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NO. 66304-6-I

**COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON**

KING COUNTY PUBLIC HOSPITAL DISTRICT NO. 2, d/b/a
EVERGREEN HEALTHCARE, a Washington public hospital district,
SWEDISH HEALTH SERVICES, d/b/a SWEDISH VISITING NURSE
SERVICES, a Washington non-profit corporation, PROVIDENCE
HOSPICE AND HOME CARE OF SNOHOMISH COUNTY, a
Washington non-profit corporation, and HOSPICE OF SEATTLE, a
Washington non-profit corporation,

Respondents,

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,
ODYSSEY HEALTHCARE OPERATING B, LP, a Delaware corporation,
and ODYSSEY HEALTHCARE, INC., a Delaware corporation,

Appellants.

REPLY BRIEF OF APPELLANTS ODYSSEY HEALTHCARE

JEFFREY A.O. FREIMUND, WSBA No. 17384
Freimund Jackson Tardif & Benedict Garratt, PLLC
711 Capitol Way South, Suite 602
Olympia, WA 98501
(360) 534-9960
Attorneys for Appellants Odyssey Healthcare
Operating B, LP and Odyssey Healthcare, Inc.

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I. INTRODUCTION AND SUMMARY OF REPLY

This is a case of first impression requiring interpretation of RCW 70.38.115(10)(c). This statute authorizes the Department of Health (“the Department”) to settle adjudicative proceedings challenging the denial of a Certificate of Need (“CN”) license “prior to the conclusion of the adjudicative proceeding” so long as the CN applicant’s competitors are given an opportunity to comment on the proposed settlement before entry. Here, a Health Law Judge (“HLJ”) approved a settlement between the Department and a CN applicant after the applicant’s competitors were given two opportunities to comment on the proposed settlement.

Most settlements are not subject to administrative or judicial review due to public policies favoring settlements. Although RCW 70.38.115(10)(c) is unusual in allowing others to comment on proposed settlements, there is no indication the Legislature intended to give competitors authority to block CN settlements when their comments do not persuade the Department to go forward with litigation.

On judicial review of the HLJ’s ruling approving this settlement, the trial court erred by construing RCW 70.38.115(10)(c) as prohibiting settlement even though the CN applicant’s competitors received two opportunities to present written evidence and argument opposing settlement. The trial court misconstrued RCW 70.38.115(10)(c) as

mandating that CN adjudicative proceedings must conclude with a full hearing on the merits and can not be settled if the Department proposes to modify its decision denying a CN in the course of settling an applicant's case challenging that CN denial.

Although resolution of this appeal turns on interpretation of RCW 70.38.115(10)(c), respondents King County Public Hospital District No. 2, Swedish Health Services, Providence Hospice and Home Care of Snohomish County, and Hospice of Seattle ("the competitors") barely mention this statute in their brief. They do not attempt to defend the trial court's construction of RCW 70.38.115(10)(c), nor do they claim the statute is ambiguous.

The standard of review affects resolution of the issues on appeal. The competitors ignore the law establishing the HLJ's decision approving the settlement is entitled to substantial deference, while the trial court's ruling undoing the settlement is entitled to no deference. *Overlake Hosp. Assn. v. Dept. of Health*, 170 Wn.2d 43, 50, 239 P.3d 1095 (2010) (substantial deference to HLJ rulings); *DaVita, Inc. v. Dept. of Health*, 137 Wn. App. 174, 180-81, 151 P.3d 1095 (2007) (appellate court stands in trial court's shoes when reviewing HLJ rulings). They also ignore established law placing a heavy burden on them to show there is no room for two opinions concerning the HLJ's decision approving the settlement.

See Washington Indep. Telephone Ass'n v. Washington Utilities and Transportation Comm'n, 148 Wn.2d 887, 904, 64 P.3d 606 (2003). By failing to show there is room for only one opinion, the competitors fail to meet their burden of proving the HLJ's decision was arbitrary and capricious. *See id.* In regard to the HLJ's ruling allowing consideration of updated data supporting the settlement, an abuse of discretion standard of review applies to this evidentiary ruling, not the arbitrary and capricious standard advocated by the competitors. *See Univ. of Wash. Med. Center v. Dept. of Health*, 164 Wn.2d 95, 104, 187 P.3d 243 (2008).¹

The competitors also fail to address other arguments raised by appellant Odyssey Healthcare Operating B, LP and Odyssey Healthcare, Inc. ("Odyssey") and the Department. They do not respond to Odyssey's argument that the trial court erred by reversing the federal court settlement of Odyssey's 42 U.S.C. § 1983 civil rights action for damages and equitable relief. That federal settlement was not before the state trial court on judicial review of the separate adjudicative settlement, and was agreed

¹ Respondents' brief repeatedly refers to actions of "the Department" they claim were arbitrary and capricious. To be clear, however, the only agency action subject to judicial review in this case is the HLJ's final order approving the settlement of the adjudicative proceeding. *See DaVita, Inc. v. Dept. of Health*, 137 Wn. App. 174, 181, 151 P.3d 1095 (2007) ("the HLJ is the secretary's designee, with the authority to make final decisions and issue a final order for CON applications. Thus, the agency action we review ... is the HLJ's written order, not the [CN] Program's written evaluation."). For clarity, therefore, Odyssey distinguishes between the HLJ's final decision, which may be subject to judicial review, and the Department's actions (including its initial evaluation of Odyssey's CN application), which are not.

to by the Attorney General's office pursuant to RCW 4.92.150, not by the Department pursuant to RCW 70.38.115(10)(c).

Instead of addressing these pivotal legal issues, the competitors focus on the same arguments they previously made to the Department, the HLJ and the trial court. They claim they can continue expanding to meet the growing need for hospice care in the State's most populated county so access to a new hospice agency is unneeded. They speculate Odyssey's modest expenditure of \$45,000 to rent and furnish a small office staffed by up to eighteen people to provide end-of-life care to around thirty-five terminally ill patients at the patients' residences (AR 13, 27)² might flop financially, disrupt the health care system, and reduce existing providers' increasing revenues. In approving the settlement, the HLJ found these arguments for rejecting Odyssey's CN unpersuasive.

Odyssey respectfully asks this Court to affirm the HLJ's order approving the settlement of the adjudicative proceeding. This settlement fully complied with RCW 70.38.115(10)(c). The settlement of the separate federal civil rights action, which was not before the HLJ or the trial court, fully complied with RCW 4.92.150. The trial court erred by concluding otherwise and undoing both settlements.

² "AR" refers to the Administrative Record included with the Clerk's Papers.

II. REPLY STATEMENT OF THE CASE

There is no dispute the competitors had two opportunities to submit written evidence and argument opposing the Department's proposed settlement of Odyssey's adjudicative proceeding challenging the denial of its CN application before the HLJ approved the proposed settlement. Brief of Respondents ("BR"), pp. 17-19. There is no dispute corrected data shows there is need for at least one new hospice agency in King County (although the competitors argue this data should not be considered, or is inaccurate). *Id.*, p. 14. And, there is no dispute the Department and HLJ expressly found that all statutory and regulatory criteria for issuance of a CN to Odyssey were met (although the competitors argue a more "substantial analysis" should have been made to support this finding). *Id.*, pp. 30-32. These undisputed material facts show the HLJ's ruling approving the settlement of Odyssey's adjudicative proceeding fully complied with RCW 70.38.115(10)(c), even though the HLJ was not persuaded by the competitors' written evidence and arguments urging rejection of the settlement.

In an attempt to misdirect the Court from these relevant material facts, the competitors' response brief contains some mischaracterizations of "facts" that Odyssey is compelled to address. First, they claim "Odyssey concedes that the existing providers have met and are meeting

the hospice needs of King County residents,” citing page 12 of Odyssey’s opening brief. BR, pp. 3-4. Actually, Odyssey stated on page 12 of its opening brief that the existing providers’ operations have continuously grown, increasing their censuses by 1,535 new patients in King County from 2005 to 2009 without having to obtain CNs for their expansions, and this growth in hospice use would have justified several new hospice agencies. Characterizing Odyssey’s recitation of these undisputed facts as a concession that “the existing providers have met and are meeting the hospice needs of King County residents” is misleading.

On page 4 of their brief, the competitors attempt to portray Odyssey as a bad actor by noting that, of the 81 hospice agencies Odyssey operated in 30 states, three states had investigated Odyssey for “significant noncompliance issues” (citing AR 862). Yet, the competitors fail to mention the Department referenced this statistic in the course of concluding Odyssey met the CN criterion requiring “a reasonable assurance that [Odyssey’s hospice] project will be in conformance with applicable state licensing requirements and ... with applicable conditions of participation” in Medicaid or Medicare programs. AR 862. Although the Department found this criterion was met in its initial evaluation denying Odyssey’s CN application (the same evaluation the competitors contend was “correct,” *e.g.*, BR, p. 13), the Department denied Odyssey’s

CN application because it found the need criteria were not met. AR 855-56, 857, 859, 860, 861, 862, 863-64. Failing to provide the context for this statistic is misleading.

On page 5 of their brief, the competitors suggest Odyssey is a profit-driven monolith that will not provide charity care. They fail to acknowledge, however, that in the settlement of the adjudicative proceeding Odyssey committed to “provide charity care in an amount comparable to or exceeding 2.5% of Medicare revenue” AR 1094. The competitors also fail to mention that in its initial evaluation of Odyssey’s CN application, the Department concluded Odyssey’s charity care policy met the CN criterion requiring that “all residents of the service area, including low-income persons ... and other underserved groups ... are likely to have adequate access” to Odyssey’s proposed hospice agency. AR 856-57.

On BR page 11, footnote 4, the competitors suggest Odyssey’s remedy lies in some unspecified amendment of the hospice CN regulations, and note the Department began a rulemaking process in 2010 as required in the settlement of Odyssey’s federal civil rights action (AR 1091). However, they omit the fact the website they refer the Court to (*i.e.*, www.doh.wa.gov/hsqa/fsl/certneed/Hospice.htm) states Governor Gregoire, by Executive Order 10-06, indefinitely suspended all

rulemaking in November 2010, including the hospice rulemaking.³

On BR pages 18-19, the competitors incorrectly allege the Department and Odyssey sought HLJ approval of the federal court settlement of Odyssey's civil rights action. The truth is the HLJ was only asked to approve the settlement of the adjudicative proceeding pursuant to RCW 70.38.115(10)(c); he was not asked to approve the separate, albeit related settlement of the federal court civil rights action over which he had no jurisdiction. *See, e.g.*, AR 995, 1001-02, 1019-28. In fact, the federal settlement was complete by its express terms once it was signed on September 25, 2009, and Odyssey's federal lawsuit was dismissed two days later as agreed. AR 1091-92. Thus, even if the HLJ had jurisdiction over the federal civil rights action for damages and equitable relief, which he did not (*see, e.g.*, RCW 34.05.510(1)), there was nothing in the federal settlement for the HLJ to approve; the federal case was over. *See id.*⁴

³ Similarly disingenuous is the competitors' argument that Odyssey's remedy lies in pursuing the remand ordered by the trial court. BR, pp. 42-43. Given the trial court's remand order limiting the HLJ's discretion to consideration of only the Department's 2007 need calculation showing no need (CP 974), the outcome of the remand proceeding is foreordained.

⁴ In any event, a timely petition for judicial review of the Department action settling the federal litigation had to be filed within thirty days of that agency action. RCW 34.05.542(3). No such petition was filed. The competitors did, however, timely file a petition for judicial review of the HLJ's December 8, 2009 order approving the separate settlement of Odyssey's adjudicative proceeding, which resulted in issuance of a CN to Odyssey for a hospice agency in King County. *See* CP 7-10; RCW 34.05.542(2).

The issuance of the King County CN to Odyssey, which is the focus of the competitors' complaints, was a product of the settlement of Odyssey's adjudicative proceeding, not the settlement of Odyssey's federal civil rights action. *Compare* AR 1091-92 *with* AR 1093-95. The federal court settlement was not before the HLJ, nor was it before the trial court on judicial review of the HLJ's decision approving the settlement of Odyssey's separate adjudicative proceeding.

III. REPLY ARGUMENT

A. Standard of Review

1. The abuse of discretion standard applies to the HLJ's evidentiary ruling allowing consideration of updated data showing need for another hospice agency

The competitors claim "the Department and Odyssey misstate the applicable standard of review" regarding the HLJ's consideration of updated data showing need for another hospice agency in the course of approving the settlement of Odyssey's adjudicative proceeding. BR, p. 20. They contend the standard of review for an HLJ's evidentiary rulings should be the arbitrary and capricious standard, not the abuse of discretion standard. *See id.*, pp. 20-21, 23-30. Thus, they argue the trial court properly applied the arbitrary and capricious standard to overturn the federal court settlement because the HLJ had to willfully disregard updated evidence showing need for an additional hospice agency. CP 973.

Our Supreme Court has squarely held the correct standard of review for evidentiary rulings in CN cases is whether an abuse of discretion occurred, not whether the evidentiary ruling was arbitrary and capricious. *Univ. of Wash. Med. Center*, 164 Wn.2d at 104 (“evidentiary rulings [are reviewed] for abuse of discretion” and “[i]t was within the sound discretion of the health law judge to admit, or not admit, evidence that came into existence after the close of the public comment period” [emphasis added]). Odyssey so argued in its opening brief at pages 41-45.

Although the competitors quote portions of the *Univ. of Wash. Med. Center* decision, they omit the key portions of the decision quoted above expressly holding the HLJ had discretion to admit, or not admit, updated evidence that came into existence after the close of the public comment period. *See* BR, pp. 26-27. The HLJ’s admission of updated evidence when considering the propriety of a settlement was no more an abuse of discretion than not admitting it would have been. *Univ. of Wash. Med. Center*, 164 Wn.2d at 104. The trial court erred by applying the arbitrary and capricious standard of review to the HLJ’s evidentiary ruling, and, more importantly, by failing to apply the binding precedent in *Univ. of Wash. Med. Center* holding that consideration of updated data is

within the HLJ's discretion.⁵

2. Because there is room for two opinions, the HLJ decision approving the settlement is not arbitrary and capricious

“The standard of review in CN cases is that the agency decision is presumed correct and that the challengers have the burden of overcoming that presumption.” *Overlake Hosp. Assn.*, 170 Wn.2d at 49-50. Courts are to “accord substantial deference to the agency’s interpretation of law in matters involving the agency’s special knowledge and expertise.” *Id.* at 50. Challengers of an HLJ’s decision must show the decision is arbitrary and capricious, or contrary to law.⁶ *Id.*

⁵ The competitors argue the HLJ’s consideration of updated data was arbitrary and capricious because it deviated from both an internal memorandum the Department Secretary wrote before the *Univ. of Wash. Med. Center* decision was issued, and the Department’s Answer to Odyssey’s federal Complaint. BR, pp. 23-25. Neither the Secretary’s memorandum, nor the Department’s denials of liability in an Answer to a Complaint have the force of law sufficient to overrule binding Supreme Court precedent according HLJs discretion to admit evidence that came into existence after the close of the public comment period. *See, e.g., Melville v. State*, 115 Wn.2d 34, 39-40, 793 P.2d 952 (1992) (making a “distinction between regulations having the force of law and policy manuals or recommended procedures which lack the force of law”). There is no merit to the argument that a government agency acts arbitrarily and capriciously by settling a federal civil rights lawsuit for damages and equitable relief even though the agency initially denied some of the allegations in the plaintiff’s Complaint.

⁶ One of the competitors (Evergreen) argues in a footnote the Department deprived it of procedural due process by not giving that competitor an opportunity to oppose the federal settlement, even though there is no dispute the competitor had notice of the federal action, did not seek to intervene, and was not a party to the federal action. BR, pp. 12, 20-21, n. 8. Odyssey refuted this constitutional claim in its opening appellate brief at page 28, footnote 4. Evergreen does not cite any relevant authority supporting its footnoted constitutional claim, does not respond to the arguments in Odyssey’s opening appellate brief refuting this claim, and can not prove beyond a reasonable doubt that RCW 70.38.115(10)(c) or the HLJ’s order approving the settlement of Odyssey’s adjudicative proceeding are unconstitutional.

The scope of review under the arbitrary and capricious standard “is very narrow,” “highly deferential” to the agency and the party challenging an agency decision carries “a heavy burden.” *Alpha Kappa Lambda Fraternity v. Washington St. Univ.*, 152 Wn. App. 401, 418, 422, 216 P.3d 451 (2009). “An agency’s decision is arbitrary and capricious if the decision is the result of willful and unreasoning disregard of the facts and circumstances.” *Overlake Hosp. Assn.*, 170 Wn.2d at 50. “Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous.” *Washington Indep. Telephone Ass’n*, 148 Wn.2d at 904.

There was room for two opinions about whether the HLJ should have approved the settlement of Odyssey’s adjudicative proceeding, but after due consideration of the Department’s, Odyssey’s and the competitors’ written evidence and arguments, the HLJ decided to approve the settlement consistent with RCW 70.38.115(10)(c). The HLJ did not willfully disregard the competitors’ arguments; he just did not find them persuasive. Therefore, the HLJ’s ruling approving the settlement was not arbitrary and capricious because there was room for two opinions. The trial court erred by concluding otherwise.

Odyssey made this argument in its opening appellate brief at pages 23-24. The competitors offer no response to this dispositive argument.

Therefore, even though the trial court believed the HLJ's ruling was erroneous, the trial court erred by reversing the ruling because there undeniably is room for two opinions as to whether the settlement granting Odyssey a CN for a new hospice agency should have been approved.

B. The Trial Court Erred by Construing RCW 70.38.115(10)(c) as Prohibiting Settlement and Requiring a Full Adjudicative Hearing

Without concluding RCW 70.38.115(10)(c) is ambiguous, the trial court erroneously construed the statute as follows:

[I]t is clear that the intent of the Legislature in enacting this provision was not to allow a "settlement" to circumvent established evaluation procedures or to modify a decision of the Department without an adjudicative hearing, especially if the primary settlement arose from an entirely separate lawsuit and proceeding.

CP 973 (emphasis added). Rather than applying the plain language of an unambiguous statute broadly authorizing the Department to settle CN cases, the trial court narrowly construed the statute as allowing pre-hearing settlements only where the Department essentially is not settling at all - - *i.e.*, where the Department is not modifying the challenged decision denying a CN.

In its opening appellate brief, at pages 25-38, Odyssey argued RCW 70.38.115(10)(c) is not ambiguous and, even if it were, the trial court's construction of the statute renders the Department's pre-hearing

settlement authority meaningless, and leads to strained or absurd results. In support, Odyssey cited *St. Joseph Hosp. v. Dept. of Health*, 125 Wn.2d 733, 887 P.2d 891 (1995), which led to enactment of RCW 70.38.115(10)(c).

The *St. Joseph* court rejected the argument that competitors are entitled to a full adjudicative proceeding on the merits, in addition to an opportunity to submit written evidence and arguments, when the Department desires to settle an applicant's challenge to the denial of a CN. *St. Joseph Hosp.*, 125 Wn.2d at 742-43 (also recognizing "a limited right of agencies to reopen their final decisions"). The Legislature codified the *St. Joseph* court's ruling by enacting RCW 70.38.115(10)(c), giving competitors a limited opportunity to submit written evidence and argument opposing a proposed settlement (much like the opportunity to comment at CN public hearings pursuant to RCW 70.38.115(9)), but not an adjudicative trial on a case the original parties propose to settle before incurring the risks and costs of trial.

The competitors offer no response to this analysis of RCW 70.38.115(10)(c). *Contra* RAP 10.3(b) ("The brief of respondent should ... answer the brief of appellant"). They mention the statute only once in a footnote for the undisputed proposition the statute "unambiguously" requires the Department to provide competitors an opportunity to

comment on a proposed settlement before the settlement is finalized. BR, p. 21 n. 8. They cite *St. Joseph* twice, but only for the proposition they have standing to seek judicial review of the HLJ's ruling approving the settlement.⁷ BR, pp. 21, 41.

In summary, the competitors do not dispute Odyssey's arguments at pages 25-38 of its opening appellate brief that:

(1) RCW 70.38.115(10)(c) broadly and unambiguously allows settlements prior to the conclusion of a CN applicant's adjudicative proceeding, with the only limitation being that competitors must be given one opportunity to submit written evidence and argument before the Department may enter a proposed settlement;

(2) the *St. Joseph* court squarely rejected the argument that competitors are entitled to a full adjudicative proceeding if the Department issues a CN in the course of settling an applicant's adjudicative proceeding challenging the denial of the CN;

(3) the legislative history of RCW 70.38.115(10)(c) demonstrates

⁷ Although the competitors argue at length they have standing to seek judicial review of the HLJ's order approving settlement of Odyssey's adjudicative proceeding (BR, pp. 21 n.8, 39-41), neither the Department nor Odyssey argue on appeal they lack standing. The real issue is the scope of judicial review, not standing. Odyssey argues the process due competitors opposing proposed settlements pursuant to RCW 70.38.115(10)(c) is limited to a single opportunity to persuade the Department through written evidence and argument to reconsider the proposed decision to settle instead of continuing litigation. The statute provides no further process for undoing proposed settlements. Judicial review of RCW 70.38.115(10)(c) settlements is limited to ensuring required procedures were followed and the competitors' comments were not willfully ignored by the HLJ who makes the final decision on whether to settle or continue the litigation.

the Legislature's intent to favor settlements by giving competitors only a limited right to submit written evidence and argument on a proposed settlement, rather than a full adjudicative hearing with oral testimony and argument on a case the Department and CN applicant want to settle; and

(4) the trial court's misconstruction of RCW 70.38.115(10)(c) requiring a full hearing on the merits, in addition to opportunities to comment, renders the statute's pre-hearing settlement authority meaningless and leads to strained or absurd results prohibiting settlements.

Ignoring these arguments does not make them less decisive. By enacting RCW 70.38.115(10)(c), the Legislature did not intend to change public policy favoring settlements. Under the law favoring settlements, an HLJ's role as the Department's final decision-maker (*see DaVita*, 137 Wn. App. at 181) is to consider intervening competitors' written arguments for rejecting a proposed settlement. On judicial review of an HLJ's settlement ruling, the reviewing court's role is narrower and deferential; limited to determining whether the HLJ willfully disregarded undisputed material facts or misapplied the law. If a reviewing court concludes either occurred, the remedy should be a remand to the HLJ to consider the willfully disregarded facts or to correctly apply the law. The remedy should not be reversal of the parties' settlement and remand for trial.

The trial court erred by reversing the HLJ's approval of the

settlement and remanding the case for trial. The trial court's misconstruction of RCW 70.38.115(10)(c) should be reversed because the statute does not prohibit settlements in which the Department or HLJ modifies an initial decision denying a CN.

C. The Trial Court Erred by Reversing the Settlement of Odyssey's Federal Court Lawsuit Because the Federal Court Case Was Not Before the State Trial Court and, by Statute, Neither the HLJ Nor the Department Made the Decision to Settle the Federal Lawsuit for Damages and Equitable Relief

There is no genuine dispute the competitors only sought judicial review of the HLJ's ruling approving the settlement of the state adjudicative proceeding pursuant to RCW 70.38.115(10)(c), not the separate settlement of Odyssey's federal civil rights action for damages and equitable relief that was not before the HLJ. *See* CP 7-8. The intervening competitors also do not dispute the applicable statute governing settlements of federal civil rights lawsuits for damages against state employees is RCW 4.92.150, which gives statutory authority to settle 42 U.S.C. § 1983 claims for damages only to the Attorney General's office and the State Risk Management Division, not the Department or an HLJ. And, they do not dispute that the trial court's ruling undoing the federal settlement sets an unwise precedent that settlements of federal civil rights actions against state employees pursuant to RCW 4.92.150 are subject to administrative and judicial review under chapter 34.05 RCW.

Odyssey made these arguments in its opening appellate brief at pages 39-41. The competitors offer no response to these legal arguments. Thus, there is no genuine dispute the trial court's decision undoing the federal settlement should be reversed because that separate settlement was not before the HLJ, or the state trial court.

D. The Trial Court Erred in Reversing the Settlement on the Mistaken Grounds the HLJ Did Not Find Odyssey Had Met All Four Criteria for Issuance of a CN

The trial court erroneously concluded the HLJ approved the settlement of the adjudicative proceeding “without an adjudication or finding that Odyssey had actually met all four of the CN criteria” CP 973. The competitors implicitly concede the trial court's conclusion is erroneous by acknowledging the HLJ actually did make a finding (at AR 1722; CP 972) that “For reasons stated by the [CN] Program in its evaluation and settlement proposal ... Odyssey's hospice application for King County meets the requirements of WAC 246-310-210, 246-310-220, 246-310-230, and 246-310-240 [*i.e.*, all four of the CN criteria].” *See* BR, p. 30 (quoting this finding).

Rather than attempting to defend the trial court's erroneous conclusion that no such adjudication was made, the competitors instead raise a new, conclusory argument that the HLJ acted arbitrarily and capriciously by not presenting a more “substantial analysis” to support his

adjudication that all four CN criteria were met. BR, p. 32. They cite no authority establishing an HLJ's conclusion of law is arbitrary and capricious if stated in a conclusory fashion along with references to the portions of the record supporting the conclusion; nor do they cite any authority requiring administrative tribunals to compose a "substantial analysis" explaining each conclusion of law. Legal arguments unsupported by any authority need not be considered. RAP 10.3(a)(6); *Ang v. Martin*, 154 Wn.2d 477, 487, 114 P.3d 637 (2005).

Even if considered, however, the competitors understood the HLJ's analysis underlying his conclusion was that once the "Need" criteria were met, the three CN criteria other than "Need" were also met based on the Department's initial evaluation and explanations of that initial evaluation in its briefs supporting approval of the settlement. *See* AR 1722. In recognition of this analysis by the HLJ, the competitors argue the record does not support "[t]he Department's argument that the three criteria other than need were not satisfied under the original analysis only because 'Need' had not been satisfied" BR, p. 32 n. 15.

The substantial evidence standard of review applies to the competitors' argument that the record does not support the HLJ's conclusion. *See* RCW 34.05.570(3)(d), (e). The Supreme Court has explained this standard of review as follows:

We do not retry factual issues and accept the administrative findings unless we determine them to be clearly erroneous, that is, the entire record leaves us with a definite and firm conviction that a mistake has been made. Important here is the corollary principle that the existence of credible evidence contrary to the agency's findings is not sufficient in itself to label those findings clearly erroneous.

Univ. of Wash. Med. Center, 164 Wn.2d at 102.

The competitors fail to show the HLJ clearly erred by concluding the Department had correctly found the three non-need criteria were met so long as the need criteria were met. Even a cursory reading of the Department's initial evaluation demonstrates the Department found the three criteria other than need were not satisfied solely because the "Need" criteria had not been satisfied. AR 22-31. Relying on this evaluation and the Department's briefs supporting the settlement proposal (AR 1018-28, 1682-88), which explain the basis for the Department's conclusions in its initial evaluation, the HLJ expressly found, "[f]or reasons stated by the [CN] Program in its evaluation and settlement proposal" Odyssey's CN application meets all four CN criteria. AR 1722. The initial evaluation and the Department's briefs explaining its initial findings provide substantial evidence supporting the HLJ's ruling adopting the Department's reasoning that all four CN criteria were met.

In response, the competitors point to evidence in the Department's

initial evaluation they claim shows two of the three criteria other than “Need” were not met even if the “Need” criteria were met. BR, pp. 33-34. First, they point to the Department’s initial evaluation that the first of three sub-criteria for “Financial Feasibility” (WAC 246-310-220) was not met because:

[I]n the need section of this evaluation the department concluded that need for an additional Medicare certified hospice agency has not been demonstrated. As a result, the department concludes that Odyssey’s projected number of patient days is not reliable and the department cannot conclude that sufficient revenue would be generated to meet the expenses of the proposed project.

AR 26. This finding was based on inaccurate 2007 data showing the statewide average length of stay was 51.6 days, and the forecasted unmet need in 2011 in King County was an average daily census of negative 15 patients.⁸ AR 1058. When the Department corrected this data in 2008, the statewide average length of stay was determined to be 61.7 days, and the forecasted unmet need in King County was an average daily census of 37 patients in 2009, increasing to 56 patients in 2011, and 73 patients in 2013.

⁸ To meet the Department’s need criteria a hospice agency must be forecasted to have an average daily census of at least 35 patients by the third full year of operation. WAC 246-310-290(6). At the time of Odyssey’s October 2006 application, its proposed third full year of operation was projected to be 2011. AR 25. Thus, Odyssey had to show there would be an unmet need for an average daily census of at least 35 hospice patients in King County by 2011. As explained in the text, the 2008 corrected data shows Odyssey met the need criteria in 2009, 2010 and 2011.

AR 1101. Thus, the forecasted sources of revenue increased from no patients to a daily average of over 55 patients by Odyssey's projected third full year of operation in 2011. There is no dispute that even if the average daily census were only 36 patients, Odyssey would have a net profit of over \$31 per patient day by 2011. *See* AR 25. As the HLJ concluded when approving the settlement, these corrected numbers regarding need substantially increased the financial feasibility of Odyssey's project and met the financial feasibility criteria. *See* AR 1722. The competitors are thus unable to meet their burden of showing the HLJ's ruling was clearly erroneous.

Second, the competitors point to the Department's initial evaluation where it is stated Odyssey's CN application met two Structure and Process of Care sub-criteria (WAC 246-310-230), but would need to "provide copies of ... agreements [with ancillary and support services] for review and approval, identifying vendors and charges for services consistent with the draft provided" and identify a clinical services director and back-up. AR 28-29. The competitors argue the HLJ erred by concluding Odyssey met these sub-criteria as the Department had found because they speculate the Department may no longer require identification of these vendors and staff and, if so, the failure to explain why would be arbitrary and capricious. BR, p. 34. Putting aside that

speculation is insufficient to meet their burden, the competitors' speculation is baseless because Odyssey has always intended to comply with the Department's standard request for identification of vendors and key staff. The competitors have offered no evidence to the contrary, nor could they. Therefore, they fail to meet their burden of showing the HLJ's ruling that all four CN criteria were met was clearly erroneous.

E. The Department's Updated December 2008 Need Calculation, Which the HLJ Referenced in His Final Order, Was Accurate

Perhaps recognizing HLJs do have discretion to consider updated, corrected data pursuant to *Univ. of Wash. Med. Center*, the competitors alternatively argue there are flaws in the December 2008 need calculation. BR, pp. 35-37. First, they claim the December 2008 need calculation does not account for an exemption pursuant to RCW 70.38.111(9) that Kline Galland received almost a year later on October 20, 2009, allowing it to open a new hospice. This exemption was granted after the Department and Odyssey entered the proposed settlement on September 25, 2009 (AR 1093-95), but before the HLJ approved the settlement on December 8, 2009 (AR 1721-22). BR, pp. 35-36.

RCW 70.38.111(9)(b) provides "[t]he department shall include the patient census for an agency exempted under this subsection (9) in its calculations for future certificate of need applications [emphasis added]."

Accordingly, Kline Galland's patient census could only be counted when calculating need for hospice CN applications submitted after October 2009. Odyssey's application was submitted in 2006. AR 14. Thus, Kline Galland's potential future census was properly excluded from the December 2008 need calculation the HLJ referenced in his final order approving the settlement.⁹

Second, the competitors point to need calculations the Department conducted before the December 2008 need calculation, and claim the Department arbitrarily considered the corrected December 2008 calculation rather than the prior calculations that did not show need for a new hospice agency. BR, pp. 36-37. Although the HLJ had discretion to consider any of the Department's various need calculations reaching varying results, the fact he decided to consider the December 2008 calculation was not an abuse of discretion, as argued above (citing *Univ. of Wash. Med. Center*, 164 Wn.2d at 104).

IV. CONCLUSION

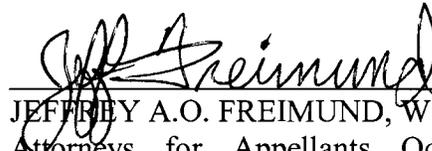
Based on the foregoing reasons, the HLJ's order approving the settlement between the Department and Odyssey should be affirmed. The

⁹ The competitors also accuse the Department of "arbitrarily extending the planning horizon by two years" from 2011 to 2013, citing their own interpretation of the December 2008 need methodology. BR, p. 36 (citing AR 1108). However, they acknowledge the Department used the correct planning horizon of 2011 when it urged the HLJ to approve the settlement. *Id.* (citing AR 1687).

trial court's ruling undoing the settlements of the federal case and Odyssey's adjudicative proceeding should be reversed. At a minimum, even if the trial court's reversal and remand of the settlements is upheld, the trial court's ruling prohibiting the HLJ from exercising discretion to consider 2008 evidence showing need exists for another hospice agency in King County should be reversed.

RESPECTFULLY SUBMITTED this 23rd day of May, 2011.

FREIMUND JACKSON TARDIF & BENEDICT
GARRATT, PLLC



JEFFREY A.O. FREIMUND, WSBA No. 17384
Attorneys for Appellants Odyssey Healthcare
Operating B, LP and Odyssey Healthcare, Inc.

DECLARATION OF SERVICE

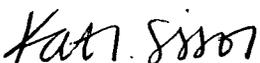
The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on May 23, 2011, I arranged for the service of the foregoing Reply Brief of Appellant Odyssey Health Care, to all parties to this action as follows:

James S. Fitzgerald U. S. Mail
Gregory A. McBroom Hand Delivery
Livengood, Fitzgerald & Alskog Facsimile
121 Third Avenue E-Mail
P. O. Box 908 Legal Messenger
Kirkland, WA 98083-0908
fitzgerald@lfa-law.com
mcbroom@lfa-law.com

Bruce W. Megard, Jr. U. S. Mail
Brian W. Grimm Hand Delivery
Bennett Bigelow & Leedom, P.S. Facsimile
1700 Seventh Avenue, Suite 1900 E-Mail
Seattle, WA 98101-1397 Legal Messenger
bmegard@bblaw.com
bgrimm@bblaw.com

Richard A. McCartan U. S. Mail
Assistant Attorney General Hand Delivery
7141 Cleanwater Drive SW Facsimile
P. O. Box 40109 E-Mail
Olympia, WA 98504-0109 Legal Messenger
richardm@atg.wa.gov



KATHRINE SISSON