

NO. 43193-9

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

KADLEC REGIONAL MEDICAL CENTER, a Washington nonprofit
corporation,

Appellant,

v.

DEPARTMENT OF HEALTH OF THE STATE OF WASHINGTON,

Respondent.

STATE OF WASHINGTON
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DEPARTMENT OF HEALTH BRIEF

ROBERT M. MCKENNA
Attorney General

Richard A. McCartan
Assistant Attorney General
WSBA No. 8323
PO Box 40109
Olympia, WA 98504-0109
(360) 664-4998

 ORIGINAL

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I. INTRODUCTION

Kadlec Regional Medical Center (Kadlec) filed this Petition for Judicial Review challenging the Department of Health's (Department) Certificate of Need (CN) decision to approve 55 additional acute care beds at the hospital, rather than 75 or 114 beds. Both a Health Law Judge (HLJ) and the superior court held that Kadlec could not contest the 55-bed approval because a 55-bed approval was one of the options proposed by Kadlec in its CN application.

II. STATEMENT OF CASE

A. Certificate of Need Law

RCW 70.38 and WAC 246-310 require health care providers to obtain a CN from the Department to establish certain health care facilities and services. RCW 70.38.105(4)(e) required Kadlec to obtain a CN in order to add beds to its 215-bed hospital. A primary purpose of the CN law is to control health care costs by approving only those projects that are "needed" to serve patients in the future. RCW 70.38.015. The CN law reflects a legislative judgment that overall costs are controlled if the health care system is not burdened with idle capacity that is expensive to build and maintain. St. Joseph Hosp. v. Dep't of Health, 125 Wn.2d 733, 741, 887 P.2d 891 (1995).

The CN process generally involves an application; an opportunity for public comment on the application, and a decision by the Department to approve or deny the application. RCW 70.38.115. An application may be approved by the Department only if the proposed project meets four criteria: Need (WAC 246-310-210); Financial Feasibility (WAC 246-310-220); Structure and Process of Care (WAC 246-310-230); and Cost Containment (WAC 246-310-240).

B. Kadlec's Certificate Of Need Application

In November 2009, Kadlec submitted a CN application for new hospital beds, proposing 55, 75, and 114-bed alternatives. In determining whether "need" exists under WAC 246-310-210 for proposed hospital beds, the Department applies the State Health Plan Methodology. The Methodology is a 12-step formula – inputting data, including hospital use rates and future population forecasts – to determine whether a planning area's existing bed supply is adequate to meet future need or whether additional beds will be needed.

In Kadlec's case, the Department applied the Methodology to the Benton/Franklin County planning area (AR 17-28), and found need for 61 additional beds by 2016 (AR 25). Hence, under WAC 246-310-210, the Department found that Kadlec had demonstrated need for the 55 beds requested in its application. The Department further found that Kadlec

also satisfied the other CN criteria. AR 28-48. These findings led the Department, on November 3, 2010, to approve Kadlec's CN application to add 55 beds to its hospital.

C. Health Law Judge Decision

Kadlec requested an adjudicative proceeding to contest the Department's decision to approve only 55 additional beds, rather than 75 or 114 beds. In the adjudicative proceeding, on summary judgment, the Health Law Judge held that Kadlec could not successfully challenge the decision because it had given the Department the option of approving just 55 beds. AR 614-622. Kadlec filed this Petition for Judicial Review under RCW 34.05.542, contesting the HLJ's decision to uphold the approval of just the 55 beds. CP 3-78.

D. Superior Court Decision

In February 2012, the superior court denied Kadlec's judicial review petition. The court found that because Kadlec had requested approval of 55, 75, or 114 beds, the Department's approval of 55 beds was not the "denial" of a CN application subject to challenge by an adjudicative proceeding under RCW 70.38.115(10)(a). CP 226-227.

III. ISSUES

A. Does substantial evidence support the HLJ's finding that Kadlec's single CN application alternatively requested the approval of 55, 75, or 114 new hospital beds?

B. Did approval of 55 beds constitute approval of a CN application, precluding Kadlec from successfully contesting the decision through an adjudicative proceeding under RCW 70.38.115(10)(a)?

C. Did Kadlec waive any right to contest the approval of 55 beds when it implemented the 55-bed CN prior to the resolution of the adjudicative proceeding?

D. When Kadlec seeks judicial review under RCW 34.05.570(3) of an HLJ decision in an adjudicative proceeding may Kadlec alternatively seek judicial review of "other agency action" under RCW 34.05.570(4)?

IV. STANDARD OF REVIEW

Kadlec bears "the burden of demonstrating the invalidity" of the HLJ's decision. RCW 34.05.570(1)(a). Furthermore, the reviewing court has only limited authority to reverse an agency's factual findings and legal conclusions.

A. Factual Findings

The HLJ found that Kadlec’s application had given the Department the option of approving 55, 75, or 114 beds. AR 617. A factual finding must be upheld if supported by “substantial evidence when viewed in light of the whole record.” RCW 34.05.570(3)(e). Substantial evidence is of a “sufficient quantum to persuade a fair-minded person of the truth of the declared premise.” Miller v. City of Tacoma, 138 Wn.2d 318, 323, 979 P.2d 429 (1999). Substantial evidence exists if a “fair-minded person” could have reached the same conclusion, even if the reviewing court would have reached a different conclusion on its own. Callecod v. Wash. State Patrol, 84 Wn. App. 663, 676, 929 P.2d 510 (1997).

B. Legal Conclusions

The HLJ concluded that under RCW 70.38.115(10)(a) Kadlec could not successfully challenge the Department’s approval of only 55 beds because 55 beds was actually one of the alternatives offered by Kadlec in its CN application. AR 618-19.

CN decisions are “presumed correct,” and courts must accord “substantial deference” to the Department’s legal interpretations. Univ. of Wash. Med. Ctr. v. Dep’t of Health, 164 Wn.2d 95, 102, 187 P.3d 243 (2008) (upholding 9-0 Department finding of need for new liver transplant program); Overlake Hosp. v. Dep’t of Health, 170 Wn.2d 43, 50, 239 P.3d

1095 (2010) (upholding 9-0 Department finding of need for new ambulatory surgery center); Odyssey v. Dep't of Health, 145 Wn. App. 131, 141, 185 P.3d 652 (2008) (upholding 3-0 Department finding of no need for new hospice agency). "Deference" means that an agency's reasonable conclusion should be upheld even though a court might find a different conclusion more persuasive. Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989).

C. Arbitrary And Capricious

Kadlec also argues that the HLJ's decision was "arbitrary and capricious." The judicial review standard is "highly deferential" to the agency. ARCO Products Co. v. Util. and Transp. Comm'n, 125 Wn.2d 805, 812, 888 P.2d 728 (1995). Under this narrow standard, a court may reverse an agency action only if the decision was made by "willful and unreasoning disregard of the facts and circumstances." Univ. of Wash. Med. Ctr. v. Dep't. of Health, 164 Wn.2d at 102. A ruling is not arbitrary and capricious if "there is room for two opinions," even though the reviewing court believes it to be erroneous. Rios v. Dep't of Labor & Indus., 145 Wn.2d 483, 501, 39 P.3d 961 (2002)

V. ARGUMENT

A. Under RCW 70.38.115(10)(a), Kadlec Had No Right To Contest The Decision To Approve Only 55 Beds Because Kadlec Gave The Department The Option To Approve 55 Beds

As noted by the HLJ (AR 618), only an applicant “denied” a CN has the right to challenge a decision through an adjudicative proceeding. RCW 70.38.115(10)(a). WAC 246-310-610(1) also limits such right to a “denied” applicant. Conversely, the granting of a CN may not be challenged by an applicant through an adjudicative proceeding.

Critically, in the adjudicative proceeding, the HLJ found that Kadlec’s application had “alternatively” requested approval of 55, 75, or 114 new beds. AR 617 (¶ 1.6); 619 (¶ 2.4). Hence, the HLJ concluded the Department approval of the 55-bed option did not constitute an application “denial” that could be challenged through an adjudicative proceeding under RCW 70.38.115(10)(a). AR 618 (¶ 2.2).

A review of the application substantiates that Kadlec in fact did propose approval of 55, 75, or 114 beds, as the HLJ found. According to the “project overview” statement in the application:

The only clinical and financially feasible solution is to build all four floors onto the River Pavilion at once. This is the proposed project – the construction, build-out and phased implementation of 4 additional patient care floors – a net addition of 114 acute care beds. This planned expansion project is summarized in Table 4 [AR 645]. Exhibit 6 [AR 735-738] includes comparable summary

tables for the 75-bed and 55-bed alternatives. This exhibit indicates that all 3 projects are very similar, but vary by the number of floors that are built out and operated.

AR 645 (Emphasis added.) Indeed, throughout the application, Kadlec presented the three different options for the Department's approval. The application included a discussion of the advantages of each of the three "options." AR 701-704. See also AR 648 (operating expenses for the three options); AR 652-53 (projected utilization for the three options); AR 684-86, 695 (capital costs for the three options); AR 686-87 (depreciation and interest costs for the three options); AR 688-89 (funding sources for the three options); AR 690 (funding for the three options); AR 691 (budgets for the three options); AR 693 (use forecasts for the three options); AR 705-06 (patient-day forecasts for the three options); AR 707 (operating expenses under the three options); AR 708 (legal restrictions for the three options); AR 700-03, 707-08 (quality of care for the three options); AR 709-10 (efficiency for the three options).

In summary, substantial evidence (convincing to a fair-minded person) supports the HLJ's finding that Kadlec applied for approval of 55, 75, or 114 beds. Hence, the finding must be upheld under the judicial review standard in RCW 34.05.570(3)(e).

Based on that finding, the HLJ reasonably concluded that: (1) approval of the 55-bed alternative did not constitute "denial" of the

application; (2) Kadlec had no right to contest the decision as an application “denial” under RCW 70.38.110(10)(a); and (3) Kadlec’s request for an adjudicative proceeding, therefore, should be dismissed. The HLJ’s legal conclusion based on RCW 70.38.115(10)(a) is entitled to substantial deference from the court, and should be upheld.¹

B. Kadlec’s Arguments On Its Right To An Adjudicative Proceeding To Seek Approval Of 75 Or 114 Beds Lack Merit

Kadlec argues it had the right to an adjudicative proceeding under RCW 70.38.115(10)(a) because, in receiving approval for only 55 beds, it was effectively “denied” approval for 75 or 114 beds. Br. at 17. However, the HLJ found Kadlec did not separately apply for 75 or 114 beds, but instead submitted only one application for 55, 75, or 114 beds. AR 619 (¶ 2.4). Hence, in approving the 55-bed alternative, the Department simply did not “deny” the application.

Kadlec argues that “partial” appeals from “partial” denials should be allowed in administrative cases. Br. at 17-18. This argument must be rejected because, as stated above, the HLJ reasonably found that the Department had not “denied” the application, but instead had “approved” one of three alternatives (for 55 beds) proposed by Kadlec.

¹ The HLJ also found that Kadlec had “waived” its right to challenge the 55-bed approval when it implemented the approval by actually adding the 55 beds to its hospital. AR 619 (¶ 2.5). Since this implementation demonstrates acceptance of the 55-bed approval, the ruling should not be overturned under any of the judicial review standards in RCW 34.05.570(3).

Kadlec claims that its application assumed that approval of only the 55-bed alternative would allow the hospital to add the 55 beds in the short term, while not precluding an appeal seeking approval of the larger 75 or 114-bed projects. Br. at 20-21. But this assumption was not explained in the application. In rejecting this argument, the HLJ noted that Kadlec under WAC 246-10-606 had the burden of showing compliance with the CN criteria, and failed to make clear that approval of only the 55 beds would be unacceptable to Kadlec. AR 619 n.2.

Finally, Kadlec notes that, when the Department issued the CN, it informed the hospital in boilerplate language of its general right to request an adjudicative proceeding. AR 1604-1605. Given this notice, Kadlec argues it was “arbitrary and capricious” to deny Kadlec the opportunity to contest the approval of only the 55 beds. Br. at 23-24. The CN document contained conditions in addition to approving the 55 beds, including designating the type of service and the approved capital expenditure. AR 674. If the CN document contained conditions that Kadlec opposed and had not requested, then the hospital could have challenged the validity of those conditions through an adjudicative proceeding.

However, for reasons discussed above, the general right to an adjudicative proceeding to contest the CN decision would not allow

Kadlec to successfully contest approval of the 55 beds, given that Kadlec had offered 55 beds as one of three alternatives for Department approval.²

C. The Department Decision Is Not Subject To Judicial Review As “Other Agency Action” Under RCW 34.05.570(4)

RCW 34.05.570 lists three types of judicial review of agency decisions. One type of review is “of agency orders in adjudicative proceedings.” RCW 34.05.570(3). Another type of review is “of other agency action.” RCW 34.05.570(4).

Kadlec argues that if it cannot challenge the 55-bed approval in an adjudicative proceeding under RCW 34.05.570(3), then the approval is “other agency action” subject to judicial review under RCW 34.05.570(4). Br. at 24-29. In such review, Kadlec argues that whether the hospital received approval for what it requested somehow would not be an issue, allowing the court itself to decide whether Kadlec should have been approved for 75 or 114 beds. Br. at 29-36.

The fallacy of this argument is that, as Kadlec itself correctly acknowledges in the Petition for Judicial Review, review should occur under RCW 34.05.570(3) because the HLJ’s decision is “an agency order in an adjudicative proceeding.” Hence, RCW 34.05.570(4), relating to

² The HLJ’s decision did not expressly address this issue of the stated right to request an adjudicative proceeding. However, a reviewing court may affirm an agency decision on any ground supported by the record, even if the agency decision did not address the issue. LaMon v. Butler, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989); Heidgerken v. Dep’t of Natural Res., 99 Wn. App. 380, 388, 993 P.2d 934 (2000).

review of “other agency action,” is inapplicable to this case.³ Moreover, as discussed above, the HLJ decision actually went to the merits by holding that Kadlec could not challenge the approval of only 55 beds since such approval was one of the alternatives offered in the CN application.⁴ It would be illogical for the court to decide under a RCW 34.05.570(3) review that the HLJ had correctly denied Kadlec the opportunity to seek approval for 75 or 114 beds in an adjudicative proceeding, and yet allow Kadlec the opportunity to pursue that very same remedy in a RCW 34.05.570(4) review.

In summary, if the court finds under a RCW 34.05.570(3) judicial review that the HLJ was correct in ruling that Kadlec could not

³ By contrast, RCW 34.05.570(4) would apply when the challenged decision does not occur within the context of an adjudicative proceeding, such as when a party objects to the contents of a Department letter related to a CN issue. Children’s Hosp. v. Dep’t of Health, 95 Wn. App. 858, 863, 975 P.2d 967 (1999).

⁴ For argument sake, if Kadlec is correct, the matter should be remanded to superior court for consideration of whether the application should be approved for 75 of 114 beds. Remand would be appropriate because, in upholding the HLJ’s decision, the superior court did not reach this issue.

In the issue not reached by the superior court, Kadlec argues that, in applying the State Health Plan Methodology to show need for only 61 additional hospital beds in Benton/Franklin Counties, the Department under-estimated future population growth based on 2002 Office of Financial Management (OFM) data, and thereby under-estimated need for additional beds. This argument lacks merit.

Between 2002-07, Benton/Franklin experienced high population growth. AR 2068-69. Historically, according to OFM, the two counties tend towards “dramatic fluctuations” in population. AR 2068. Given that history, in projecting population beyond 2007, the Department reasonably applied the “medium” growth forecast – not the “high” growth forecast sought by Kadlec – as the Department simply had no basis to assume that the high 2002-07 growth would necessarily continue through 2016. AR 2068-69, 2087.

successfully contest the Department's decision to approve only the requested 55 new beds, then the case is over, and Kadlec is not entitled to challenge the decision in a RCW 34.05.570(4) judicial review.

VI. CONCLUSION

Based on the foregoing, the Department respectfully requests that the court affirm the HLJ decision dismissing Kadlec's request for an adjudicative proceeding to contest the CN approval of only 55 additional hospital beds at its hospital.

RESPECTFULLY SUBMITTED this 28th day of June, 2012.

ROBERT M. MCKENNA
Attorney General

Richard McCartan WSBA # 22273
For RICHARD MCCARTAN, WSBA No. 8323
Assistant Attorney General
Attorney for State of Washington
Department of Health
(360) 664-4998

PROOF OF SERVICE

I, Linda M. Hoffman, certify that I served a copy of the *Department of Health Brief* on the party listed below on the date below as follows:

BRIAN GRIMM
PERKINS COIE LLP
1201 3RD AVE STE 4800
SEATTLE, WA 98101-3099
bgrimm@bblaw.com

- US Mail Postage Prepaid via Consolidated Mail Service
- Facsimile
- Electronic Mail
- Hand delivered by _____

CHRISTOPHER G. EMCH
FOSTER PEPPER PLLC
1111 THIRD AVE STE 3400
SEATTLE WA 98101
emchc@foster.com

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 STATE OF WASHINGTON
 BY L.M.H.
 DEPUTY

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

DATED this 28th day of June, 2012, at Olympia, Washington.


 LINDA M. HOFFMAN