

NO. 80264-5

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

UNIVERSITY OF WASHINGTON MEDICAL CENTER,

Respondent,

v.

SWEDISH MEDICAL CENTER

and

WASHINGTON STATE DEPARTMENT OF HEALTH,

Appellants,

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APPELLANT DEPARTMENT OF HEALTH'S REPLY BRIEF

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ORIGINAL

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I. ARGUMENT

A. Substantial Evidence Supports The HLJ's Need Determination

The University of Washington Medical Center (University) agrees with the Department of Health (Department) that the Health Law Judge's (HLJ) finding of need for the Swedish liver transplant program should be upheld if "substantive evidence" supports the finding. Brief of Respondent (Br. Resp't) at 23. The University's argument against the HLJ's need finding invites the court to weigh the evidence presented at the adjudicative proceeding on this issue. The court should decline this invitation. In determining whether there is substantial evidence to support a finding, the reviewing court does not "weigh" the evidence, but rather determines whether there is a sufficient quantum of proof to support the findings. Opal v. Adams County, 128 Wn.2d 869, 882, 913 P.2d 793 (1996).

In their opening briefs, Swedish and the Department demonstrated that substantial evidence showed "need" for the Swedish program based on the University's patient MELD scores, short waiting list, and low number of transplants. This evidence indicated that a second program will allow more patients to receive transplants. The University attempts to dispute need for the Swedish program. Br. Resp't at 23-31. The

Department has reviewed, and concurs with, Swedish's reply. To avoid duplication, Swedish's arguments will not be repeated by the Department.

The Department adds that the University, in its brief, does not deny that a second liver transplant program at Swedish will increase the number of patients who receive life-saving liver transplants in Washington. It is difficult to imagine a more compelling demonstration of "need" than saving additional lives. Nor does the University contest the HLJ's finding that a second program will benefit patients by spurring competition and innovation in the liver-transplant field and by giving patients a choice of providers. 1st AR at 1001, 1003, 1009. Nevertheless, despite these undisputed benefits to patients, the University continues to argue that it is somehow more important that it remain Washington's only liver transplant provider.¹ This argument should be rejected as contrary to meeting the needs of Washington patients who suffer from life-threatening liver disease.

Lastly, on the issue of need, the University claims it now has two liver transplant fellows. Br. Resp't at 12. National standards require that each fellow participate in 45 transplants as a primary surgeon or first assistant over a two-year period. 1st AR at 1978-79. At the time of the

¹ In the liver distribution system, Washington is in the WWAMI region, which encompasses 8.8 million people in Washington, Wyoming, Alaska, Montana, and Idaho. The University does not deny that WWAMI is the most populated region in the entire country served by one provider. 1st AR at 1343.

Certificate of Need Program's (Program) decision to approve the Swedish application in June 2004, the University had only one fellow. One month later, in July 2004, the University first claimed that it would add a second fellow by the end of 2004. 1st AR at 99.² The University argued that approving a second liver transplant program at Swedish would cut into its volume and thereby jeopardize its plan to add a second fellow. This argument is an admission by the University that – in 2004 when the Program made its decision – there was ample growing volume and “need” to support an expanded University program. Given that admission, it is incongruous for the University to argue that “no need” existed for a second program at Swedish at the time the Program made its decision. The University unfairly attempts to change the facts after the Program made its decision in order to reverse the Department's determination that need existed for the Swedish program.

B. The Health Law Judge Correctly Exercised Her Discretion In Limiting The Evidence That The University Could Present

In its opening brief, the Department defended the HLJ's ruling to limit the evidence that the University could present at the adjudicative proceeding to evidence that existed on December 31, 2003. The date was about five weeks after the Program “closed the record” for receiving

² There is no evidence in the record that Swedish actually added a second fellow at the end of 2004.

information on which to make its decision on Swedish's application to establish a new liver transplant program. Brief of Appellant Washington State Department of Health (Br. Appellant) at 27-42. Information received by the Program included a substantial amount of information submitted by the University. 1st AR at 1406-1564, 1573-1627. The University argues the evidence cutoff was an error. Br. Resp't at 34-44.

1. The Health Law Judge's Evidentiary Ruling Is Reviewed Under the Abuse of Discretion Standard

As explained in the Department's opening brief, the HLJ's ruling limiting the evidence was a "relevancy" ruling. Br. Appellant at 31-33. The University does not dispute the Department's characterization. The Department further explained that evidentiary rulings are reviewed by the court under the narrow "abuse of discretion" standard. Br. Appellant at 32. In response, citing Port of Seattle v. Pollution Control Hearings Board, 151 Wn.2d 568, 593, 90 P.3d 659 (2004), the University argues that rulings limiting evidence is reviewed de novo by the court for error of law. Br. Resp't at 34. However, in that case, the court held that evidentiary rulings are reviewed only for "abuse of discretion." Id. at 642. Abuse of discretion occurs only when "no reasonable person" could agree with the HLJ's ruling. T.S. v. Boy Scouts of America, 157 Wn.2d 416, 424, ¶ 11, 138 P.2d 1053 (2006).

2. Cases Cited By The University Do Not Require The HLJ To Admit Evidence That Did Not Exist When The Program Made Its Decision To Approve Swedish's Application

The University cites Port of Seattle in support of its argument that the HLJ should have admitted evidence that came into existence after the Program approved Swedish's Certificate of Need application. Br. Resp't at 36. Port of Seattle is distinguishable because the issue – clean water certifications – involved a markedly different statutory scheme than the Certificate of Need law. The Department of Ecology (Ecology) certified a project as complying with the federal Clean Water Act. The Pollution Control Hearings Board (PCHB) held adjudicative proceedings on challenges to Ecology's certification. The Court held that the PCHB may consider evidence that was not presented to Ecology during the certification process, including evidence that came into existence after Ecology's certification. Port of Seattle, 151 Wn.2d at 597-98. The holding was based on WAC 371-08-485(1), which provided that PCHB adjudicative proceedings "shall be de novo unless otherwise provided by law." Id. at 596. Additionally, this Court referenced the federal Clean Water Act regulations that "contemplate that . . . certifications [under the Act] would be supplemented" by new information. Id. at 597.

In contrast, no provision of the Certificate of Need law (RCW 70.38 and WAC 246-310) requires the HLJ to hold a de novo hearing or to consider new information coming into existence after the Program has collected information on which to decide the application. No provision precludes the HLJ from excluding new information as irrelevant. To the contrary, RCW 34.05.452(1) explicitly provides that irrelevant evidence may be excluded in an adjudicative proceeding.

Finally, in upholding the PCHB's right to hear evidence not presented to Ecology, the Court in Port of Seattle noted that the PCHB is a separate agency from Ecology with authority to independently review Ecology's actions. Port of Seattle, 151 Wn.2d at 597. The Court did not mandate that PCHB must hear new evidence regarding Ecology certifications. Instead, the Court deferred to the PCHB's judgment as to when it is appropriate to accept new evidence. In contrast, the HLJ is part of the Department of Health, and is not a separate reviewing agency. This court should defer to the HLJ's exclusion, on relevancy grounds, of new evidence coming into existence after the Program had closed the record in the case.

The University also mistakenly relies on DaVita, Inc. v. Department of Health, 137 Wn. App. 174, 887 P.2d 891 (2007). Br. Resp't at 38-39. The Program there granted DaVita's Certificate of Need

application for a new kidney dialysis facility, and the HLJ reversed the decision. The appeal involved whether the HLJ must show deference to the Program's decision. The court held that the HLJ, as the Department's final decision-maker, need not show deference to the Program. Id. at 182, ¶ 22. DaVita did not address the scope of evidence that may be considered by the HLJ at the adjudicative proceeding. Nor did it determine whether an HLJ may exclude, as irrelevant, evidence that came into existence after the Program had conducted its review and rendered its decision on the application. The DaVita case is not on point.³

Lastly, the University mistakenly relies on Marlboro Park Hospital v. Department of Health and Environment Control, 358 S.C. 573, 595 S.E.2d 851 (2004). In that case, the South Carolina court construed a statute that prohibited the administrative law judge from considering "issues" that were not raised before the Department staff that made the original decision on whether to grant a Certificate of Need application. The court held that this statute impliedly allowed that administrative law

³ As the University notes, the Court of Appeals held the Certificate of Need adjudicative proceedings may be "de novo." DaVita, 137 Wn. App. at 182, ¶ 22. In the Swedish-University adjudicative proceeding, the parties were allowed to present any relevant evidence in existence on December 31, 2003, and the HLJ examined the evidence and issued her own findings and fact and conclusions of law. The exclusion of irrelevant post-2003 evidence in the adjudicative proceeding was not inconsistent with the concept of a de novo hearing.

judge, in making his decision, to consider “evidence” that was not presented to the Department staff. Id. at 578-79.

By contrast, in Washington, no provision of the Certificate of Need law (RCW 70.38 and WAC 246-310) mandates what must be considered, or not considered, in an adjudicative proceeding. Thus, the Marlboro Park Hospital case does not assist this court because the issue in this case is not one of statutory construction. In any event, the case did not address the issue here: whether the HLJ may exclude, as irrelevant, evidence that did not come into existence until after the Program made its decision to grant Swedish’s Certificate of Need application.

3. The University Admits That An Evidence Cutoff Date Is Essential

The University admits that an evidence cutoff date is essential when it states that “(e)very proceeding must have an end point, decisions must be made and actions taken.” Br. Resp’t at 44. This admission undercuts the University’s argument that the HLJ’s decision should be made based on the most current information available at the time of the adjudicative proceeding. While admitting that a cutoff is appropriate, the University argues that closing the evidentiary record prior to the adjudicative proceeding “by establishing an artificial cut-off is contrary to common sense and disserves the public interest.” Br. Resp’t at 44.

However, for reasons stated in the Department's opening brief, the December 31, 2003 cutoff was not an "artificial" date. Br. Appellant at 33-39. The date was the end of the year in which Swedish had applied for its Certificate of Need, and was five weeks after the Program had "closed the record" on the application. The cutoff date promoted the public interest and the law's intent by assuring that "need" was assessed at the time of application. It also assured fairness to the applicant by evaluating circumstances at the time of application, thereby preventing a competitor from "changing the facts" in an attempt to defeat the application after it had been approved by the Program.

Finally, the University argues that its position advances "the time-honored method to test the accuracy of evidence to include the introduction of evidence that is then subject to cross examination or analysis through expert testimony, and the prospective of countervailing evidence." Br. Resp't at 44. These procedural rights under RCW 34.05.449(2) in fact were provided to the parties by the HLJ in the six-day hearing. The HLJ's exclusion of irrelevant evidence under RCW 34.05.452(1) is not a denial of these procedural rights.⁴

⁴ The University does not attempt to defend that superior court's conclusion (CP at 863-64) that the exclusion of evidence violated the University's right to due process.

C. Substantial Evidence Supports The HLJ's Finding Of No Adverse Effect On The University's Program

The University alleges that the Department “fail[ed] to conduct any meaningful assessment of the adverse effects” under RCW 70.38.115(2)(d) and WAC 246-310-210. Br. Resp’t at 34. That allegation simply is not true.

The only program that the University alleged would be adversely affected by the Swedish program was its fellowship program. As explained by the Department in its opening brief, the HLJ found that under the national standards of the United Network for Organ Sharing (UNOS) and the American Society of Transplant Surgeons (ASTS), a training program – like the University’s – must perform 50 transplants annually, and a program fellow must participate in 45 transplants either as a primary surgeon or first assistant over a two-year period. Br. Appellant at 46. In assessing adverse effects, the HLJ concluded the University had one liver transplant fellow and would be able to continue meeting the UNOS and ASTS standards even if Swedish implemented its new program. Br. Appellant at 45-46.⁵ The University does not challenge her conclusion.

However, the University complains that the HLJ improperly “converted [UNOS and ASTS] minimum requirements into maximum.”

⁵ The HLJ also reasonably concluded that the University could continue to meet UNOS/ASTS standards even if it added a second fellow. 1st AR at 1007, n.34.

Br. Resp't at 30. The University mischaracterizes the HLJ's finding. The Department recognizes the UNOS/ASTS volume standards are "minimum" standards. Accordingly, nothing prohibits a training program from having transplant volume that exceeds those minimums. The HLJ did not conclude otherwise. What the HLJ reasonably concluded is that Swedish's application may be approved if the new program would not cause the University's program to fall below accepted minimum volume standards.

The University argues that, in order to operate a viable training program, it must perform 120 transplants per year, a number far in excess of the UNOS/ASTS standards. Br. Resp't at 33. As noted in the Department's opening brief, the HLJ reasonably concluded that she should rely on the national UNOS/ASTS experts to determine the proper minimum volume necessary to maintain an accredited training program. Br. Appellant at 48.

Finally, as noted in the Program's opening brief and in Swedish's reply brief, in considering adverse effects, the HLJ properly found (1st AR at 1008) that other academic programs perform a much lower volume than the University will perform even if a new program is added at Swedish. This finding supports that the University will not be adversely affected by a new program at Swedish.

D. If The Health Law Judge Erred In Excluding Evidence, This Court Should Remand The Case For Taking Additional Evidence And Making A New Decision

Finding that the HLJ incorrectly limited the evidence, the superior court denied Swedish's Certificate of Need application. For argument sake, if this court overturns the Department's exclusion of evidence, the appropriate remedy would be remand. RCW 34.05.562(2)(b) makes remand the appropriate remedy whenever an agency "improperly excluded or omitted evidence from the record." Upon a remand, the Department would hear the excluded evidence, and make a new decision on whether to grant Swedish's Certificate of Need application.⁶

Moreover, a remand, as opposed to denial of the application as requested by the University, would be in the public interest. Swedish asserts that its program will to save lives by increasing the number of persons who receive liver transplants in Washington. If the HLJ improperly excluded evidence, the most expeditious manner to resolve this

⁶ In addition to the issue of excluding evidence, the University argues that denial – rather than remand – is proper because Swedish and the Department failed to properly assess impacts of Swedish's proposed program on the University's existing program, as required by RCW 70.38.115(2)(d) and WAC 246-310-210(4).

If the court finds that post-2003 evidence was improperly excluded, then the case should be remanded for the HLJ to hear additional testimony and to make a new determination under RCW 70.38.115(2)(d) and WAC 246-310-210(4).

If the Court finds that the evidence was properly excluded, the court should consider whether the HLJ's findings not to deny the Swedish application under RCW 70.38.115(2)(d) and WAC 246-310-210(4) is supported by substantial evidence in this record.

important issue would be through a remand, rather than forcing Swedish to reapply and start the application process all over again.

In response, the University cites Weyerhaeuser v. Pierce County, 124 Wn.2d 26, 873 P.2d 498 (1994), where the court did not remand a case after determining that a hearing examiner had made errors in denying a conditional use permit. The case fails to support the University's argument against remand because the case – involving local government – did not arise under the state Administrative Procedures Act (RCW 34.05). Nor did Weyerhaeuser involve the issue in the University's case of whether the decision-maker had abused her discretion by excluding evidence as irrelevant. Given the remand provision in RCW 34.05.562(2)(b), the University cites no authority supporting the superior court's decision to deny the Certificate of Need application, rather than remand it to the Department.

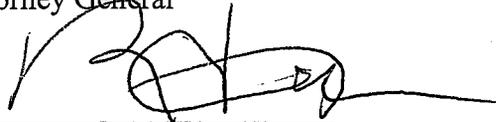
II. CONCLUSION

The Department of Health respectfully requests the court to uphold the decision of the Health Law Judge to approve Swedish's Certificate of Need application to establish a second liver transplant program in Washington.

RESPECTFULLY SUBMITTED this 19 day of February,

2008.

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A handwritten signature in black ink, appearing to read 'R. McCartan', written over a horizontal line.

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