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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By.....

NO. 311163

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON
DIVISION NO. III**

HOSPICE OF SPOKANE, a Washington-profit corporation,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH, a Washington
governmental agency, SECRETARY MARY SELECKY, Secretary of
Washington's Department of Health in her official and individual
capacity, FAMILY HOME CARE CORP., a Washington corporation,

Respondents.

APPELLANT'S REPLY BRIEF

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I. Issues

In its simplest form, the real issue before this Court can be simply stated as follows: is WAC 246-310-290(6) a part of the quantitative “need projection” set forth in WAC 246-310-290(7)?

It is undisputed by the parties in this appeal that Family Home Care (“FHC”) is required to prove that there was quantitative need using the forecast formula set forth in WAC 246-310-290 in order to have its application for a Certificate of Need (“CN”) approved by the Department of Health (“DOH”). If the mathematical formula does not result in a showing of “need”, the application must be denied.

It is undisputed that the mathematical calculations (inputting the data found by the Health Law Judge (HLJ) to be applicable to this matter) set forth in the seven steps of the need projection found in WAC 246-310-290(7) do not result in the showing of need. The only way that FHC can reach the minimum threshold of an average daily census (“ADC”) of unmet need is to incorporate WAC 246-310-290(6) into the forecast formula and to continue to project population growth in Spokane County for an additional three years following the year that FHC intended to commence operations.

Therefore, the issue is whether Subsection (6) is one of the steps of the need projection formula that is otherwise set forth in Subsection (7).

II. Discussion

A. Actual Language of WAC 246-310-290(6)

The language of WAC 246-310-290(6) (hereinafter referred to as “Subsection 6”) that is relevant to this appeal is as follows:

“(6) Hospice agencies applying for a certificate of need must demonstrate that they can meet a minimum average daily census (ADC) of thirty-five patients by the third year of operation.”

On its face, this language states that an applicant must show in its application that it will be able to “meet” a minimum average of thirty-five patients per day in its projected operations. This language does not state that the applicant must show unmet need in Spokane County using the need projection set forth in WAC 246-310-290(7) (hereinafter referred to as “Subsection 7”) in the third year after commencing operations as argued by the Respondents (Brief of FHC, p. 22; Brief of DOH, pp. 11, 18). Similarly, this language does not state that the applicant is to “project forward” for three years (after the year it commences business operations) following completion of the need projection steps contained in Subsection 7 (Brief of DOH, p. 13). And, contrary to the assertions made by FHC at p. 24 of its brief, Hospice of Spokane (“HOS”) is not stating that, under Subsection 6, FHC must show that it will have an ADC of thirty-five by

the third year of operation (Brief of FHC, p. 24). Instead, it is HOS's position that Subsection 6 means exactly what it says; i.e., that FHC must demonstrate that its business operations will be able to meet the needs for hospice services by an average of thirty-five patients per day by its third year of operations. The obvious purpose of Subsection 6 is to limit approval of CN's to only those applicants who can make a reasonable showing that they can meet the minimum daily quantitative need (as determined in Subsection 7) by their third year of operations.

B. WAC 246-310-290(6) has Independent Meaning

The Respondents continue to assert that an interpretation of the planning horizon under the need projection of Subsection 7 as being one year would render Subsection 6 meaningless (Brief of FHC, pp. 13, 19). To accept that argument means that Subsection 6 would not make any sense if Subsection 7 was not in the regulation. That is not the case. Clearly, Subsection 6 has independent substance and meaning which is, again, that an applicant must demonstrate in its application a business plan confirming that the applicant will be able to meet the hospice service needs of a minimum thirty-five patients per day by the third year of its operations. As addressed above, there are valid reasons for this requirement.

C. Language and Format Structure of Regulation

The language and formatting of WAC 246-310-290 clearly shows that the requirement contained in Subsection 6 (that applicants must demonstrate that they can meet a minimum ADC of thirty-five patients by their third year of operations) is a requirement (standard) separate and distinct from the forecasting formula set forth in Subsection 7.

First, as specifically recognized by FHC in its brief at page 21, the performance standard set forth in Subsection 6 precedes the subsection of the regulation (Subsection 7) dealing with need projection. In other words, this performance standard was not included in Subsection 7 of the regulation addressing need forecasting. On its face, it is separate and distinct from the required need projection.

Second, the language of Subsection 7 (titled “Need Projection”) begins as follows: “The following steps will be used to project the need for hospice services.” (Emphasis added) The preceding Subsection 6 is not one of “the following steps”.

Third, the following subsection (WAC 246-310-290(8)) commences with the language: “In addition to demonstrating need under Subsection (7) of this section, hospice agencies must meet the other certificate of need requirements including...”. (Emphasis added) This language clearly states that the forecasting method to determine whether

there is quantitative need is contained within Subsection 7. No reference is made to Subsection 6.

As set forth above, the language and format of WAC 246-310-290 unambiguously show that the entire formula for forecasting quantitative need is contained within Subsection 7.

D. Responses to Other Arguments Asserted by FHC and DOH

1. Accessibility for Hospice Services.

On pages 6 – 11 of its brief, FHC addresses several findings made by the HLJ that the issuance of a CN to FHC would increase accessibility for hospice services in Spokane County. Those findings by the HLJ are irrelevant to the issue on appeal in this matter. Those findings relate to “qualitative need” and not “quantitative need”. Even with those findings, the DOH is legally precluded from issuing a CN to FHC if there is no quantitative need shown in utilizing the need projection set forth in Subsection 7.

2. DOH’s Practice in Determining Need.

FHC further argues that DOH has consistently interpreted WAC 246-310-290 as requiring use of a 3-year planning horizon measured from the date the CN applicant intends to commence its hospice operations (Brief of FHC, p. 11).

How the Department has decided to interpret the regulation is irrelevant in this matter. If the meaning of the regulation can be derived from the plain language of the regulatory provision itself, this Court is to substitute its interpretation of the regulation and not defer to the Department. *City of Seattle v. Allison*, 148 Wn.2d 75, 59 P.3d 85 (2002); *Children's Hosp. & Med. Ctr. v. Dept. of Health*, 95 Wn.App. 858, 975 P.2d 567 (1999); *See also Conway vs. Dept. of Soc. & Health Servs.*, 131 Wn. App. 406, 120 P.3d 130 (2006).

3. WAC 246-310-290 Not Ambiguous as to Issue Before This Court.

FHC argues that WAC 246-310-290 is ambiguous and, therefore, great weight should be given to the HLJ's interpretation (Brief of FHC, pp. 17 – 18). FHC relies on *Odyssey vs. Dept. of Health*, 145 Wn.App. 131, 185 P.3d 652 (2008) which found that WAC 246-310-290 contains ambiguities.

The reliance by FHC on *Odyssey* in this appeal is misplaced. *Odyssey* did not deal with the length of the planning horizon in WAC 246-310-290(7)(e)-(g). What was found to be ambiguous by the *Odyssey* court was Step 2 of the need projection found in WAC 246-310-290(7)(b). The findings of the HLJ in this matter as to the calculations of Steps 1 through 4 of the need projection are not in dispute in this appeal. Therefore, the fact that another division of the Court of Appeals found Subsection 7 to be

ambiguous relating to the specific issue in dispute in that case has no bearing on this Court's analysis as to whether WAC 246-310-290(7)(e)-(g) are ambiguous.

4. Difficulty of Finding Need if One Year Projection Horizon.

In its brief, FHC addressed the point that the CN Program's Executive Director explained that a one year planning horizon virtually eliminates a possibility of finding quantitative need in a county. (Brief of FHC pp. 19-20)

First of all, the planning horizon is a matter that is defined in the regulation adopted by the DOH. If the DOH believes that this planning horizon is too short given the intent of the State Health Planning and Resources Development Act, RCW Chapter 70.38, then the DOH can propose amendments to the regulation. But, until such time as the regulation is amended, the regulation is what it is.

Second, as set forth in the Brief of Appellant filed herein, there, in fact, has been a showing of need within the one year projection horizon in all instances of past hospice decisions under this regulation wherein the DOH approved the CN application. (Brief of Appellant pp. 33-34)

5. Planning Horizons for Other Health Care Services.

Respondents argue that the planning horizons for other health care services are three years or greater. (Brief of FHC p. 20, Brief of DOH p. 17)

Again, it is irrelevant what other regulations require in order to obtain a CN for other health care services. There is little consistency among the various regulations. Such planning horizons extend from one to five years. Furthermore, a one year planning horizon is justified for hospice services given the fact that it does not require substantial infrastructure investment to commence providing hospice services. (AR 3008, lines 14-25; AR 3009, lines 1-9).

6. Advisory Committee Comments.

In responding to the observation made in HOS's Brief of Appellant that the Hospice Methodology Advisory Committee to the DOH rejected a three year projection horizon in favor of a one year projection horizon in its most recent report before it was disbanded, FHC responds that those comments were "just drafts; there are no final comments in the record that are not drafts." (Brief of FHC p. 25) As set forth in footnote 6 of Appellant's Brief, "events surrounding the enactment of a statute are considered a source of information of a legislative intent embodied therein." *State v. Zuanich*, 92 Wn. 2d 61, 593 P.2d 1314 (1979). Such legislative history includes committee reports, statements and explanations of the draftsman and sequential drafts of the legislation. *Id*; *See also*, *Spokane County Health Dist. v. Brockett*, 120 Wn.2d 140, 839 P.2d 324 (1992).

This Court can certainly take into account the comments generated by the Committee that was involved in the drafting of the regulation. These comments evidence the fact that specific consideration was given to the particular issue of whether a one year planning horizon should be embodied in the regulation rather than a three year planning horizon. Furthermore, these comments set forth the reasoning why a one year planning horizon makes better sense. The regulation, as adopted, included the one year planning horizon in Step 5 thereof (“Inflate the potential volume of hospice service by the one-year estimated population growth (using OFM data”).

7. Absurd Result Issue.

In the Brief of Appellant, HOS shows how the HLJ’s conclusion that the planning horizon extends through the third year following the applicant’s commencement of business can lead to an absurd result whereby two applicants may obtain inconsistent results as to quantitative need solely depending on their respective intended first year of operations. (Brief of Appellant at pp. 36-37) FHC responds that, “if this hypothetical situation were to arise, an HLJ could find the Department has discretion to evaluate both applicants using the same three-year planning horizon, or apply the different planning horizons HOS posits would occur in order to grant a CN to the agency able to most quickly meet the community’s need

for another agency.” (Brief of FHC p. 29) FHC gives absolutely no legal basis or authority to support the position that the Department would have discretion to analyze the applications in this manner and ignore the regulatory requirements.

The purpose for showing the possible absurd result arising from incorporating Subsection 6 as a part of the need forecasting steps set forth in Subsection 7 is because this Court, in reviewing and interpreting regulations, must avoid interpretations that are unlikely or absurd. *Odyssey*, 145 Wn.App at 143 (citing *Alderwood Water Dist. v. Pope & Talbot, Inc.*, 62 Wn.2d 319, 382 P.2d 639 (1963))

III. CONCLUSION

The need projection formula set forth in Subsection 7 is a self contained formula. It finishes with the final step of “Determine the number of hospice agencies...which could support the unmet need with an ADC of thirty-five.” If this number is one (1) or greater, need is shown. If this number is less than one (1), no quantitative need is shown and the CN application must be denied. The facts are undisputed in this appeal that, under Subsection 7 alone, there is no need following the inflation of the potential volume of hospice services by the one-year estimated population growth as set forth in the regulation. The formula would require an additional 3 years of population growth inflation before the

quantitative need threshold is surpassed in this matter. The regulation does not provide for that.

For the reasons stated in its opening brief and in this Reply, Appellant Hospice of Spokane respectfully requests that this Court reverse the Department's Decision and Final Order granting FHC's 2006 CN application.

RESPECTFULLY SUBMITTED this 27th day of March, 2013.

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CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury according to the laws of Washington that the following statements are true and correct.

On the 27th day of March, 2013, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

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DATED this 27th day of March, 2013, at Spokane, Washington.



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