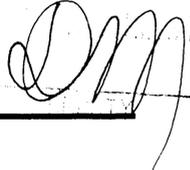


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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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DAVITA, INC.,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH,

Respondent.

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**WASHINGTON STATE DEPARTMENT OF HEALTH'S  
RESPONSE BRIEF**

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**ORIGINAL**

**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. BACKGROUND.....2

III. STANDARD OF REVIEW.....3

IV. SUMMARY OF ARGUMENT.....4

V. ARGUMENT .....5

    A. The issue was whether the OPKC application or the DaVita application should be approved as the “superior” under WAC 246-310-240, and DaVita cannot show that the Presiding Officer erred in finding the OPKC application to be superior.....5

        1. The factors favoring OPKC justified approval of its application as the “superior” application.....7

            a. OPKC’s application was superior based on comparative financial projections by the two applicants. ....7

                (1) OPKC projected lower operating costs. ....7

                (2) DaVita failed to provide commercial rate information and OPKC’s rates are lower. ....8

            b. OPKC’s application was superior based on demonstrated support for OPKC within the community. ....10

            c. OPKC’s application was superior because it proposed an earlier opening date. ....11

        2. No factors support approving DaVita’s application over OPKC’s application.....11

a.	DaVita failed to prove that the Presiding Officer was incorrect in rejecting “patient choice” as a factor favoring approval of its application.....	11
b.	DaVita failed to prove that the Presiding Officer was incorrect in finding “competition” was a factor favoring approval of its application.....	14
c.	DaVita’s argument that its application should be approved because DaVita justified a need for ten stations, and OPKC for only eight, lacks merit. Moreover, it should not even be considered because it was not raised before the Department.....	15
B.	In making her decision, the Presiding Officer did not apply the “wrong standard of review” and had authority to overturn the Program’s decision.....	17
C.	The Presiding Officer’s decision to approve OPKC’s application did not violate DaVita’s due process rights.....	20
VI.	CONCLUSION.....	24

## TABLE OF AUTHORITIES

### Cases

<u>Goldberg v. Kelly,</u> 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970).....	24
<u>In re Estate of Jones,</u> 152 Wn.2d 1, 100 P.3d 805 (2004).....	3
<u>Jacquins v. Department of Social and Health Services,</u> 69 Wn. App. 21, 847 P.2d 513 (1993).....	24
<u>Levinson v. Washington Horse Racing Commission,</u> 48 Wn. App. 822, 740 P.2d 898 (1987).....	21, 22
<u>Seattle Building and Construction Trades Council v. The Apprenticeship and Training Council,</u> 129 Wn.2d 787, 804, 920 P.2d 581 (1996).....	24
<u>St. Joseph Hospital v. Department of Health,</u> 125 Wn.2d 733, 877 P.2d 891 (1995).....	2, 3
<u>Tapper v. Employment Security,</u> 122 Wn.2d 397, 858 P.2d 494 (1993).....	19
<u>Towle v. Department of Fish &amp; Wildlife,</u> 94 Wn. App. 196, 971 P.2d 591 (1999).....	19

### Statutes

RCW 34.05 .....	1
RCW 34.05.422(1)(b) .....	2
RCW 34.05.449(2).....	24
RCW 34.05.461 .....	24
RCW 34.05.461(5).....	20

RCW 34.05.470 .....	24
RCW 34.05.554(1).....	16
RCW 34.05.570(1)(a) .....	3
RCW 34.05.570(3)(a) .....	3
RCW 34.05.574(1)(a) .....	25
RCW 70.38 .....	1
RCW 70.38.015 .....	1, 7
RCW 70.38.015(1).....	8
RCW 70.38.025(6).....	1
RCW 70.38.105 .....	1
RCW 70.38.105(4)(a) .....	2
RCW 70.38.115(10)(a) .....	1, 20

**Rules**

RAP 10.3(h).....	8
------------------	---

**Regulations**

WAC 246-10.....	2
WAC 246-10-605.....	2
WAC 246-10-605(1).....	20, 22
WAC 246-310.....	1
WAC 246-310-102.....	20
WAC 246-310-140.....	1

WAC 246-310-180.....	1
WAC 246-310-200(1).....	1
WAC 246-310-210.....	1, 5
WAC 246-310-220.....	6, 8
WAC 246-310-220(1).....	7
WAC 246-310-230.....	6
WAC 246-310-240.....	1, 5, 6, 23
WAC 246-310-240(1).....	passim
WAC 246-310-280.....	5, 16, 17
WAC 246-310-606.....	18
WAC 246-310-610.....	1

## I. INTRODUCTION

The Department of Health (Department of Health) administers the Certificate of Need (CN) law under RCW 70.38 and WAC 246-310. The law requires that an entity wishing to establish various new health care services and facilities must first apply to the Department for a CN. RCW 70.38.105. One type of facility requiring CN approval is a kidney dialysis facility. RCW 70.38.025(6). The intent of the law includes controlling health care costs by preventing “unnecessary duplication” of costly facilities and services. RCW 70.38.015.

The Department’s Certificate of Need Program (Program) reviews all CN applications. Department rules prescribe the conduct for CN reviews, and include an opportunity for public comment and hearing. WAC 246-310-140 through WAC 246-310-180. The Program evaluates an application under four different criteria. WAC 246-310-210 through 246-310-240. The Program may approve a proposed project only if the applicant demonstrates compliance with all four criteria. WAC 246-310-200(1).

When an application is denied by the Program, the applicant may request an adjudicative proceeding under RCW 34.05 to contest the denial of the CN. RCW 70.38.115(10)(a); WAC 246-310-610. Conversely, when an application is granted, a competitor of the applicant may request

an adjudicative proceeding to contest the granting of the CN. RCW 34.05.422(1)(b); St. Joseph Hospital v. Department of Health, 125 Wn.2d 733, 739, 877 P.2d 891 (1995). The adjudicative proceeding is conducted under WAC 246-10 by a Presiding Officer of the Department. Acting as the designee of the Secretary of Health, the Presiding Officer hears the evidence and issues a “final order” either granting or denying the CN application. WAC 246-10-605.

## II. BACKGROUND

There are two competing parties in this case. Olympic Peninsula Kidney Center (OPKC), a Washington not-for-profit corporation, operates a kidney dialysis facility in Port Orchard and in Bremerton. DaVita Inc (DaVita), a California for-profit corporation, operates 515 kidney dialysis facilities in 33 states, including nine in Washington. AR 1168. Both applied at approximately the same time to establish a kidney dialysis facility in Poulsbo. RCW 70.38.105(4)(a). The following dates are relevant to this case:

8/1/03	OPKC applies for 12-station kidney dialysis facility in Poulsbo to serve Kitsap and Jefferson counties.
8/5/03	DaVita applies for 13-station kidney dialysis facility in Poulsbo to serve Kitsap and Jefferson counties.
5/21/04	CN Program approves DaVita for 12 stations. CN Program denies OPKC application.

6/18/04	OPKC requests adjudicative proceeding to contest both decisions.
10/04	Department Presiding Officer holds two-day hearing.
5/26/05	Department Presiding Officer issues Amended Final Order, denying DaVita's application and approving OPKC's application.
6/24/05	DaVita files Petition For Judicial Review.
7/12/05	Order Denying Judicial Review

### III. STANDARD OF REVIEW

Legal determinations by the Department in CN cases are entitled to “considerable weight” when reviewed by a court. St. Joseph Hospital, 125 Wn.2d at 743. Factual determinations must be upheld if supported by “substantial evidence.” RCW 34.05.570(3)(a). Substantial evidence is “evidence that is sufficient to persuade a rational, fair-minded person of the truth of the finding.” In re Estate of Jones, 152 Wn.2d 1, 8, 100 P.3d 805 (2004). Thus, the Department’s factual findings should be upheld if they are fair and rational, even if the court might have come to a different conclusion on its own. Moreover, as the appealing party, DaVita bears the burden of proving the invalidity of the Department’s decision to approve the OPKC’s application and to deny the DaVita application. RCW 34.05.570(1)(a).

#### IV. SUMMARY OF ARGUMENT

Both OPKC and DaVita applied for a CN to establish a kidney dialysis facility in Poulsbo. Because only one new facility was needed in Kitsap and Jefferson counties, the Department could not approve both applications. Thus, under WAC 246-310-240(1), the Department determined that it would compare the applications and grant the CN to the “superior” (or better) applicant. The Department’s Presiding Officer reasonably concluded that factors favoring approval OPKC’s application included: (1) its lower operating costs and commercial rates; (2) support within the community; and (3) an earlier opening date.

On the other hand, the Presiding Officer rejected DaVita’s arguments for why that company was the “superior” applicant. OPKC is currently the only kidney dialysis provider in Kitsap and Jefferson counties. DaVita argued that approval of its application – introducing a second provider into the two counties – would (1) offer patients a “choice” of providers and (2) create “price competition” that could potentially lower commercial rates paid by patients. In rejecting these arguments, the Presiding Officer reasonably concluded that approval of DaVita would offer a “realistic choice” of providers for few patients, and that no evidence suggested that approval of DaVita would create “price competition” between DaVita and OPKC.

In short, the Presiding Officer weighed the merits of each application and reasonably decided to approve the OPKC application as

the superior application. Because DaVita cannot meet its burden to show that the Presiding Officer made the wrong decision, her decision should be affirmed.

Moreover, in reaching her decision, the Presiding Officer did not violate DaVita's due process rights, as alleged by DaVita. The Presiding Officer had authority to make her decision which was based on an evaluation of the arguments of the parties, and DaVita received all its procedural rights during the course of the adjudicative proceeding.

## V. ARGUMENT

**A. The issue was whether the OPKC application or the DaVita application should be approved as the "superior" under WAC 246-310-240, and DaVita cannot show that the Presiding Officer erred in finding the OPKC application to be superior.**

Both DaVita and OPKC proposed to serve Kitsap and Jefferson counties with a new kidney dialysis facility in Poulsbo. In reviewing a kidney dialysis application, the Department's first step is to apply the "need methodology" in WAC 246-310-280. The methodology forecasts whether additional kidney dialysis stations will be needed three years into the future in the area proposed to be served by the applicant. In applying the methodology, the Program projected a need for twelve (12) new kidney dialysis stations in Kitsap and Jefferson counties by 2007, a projection that is not challenged by either DaVita or OPKC. AR 17. Next, given the need for new stations, the CN Program evaluated the four criteria that apply in determining whether to approve a CN application:

- (1) Need (WAC 246-310-210);

- (2) Financial Feasibility (WAC 246-310-220);
- (3) Structure and Process of Care (WAC 246-310-230); and
- (4) Cost Containment (WAC 246-310-240).

The Program found that both applicants met the first three criteria, and also would meet the fourth criterion (on cost containment) absent a competing application. AR 14-26. The cost containment criterion in WAC 246-310-240(1) states in part that for CN approval there must be:

A determination [by the Department] that a proposed project will foster cost containment shall be based on the following criteria: (1) superior alternatives, in terms of cost, efficiency, or effectiveness, are not available or practical.

(Emphasis added.) Given there were two applications to establish a facility to serve Kitsap and Jefferson counties, but a need for only twelve (12) additional stations in the area by 2007, it followed that only one application could be approved.<sup>1</sup> This led the Program to conclude that under WAC 246-310-240(1), the CN should be awarded to the “superior alternative” (i.e., the better applicant). AR 28. Both DaVita and OPKC accepted this approach to deciding the case.

This approach required the Department to make the difficult assessment of whether, on balance, DaVita or OPKC had submitted the superior application. As explained above, the Program approved the

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<sup>1</sup> As stated, DaVita applied for 13 stations and OPKC for 12. The need was for 12 stations. The Presiding Officer found that she could not approve both applications for six stations, since “splitting the stations is not fiscally prudent” because of increased total costs, and the main purpose of the CN is to hold down health care costs. AR 736. In its petition for judicial review, DaVita is not challenging that finding by the Presiding Officer.

DaVita application as the superior application. OPKC challenged the Program's approval through a request for an adjudicative proceeding. After hearing the evidence, the Presiding Officer decided to approve the OPKC application as the superior application, AR 722-46. The superior court upheld her decision. CP 237-39.

**1. The factors favoring OPKC justified approval of its application as the "superior" application.**

According to the Presiding Officer, three factors favored approval of OPKC's application as the superior (or better) application. These factors are informally referred to by the parties as "tiebreakers." Tiebreakers are differences in the applications that arguably favor one qualified applicant over the other qualified applicant. Because the law does not identify specific tiebreakers to assess in choosing between competing applications, the Department uses its judgment to assess tiebreakers based on information provided by the particular applicants.

**a. OPKC's application was superior based on comparative financial projections by the two applicants.**

**(1) OPKC projected lower operating costs.**

A primary purpose of the CN law is to "control excessive increases" in health care costs. RCW 70.38.015. "Operating costs" must be assessed by the Department in determining whether a project is "financially feasible." WAC 246-310-220(1). "Cost" is one factor in determining whether a project is the "superior" alternative. WAC 246-

310-240(1). Accordingly, in reaching her decision, the Presiding Officer examined the operating expenses of the two applicants. AR 733-34. The Presiding Officer found that DaVita’s pro-forma (AR 203, 500, 841, 842) had understated lease expenses. AR 733. With this revision, the Presiding Officer noted the following operating-expense comparison:

<u>Year</u>	<u>DaVita</u>	<u>OPKC</u>
1	\$1,585,815	\$1,049,433
2	\$1,823,352	\$1,191,528
3	\$2,170,295	\$1, 339,794

AR 733-34. The Presiding Officer concluded that the revised operating expense projections “raise doubt as to DaVita’s financial feasibility (WAC 246-310-220) and cost containment, indicating that DaVita is not the better applicant.” AR 734.

DaVita does not expressly assign error to this finding; does not identify issues related to this finding; and in fact does not even discuss this finding. Under RAP 10.3(h), DaVita therefore has waived any right to argue against the “operating-expense” finding.

**(2) DaVita failed to provide commercial rate information and OPKC’s rates are lower.**

“Cost” is a factor in determining whether an application is “superior.” WAC 246-310-240(1). Indeed, “controlling costs” is one purpose of the CN law. RCW 70.38.015(1). Thus, the Presiding Officer considered which applicant may provide lower commercial rates to patients who are not covered by fixed Medicare or Medicaid rates.

The Presiding Officer found that, unlike OPKC, DaVita “did not disclose its commercial rates or its projected rates.” AR 732. In the absence of this information, OPKC attempted to project overall rates as follows:

<u>Year</u>	<u>DaVita</u>	<u>OPKC</u>
1	\$184.20	\$164.93
2	\$184.61	\$165.09
3	\$185.56	\$166.50

AR 608. These overall rates (which include fixed lower rate Medicaid and Medicare patients) mean that DaVita’s commercial rates are projected much higher than OPKC’s commercial rates. At the hearing, the Program acknowledged that the DaVita rates would be higher. AR 2087-88. The Presiding Officer found that the DaVita rates will be “higher,” noting that the Program “did not find any error in the [above OPKC] analysis” on this issue. AR 732. The Presiding Officer further found that DaVita failed to rebut OPKC’s claim (AR 947) that as a not-for-profit corporation, “its charge structure is lower because all profits are ‘to be used to meet future facility needs, improvement in patient care and/or other additional benefits to patients’”. AR 732. Certainly, these lower rates favor approval of OPKC’s application, as lower rates will facilitate the purpose of the CN law to control health care costs. DaVita

cannot meet its burden to show that the Presiding Officer either misapplied the law or issued a determination that was unsupported by substantial evidence.

**b. OPKC's application was superior based on demonstrated support for OPKC within the community.**

Founded 25 years ago, OPKC operates two kidney dialysis facilities in Kitsap County (in Port Orchard and Bremerton), and no other such facilities exists in either Kitsap or Jefferson counties. The Presiding Officer correctly found no evidence of dissatisfaction with OPKC. AR 729. In fact, evidence of satisfaction exists. Five patients wrote letters of support for OPKC's quality of care. AR 962-967. The Executive Director of Norwood Lodge, a short-stay rehabilitation facility, wrote of its "long-standing and positive relationship" with OPKC. AR 968. OPKC also received support from Poulsbo's mayor, as well as from KPS Health Plan and the Montclair Park assisted living facility. AR 969, 971-72. By contrast, DaVita failed to introduce any letters of support from anyone inside or outside of Kitsap and Jefferson counties.

Notably, in its brief, DaVita makes no attempt to dispute the Presiding Officer's finding that OPKC's history of providing quality dialysis care to Kitsap and Jefferson counties is a factor favoring approval of OPKC to open a new facility in Poulsbo.

**c. OPKC’s application was superior because it proposed an earlier opening date.**

In deciding for OPKC, the Presiding Officer also found (AR 735) that an “immediate need” existed for a new facility in Poulsbo, and OPKC was better positioned to meet that need because it proposed to open about ten months earlier than would DaVita. AR 2212. Indeed, during the application process, DaVita itself stated that the need for a new Poulsbo facility was “immediate.” AR 1196. Moreover, DaVita concedes that an earlier opening date would provide “short-term benefits” for dialysis patients. Brief at 38. The Presiding Officer was correct in concluding that the earlier opening date favored approval of OPKC’s application.

**2. No factors support approving DaVita’s application over OPKC’s application.**

As stated above, three “tie-breaker” factors favored approval of OPKC over DaVita. On the other hand, as explained below, no factors favored approval of DaVita over OPKC.

**a. DaVita failed to prove that the Presiding Officer was incorrect in rejecting “patient choice” as a factor favoring approval of its application.**

As stated, OPKC currently operates the only kidney dialysis facilities in Kitsap County at Port Orchard and Bremerton. The map shows that Bremerton is north of Port Orchard and south of Poulsbo,

where both DaVita and OPKC propose to build a new facility. North of Poulsbo is Jefferson County, which has no facility. DaVita argues that its application is superior, and therefore should be approved because it would offer patients in those two counties a “choice” of providers for the first time. Brief at 27-34.

In analyzing the “choice” issue, it is first critical to understand that, since dialysis patients must receive treatment three times per week often for life, they generally prefer treatment at a facility close to home or work in order to minimize travel time. The Presiding Officer found that it was reasonable to assume that patients, if possible, prefer to drive no longer than 20 minutes to receive treatment. AR 728. Bremerton and Poulsbo are 31 minutes apart. AR 727. Thus, looking at the map, the question becomes: Would a DaVita facility in Poulsbo offer residents of Kitsap and Jefferson County (who are now served only by OPKC facilities in Port Orchard and Bremerton) a “choice” of providers? In rejecting the argument that “patient choice” favored approval of the DaVita application, the Presiding Officer concluded:

(G)ranting the Poulsbo CN to DaVita rather than Olympic may provide only a realistic choice to a small number of patients. AR 727.

This conclusion is supported by patient data and a map provided by OPKC. AR 794-805. This information shows that of OPKC’s current

142 patients who dialyze at Port Orchard or Bremerton, only twelve (eleven in Silverdale and one in Keyport) actually live between Bremerton and Poulsbo. The Presiding Officer also found it is “unclear” whether the number of patients living or working between the two cities will increase in the future. AR 727. She also noted that many dialysis patients use public transportation, and those patients will consider the closest facility as their only realistic option for accessing treatment. AR 728.

Based on this data, it was reasonable for the Presiding Officer to conclude that a new Poulsbo facility operated by DaVita would not provide patients in Kitsap and Jefferson counties with a meaningful choice of providers for one simple reason: DaVita would serve patients in and around and north of Poulsbo, while OPKC would serve patients in and around and south of Bremerton through its facilities in Bremerton and Port Orchard. In essence, if DaVita was approved, the two providers would divide-up the service area on a north-south basis, rather than providing a significant number of patients with a realistic choice of providers.

In sum, given the distance between Bremerton and Poulsbo (31 miles) and the limited number of patients who live between the two cities (12), the Presiding Officer reasonably rejected DaVita’s argument that

“patient choice” was a meaningful factor favoring approval of its application. DaVita cannot meet its burden to show that the Presiding Officer’s conclusion is unsupported by substantial evidence.

Finally, the advantage of “choice” is that it enables patients to “shop” for a provider and to switch providers if they are dissatisfied. Even given the distance between Bremerton and Poulsbo, and the low number of patients living between the two cities, the “choice” argument may have more strength if there was indication of patient dissatisfaction with OPKC. In other words, patients might be willing to travel further than normally expected if they were not satisfied with treatment at OPKC. However, as stated, no evidence exists that any patients are dissatisfied with OPKC. This fact further weakens DaVita’s argument about the importance of providing “patient choice.”

**b. DaVita failed to prove that the Presiding Officer was incorrect in finding “competition” was a factor favoring approval of its application.**

The Presiding Officer rejected DaVita’s argument that its application should be approved because introduction of a second provider into the Kitsap-Jefferson marketplace potentially may lower consumer rates through price competition between the two providers. AR 730-31. Even though DaVita no longer makes this argument, the fallacy of the

argument is addressed below because it was a factor in the Presiding Officer's decision. AR 730-31

The possibility of price competition is limited because about 80 percent of dialysis patients are billed at fixed Medicare or Medicare rates. AR 730. Moreover, as the Presiding Officer found, the possibility of price competition is further limited by the distance between Bremerton and Poulsbo, meaning that, for travel convenience, few patients view both facilities as realistic options. AR 731.

More importantly, DaVita introduced no information to support its claim that competition between providers somehow results in lower commercial better kidney dialysis rates. Nor, as the Presiding Officer found (AR 731) could the Program Analyst provide any support for the claim. AR 2074. It seems equally plausible to conclude that competition may increase costs by causing facilities to spend more money to enhance operations in order to attract customers in a competitive environment. In short, DaVita carried the burden of providing information to support its "price competition" argument, and completely failed to meet that burden. Thus, DaVita cannot show that the Presiding Officer was incorrect in rejecting its argument.

- c. **DaVita's argument that its application should be approved because DaVita justified a need for ten stations, and OPKC for only eight, lacks merit.**

**Moreover, it should not even be considered because it was not raised before the Department.**

In performing the WAC 246-310-280 need methodology, the CN Program found a need for 12 additional stations in 2007 in Kitsap and Jefferson counties. AR 1766-68. DaVita applied for 13 stations and OPKC for 12. Based on projected utilization-rate information in the respective applications, the Program approved DaVita for ten stations, and would have approved OPKC for only eight stations if it were the superior applicant. AR 1766-68. Thus, based on this difference, DaVita argues that it submitted the superior application because, having ten CN-approved stations, it could satisfy a greater percentage of the 2007 projected need for 12 stations. Brief at 39-40.

DaVita criticizes the Presiding Officer for not addressing this “10 vs. 8” issue in her decision. What DaVita fails to mention is that it never presented this issue to the Presiding Officer. RCW 34.05.554(1) states that, with certain narrow exceptions, “issues not raised before the agency may not be raised on appeal...” The exceptions apply include when, following the agency decision, new facts are discovered, the law changes, or there is some type of relevant agency action. None of the exceptions even arguably apply to this case. DaVita simply failed to make the “10 vs. 8” argument during the adjudicative proceeding, and therefore may not raise it on judicial review.

In any event, for argument sake, if the argument is considered by the Court, it should be rejected. First of all, the Program's projected need for 12 new Kitsap-Jefferson stations in 2007 is only an estimation of how many stations may be needed. Furthermore, between now and 2007, if the projections in fact are realized, any kidney dialysis provider will have the opportunity to apply for new stations in order to meet projected future need three years into the future. By forecasting need three years into the future, and by allowing approved providers to add stations to meet that future need, the need methodology in WAC 246-310-280 is specifically designed to prevent station shortages from occurring. Thus, the "10 vs. 8" difference simply would not have been significant in evaluating these two applications, even if the issue had been properly raised by DaVita in the adjudicative proceeding. In any event, the fact that DaVita would be approved for two more stations than would OPKC would not overcome the other more significant factors that favor approval of the OPKC application.

**B. In making her decision, the Presiding Officer did not apply the "wrong standard of review" and had authority to overturn the Program's decision.**

DaVita argues that, in deciding the case, the Presiding Officer applied the "wrong standard of review" in deciding whether the Program

had reached the correct decision in approving the OPKC application. Brief at 21-26.

First, DaVita argues that the Presiding Officer failed to assign OPKC the burden of proving by a preponderance of the evidence that the Program reached the wrong decision in approving the DaVita application. Brief at 23. No authority supports this argument. In fact, the Presiding Officer applied the correct standard of review in resolving this case. The two applications were reviewed by the Department at the same time. The Presiding Officer ruled that under WAC 246-310-606 both applicants had the burden of proving that they satisfied each of the four CN criteria. AR 738. As stated, the Presiding Officer also found that both applicants met all CN criteria, except that only one applicant could be approved as the “superior” applicant under WAC 246-310-240(1). AR 741. In weighing the evidence, the Presiding Officer determined OPKC was the “superior” applicant based on the specific factors discussed above. AR 744-45. She correctly recognized that under WAC 246-10-606 the standard of proof was preponderance of the evidence. AR 739.

In sum, the Presiding Officer found that, by a preponderance of the evidence, OPKC was the superior applicant and therefore should receive the CN. While DaVita may disagree with the Presiding Officer’s

finding, its argument that the Presiding Officer somehow applied the “wrong standard of review” is without merit.

DaVita further argues that the Presiding Officer violated due process and various statutes when she adopted an analysis that differed from the Program’s analysis, given the “vast experience” and “specialized knowledge” of the Program in deciding CN applications. DaVita contests the Presiding Officer’s right to “substitute her own views and experience for the expertise of the Program analyst.” Brief at 25. In essence, DaVita argues that the Presiding Officer was “not qualified” to reach a decision that differed from the Program decision. However, as noted by the Presiding Officer, she was not precluded from making findings and conclusions that differed from the Program’s decision. AR 739. The Presiding Officer cited Tapper v. Employment Security, 122 Wn.2d 397, 404, 858 P.2d 494 (1993), holding:

...the Commissioner has the power to review ALJ decisions and is the final authority for departmental determinations as regards unemployment compensation.... As a reviewing officer, the Commissioner may “exercise all the decision-making power” of the official who presided over the initial agency hearing. Since the ALJ had the power to make findings of fact, the Commissioner has the power to make his or her own findings of fact and in the process set aside or modify the findings of the ALJ.

See also, Towle v. Department of Fish & Wildlife, 94 Wn. App. 196, 206, 971 P.2d 591 (1999). Indeed, the Tapper holding is common sense, as an

adjudicative proceeding would be a sham if the Presiding Officer lacked authority to overturn the decision under review. It is also common sense that, as the Secretary of Health's designee with authority to issue a final decision, the Presiding Officer certainly may disagree with CN decisions of Department employees who serve under the Secretary. Moreover, based on evidence presented to them, judges very often must decide matters on which they are not "experts." In short, there is no requirement that the Presiding Officer must defer to the Program's determinations in CN cases.<sup>2</sup>

**C. The Presiding Officer's decision to approve OPKC's application did not violate DaVita's due process rights.**

As stated, an applicant may request an adjudicative proceeding to contest a decision by the CN Program to deny a CN application. RCW 70.38.115(10)(a). The adjudicative proceeding is conducted by a Presiding Officer as the designee of the Secretary of Health with authority to issue a "final order containing findings of fact and conclusions of law." WAC 246-10-605(1); 246-310-102 (defining "presiding officer").

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<sup>2</sup> DaVita cites RCW 34.05.461(5) which states: "Where it bears on the issues presented, the agency's evaluation, technical competency, and specialized knowledge may be used in evaluating the evidence." DaVita argues that this statute required the Presiding Officer to "defer" to the Program. Brief at 25. What this statute actually means is that the Presiding Officer may use her own expertise, or the Program's expertise, in evaluating evidence and making a decision. However, contrary to DaVita's argument, this statute certainly does not mean that the Presiding Officer must issue a decision that defers to the Program's view of the evidence.

In this case, the CN Program granted DaVita's application and denied OPKC's application in the belief that DaVita was the superior applicant. OPKC requested an adjudicative proceeding, and the Presiding Officer reversed the CN Program's determinations. DaVita argues that the Presiding Officer's reversal constituted denial of due process. Brief at 14-21.

According to DaVita, because the Program had approved DaVita's application, OPKC's requested adjudicative proceeding was "essentially a license revocation proceeding." Brief at 17. DaVita notes that in Levinson v. Washington Horse Racing Commission, 48 Wn. App. 822, 740 P.2d 898 (1987), the court held that in a license revocation proceeding an agency must give advance notice of the grounds for revocation. Based on this case, DaVita argues that its due process rights were violated when the Presiding Officer reversed the Program and denied its application, based on factors not relied upon by the Program in making its decision (i.e., OPKC's financial information, community support, and earlier opening date). Brief at 19-21.

DaVita fails to realize that license revocation hearings and CN hearings are completely different types of hearings. In license revocation, as in Levinson, a person is operating under a license, and an agency attempts to revoke the license for specific acts of misconduct. It is a

disciplinary proceeding. Due process requires prior notice of the allegations so that licensees may defend themselves in the adjudicative proceeding to contest the revocation.

By contrast, in a CN hearing, an entity is challenging a decision by the Program to deny its application or to approve the application of a competitor. The Presiding Officer is deciding whether the Program made the correct decision. WAC 246-10-605(1). Unlike in a license revocation hearing, the Presiding Officer is not deciding whether to discipline the applicant. DaVita argues that it had the right to know in advance of the hearing what tie-breaking factors the Presiding Officer would use in ruling on which applicant had submitted the superior application. However, it was impossible for the Presiding Officer to inform DaVita in advance of the hearing of her reasons for reversing the Program's determination, as she had not yet heard the evidence, let alone decided how to rule.

In sum, OPKC's request for an adjudicative proceeding was not an attempt by the Department to revoke DaVita's CN for misconduct by DaVita. Thus, the Levinson due process holding is not relevant. Comparing CN hearings to license revocation hearings is simply an invalid apples-to-oranges comparison.

In relation to due process, DaVita further argues that it had no notice of the factors that the Presiding Officer would consider in denying

its application, and therefore “had no opportunity to... present argument until it was too late.” Brief at 17. It first should be noted that, as explained, the “tie-breaking” factors considered by the Presiding Officer in deciding which application was “superior” under WAC 246-310-240 are not established in statute or rule. That meant that both DaVita and OPKC in the adjudicative proceeding had reign to attempt to identify specific “tie-breakers” that favored approval of its application by a preponderance of the evidence.

Indeed, all the “tie-breaking” factors on which the Presiding Officer decided the case in favor of OPKC were identified and argued by the applicants during the adjudicative proceeding prior to the Presiding Officer rendering her final decision. OPKC urged the Presiding Officer to find in its favor based on community support for OPKC (AR 78, 174-75, 475-76); OPKC’s earlier opening date (AR 78, 483-85); OPKC’s lower costs and rates (AR 186-198, 480-83, 485-87); the lack of meaningful choice that would occur by approving DaVita (AR 174-77, 180-86, 305-312; 471-75); and the lack of evidence that price competition would occur by approving DaVita (AR 74-75, 177-180, 312-317, 476-480). DaVita had every opportunity to respond to OPKC’s arguments and to make its own arguments in its post-hearing briefing (AR 216-37) and reconsideration briefing (AR 388-405, 625-659). In short, contrary to

DaVita's assertion, it is simply not true that DaVita had no opportunity to be heard on the issues on which the Presiding Officer based her decision.

Finally, what due process does require is that "administrative agencies to give those it regulates full and fair opportunity to be heard on the merits of their claims." Jacquins v. Department of Social and Health Services, 69 Wn. App. 21, 26, 847 P.2d 513 (1993), citing Goldberg v. Kelly, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970). Parties to adjudicative proceedings must receive all procedural rights granted by the Administrative Procedures Act. Seattle Building and Construction Trades Council v. The Apprenticeship and Training Council, 129 Wn.2d 787, 804, 920 P.2d 581 (1996). These rights include the right to present evidence; conduct cross examination; make argument; receive a final order with findings of fact and conclusions of law; and petition the agency for reconsideration. RCW 34.05.449(2), 34.05.461, 34.05.470. DaVita indisputably received all these procedural rights during the course of the adjudicative proceeding. Thus, DaVita's due process claim is without merit.

## VI. CONCLUSION

Parties agree that under WAC 246-310-240(1) the CN should be granted to the applicant that submitted the "superior" (better) application. This approach requires identification of the differences in the applications,

and a decision on which applicant on balance submitted the superior application. The Department's Presiding Officer carefully weighed the evidence, and reasonably concluded that OPKC had submitted the superior application and therefore should be approved over DaVita. The Presiding Officer correctly interpreted the law, and entered findings that are supported by substantial evidence. DaVita cannot meet its burden of proving the invalidity of the Presiding Officer's decision.

Moreover, in conducting the adjudicative proceeding, the Presiding Officer accorded DaVita all its procedural rights, and hence did not violate DaVita's due process rights in making her decision.

Accordingly, under RCW 34.05.574(1)(a), the Department respectfully requests that the Court affirm the Presiding Officer's decision to grant the OPKC application and to deny the DaVita application.

RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of June, 2006.

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NO. 34249-9

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

DAVITA, INC.,  <p style="text-align: center;">Appellant,</p> <p style="text-align: center;">v.</p> WASHINGTON STATE DEPARTMENT OF HEALTH,  <p style="text-align: center;">Respondents.</p>
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CERTIFICATE OF SERVICE

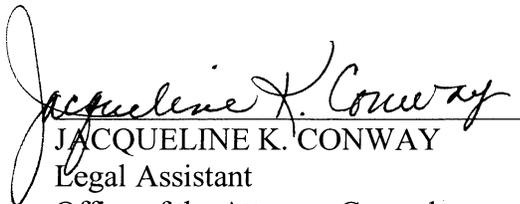
  
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I certify that on the **2<sup>th</sup> day of June 2006, in Olympia, Washington**, I caused a true and correct copy of the Washington State Department of Health's Response Brief to be served on the following in the manner indicated below:

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