Id.

The Department's CON Program administers the issuance of CONs pursuant to chapter 70.38 RCW and chapter 246-310 WAC. OPKC operates kidney dialysis facilities in Bremerton and Port Orchard. AR¹ 756, 1007.

B. The Program's Comparative Review of DaVita's and OPKC's Certificate of Need Applications

DaVita submitted a CON application to establish a new 13-station dialysis facility in Poulsbo on August 5, 2003. AR 1166 – 1558. The application proposed to establish a dialysis facility with 12 in-center dialysis stations and one training station. Id. The stated capital expenditure associated with DaVita's proposed project was \$867,706. AR 1166.

¹ DaVita will identify pages in the Administrative Record by reference to the stamped page number, from 1 to 2248, preceded by "AR."

On August 1, 2003, the Program received an application from OPKC proposing to establish a dialysis facility, also to be located in Poulsbo. AR 752 – 982. OPKC requested 12 dialysis stations including an isolation station. AR 761. The capital expenditure associated with OPKC's project was stated to be \$921,703. AR 895.

The CON application process and kidney dialysis rules required OPKC and DaVita to project their respective facilities as fully utilized by the third year following the base year of application. See WAC 246-310-010; see also AR 1080. Thus, both applications were prepared based on their facilities meeting the need and the other CON criteria by year 2007. DaVita's application stated its proposed new Poulsbo facility would be operational in the second quarter of 2005 and OPKC projected its facility to be operational in July 2004 (based on a CON approval date of January 2004). AR 761, 1175.

Since the two CON applications were received by the Program within days of each other, the Program decided a comparative review was required and placed both applications under comparative review on November 6, 2003. AR 1559, 1763. The Program did not hold a public hearing on the applications since none was requested. AR 1763, 2060. The public comment period ended on December 11, 2003, and the Program's analyst, Randall Huyck, closed the record and began his comparative review of the two applications. AR 1763.

C. The CON Program Grants CON No. 1285 to DaVita

On May 21, 2004, the Program issued its Evaluation of the Certificate of Need Applications Submitted on Behalf of Olympic Peninsula Kidney Center Inc., Proposing to Establish a Twelve-Station Kidney Dialysis Treatment Facility in North Kitsap County and DaVita Inc., Proposing to Establish a Thirteen-Station Kidney Dialysis Treatment Facility in North Kitsap County (the “Evaluation”), granting a CON to DaVita for its proposed dialysis facility in Poulsbo. AR 1072–93. In the Evaluation, the Program first assessed the need for additional dialysis stations in the service area by applying the kidney dialysis need methodology set forth in WAC 246-310-280. AR 1079–84. The Program projected a need for 12 new kidney dialysis stations by year 2007, using Northwest Renal Network facility utilization data for the service area. *Id.* The Program then applied the prescribed utilization methodology and found OPKC’s application only supported an 8-station dialysis facility at the benchmark 80% utilization threshold rather than the 12-station facility for which OPKC applied. On the other hand, the Program found DaVita’s application supported a 10-station facility at the 80% utilization rate. AR 1080–81.

In addition to the need criteria, the Program’s Evaluation addressed the financial feasibility and structure and process of care criteria, applying the standards set forth in WAC 246-310-220 and WAC 246-310-230. AR 1084–93. The Program concluded that DaVita’s and OPKC’s applications each complied with these CON criteria but there was not a

need for two new kidney dialysis facilities in north Kitsap and Jefferson Counties. AR 1093.

The Program then evaluated the applications to identify which application was the superior alternative in accordance with the cost containment criteria in WAC 246-310-240. In this review, the Program analyzed need, patient choice, the potential for price competition, and OPKC's failure to express an appropriate provision for charity care. It concluded that DaVita was the best option for a new dialysis center in Poulsbo, based on each of those "tie-breaker factors". AR 1072-93. Since OPKC's application was not a superior alternative, the Program found OPKC did not meet the cost containment criteria in WAC 246-310-240. AR 1091-93.

The Program advised DaVita that it would be given a CON for a 10-station dialysis facility to be located in Poulsbo subject to two conditions, which DaVita immediately satisfied. AR 1758-59. On May 28, 2004, the Program issued CON No. 1285 to DaVita authorizing DaVita to establish a 10-station kidney dialysis center in Poulsbo. AR 1780-84. OPKC appealed the Program's decision to grant DaVita a CON but did not seek to stay CON No. 1285 during the appeal. See generally clerk's papers. Accordingly, DaVita began the process of constructing its needed dialysis facility having committed in its

application that its 10 stations would be operational by the second quarter of 2005. CP² 182–3.

D. The Adjudicative Proceeding

An adjudicative proceeding was held on October 4 and 7, 2004. AR 1886 – 2248. During the adjudicative proceeding, the Program’s analyst testified in support of his comparative review of the applications. He affirmed all of his findings, except for noting that OPKC’s application in fact did provide for charity care in its proposed budget projection pro forma. Other witnesses testified in support of their respective applications. AR 1886 – 2248.

The Department’s HLJ issued Findings of Fact, Conclusions of Law, and Final Order on February 28, 2005 (“First Final Order”), in which she concluded the Program’s analysis and reliance on need, price competition and patient choice as the tie-breaking factors in DaVita’s favor were not supported by the record and that OPKC’s proposed 8-station facility was the superior alternative to DaVita’s proposed 10-station facility. AR 351–73. The HLJ therefore reversed the Program’s issuance of CON No. 1285 to DaVita and reversed the Program’s decision to deny OPKC’s application for a kidney dialysis facility. Id.

E. The Program and DaVita Seek Reconsideration

After receiving the HLJ’s decision, the Program and DaVita each filed motions for reconsideration. AR 374–81, 372–73. The Program

² DaVita will identify pages in the Clerk’s Papers by reference to the page number assigned by the Thurston County Clerk, from 1 to 239, preceded by “CP.”

argued in its motion that the HLJ, in reversing the Program’s determination, “totally substituted her judgment on all factual legal issues regarding identification and analysis of issues.” AR 426. The Program also strongly objected to the HLJ’s adoption of tie-breaker new factors. AR 425–42. Specifically, the Program’s position before the HLJ was:

- Comparison of commercial rates and operating costs. The Program advised the HLJ that such “rates are not accurately predictable” and “any suggestion that DaVita’s rates are too high is complete speculation.” AR 431. The Program asserted the unreliability of rate projections and its policy to not require applicants to provide them. AR 430–31, 436–40, 732. The Program further pointed out that its practice is not to perform a summary examination of projected total costs and give the advantage to the applicant whose costs are lowest. *Id.* This, the Program stated, is due in part to the fact that “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.” *Id.*
- 20-Minute Drive Time Standard. In response to the HLJ’s adoption of a rigid 20-minute drive time standard (AR 727–28), the Program informed the HLJ that “a bright-line 20-minute standard has not been adopted by the Department, and no evidence supports such a standard in this case.” AR 434.

- Isolation Unit. The Program acknowledged that it made no finding regarding OPKC's planned isolation station. Both parties' applications planned to have isolation capability. Therefore, the Program did not consider this as an issue. AR 761, 955, 1045.
- Proposed Opening Date. Because of the unpredictability and delays in the issuance of CON decisions, the Program does not consider the facility's opening date as a factor, let alone the deciding factor in a comparative review. See AR 428–30, 679–80. The Program advised the HLJ that it had no authority to enforce estimated opening dates because an approved applicant has two years to fully implement a CON. AR 428–29, see also RCW 70.38.125.
- Support within the Community. The Program also told the HLJ that it has not considered patient letters as a basis for preferring one application over another. AR 427–30. The Program strongly opposed the HLJ's reliance on the patient letters submitted in support of OPKC. AR 421, 427 – 728, 678–79. The Program first pointed out that OPKC's dialysis facilities provided services to over 100 patients but only four had submitted letters. Id. The Program then noted DaVita does not have a facility in the service area and thus it would not have had any patients to send letters. Id. The Program also reiterated its finding that both applicants provide quality services and that this was not contested by either applicant or reversed by the HLJ. AR 12, 25 28, 669.

F. The HLJ's Reconsideration Decision

On May 26, 2005, following reconsideration, the HLJ issued Amended Findings of Fact, Conclusions of Law, and Final Order (“Order”) that substantially revised her initial Final Order but retained her reversal of the Program’s grant of CON No. 1285 to DaVita and grant of the CON to OPKC. AR 722–46. Specifically, the HLJ rejected the Program’s analysis and conclusions that DaVita’s application was superior because it would give patients a choice of providers and introduce the potential for price competition, thereby reducing the cost of dialysis treatment in Kitsap and Jefferson Counties. AR 729–31. In addition, the HLJ made no findings regarding DaVita’s superior ability to satisfy 10 of the 12-station need. See AR 723–26.

Instead, the HLJ based her decision to revoke DaVita’s CON and give it to OPKC on three totally new factors that were not addressed in the applications and not argued in the hearing, and three other new factors that were not addressed in the applications but were argued by OPKC at the hearing. See AR 729–36. The first three factors were not disclosed to DaVita and the Program until they received the HLJ’s first order dated February 28, 2005. These were: (1) a simplistic examination of projected total costs to determine which applicant’s projected costs were lower (AR 733–34); (2) the imposition of a 20-minute maximum drive-time standard (AR 727–28); and (3) DaVita’s alleged absence of an isolation station. AR 732–33.

The three other new factors relied upon by the HLJ, were first raised by OPKC in its prehearing brief. These were: (1) a comparison performed by OPKC of the applicants' projected commercial rates, information which the Program did not request (AR 729–31); (2) a comparison of estimated facility opening dates (AR 735–36); and (3) indications of support in the community (AR 729, 738). DaVita did not address these factors in its application as the Program did not request such information and had not considered these factors to be of significance in previous CON reviews. See generally, AR 1166 – 1558.

G. DaVita's Petition for Judicial Review and the Decision of the Superior Court

DaVita appealed the HLJ's order revoking DaVita's CON and issuing a CON to OPKC for its proposed 8-station kidney dialysis facility in Poulsbo. AR 746. The hearing on DaVita's Petition for Judicial Review was argued before Judge Tabor on November 18, 2005. By order dated December 7, 2005, the court denied the Petition. CP 237–39. This appeal followed.

V. STANDARD OF REVIEW

The applicable standard for judicial review following an adjudicative proceeding is found in RCW 34.05.570(3). On review of administrative decision, this Court sits in the same position of the superior court and reviews legal conclusions de novo to determine whether the administrative law judge correctly applied the law, including whether the factual findings support the legal conclusions. Timberlane Mobile Home

Park v. Washington State Human Rights Comm'n., 122 Wn. App. 896, 900, 95 P.3d 1288 (2004). The review of the HLJ's determination in this matter is specifically governed by the provisions of RCW 34.05.570(3)(a) – (f) and (h) – (i).

VI. ARGUMENT

A. **DaVita's Procedural Due Process Rights Were Violated Because the HLJ's Retroactive Creation and Imposition of New Standards and Rules for Granting a CON Deprived DaVita of Its Right to a Meaningful Hearing**

DaVita's constitutional right to a fair hearing was lost when the HLJ denied it a meaningful opportunity to present evidence with knowledge of the tie-breaker factors the HLJ would be applying. In order for a hearing to be meaningful, a party must be able to present evidence and witnesses with knowledge of the standards and regulations by which the evidence will be judged. Prior to receiving the HLJ's First Final Order, DaVita had no notice whatsoever that the HLJ would adopt the "tie-breakers" described above. See AR 351–71. The first opportunity DaVita and, for that matter, the Department, had to address these issues was by motions for reconsideration. AR 374–81; 387 – 424; 372–73 and 425–42. By then, of course, it was too late for DaVita to include information regarding these factors in its initial application or to submit evidence to address the factors at the hearing.

In addition and also as explained above, the HLJ added three other new factors which the Program did not address in its comparative review but which OPKC asserted in the hearing. See AR 729–36. These were factors that the Program had never before considered and, therefore,

DaVita made no attempt to address in its application. See AR 752 – 885. Although OPKC argued these issues at the hearing, the Program opposed the introduction of these standards and evidence and argued the proceeding should be generally confined to the application record. Again, this application record did not address these factors as possible tie-breakers. Thus, DaVita did not have an adequate opportunity to present evidence or otherwise respond to these factors at the hearing.

1. Requirements for Establishing a Procedural Due Process Violation

The law governing the constitutional right to due process of law is well-settled in Washington:

The federal due process clause requires that 'deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S. Ct. 652, 94 L. Ed. 865 (1950); U.S. Const. amend. XIV, sec. 1. Notice must be 'reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' Olympic Forest Prods., Inc. v. Chaussee Corp., 82 Wn.2d 418, 422, 511 P.2d 1002 (1973) (quoting Mullane, 339 U.S. at 314). The form of due process may vary and the court should use a balancing test to decide if procedures are sufficient to satisfy due process. Mathews v. Eldridge, 424 U.S. 319, 334-35, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). The court must consider three factors: (1) The private interest affected by an official action, (2) the risk of erroneous deprivation of such interest through the procedures used and the value of additional procedural safeguards, and (3) the governmental interest, including the cost and administrative burden of additional procedures.

Guardianship Estate of Keffeler ex rel Pierce v. State, 151 Wn.2d 331, 342-43, 88 P.3d 949 (2004).

In determining the nature and extent of the process required, “the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” City of Redmond v. Moore, 151 Wn.2d 664, 670, 91 P.3d 875 (2004).

This procedural due process guaranty includes ‘an opportunity to know the claims of opposing parties and to meet them; and a reasonable time for preparation of one's case.’ Rody v. Hollis, 81 Wn.2d 88, 93, 500 P.2d 97 (1972), quoting Cuddy v. Department of Pub. Assistance, 74 Wn.2d 17, 19, 442 P.2d 617 (1968).

Levinson v. Washington Horse Racing Commission, 48 Wn. App. 822, 828, 740 P.2d 898 (1987).

2. DaVita has a Property Right in the CON as a License to Operate a Lawful Business

Under the CON regime, “health care providers wishing to establish or expand facilities or acquire certain types of equipment are required to obtain a CON, which is a nonexclusive license.” St. Joseph Hospital v. Department of Health, 125 Wn.2d 733, 736, 887 P.2d 891 (1995). Kidney dialysis facilities are among the types of facilities for which a CON is required. WAC 246-310-020(1)(a)³; WAC 246-310-280. Thus, in order to operate a dialysis center in Poulsbo, DaVita must have a CON. A CON would confer a license for DaVita to build and operate a dialysis facility.

“Property rights” are defined very broadly for purposes of a procedural due process analysis.

³ WAC 246-310-020(1)(a) requires a CON for a new “health care facility.” Health care facility is defined to include a kidney disease treatment center. WAC 246-310-010.

‘Property is a word of very broad meaning and when used without qualification may reasonably be construed to include obligations, rights and other intangibles as well as physical things.’ . . . And property ‘. . . is a term of broad significance, embracing everything that has exchangeable value, and every interest or estate which the law regards of sufficient value for judicial recognition.’ ‘The right to operate a lawful business is a property right.’

Lee & Eastes v. Public Serv. Comm., 52 Wn.2d 701, 704, 328 P.2d 700 (1958) (emphasis added) (citations to quotes omitted). Thus, DaVita’s right to operate a kidney dialysis business is a property right.

Moreover, the Department initially granted DaVita a license to build and operate the Poulsbo dialysis center. Thus, the adjudicative proceeding was essentially a license revocation proceeding. “The Washington Supreme Court has long required that licensing commissions may only revoke a license if they comport with procedural due process requirements.” Levinson at 828. Quite obviously, then, licenses constitute property rights and licensees such as DaVita are entitled to due process in an administrative proceeding that may result in revocation of the license.

3. The HLJ Deprived DaVita of Its Property Interest and Failed to Provide DaVita a Meaningful Opportunity to Be Heard by Adopting and Applying New CON Review Standards After the Hearing Ended

By adopting brand new dialysis facility CON review standards when the hearing was completed, the HLJ, in essence, changed the rules at the end of the game. DaVita simply had no opportunity to adduce evidence or present argument until it was too late. As such, DaVita’s right to a meaningful opportunity to be heard was destroyed.

This situation is analogous to the facts in Levinson. In Levinson, the plaintiff appealed the Horse Racing Commission's revocation of the plaintiff's racehorse ownership license. The Commission originally notified Levinson that it was revoking her license because her husband had been convicted of a felony. Levinson at 824. At the hearing, the Commission asserted for the first time that Levinson's license should be revoked because she had misrepresented her marital status in her application. Id. at 829. Although Levinson was able to present evidence on the issue at the hearing, the Court of Appeals ruled that the Commission's failure to provide Levinson with notice that the misstatement was to be an issue violated Levinson's constitutional right to due process of law. The Court held that notice "must be sufficiently accurate to prevent the case from being decided on unexpected grounds if undue surprise or prejudice would result." Id. at 829. The Court observed that, had Levinson known of the issue prior to the hearing, she could have presented evidence on her behalf on this issue. Id.

The due process violation in the case at bar is even more egregious. Unlike Levinson, DaVita had no chance whatsoever to present evidence on several of the new tie-breaker standards created by the HLJ.

'Due process requires that the Board base its findings against a party only upon matters brought to the party's attention in the complaint or during the administrative hearing, and that are fully litigated.' NLRB v. Temple Estex, Inc., 579 F.2d 932, 936 (5th Cir. 1978).

Marysville v. Pollution Control Agency, 104 Wn.2d 115, 120, 702 P.2d 469 (1985) citing 3 K. Davis, Administrative Law 14:11, at 48 (2d ed.

1980). None of the HLJ's critical tie-breaking factors were brought to the attention of DaVita in any of the pre-hearing materials or were fully litigated.

The statutory and regulatory regime governing the CON process clearly contemplates that the Department is to manage the approval of health care facility applications in a planned, orderly fashion, consistent with identified priorities. RCW 70.38.015(2). Essential to attainment of that goal is orderliness and predictability that allows applicants to know the required information and how applications will be evaluated. This is why the Department must "specify information to be required for certificate of need applications." RCW 70.38.115(6). The Department must publish the information it prescribes for a CON application. WAC 246-310-090(1)(a)(i). It may not request any information not so prescribed and published. WAC 246-310-090(1)(d). And, it is a ground for reconsideration of an adjudicative decision in a CON proceeding if the final order is "inconsistent with current department practice." WAC 246-310-704(2)(b).

The Department, which now must rather awkwardly defend a decision it vigorously attempted to overturn in its motion for reconsideration of the HLJ's decision, agrees that the HLJ's final order was inconsistent with the current practices of the Program. As the Department observed, the HLJ ignored the Program's current practice and "totally substituted her judgment on all factual legal issues regarding identification and analysis of issues." AR 426. The Program

demonstrated its own belief that the HLJ's new standards were inconsistent with Program practice and standards. AR 425-442. By creating entirely new tie-breaker factors that were inconsistent with standards developed and utilized by the Program, the HLJ undermined the entire CON application process.

DaVita submitted its CON application based on the information requested by the Program and the standards that the Program had developed and utilized based upon years of CON review and dozens of dialysis facility applications. "The Program evaluates numerous CN applications each year, including numerous kidney dialysis applications. It therefore has vast experience in identifying and evaluating relevant issues." AR 676. The Program applied these standards in reaching its decision to grant the CON to DaVita. DaVita developed evidence and testimony and otherwise presented its case in the adjudicative hearing on the understanding that the well-established, pre-existing standards would still apply. Only at the end of the hearing, after all of the evidence had been presented and post-hearing briefs had been submitted by the parties, did DaVita learn by reading the HLJ's decision that the rules had changed.⁴ DaVita had no opportunity to present evidence applicable to the new standards, a requirement for meaningful participation in the hearing, since the hearing had already been completed. This violated DaVita's

⁴ The HLJ's surprise creation and application of new standards at the end of the proceeding is analogous to a baseball umpire announcing at the end of the ninth inning that the rules had changed and the team with the fewest runs would be the winner.

constitutional rights to procedural due process under the 14th Amendment to the United States Constitution and Article 1, Section 3 of the Washington State Constitution.

RCW 34.05.570(3) requires the Court to grant relief from an agency order such as the one in this case where (a) the order violates a party's constitutional rights; (b) the order is outside of the statutory authority of the agency; or (c) the agency has engaged in unlawful procedure or process. RCW 34.05.570(3)(a)-(c). Under any or all of these standards, this Court should reverse the order of the HLJ due to the violation of DaVita's rights to due process of law.

B. The HLJ Applied an Erroneous Standard of Review

The HLJ's application of an erroneous standard of review can be seen in her conclusions of law in the four paragraphs in which she attempts to identify the "burden of proof." In the first paragraph, she indicates that the HLJ "must take into consideration the experience/expertise that support Program's decision." AR 739. In the following paragraph, she then states "[t]he burden of proof in an adjudicative proceeding regarding a CON is preponderance of the evidence," citing WAC 246-10-606. She follows this statement with the conclusion that "[t]he Program's decision is not reasonable in light of substantial evidence to the contrary that OPKC is the 'superior' applicant." AR 739.

This conclusion is followed by paragraph 2.8, which states "the agency head or its designee may substitute her own conclusions for those

by a Program or Presiding Officer who issued an ‘initial’ decision.” AR 739. In support of this statement, she cites Tapper v. Employment Security Dept., 122 Wn.2d 397, 404 (1993) and Towle v. Washington State Dept. of Fish & Wildlife, 94 Wn. App. 194, 206 (1999), as well as RCW 34.05.461(1)(c). The HLJ further maintains “[t]hat expertise/specialized knowledge may be used by a presiding officer issuing a final order for the agency head or by a presiding officer/program issuing an ‘initial’ decision.” AR 740.

Finally, in paragraph 2.9, the HLJ states that “[t]he APA and its rules make no reference to agency presiding officers deferring to agency Program expertise,” and that while this does not preclude the HLJ from “relying on the Program’s expert opinion as is done with expert evidence in any case,” she will assess the weight given the Program’s opinion “as she does in other Department of Health cases where expert opinion is presented.” AR 740.

These conclusions of law show both confusion and a total misunderstanding of the adjudicative and judicial review provisions of the APA. Compare RCW 34.05.410–.476 and RCW 34.05.570(3)(d). Under WAC 246-10-606, the HLJ’s order must “be based on the kind of evidence upon which reasonably prudent persons are accustomed to rely in the conduct of their affairs.” This provision further states that in license application cases, like an appeal from the denial of a CON application, the burden is on the applicant to establish that the applicant met all of the applicable criteria. However, in this case, both DaVita and OPKC are

“applicants” and thus the literal reading of WAC 246-10-606 does not apply. Moreover, the Program found that both OPKC and DaVita’s applications, standing alone, met the criteria but, since there was a need for only one facility, the two applications were placed under comparative review. Again, the burden of proof provision does not directly address a comparative review where two applicants seek the same license.

Nevertheless, since OPKC was the “appealing” applicant, under the provisions of WAC 246-10-606, it carried the burden of showing that a preponderance of the evidence did not support the Program’s decision to issue the CON to DaVita rather than OPKC. The preponderance of the evidence standard only requires that the Program’s evidence establish the proposition at issue is more probably true than not true. Mohr v. Grant, 153 Wn.2d 812, 822, 108 P.3d 768 (2005). It is clear from the HLJ’s findings that she did not view the evidence in terms of this standard and reached no conclusion regarding the preponderance of evidence.

Additionally, while the HLJ states in paragraph 2.7 of the Order that the preponderance of the evidence is the standard for review, she then misstates how it should be applied. Rather than determining whether there is a preponderance of evidence in the record to uphold the Program’s determination, she imposes a substantial evidence standard and finds that substantial evidence shows OPKC is the superior applicant. AR 739. A substantial evidence is not appropriate under the required preponderance of evidence standard.

The HLJ also wholly misunderstands the distinction between a final agency order and an initial decision, which are the two types of decisions “presiding officers” like the HLJ can make following adjudicative proceedings. See RCW 34.05.461 and 34.05.464. The Program’s decision to grant the CON to DaVita is not an initial order. It is instead the threshold agency action that can be appealed in an adjudicative proceeding. See RCW 34.05.010(3) (definition of “agency action”) and RCW 34.05.452 (a license applicant may contest an agency’s decision to deny a license by requesting an adjudicative proceeding). The Secretary of the Department, as the agency head, has delegated to HLJs the final decision making authority in CON adjudicative proceedings. AR 423. Thus, there is never an initial order issued in a CON adjudicative proceeding.⁵ The HLJ’s Conclusion of Law paragraph 2.8 is therefore based on an erroneous reading of the APA and a failure to understand that she, like all of the Department’s HLJs, has been delegated final decision-making authority by the Secretary. See AR 739–40.

The HLJ further states as a conclusion of law that the APA does not require the HLJ to give any deference to the Program’s expertise, citing RCW 34.05.461(3), and that the Program’s staff should be treated the same as any other expert witness. AR 740. Yet, RCW 34.05.461(3) says nothing about denying deference to the expertise of the agency program administrators and regulators. In direct contrast, however,

⁵ See footnote 4 infra.

subsection 5 of this same provision plainly states that deference should be afforded the regulators making pre-adjudicative decisions. RCW 34.05.461(5) (“[w]here it bears on the issues presented, the agency’s experience, technical competency, and specialized knowledge may be used in the evaluation of evidence.”).

Finally, the HLJ criticizes the Program for making determinations based upon “common sense” and its “experience/expertise” to support its conclusion that DaVita’s application will result in patient choice and improved quality care and better price competition.” See AR 730–31. The HLJ erroneously denigrates the Program’s common sense and experience and expertise. The Program’s analyst made his assessment of the DaVita and OPKC applications based on experience and expertise gained from reviewing 28 CON applications, including 14 kidney dialysis applications. AR 1979. RCW 34.05.461(5) requires the “common sense” determinations of the Program based on the Program’s experience and expertise to be given deference.

The HLJ’s conclusions of law regarding the burden of proof, the deference to be given the Program’s analyst’s experience, technical competency, and specialized knowledge, and her ability to substitute her own views and opinions for the expertise of the Program’s analyst are without support in the APA, case law, or the record. In short, the HLJ fails to understand her role, the evidentiary weight to be given testimony, and the appropriate burdens of proof. As a consequence, she has collapsed her role as the adjudicator with that of the agency decision maker in

violation of the provisions and philosophy of the APA and supporting case law. These critical conclusions of law regarding the standard of review are clearly erroneous and beyond the authority of the HLJ.

C. The HLJ's Order Is Not Supported by Evidence which is Substantial When Viewed in Light of the CON Program's Review Record and Evidence from the Hearing

DaVita also seeks review of the HLJ's decision under the substantial evidence standard set forth in RCW 34.05.570(3)(e). This subsection requires the Court to grant relief if the "order is not supported by evidence that is substantial when viewed in light of the record as a whole." Substantial evidence has been defined as evidence in sufficient quantum to persuade a fair-minded person of the truth or correctness of the agency order. Borschart v. Department of Employment Security, 123 Wn. App. 257, 95 P. 3d 356 (2004). Affordable Cabs, Inc. v. Department of Employment Security, 124 Wn. App. 361, 101 P. 3d 440 (2004). Although the HLJ's task during the administrative hearing was to determine whether the CON Program's decision was supported by the preponderance of the evidence, as explained above, the HLJ instead made wholly discretionary decisions, substituting her judgment for the judgment of the CON Program, despite a record replete with documentation upon which the CON Program relied in making its determination. Again, much of the "evidence" upon which the HLJ based her findings was not even in the CON Program's review record or introduced into evidence at the hearing. This is well-demonstrated by comparing the HLJ's findings with

the actual testimony and evidence provided in the record or at the hearing.

The HLJ states as a finding of fact:

A second provider in reasonably close proximity to the existing Bremerton facility would provide a choice between two providers to the dialysis patient. But a new Poulsbo facility will be approximately a 31 minute drive to the closest existing facility in Bremerton. . . . Therefore, granting the Poulsbo CON to DaVita rather than Olympic *may* only provide a realistic choice to a small number of patients. It is unclear how many future patients will live or work between Bremerton and Poulsbo, but it is expected that the need in Kitsap County will increase therefore probably increasing the number of patients with a choice.

AR 727.

. . .

A ‘new’ provider in Poulsbo would only provide choice to those patients who either live or work in limited area between Poulsbo and Bremerton. . . . Only five of the thirty five Olympic patients identified by Olympic who will switch dialysis care to a new Poulsbo facility from the Olympic Bremerton Facility (because they live north of or closer to Poulsbo than Bremerton) are working. Of those working patients, three work north of Poulsbo and two work midway between Poulsbo and Bremerton. 10/7/04 RP at 58-9. Therefore only two of thirty five patients would have a realistic choice of providers as a result of their job location.

AR 728.

. . .

Population is denser between these two cities than north or west of Poulsbo, but evidence indicates that few existing patients would have a realistic choice due to the commute time.

AR 728–29.

The first obvious error is that the HLJ measured drive time distances from the dialysis center in Bremerton to the proposed facility in

Poulsbo, even though most of the patients live somewhere between these two cities. Quite obviously, no dialysis patient living between Poulsbo and Bremerton would first travel to the Bremerton center, then turn around and drive 31 minutes north to the Poulsbo center. Instead, the patient would drive directly to the Poulsbo facility from her home or place of work. Not surprisingly, none of the parties argued that a 31-minute drive time from center to center should be the measure.

The actual focus of the testimony and record was on OPKC's assertion that it expected 35 of the existing patients at its Bremerton facility would choose to transfer to its proposed Poulsbo center if granted the CON. Mr. Jeff Lehman, OPKC's Executive Director, testified that OPKC arrived at this number by looking at patient zip codes for home addresses and if a patient lived in the Poulsbo-Bremerton (North Kitsap) area, OPKC assumed the patient would prefer to have dialysis in the Poulsbo facility. AR 2157–58. Mr. Lehman also testified that this figure was based on a review of existing patients' zip codes, and not future patients. (“I didn't look forward. If we start looking forward, I know today there's a lot more than 35 patients there that could go to the North Kitsap facility.”) AR 2165.

Additionally, according to the testimony and the HLJ's finding, Poulsbo is only 18.6 miles from Bremerton, and Silverdale is approximately half way between the two cities.⁶ Yet, despite this

⁶ The HLJ's finding states that the distance between Bremerton and Poulsbo is “approximately 18.6 miles” and that the “population is denser between” Poulsbo and
(continued . . .)

relatively short distance and testimony that 35 OPKC patients had residences with zip codes in North Kitsap, the HLJ concluded “only two of thirty five patients would have a realistic choice of providers as a result of their job location.” AR 728. The HLJ does not, and cannot, explain what happened to the remaining 30-plus patients who live in the North Kitsap region.

Moreover, when the actual testimony is reviewed, it is readily apparent that the HLJ misunderstood what was said. The witnesses did not testify that only two of the 35 patients residing in the North Kitsap area would have a “realistic” choice of providers. What little testimony there was on this issue came from Robert Swartz, OPKC’s administrator, who testified regarding whether patients living in Bremerton (in addition to the 35 residing in the North Kitsap area) might also choose to have dialysis in Poulsbo because their place of employment is in the Silverdale area. Mr. Swartz testified:

A: . . . And of the 35 patients who would be served, actually, of 45 patients that fall into the Zip codes we looked at, all of the 35 identified are included in that 45. Five of the patients are employed. And of those five patients, none of them are employed south of Silverdale, which means their place of employment is at no closer to the Bremerton facility than it would be to the Poulsbo facility. And only two of the total patients are employed in Silverdale. The other patients are on the north side of Poulsbo, and are closer to Poulsbo than Silverdale.

Q: So there’s two employed in Silverdale and three north of Poulsbo?

(. . . continued)

Bremerton than elsewhere in the service area. AR 727.

A: Correct. And none in Bremerton or south.

AR 2229–30.

The Program’s analyst also testified regarding an exhibit he prepared for the hearing using Map Quest that showed “simply city center to city center, not dialysis proposed location to known location drive times.” CP 206–7. The analyst also testified that many patients from the relatively large-population area between Bremerton and Poulsbo would have a realistic choice of providers:

Similarly on the other side are those living in Port Townsend, or those living in the northern end of the Kitsap Peninsula may view a new facility in Poulsbo as a more attractive choice to other providers. I think depending where an individual lives and works colors how that choice is made, and the opinions of their nephrologist as well.

There is a sizable amount of people, looking at the population density now, you know, the darker the color on this map, the denser the population. The bulk of the population in this area lies in and around Bremerton and extending northward towards Poulsbo. I think there is a number of people in that area, if the population density is consistent with ESRD incidents, a number of people that would find OPKC Bremerton and any new Poulsbo facility, whether DaVita or Poulsbo, to be a convenient and perhaps desirable alternative.

AR 2028. The application record the analyst reviewed also contained 2003 data from OPKC that showed 89 dialysis patients live in Bremerton, Silverdale, Keyport, and Poulsbo. AR 434. Of those, 68 lived in Bremerton, including 31 in north Bremerton, 11 in Silverdale, and one in Keyport. Id. The Program found all of these patients would have a realistic choice between dialyzing at a Bremerton or Poulsbo facility, especially the 43 patients residing in north Bremerton, Silverdale, and

Keyport. AR 434. Again, the distance between Bremerton and Poulsbo is only 18.6 miles, nearly all on four-lane freeway. The Program realistically found that the relevant distance for determining where patients will likely travel to receive dialysis is measured from the patient's home or place of work, not from OPKC's Bremerton facility to the Poulsbo facility. Yet the HLJ measured patient choice by driving distance and travel time from city center to city center. The HLJ's finding is not based on substantial evidence or common sense.

The HLJ also gave no consideration to projections included in the record showing the number of patients in the area between Poulsbo and Bremerton will increase dramatically in the CON projection period of 2002 to 2007. During this period, the undisputed evidence showed the total number of Kitsap patients would more than double from 150 to 342. AR 434. Based on these projections, the Program reasonably anticipated that the number of patients residing between Bremerton and Poulsbo who have a realistic choice between dialyzing at either location would more than double by 2007. Id.

Finally, the CON Program found that providing patients a choice of providers in the north Kitsap/Jefferson County service area would be beneficial because:

For services such as kidney dialysis, services that treat patients with long-lasting chronic conditions, the relationship between the patient and the facility treating that patient is likely to be more personal and extensive than a patient's relationship with a provider of acute care or surgical services.

. . .

If, for some reason, a patient is not happy or comfortable with a provider of these services, the existence of an alternative provider of those services can be a significant benefit. The dependence of patients on their dialysis center, coupled with the factors concerning physician referrals to different providers depending on the individual needs of their patients discussed in the need section of this evaluation, leads the department to conclude that choice of providers is an appropriate consideration in evaluation of a Certificate of Need application.

AR 1778–79. The HLJ made no findings on these two factors — supported by undisputed evidence in the record — upon which the CON Program relied.⁷

- The HLJ states as a finding of fact:

In a recent decision the Program concluded that maximum or default time should be reduced from 30 to 20 minutes. . . This, of course, is all relative considering the population density and other factors. Although the Program has not consistently applied the 20 minute maximum drive time, 20 minutes is a reasonable maximum commute in the case at hand considering the distance between Poulsbo and Bremerton. A 20 minute commute standard limits the area between Poulsbo and Bremerton that would encompass patients with “choice” or in other words a reasonable commute time.

AR 727–28.

Data in the record, including maps submitted by DaVita, show the parameters of a 20-minute drive time from DaVita’s proposed Poulsbo facility. AR 1213–16. The Program submitted an exhibit at the hearing showing Map Quest distances and drive times from Poulsbo’s city center

⁷ In fact, the Program advised the HLJ in its motion for reconsideration that “[i]t would have been antithesis of good health care planning for the Program to have preserved OPKC’s Kitsap monopoly well into the future – and forego the substantial benefits of choice and competition – in order to potentially shorten commute times for some patients for several months in 2004-05.” AR 680.

to Bremerton's city center. AR 182, 2066-67. OPKC also submitted its patient distribution report. AR 794. These exhibits show virtually the entire region between Poulsbo and Bremerton would fit within even a restrictive 20-minute drive-time area, giving numerous patients a choice of providers. OPKC did not dispute the accuracy of these exhibits but the HLJ chose to ignore them in her findings.

In sharp contrast to the HLJ's imposition of a bright-line drive-time standard, the Program's analyst testified that he had reviewed 14 different dialysis facility applications and the CON Program has not taken a consistent position on drive times, choosing instead to review this factor on a case-by-case basis. AR 2083. The CON Program Manager, Janis Sigman, also testified to the absence of a bright-line drive-time standard and that the evaluation of facility proximity ". . . can vary from area to area."⁸ AR 1898.

Nor was contrary testimony given by OPKC's witnesses. Mr. Robert Swartz, OPKC's on-site administrator, testified regarding the 35 patients OPKC planned to transfer to the Poulsbo facility as follows:

They are closer, their residence is closer to the proposed DaVita facility than to either of the current OPK facilities. Driving times are shorter for the 35 patients. And in personal contacts with some of the patients by firsthand and through our social workers, contacts with the majority of patients located, patients in that 35, patients stated that

⁸ Notably, the HLJ, was forced to acknowledge the only Program decision referring to a 20-minute drive-time standard had, on appeal, been remanded for further evaluation and that "the Program has not consistently applied the 20 minute maximum drive time." AR 727 (fn. 2). She further acknowledged the drive-time analysis "is all relative considering the population density and other factors." AR 727.

because of the time savings, they would likely switch facilities.

AR 2222 (emphasis added). This testimony makes clear that OPKC is expecting 35 Bremerton patients to choose the Poulsbo facility without regard to maximum drive-times. In fact, nothing in the CON Program's record or in the hearing testimony suggested a 20-minute drive time standard should be imposed on either applicant. The HLJ did not, and could not, reference anything in the record where either OPKC or DaVita asserted that a 20-minute drive time was an appropriate standard for patients in the north Kitsap/Jefferson County service area. AR 727–28. The HLJ's maximum drive-time finding is not only unsupported by a preponderance of the evidence, it lacks support from any evidence.

- The HLJ states as a finding of fact:

The Program relies on its experience/expertise and common sense argument to support its conclusion that patient choice will probably result in improved quality care and better price competition, therefore lower prices resulting from two providers negotiating with HMOs/insurance companies. Ms. Sigman and Mr. Huyck admitted that they have no data, studies or other information to support this conclusion. Exhibit 6 at 17-188 and 10/4/04 RP at 109-110, 151. They did not contact any HMO or insurance company that provides dialysis coverage for patients in this service area to pursue this theory. KPS Health Plan President submitted a letter stating that Olympic charges lower commercial fees than for-profit facilities providing similar services.

AR 731.

. . .

It is unlikely that DaVita will stimulate lower Olympic commercial fees, since Olympic commercial rates and projected rates are much lower than DaVita's projected

average commercial rates for the first three years of operation.

AR 731.

. . .

Olympic’s calculations indicates DaVita commercial/private fees will be higher. DaVita did not disclose its customary commercial rates or its projected rates. The Program failed to request that information.

AR 732.

In these findings, the HLJ rejects the CON Program’s determinations regarding commercial rates and operating costs because the Program “relies on its experience/expertise and common sense.” However, the Program’s Analyst testified that 60 – 80% of patients on dialysis are covered by Medicare or Medicaid and those rates are fixed; that the Program does not require an applicant to disclose its commercial rates as part of the application process; that DaVita’s rates would be negotiated with private payors after receiving a CON; the “presence of an alternate provider would put pressure on those negotiated rates in a downward direction”; and that even if price competition was not a factor, the Program would have approved the application because it would have given patients in Kitsap and Jefferson Counties a choice of providers. AR 2030–33; see also AR 2104–05. In addition, the Program further advised the HLJ on reconsideration that such “rates are not accurately predictable” and “any suggestion that DaVita’s rates are too high is complete speculation.” AR 431.

Significantly, OPKC’s own witness, Jeff Lehman, testified that it was not possible to predict with accuracy what DaVita’s payor mix would

be if it opened a facility in Poulsbo. AR 2205–06. He also admitted that payor mix is a key part of his method for projecting DaVita’s commercial rates and that he did not know what DaVita’s payor mix would be. *Id.* Despite this admission, the HLJ found that OPKC’s own calculations, performed without knowing DaVita’s payor mix, proved DaVita’s yet-to-be-negotiated commercial rates would be higher. AR 731; see also AR 2030–32. The HLJ disregarded the Program’s substantial experience regarding dialysis facilities and rate projections and failed to accord any deference to the Program’s rejection of OPKC’s flawed rate projection.

From the CON Program’s application review record and the testimony given at the administrative hearing, this Court has no basis to find the Program’s determination regarding price competition was not supported by a preponderance of the evidence. Nor can this Court find that the HLJ’s own findings on commercial rates, based only upon obviously flawed projections offered by an interested party and rejected by the Program, are supported by substantial evidence.

- The HLJ states as a finding of fact:

As the Program concludes, . . . DaVita’s proposed training station is not needed, but fails to address whether an isolation station is needed. AR 328. An isolation station is needed by the patients with communicable disease so they do not have to commute longer distance to another facility with an isolation station.

AR 733.

The HLJ's finding that OPKC's application planned for an isolation unit⁹ and that DaVita's application did not is factually incorrect. The Program made no finding regarding either applicant's isolation stations and OPKC did not mention the isolation unit as a tie-breaker in the proceeding. A DaVita submission during the application review process includes a paragraph under the bold header — "Staffing and Availability of an Isolation Station," followed by the statement: "DaVita intends to provide isolation capability as part of the 5,100 square foot Poulsbo facility and proposed 13 stations. The space allocated for the isolation station is approximately 100 square feet." AR 1045. The HLJ's finding that only OPKC offered an isolation unit is indisputably wrong and cannot be a tie-breaker. The HLJ's isolation station finding is not supportable under any evidentiary standard.

- The HLJ states as a finding of fact:

The cost and time savings to patients and community health care facilities justify using opening time as a tie-breaking. Ms. Sigman testified that this could potentially be a tie breaking factor.

AR 735 (footnote omitted).

OPKC stated in its application that its facility would become operational in July 2004, based on a CON approval date of January 2004. AR 761. However, since OPKC's application was initially denied and DaVita's granted, OPKC's estimated start date became moot by the time

⁹ OPKC's application states "[t]he applicant proposes to add 12 stations (including isolation) to Olympic service area. AR 761; see also AR 732–33.

the administrative hearing was held in October 2004.¹⁰ AR 428–30. Additionally, there was no evidence that OPKC would actually have opened its facility earlier than DaVita, especially when DaVita had several months (before the HLJ reversed the CON) in which to prepare for the opening of its own facility.

Additionally, the HLJ did not, and could not, point to a “preponderance of evidence” in the record refuting the Program’s findings. In essence, she just reached a different subjective conclusion on the same evidence, giving no deference to the Program’s expertise. The CON Program does not use the facility’s opening date as a CON-deciding factor, much less the tie-breaking factor in a comparative review. See AR 428–30; 679–680. Estimated opening dates are completely unenforceable and contrary to the Program’s rules. Id. At best, an earlier start date offers only a small, very short-term benefit in the context of the overall decision about which provider should build a permanent facility. The HLJ offered no rationale for rejecting the Program’s judgment and expertise on this finding, but nonetheless substituted her own view about using opening dates as a tie-breaker. The HLJ’s reliance on start dates as a reason for finding the CON Program’s award of the CON to DaVita is not based upon substantial evidence, is clearly erroneous and cannot be supported.

¹⁰ The adjudicative proceeding was held October 4 and 7, 2004, and the HLJ issued her decision on February 28, 2005.

D. The HLJ's Findings Make No Assessment of Each Applicant's Ability to Cover the Need for 12 Additional Stations

While the HLJ focused on the illusory benefit of an earlier start-up date, she completely overlooked the key issue before the Program — which applicant would best satisfy the projected need for additional dialysis stations in 2007. To assess need, the Program ran the kidney dialysis need methodology set forth in WAC 246-310-280(3) and found need for 12 additional dialysis stations by year 2007. AR 1766–68. The CON Program then found that OPKC's application would only support 8 stations — while DaVita's application would support 10 stations. *Id.* DaVita's proposed 10-station facility therefore addressed far more of the CON Program's projected 12-station need than OPKC's 8 approved stations.

Remarkably, the HLJ did not consider OPKC's and DaVita's respective abilities to satisfy this projected need. In fact, she did not even identify this difference in meeting need as an issue in her findings and order. AR 723. The HLJ's only reference to the Program's need analysis¹¹ is found in Finding of Fact No. 1.7 wherein she simply reiterates the Program's finding of a projected need for 12 new dialysis stations; that DaVita's application supports 10 stations; and OPKC's only supports 8. See AR 725. The HLJ did not take the next crucial step and assess

¹¹ The CON Program concluded that DaVita was the superior applicant based on “the need demonstrated earlier in this evaluation coupled with the introduction of a choice of providers in this service area.” AR 1779 (emphasis added).

whether DaVita's ability to fulfill nearly 20% more of the projected need than OPKC's makes DaVita's application superior.

The HLJ also gave no deference to the following additional findings made by the Program regarding need: OPKC had used, almost verbatim, the same need justification in two previous CON applications;¹² OPKC's claims of Bremerton over-utilization and transportation problems were therefore repetitive and unreliable; OPKC's plan to transfer patients as a valid need justification was questionable since OPKC could not order 35 of its patients to transfer to its new Poulsbo facility (AR 1766, 1769); and "[i]nformation provided to the department in a variety of dialysis evaluations has revealed that physicians in an area served by multiple dialysis providers will often refer to more than one provider in an effort to find the treatment model that will best serve their patients" (AR 1769). These findings constitute a preponderance of evidence that OPKC's application was inferior in the context of the critical "need" CON criteria. The HLJ's omission of any discussion of DaVita's 10 stations being better able to meet the need, and OPKC's questionable and unreliable need assertions is clear error and reflects a complete disregard of the preponderance of evidence standard.

¹² The Program expressed its adverse finding regarding OPKC's reliability as follows: "The department finds, therefore, that it cannot rely on claims of over-utilization at either OPKC facility or transportation problems resulting from scheduling difficulty as demonstration of need in this application." AR 1766.

VII. CONCLUSION

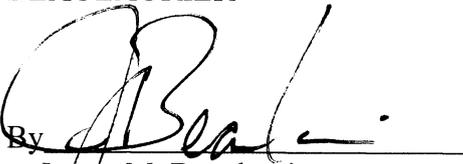
For the foregoing reasons, this Court should reverse the HLJ's decision to issue a CON to OPKC, reinstate the Program's order issuing a CON to DaVita, and order the Program to reinstate CON 1285 to DaVita. Alternatively, this Court should remand this matter to the Department to correct any deficiencies in the evaluation and to further give DaVita a meaningful opportunity to present evidence and argument on the new standards imposed by the HLJ.

RESPECTFULLY SUBMITTED this 3rd day of April, 2006.

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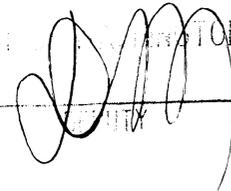
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STATE OF WASHINGTON

BY



COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

DAVITA INC.,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT
OF HEALTH,

Respondent and,

OLYMPIC PENINSULA KIDNEY
CENTER,

Intervenor.

NO. 342-49-9

PROOF OF SERVICE

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I, James M. Beaulaurier, hereby certify that on the 3rd day of April, 2006 I caused to be served true and correct copies of the foregoing Appellant's Opening Brief 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.


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