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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001846-MR

PROFESSIONAL HOME HEALTH CARE AGENCY, INC.; and WHITLEY COUNTY HEALTH DEPARTMENT, d/b/a WHITLEY COUNTY HOME HEALTH — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 07-CI-00016

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES; and COMPREHENSIVE HOME HEALTHCARE SERVICES, INC., d/b/a FAMILY HOME HEALTH CARE S.E. — APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: VANMETER AND WINE, JUDGES; SHAKE,[1] SENIOR JUDGE.

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[1] Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

WINE, JUDGE: Professional Home Health Care Agency, Inc. ("Professional") and the Whitley County Health Department d/b/a Whitley County Home Health ("the Health Department") (collectively, "the appellants") appeal from an opinion and order of the Franklin Circuit Court remanding a Certificate of Need ("CON") application for an additional hearing based upon a finding that the Commonwealth of Kentucky, Cabinet for Health and Family Services ("the Cabinet"), denied the appellants due process in the hearing on their challenge to an application for a certificate of need filed by Comprehensive Home Healthcare Services, Inc. d/b/a Family Home Health Care ("Family"). The limited issue raised on appeal by the appellants is whether the circuit court's limitation on remand was in error. We find that it was.

Facts and Procedural History

On July 28, 2006, Family, a home health care agency offering services in certain Kentucky counties, filed a CON application pursuant to Kentucky Revised Statute ("KRS") Chapter 216B to expand its home health services into Whitley County, Kentucky. In August of 2006, Family's application was placed on "public notice," thus commencing a ninety-day review period. Thereafter, Professional and the Health Department, two competing home health agencies in Whitley County, requested a hearing to challenge Family's application for a CON. A hearing was scheduled on October 25, 2006.

The State Health Plan, as of October 2, 2006, showed that Whitley County did not have a need for any new patients to be served. Indeed, the

calculations showed that there was a need for "-189" patients in Whitley County, meaning that the county had a negative need at that time. In response to these calculations published by the Cabinet, the appellants filed a motion for summary judgment arguing that this figure precluded a grant of Family's application. At that time, the threshold for a CON for a provider "expanding services" into a contiguous county, was "125." Family challenged the need numbers published by the Cabinet, arguing that Professional was guilty of inaccurate reporting. In response, on October 10, 2006, the Cabinet published recalculated numbers for the State Health Plan which showed a need of "-20" in Whitley County.[2] Based upon the October 10, 2006 recalculation, Family's certificate of need was still inconsistent with the Health Plan's need requirements for Whitley County.

The Cabinet published yet another set of figures for unmet need in Whitley County on its website on October 16, 2006. The appellants were required by 900 Kentucky Administrative Regulation ("KAR") 6:050 §16[3] to file its witness and exhibit lists for the hearing on this very same day. Appellants filed the required prehearing filings on the October 16, 2006 deadline, but were unaware at that time of the new figures for unmet need published by the Cabinet on that very day. The new figure for unmet need in Whitley County represented a dramatic increase from the previously stated figure, from a need of "-20" to a need of "184." This newest figure exceeded the threshold need of "positive 125" required for

[2] Again, the calculations still showed a negative need for Whitley County.

[3] 900 KAR 6:050 is no longer in effect.

Family's certificate of need to be consistent with the State Health Plan. Until this point, the appellants' theory of the case had been, simply, that Family's application was inconsistent with the State Health Plan figures for Whitley County. This inconsistency with the State Health Plan would have been fatal to Family's application.

However, on October 18, 2006, in light of the new calculations published by the Cabinet which substantially altered the appellants' theory of the case, the appellants filed a motion for a continuance of the hearing. On October 23, 2006, the hearing officer denied the appellants' request for a continuance and the hearing proceeded as scheduled on October 25, 2006. At the hearing, the appellants were denied the opportunity to introduce any evidence that was not identified in its October 16, 2006 prehearing filings. As such, appellants were essentially unable to effectively address the calculations for unmet need in Whitley County which had been released by the Cabinet only ten days prior.

Ultimately, the hearing officer issued a decision approving Family's application for a CON.[4] The hearing officer's decision was based upon the October 16, 2006 calculations published by the Cabinet. The appellants moved the hearing officer for reconsideration. One of the arguments advanced by the appellants was that Professional had filed a corrected utilization report for 2005

[4] Family has provided home health services in Whitley County since this time.

which could necessitate a recalculation of the Plan's need figures.[5] The hearing officer denied the motion for reconsideration on December 20, 2006.

Thereafter, Professional and the Health Department appealed to the Franklin Circuit Court. Upon review, the Franklin Circuit Court determined that the hearing officer's adherence to the filing deadlines and refusal to allow the appellants a chance to develop its case in response to the Cabinet's release of new need figures, effectively denied the appellants due process. The court noted that the Cabinet's State Health Plan figures changed several times in October 2006 and that all of the figures published prior to October 16, 2006 showed insufficient need for the expansion of home health services in Whitley County. Accordingly, prior to October 16, 2006, the Cabinet could not approve Family's CON application as a matter of law, regardless of any other factors for consideration. The court found that this virtual "180°" in the circumstances required that the appellants be given additional time to change its strategy and gather supporting evidence. Thus, the court found that the hearing officer's decision violated due process, stating as follows:

> The last minute change in [the State Health Plan's] home health need figures, combined with the refusal to alter the predetermined scheduling agreement, deprived Professional of a meaningful opportunity to be heard.
> . . .
> In light of the exclusion of necessary evidence, the Cabinet's factual conclusion that approving [Family's

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[5] The request for reconsideration was still pending when, on December 8, 2006, in response to Professional's report, the Plan's need figures changed yet again. The need figure in this calculation became "158" for Whitley County.

certificate of need] was in the best interest of Whitley County and the Commonwealth was arbitrary.

Family filed a motion to alter, amend, or vacate, arguing that the appellants failed to preserve due process related errors at the agency level and that, if remanded the hearing officer should be restricted to using the need figures for Whitley County in effect at the time of the hearing. The Franklin Circuit Court rejected Family's argument as to the preservation of due process errors at the agency level, but granted the motion with respect to Family's argument concerning the applicable need figures.[6] The Franklin Circuit Court found that the hearing officer should be restricted on remand to the use of the figures in effect at the time of the October 25, 2006 hearing. Professional and the Health Department appeal from this second opinion and order of the Franklin Circuit Court limiting the scope of remand to the numbers in existence at the time of the 2006 hearing.

Analysis

The Cabinet has been identified by the General Assembly as "the primary state agency for operating the public health, Medicaid, certificate of need and licensure, and mental health and intellectual disability programs in the Commonwealth." KRS 194A.010(1). A Certificate of Need has been defined by the General Assembly as "an authorization by the cabinet to acquire, to establish, to offer, to substantially change the bed capacity, or to substantially change a health service . . . ." KRS 216B.015(8). In order to obtain a CON, an applicant

[6] Although the Franklin Circuit Court styled this opinion and order as a denial of the motion to alter, amend, or vacate, it essentially granted the motion in part when it modified its original opinion by requiring application of the October 16, 2006 SHP numbers on remand.

must meet six statutory criteria set forth in KRS 216B.040(2)(a)(2). While most of the criteria are open to interpretation by the hearing officer, one of the criteria requires that the application for the CON be consistent with the State Health Plan (the "SHP"), which is a document prepared by the Cabinet that provides statistics for unmet need in various counties regarding whether a new or expanded service is necessary. *Id*. Notably, if the SHP indicates that there is no "need" for a particular service in the relevant county, the CON must be denied as a matter of law. *Id*.

When reviewing a lower court's ruling on the Cabinet's approval or denial of a CON, this Court stands in the shoes of the lower court and reviews the Cabinet's decision for arbitrariness. *Nurses' Registry and Home Health Corp. v. Gentiva Certified Healthcare Corp*., 326 S.W.3d 15, 17 (Ky. App. 2010). If findings of fact of the Cabinet "are supported by substantial evidence of probative value, they must be accepted as binding upon the reviewing court, and the resulting question is whether or not the agency applied the correct rule of law to the facts so found". *Starks v. Kentucky Health Facilities,* 684 S.W.2d 5 (Ky. App. 1984).

The appellants argue that the Franklin Circuit Court's ruling requiring the use of the October 2006 plan figures: (1) is inconsistent with applicable regulations; (2) is inconsistent with the language of the State Health Plan; (3) runs contrary to previous ruling of this Court; and (4) would act to deny appellants due process on remand and produce arbitrary results. The Franklin Circuit Court's amended order states, in pertinent part:

> [Family] request[s] that the scope of the remand be limited . . . For this, [Family] maintain[s] that the State Health Plan in effect at the time of the hearing in October of 2006, with the projected need calculation for Whitley County, should be the subject of the re-hearing. We agree.
> . . .
> The relevant decision here is the 2006 decision; the relevant issue is whether [Family] was entitled to a certificate of need under the State Health Plan and figures effective on the date of the original hearing. The hearing on remand should be limited to the scope of the October 25, 2006 hearing.

The appellants first argue that the language included in the Franklin Circuit Court's amended order contradicts regulatory authority. They contend that the applicable regulation, 900 KAR 6:050 §7(1)(b), required the Cabinet to determine whether a CON should be granted based upon the latest inventories and figures.[7] 900 KAR 6:050 §7(1)(b), now repealed, stated as follows:

> In determining whether an application is consistent with the State Health Plan, the Cabinet shall apply the latest inventories and need analysis figures maintained by the Cabinet and the version of the State Health Plan in effect at the time of the Cabinet's decision.

Thus, according to the appellants, to direct otherwise would contradict regulatory authority. Appellants maintain that the regulations require application of the latest "need" figures on remand, rather than application of figures which are now over four years old.

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[7] In 2009, after the Franklin Circuit Court's decision, the comprehensive CON regulation, 900 KAR 6:050, was divided into several new regulations. The criteria set forth for determinations of need are now addressed in 900 KAR 6:070, which states that the Cabinet "shall apply the latest criteria, inventories, and need analysis figures maintained by the Cabinet and the version of the State Health Plan in effect at the time of the public notice." Thus, the relevant content of the regulation remained substantially the same.

The appellants also contend that the State Health Plan itself requires application of the most current figures. The appellants contend that both the State Health Plan in effect in 2006, and the 2009 State Health Plan in effect at the time this action was filed, state in their introductory technical notes that:

> All certificate of need decisions shall be made using that version of the Plan in effect on the date of the decision, regardless of when the letter of intent or application was filed, or public hearing held.

Thus, according to the appellants, to dictate that the October 2006 State Health Plan figures be used on remand would contradict the terms of the State Health Plan itself.

The appellants also argue that the decision of the Franklin Circuit Court conflicts with previous decisions of this Court. Appellants further argue they had planned to challenge the accuracy of the "need" numbers published by the Cabinet and that to limit the scope of review to the October 2006 numbers would effectively take away the due process rights which were vindicated in the appeal. Appellants additionally claim that the circuit court's ruling would create arbitrary results.

As the appellants note in their brief, this Court previously encountered a similar case involving two of the same parties and nearly identical facts. *See, Family Home Health Care, Inc. v. Saint Joseph Health System, Inc.*, 2009 WL 2408464 (Ky. App. 2009) (2008-CA-001790-MR).[8] In *St. Joseph*, Family applied

[8] Kentucky Rule of Civil Procedure ("CR") 76.28 allows unpublished cases to be cited for consideration by the Court where there are no published opinions that adequately address the issue before the court.

for a CON to expand its home health services to Laurel County. Professional and others challenged the application. The application was filed close in time to the application filed in the present case. The hearing in *St. Joseph* was set for October 23, 2006, just two days prior to the hearing in this case. On October 16, 2006, the Cabinet published new State Health Plan figures for Laurel County (just as the Cabinet published new figures for Whitley County in the present case). Before that time, Family's CON for Laurel County would have been denied as a matter of law because the State Health Plan figures showed insufficient need. However, the October 16, 2006 State Health Plan figures projected sufficient need for Laurel County (just as they projected sufficient need for Whitley County in the present case). *Id*. This drastically changed Professional's position with respect to Family's CON in both cases.

Nonetheless, the hearing officer refused to grant Professional's motion to continue in *St. Joseph*, just as in the present case, going forward with the scheduled hearing on October 23, 2006. Professional appealed in *St. Joseph*, arguing they had been denied due process of law and that the hearing officer's decision was unsupported by substantial evidence. *Id*. Upon review, we held the circuit court was correct in finding that due process had been violated. We further found that the decision was unsupported by substantial evidence as new State Health Plan numbers were published after the decision. However, in *St. Joseph*, the numbers released by the Cabinet on October 16, 2006 showed insufficient need

for Laurel County and would have resulted in a denial of the CON.[9] We held that the Cabinet's decision was not supported by substantial evidence as it was based upon incorrect data. Indeed we stated that "the Cabinet's publication of several corrections to the need assessment for home health services in a relatively short period of time is in effect an admission that the previous figures were incorrect." *Id.* at 4.

Although new State Health Plan numbers were released after the Cabinet's decision in this case, they were not so low as to preclude the grant of a CON to Family. Although the figures were consistent with the State Health Plan in this case, the parallel between *St. Joseph* and the present case is obvious. Even though the later-published State Health Plan numbers in this case would not necessarily have resulted in a different decision with respect to the CON,[10] the numbers relied upon were still incorrect. As previously stated, sufficient State Health Plan numbers for unmet need do not guarantee that a CON will be granted, as the hearing officer must consider other statutory factors as well. KRS 216B.040(2)(a)(2).

To restrict the numbers on remand to the incorrect numbers utilized at the October 25, 2006, hearing would not effectuate justice. In addition, we find that the language of the applicable regulations (then 900 KAR 6:050; now 900

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[9] This is contrasted with the present case, in that the new data for Whitley County on that same date showed a sufficient need for approval of the CON.

[10] The later-published State Health Plan figure for Whitley County was "158," which is above the "125" threshold for a provider seeking to expand home health services.

KAR 6:070) requires the use of the latest numbers available at the time of the decision. Moreover, as the appellants note, the State Health Plan itself requires the use of the latest numbers available at the time of the decision. This is in accord with previous decisions by our Courts upon reversal of analogous agency determinations. *Cf. Whittaker v. Southeastern Greyhound Lines*, 314 Ky. 131, 234 S.W.2d 174 (1950) (On reversal of the grant of a "certificate of convenience and necessity," the Supreme Court directed the agency to consider the current need for the service, any pending applications for the service, and any proposed new schedules or offers of service); *Williams v. Cumberland Valley Nat. Bank*, 569 S.W.2d 711 (Ky. App. 1978) (On reversal of an agency decision granting the issuance of a bank charter, this Court directed the agency to consider whether there had been a significant change of conditions or circumstances since the initial decision).

In light of the foregoing, we vacate the September 2, 2009 amended opinion and order of the Franklin Circuit Court requiring the use of the SHP figures in existence at the time of the October 25, 2006 hearing, reinstate the original opinion and order, and remand without limiting the evidence to be considered on remand.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Carole D. Christian Louisville, Kentucky	Marian J. Hayden Holly Turner Curry Cull & Hayden, P.S.C. Frankfort, Kentucky