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Supreme Court No. 87574-0

SUPREME COURT OF THE 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,

Petitioners,

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,

Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENT ODYSSEY

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TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR 1

II. ISSUES ON APPEAL 1

III. STATEMENT OF THE CASE 2

IV. ARGUMENT 5

A. Applicable Standards of Review 6

B. The Competitors Are Incorrect that RCW 70.38.115(10)(c) Should Be Interpreted as Prohibiting Settlement and Requiring a Full Adjudicative Hearing when the Department Modifies an Initial Decision Denying a CN in the Course of Settling a Case Challenging that Denial 9

C. The Competitors Are Incorrect that the HLJ Abused His Discretion by Considering Updated Evidence in the Context of Approving the Settlement 14

D. The Competitors Are Incorrect that Substantial Evidence Was Lacking to Support the HLJ's Finding that Odyssey Met All Four Criteria for Issuance of a CN 16

V. CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Alpha Kappa Lambda Fraternity v. Washington St. Univ.,
152 Wn. App. 401, 216 P.3d 451 (2009) 7

Ang v. Martin,
154 Wn.2d 477, 114 P.3d 637 (2005) 16

DaVita, Inc. v. Dept. of Health,
137 Wn. App. 174, 151 P.3d 1095 (2007) 6, 13

Fox v. Dept. of Retirement Systems,
154 Wn. App. 517, 225 P.3d 1018,
rev. denied, 169 Wn.2d 1012 (2010) 8

King County Public Hosp. Dist. No. 2 v. Dept. of Health,
167 Wn. App. 740, 275 P.3d 1141 (2012) 4

LaMon v. Butler,
112 Wn.2d 193, 770 P.2d 1027 (1989) 4

Melville v. State,
115 Wn.2d 34, 793 P.2d 952 (1992) 15

Odyssey Healthcare Operating BLP v. Dept. of Health,
145 Wn. App. 131, 185 P.3d 652 (2008) 10

Overlake Hosp. Assn. v. Dept. of Health,
170 Wn.2d 43, 239 P.3d 1095 (2010) 6-7, 10

Pickett v. Holland American Line-Westours, Inc.,
145 Wn.2d 178, 35 P.3d 351 (2001) 13

Providence Hosp. v. Dept. of Soc. and Health Servs.,
112 Wn.2d 353, 770 P.2d 1040 (1989) 8

St. Joseph Hosp. v. Dept. of Health,
125 Wn.2d 733, 887 P.2d 891 (1995) 10-12

Univ. of Wash. Med. Center v. Dept. of Health,
164 Wn.2d 95, 187 P.3d 243 (2008) 7-8, 14-15, 17, 19-20

Washington Independent Telephone Ass'n v.
Washington Utilities and Transportation Comm'n,
148 Wn.2d 887, 64 P.3d 606 (2003) 7

Statutes

RCW 34.05.060 13

RCW 34.05.452(1) 14

RCW 34.05.570(3) 6, 17

RCW 70.38.115 14

RCW 70.38.115(10)(a) 2

RCW 70.38.115(10)(c) 1-5, 9-13

Regulations

WAC 246-310-210 - 240 16

WAC 246-310-220..... 18

WAC 246-310-290..... 18

Rules

RAP 10.3(a)(6).....16

I. ASSIGNMENTS OF ERROR

Respondent Odyssey Healthcare Operating B, LP and Odyssey Healthcare, Inc. ("Odyssey") does not assign error to the Health Law Judge's ("HLJ's") or the Court of Appeals' rulings upholding a settlement entered into between Odyssey and the Department of Health ("Department") pursuant to RCW 70.38.115(10)(c). Odyssey respectfully requests that the HLJ's and the Court of Appeals' decisions be affirmed.

II. ISSUES ON APPEAL

A. RCW 70.38.115(10)(c) permits settlement of Certificate of Need ("CN") applicants' adjudicative proceedings challenging the denial of a CN so long as competitors are provided notice and an opportunity to submit written evidence and argument to the Department opposing the proposed settlement before the Department may or may not agree to the settlement. Should RCW 70.38.115(10)(c) be interpreted as requiring a full adjudicative hearing on the merits, precluding the parties from settling, even though competitors received notice and opportunity to submit written evidence and arguments opposing a settlement before the Department decided to approve the settlement, then a second opportunity to submit written evidence and arguments opposing the settlement to an HLJ before the HLJ independently decided to approve the settlement?

B. Did the HLJ act arbitrarily and capriciously, or abuse his

discretion by considering updated and corrected data showing need exists for additional hospice agencies in King County in the context of reviewing a proposed settlement of an adjudicative proceeding pursuant to RCW 70.38.115(10)(c)?

C. Did the HLJ act arbitrarily and capriciously, or in the absence of substantial evidence by concluding, in the context of approving a settlement pursuant to RCW 70.38.115(10)(c), that Odyssey's CN application for a hospice agency in King County met all four regulatory criteria for issuance of a CN?

III. STATEMENT OF THE CASE

Odyssey is a hospice care agency that applied for CNs to open hospice agencies providing palliative care to dying residents in King, Pierce and Snohomish counties. AR 1-139.[1] The applications were denied and Odyssey sought administrative review of the denials pursuant to RCW 70.38.115(10)(a). *Id.*

Ultimately, Odyssey's requests for administrative review were settled pursuant to RCW 70.38.115(10)(c). AR 1721-22. This statute authorizes the Department to settle adjudicative proceedings challenging the denial of a CN license "prior to the conclusion of the adjudicative proceeding" so long as the Department gives the CN applicant's

[1] "AR" refers to the Administrative Record included with the Clerk's Papers.

competitors notice and "an opportunity to comment, in advance, on the proposed settlement." RCW 70.38.115(10)(c).

As required by RCW 70.38.115(10)(c), the Department notified petitioners King County Public Hospital District No. 2, Swedish Health Services, Providence Hospice and Home Care of Snohomish County, and Hospice of Seattle ("the competitors") of the proposed settlement and the opportunity to submit written evidence and argument opposing the settlement. AR 321-23, 348-60, 515-26. After considering the competitors' evidence and argument, the Department decided Odyssey's CN application met the criteria for issuance of a CN in only King County. AR 1018-1158. The Department then filed a motion for presentation of an order requesting an HLJ to approve the proposed settlement. *Id.* After the HLJ gave the competitors a second opportunity to submit written evidence and argument opposing the settlement (AR 994-1009, 1179-1718), the HLJ independently determined Odyssey's application met all CN criteria and approved the settlement. AR 1721-22.

The competitors sought judicial review of the HLJ's order approving the settlement, arguing in part that the HLJ erred by considering updated data showing need for another hospice agency in King County, just as they had previously argued to the Department and HLJ. CP 4-15. Odyssey moved for summary judgment arguing the competitors had

already received all the process they were due under RCW 70.38.115(10)(c) and the settlement was reasonable. CP 405-31, 676-86. The motion was denied. CP 721-23.[2]

Following additional briefing, the trial court reversed the HLJ's order, reversed in part a related federal court settlement between the Department and Odyssey, remanded the previously settled administrative case for a full hearing on the merits, and limited the evidence the HLJ has discretion to consider at the remand hearing. CP 966-76. Central to the trial court's ruling was the court's adoption of the competitors' argument that RCW 70.38.115(10)(c) precludes an HLJ from approving a settlement of a CN case by modifying the Department's initial decision denying a CN or considering updated evidence. CP 973.

The Court of Appeals reversed the trial court and affirmed the HLJ's order approving the settlement. *King County Public Hosp. Dist. No. 2 v. Dept. of Health,* 167 Wn. App. 740, 275 P.3d 1141 (2012). The Court of Appeals concluded an HLJ may modify an initial Department decision denying a CN in the course of approving a settlement, has

[2] The Court of Appeals noted these procedural arguments raised in Odyssey's summary judgment motion, but concluded the Court need not reach these issues because no party assigned error to the denial of Odyssey's summary judgment motion concerning the procedure applicable to settlements pursuant to RCW 70.38.115(10)(c). *King County Public Hosp. Dist. No. 2 v. Dept. of Health,* 167 Wn. App. 740, 748 n.7, 275 P.3d 1141 (2012). However, the procedural issues were fully briefed by the parties and decided by the trial court. CP 405-653, 676-86, 721-23. A lower tribunal's judgment may be reviewed on any theory established by the pleadings and supported by the proof. *See LaMon v. Butler,* 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

discretion to consider updated evidence showing there is need for another hospice agency, and substantial evidence supported the HLJ's findings that all four regulatory requirements were met for issuing a CN. *Id.,* at 750-57.

IV. ARGUMENT

This is a case of first impression requiring interpretation of RCW 70.38.115(10)(c). This statute authorizes the Department to settle adjudicative proceedings challenging the denial of a 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 a proposed settlement before entry. Here, both the Department and an HLJ independently approved a proposed 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 or an HLJ that further litigation is required.

In addition to public policy favoring settlements as a preferred

means for dispute resolution, the standard of review affects resolution of the issues on appeal. 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).

A. Applicable Standards of Review

To overturn the HLJ's ruling, the competitors carry a heavy burden to show the HLJ's decision approving the settlement was arbitrary and capricious, or contrary to law. RCW 34.05.570(3).[3] "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.* To

[3] The only agency action potentially subject to judicial review in this case is the HLJ's final order approving the settlement. *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 CN 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 denying Odyssey's CN application), which are not.

overcome the presumption of correctness, challengers must show the agency decision was arbitrary and capricious, or contrary to law. *Id.*

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 Independent Telephone Ass'n v. Washington Utilities and Transportation Comm'n,* 148 Wn.2d 887, 904, 64 P.3d 606 (2003). As argued below, by failing to show there is room for only one opinion, the competitors fail to meet their burden of proving the HLJ's decision approving the settlement was arbitrary and capricious, or contrary to law.

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. *See Univ. of Wash. Med. Center v. Dept. of Health,* 164 Wn.2d 95, 104, 187 P.3d 243 (2008) ("*UWMC*"). In

UWMC, this Court held that HLJ's have discretion to consider, or to disregard, updated evidence that did not exist at the time of the Department's initial evaluation of a CN application. *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]). As argued below, the HLJ thus had discretion, especially in the context of reviewing a settlement, to consider an updated and corrected need calculation showing there was need for additional hospice agencies in King County.

Regarding the issue of whether the HLJ correctly determined in the course of reviewing the settlement proposal that Odyssey's CN application met all four regulatory criteria for approval, the standard of review is whether substantial evidence exists to support that conclusion. *See Fox v. Dept. of Retirement Systems,* 154 Wn. App. 517, 523, 225 P.3d 1018, *rev. denied,* 169 Wn.2d 1012 (2010). "Evidence is substantial if it is of sufficient quantity to persuade a fair-minded person of the truth or correctness of the agency order." *Id.* On appeal, "[i]t is not ... [the Court's] function to reweigh the evidence in an effort to reach different conclusions than did the agency." *Providence Hosp. v. Dept. of Soc. and Health Servs.,* 112 Wn.2d 353, 360, 770 P.2d 1040 (1989). As argued

below, there was substantial evidence in the record supporting the HLJ's ruling that FHC met all four regulatory criteria for approving the settlement granting Odyssey a CN to open a hospice agency in King County. Therefore, the competitors are unable to meet their heavy burden to overcome the presumption of correctness sufficient to justify reversal of the HLJ's ruling approving the settlement.

B. The Competitors Are Incorrect that RCW 70.38.115(10)(c) Should Be Interpreted as Prohibiting Settlement and Requiring a Full Adjudicative Hearing when the Department Modifies an Initial Decision Denying a CN in the Course of Settling a Case Challenging that Denial

Without concluding RCW 70.38.115(10)(c) is ambiguous, the trial court adopted the competitors' argument and reversed the HLJ's decision approving the settlement by erroneously construing 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. Statutes should be interpreted in a manner that avoids unlikely or absurd results and must be read in a "rational, sensible" manner that gives meaning to the underlying policy and intent. *Odyssey Healthcare Operating BLP v. Dept. of Health,* 145 Wn. App. 131, 143, 185 P.3d 652 (2008). The underlying policy and intent of the CN laws is the "promotion and maintenance of access to health care services for all citizens." *Overlake Hosp. Assn.,* 170 Wn.2d at 55.

In support of Odyssey's statutory interpretation argument, 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). *See* Brief of Appellants Odyssey Healthcare ("BA"), pp. 32-38. 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,* 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 to the Department opposing a proposed settlement (similar to 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. BA, pp. 32-38.

The competitors offer no response to this analysis of RCW 70.38.115(10)(c) in their appellate brief. 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 entering the settlement. Brief of Respondents ("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.[4] BR, pp. 21, 41.

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[4] 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), a more pertinent 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. *See* CP 405-31, 676-86. If judicial review of RCW 70.38.115(10)(c) settlements is permitted, it should be limited to ensuring the statutory procedure was

In summary, the competitors are unable to dispute Odyssey's arguments at pages 25-38 of its opening appellate brief that:

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

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

(3) the legislative history of RCW 70.38.115(10)(c) demonstrates 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 competitors' and the trial court's misinterpretation 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

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followed (*i.e.,* prior notice and opportunity to be heard on a proposed settlement) and the competitors' evidence and arguments opposing a settlement were not willfully ignored.

authority meaningless and leads to strained or absurd results prohibiting settlements. BA, pp. 32-38.

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.[5] 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. If judicial review of an HLJ's settlement decision is deemed appropriate, the reviewing court's role should be narrow and deferential; limited to determining whether the HLJ willfully disregarded 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.

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[5] *See, e.g.,* RCW 34.05.060 ("Except to the extent precluded by another provision of law and subject to approval by agency order, informal settlement of matters that may make unnecessary more elaborate proceedings under this chapter is strongly encouraged. Agencies may establish by rule specific procedures for attempting and executing informal settlement of matters."); *Pickett v. Holland American Line-Westours, Inc.,* 145 Wn.2d 178, 189-90, 35 P.3d 351 (2001) ("voluntary conciliation and settlement are the preferred means of dispute resolution;" it is neither the court's "duty, nor place, to make sure that every party is content with the settlement. Indeed, this would contravene the very nature of consensual settlements." A reviewing court is not "to reach any ultimate conclusions of the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements").

The competitors' misinterpretation of RCW 70.38.115(10)(c) should be rejected because the statute does not bar settlements in which the Department or HLJ modifies an initial decision denying a CN. The HLJ's decision approving the settlement should be affirmed because the procedures in RCW 70.38.115(10)(c) were followed, and the decision was not the product of willfully disregarding the competitors' evidence and arguments. There was room for two opinions on whether the settlement should be approved; the HLJ merely disagreed with the competitors' arguments opposing the settlement.

C. The Competitors Are Incorrect that the HLJ Abused His Discretion by Considering Updated Evidence in the Context of Approving the Settlement

The *UWMC* court analyzed HLJs' authority when ruling on evidentiary objections in CN proceedings. There, a competitor challenged an HLJ's evidentiary ruling barring admission of evidence at an adjudicative proceeding that did not exist until after the CN public comment period ended. *UWMC,* 165 Wn.2d at 100-02. The court held "[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." *Id.* at 104.

The *UWMC* court noted "[n]othing in the rules or the statutes specifically addresses the appropriate record before the health law judge.

Instead, the law leaves that question to the department by rule or to the health law judge by rulings guided by the Rules of Evidence." *Id.* at 103 (citing RCW 34.05.452 and 70.38.115).[6] Further, "[t]he law gives considerable discretion to administrative law judges to determine the scope of admissible evidence." *Id.* at 104. In light of this "considerable discretion," the court held the HLJ had discretion to either admit, or not admit, later acquired evidence regarding need for an additional facility, and it was not an abuse of discretion to rule either way. *Id.*

Although the competitors quote portions of the *UWMC* 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. *UWMC,* 164 Wn.2d at 104. The competitors err by applying the arbitrary and capricious standard of review to the HLJ's evidentiary ruling, and, more importantly, by failing to correctly apply the *UWMC* holding that consideration of updated evidence

[6] The evidence rules are relaxed in CN proceedings; hearsay and otherwise inadmissible evidence is permitted if "it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs." RCW 34.05.452(1).

is within the HLJ's discretion.[7]

D. The Competitors Are Incorrect that Substantial Evidence Was Lacking to Support the HLJ's Finding that Odyssey Met All Four Criteria for Issuance of a CN

The HLJ found (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]." The competitors argue 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

[7] 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 *UWMC* 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 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 case even though the agency initially denied some of the allegations in the plaintiff's Complaint.

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 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 brief urging HLJ approval of the settlement. *See* AR 1722. As discussed above, 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). This 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.

UWMC, 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 <u>solely</u> because the "Need"

criteria had not been satisfied. AR 22-31. Relying on this evaluation and the Department's brief 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 brief 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 criteria other than "Need" were not met even if the "Need" criteria were met. BR, pp. 33-34. For example, they point to the Department's initial evaluation that one of the 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. 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.

Perhaps recognizing HLJs do have discretion to consider updated, corrected data pursuant to *UWMC,* the competitors alternatively argue

[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. The 2008 corrected data considered by the Department and HLJ shows Odyssey met the need criteria in 2009, 2010 and 2011. AR 1101.

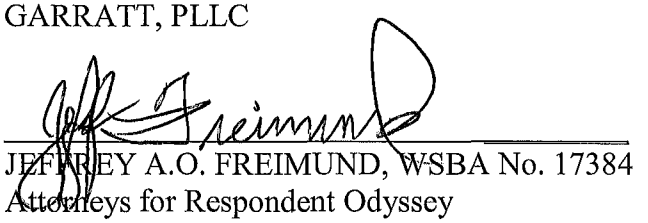
there are flaws in the December 2008 need calculation. BR, pp. 35-37. For instance, the competitors point to need calculations the Department conducted before the December 2008 need calculation, and claim the Department arbitrarily considered the corrected December 2008 calculation rather than the prior 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 *UWMC,* 164 Wn.2d at 104).

V. CONCLUSION

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

RESPECTFULLY SUBMITTED this 10th day of December, 2012.

FREIMUND JACKSON TARDIF & BENEDICT GARRATT, PLLC



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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that on December 10, 2012, I served Odyssey's Supplemental Brief on all parties to this action as follows:

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