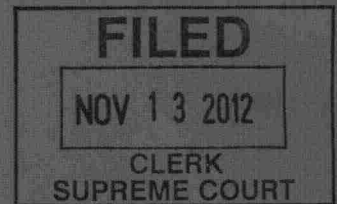


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2012-SC-000090-D



COMPREHENSIVE HOME HEALTH SERVICES, INC.
d/b/a FAMILY HOME HEALTH CARE S.E.

APPELLANT

vs.

ON REVIEW FROM COURT OF APPEALS OF KENTUCKY
CASE NO. 2009-CA-001846
ON APPEAL FROM FRANKLIN CIRCUIT COURT
CIVIL ACTION NO. 07-CI-00016

PROFESSIONAL HOME HEALTH CARE AGENCY, INC.;
WHITLEY COUNTY HEALTH DEPARTMENT d/b/a
WHITLEY COUNTY HOME HEALTH; AND
COMMONWEALTH OF KENTUCKY, CABINET FOR
HEALTH AND FAMILY SERVICES

APPELLEES

BRIEF OF APPELLANT

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Marian J. Hayden". The signature is written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Brief was served upon the following: Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Thomas D. Wingate, Judge, Franklin Circuit Court, 669 Chamberlin Avenue, Frankfort, KY 40601; Carole D. Christian, Wyatt, Tarrant & Combs, LLP, 500 West Jefferson Street, Suite 2800, Louisville, KY 40202; and Ann T. Hunsaker, Assistant Counsel, Cabinet for Health and Family Services, Office of Legal Services, 275 East Main Street, 5W-B, Frankfort, KY 40621, by mailing same with the United States Post Office, postage pre-paid, on this the 13th day of November, 2012.

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INTRODUCTION

This appeal involves an erroneous determination by the Kentucky Court of Appeals that remand hearings, including the one concerning Appellant's Certificate of Need application, should proceed in a manner that improperly improves one party's position while simultaneously placing the other party at a significant disadvantage. The Court of Appeal's Opinion is based on an erroneous conclusion that the Franklin Circuit Court's ruling is a "limitation on remand" when, in fact, the circuit court simply applied long-standing precedent and applicable Certificate of Need statutes and regulations. In light of the frequency of remand hearings in administrative matters, it is imperative that this Court reverse the Court of Appeals' Opinion in accordance with Kentucky law.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant requests that oral argument be scheduled, believing that oral argument will be useful to the Court in resolving the far reaching legal precedent established by issues in this appeal. Appellant's arguments require the interpretation of long-standing Kentucky statutes and regulations and some explication through oral argument will undoubtedly aid this Court in its resolution of these important issues.

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STATEMENT OF THE CASE

On June 28, 2006, Comprehensive Home Health Services, Inc. d/b/a Family Home Health Care S.E. ("Family") filed a Certificate of Need ("CON") application seeking approval to expand its existing home health service to Whitley County, Kentucky. The CON process is governed by KRS Chapter 216B, the purpose of which is to provide Kentucky citizens with "safe, adequate, and efficient medical care" while simultaneously regulating the operation of certain health care facilities to avoid "proliferation [that] increases the cost of quality healthcare." KRS 216B.010. To receive a CON, all Applicants must satisfy five statutory criteria delineated in KRS 216B.040(2) which are: (1) consistency with the *State Health Plan, Certificate of Need Review Standards* ("State Health Plan"); (2) need and accessibility; (3) interrelationships and linkages; (4) costs, economic feasibility, and resource availability; and (5) quality of services. See id. at 216B.040(2)(a)2.a.– e.

Pursuant to KRS 216B.040(2)(a)2.a., to receive CON approval to expand a home health agency, every Applicant must be consistent with the mandatory methodology set forth in the *State Health Plan*. The *State Health Plan*¹ is a document published by the Cabinet for Health and Family Services ("Cabinet") containing various criteria and numerical methodologies which determine whether or not a CON Applicant can proceed. Numerical methodologies vary among types of services. In other words, the methodology to determine if there is a need for acute care beds or an MRI in a particular

¹ 900 KAR 5:020 establishes the *State Health Plan* for facilities and services and consists of review criteria which dictate the need and availability of health care facilities and services. The *State Health Plan* is prepared triennially, updated annually, and based on the most recent utilization figures for a specific health care service. These annual updates are incorporated by reference into 900 KAR 5:020 and have the force and effect of law. The Home Health review criteria in the *State Health Plan* include a numerical methodology by which to determine the need for home health services in a particular county.

county is different from the methodology governing home health applications. However, regardless of what type of service for which an Applicant is applying, it must be consistent with the mandatory *State Health Plan* methodology to even proceed to hearing. The home health methodology is dictated exclusively by a numerical calculation which Applicants must satisfy.

Importantly, both at the time of the hearing itself and the rendering of the administrative decision on Family's CON application, the *State Health Plan* numerical methodology as calculated by the Cabinet showed that Whitley County had a net "need" of 184 additional patients requiring home health services; because Family's application involved an expansion of home health services from a contiguous county, the *State Health Plan* must show a minimum of 125 additional patients in its methodology for the application to even be considered for approval. Family's CON application satisfied the mandatory requirement of consistency with the *State Health Plan* both during the hearing itself and at the time of the Cabinet's decision. The remaining four CON criteria must also be addressed in every hearing. However, if an Applicant does not meet the initial *State Health Plan* numerical threshold, that application is "dead in the water" and ineligible for approval.

During the original administrative hearing, pursuant to KRS Chapter 216B, Appellees, Professional Home Health Care Agency, Inc. ("Professional") and Whitley County Health Department d/b/a Whitley County Home Health ("Whitley County"), requested a hearing to challenge Family's CON application. There were issues regarding filing deadline extensions and avowal exhibits that are not the subject of this Court's review. Ultimately, the Cabinet approved Family's CON application on November 15,

2006 as consistent with all five statutory criteria contained in KRS 216B. (Appendix 2.) Professional and Whitley County filed a Request for Reconsideration of Family's approval; the only information referenced in the Request was the two avowal exhibits presented during the hearing. The Hearing Officer denied the Reconsideration Request. (Appendix 3.)

The parties appealed Family's CON approval to the Franklin Circuit Court and on May 15, 2009, the Franklin Circuit Court issued an Opinion and Order rejecting all of Professional and Whitley County's allegations of error except for the one relating to the Hearing Officer's refusal to allow a continuance and admit avowal exhibits. (Appendix 4.)

Family filed a Motion to Alter, Amend, or Vacate asking the Franklin Circuit Court to clarify that the remand hearing was to address the errors raised in the 2006 *State Health Plan* in effect at the time of Family's CON hearing and approval, not whatever version of the *State Health Plan* in effect at the time of a remand hearing. The Franklin Circuit Court upheld its remand order and clarified its ruling stating that, "[t]he remedy to which [Professional and Whitley County] are entitled upon remand is . . . the opportunity to develop and present a case based on those changes [in the *State Health Plan*]." (Appendix 5, page 3) (Emphasis added.) In other words, Professional and Whitley County can develop an evidentiary record of their choosing, without limitation, regarding the 2006 *State Health Plan* in effect during the administrative hearing and decision which were the subject matter of the appeal.

Although Professional and Whitley County were awarded the precise relief they sought, a remand hearing to introduce evidence on the changes in the *State Health Plan*

that they argue was precluded due to a continuance denial and avowal exhibit ruling, they do not now want that relief. Because the *State Health Plan* in effect in 2009 (the year of the Franklin Circuit Court's ruling), and currently, significantly enhance their position, they appealed to the Court of Appeals challenging that portion of the Franklin Circuit Court's Opinion and Order that defines the scope of the remand hearing as the 2006 *State Health Plan*.

The Court of Appeals acknowledges these facts and recognizes that, under its ruling, Family's CON application will be subject to an immediate motion for summary judgment on remand, which will be granted. In fact, the Court of Appeals states, "[n]otably, 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." (Appendix 1, page 7.) Hence, the remand is an automatic denial without a hearing of any sort. Regardless, the Court of Appeals vacated the Franklin Circuit Court's Opinion and Order and remanded the proceeding to the Cabinet for a hearing based on the current *State Health Plan*. (Appendix 5.) Family filed a Petition for Rehearing asking the Court of Appeals to set aside its Opinion and enter a new decision remanding Family's CON application to be heard under the 2006 *State Health Plan*. The Court of Appeals denied the Petition. (Appendix 6.) Discretionary review was granted.

ARGUMENT

I. THE COURT OF APPEALS ERRED AND MUST BE REVERSED AS ITS RULING VIOLATES THE DUE PROCESS RIGHTS OF THE APPELLANT AND OTHER PARTIES APPEALING ADMINISTRATIVE PROCEEDINGS.

The Court of Appeals recognizes that the violation it is correcting from the administrative hearing is the fact that the Appellees, "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.” (Appendix 1, p. 4.) The “calculations for unmet need” are the 2006 *State Health Plan* numbers that the Franklin Circuit Court ruled should govern the remand hearing. The very same “calculations” that the Appellees contend they could never challenge due to only days notice and no opportunity to update their pre-hearing filings. Hence, the Franklin Circuit Court agreed that a due process violation occurred and granted the Appellees’ request for a remand hearing. The ruling entitled them to a “redo” of their administrative proceeding with the unfettered opportunity to challenge the regulation, which contains calculations on which Family’s approval was based, at least in part. The Court of Appeals erroneously construes this ruling as limiting the scope of the remand hearing when it is the very relief sought by the Appellees.

The purpose and scope of a remand hearing in administrative proceedings is clearly defined by Kentucky law and other governing precedent. Generally, a circuit court retains the broad authority to remand a case to an administrative agency to take evidence where the circuit court finds that the agency acted incorrectly by not introducing that evidence. See Browning Manufacturing Division, et al. v. Paulus, 539 S.W.2d 296, 297 (Ky. 1976) and Searcy v. Three Point Coal Co., 280 Ky. 683, 134 S.W.2d 228 (1939). However, on remand, the party is permitted to introduce only that evidence that it was unable to previously produce during the original administrative proceedings. See Searcy, *supra*, at 232 (emphasis supplied). This procedure permits a party to present further proof on a subject in which the facts were arguably not fully developed. See Broadway & Fourth Avenue Realty Co. v. Metcalfe, 230 Ky. 800, 20 S.W.2d 988 (1929).

More importantly, it recognizes the purpose of remand proceedings, which is “to place [the party] in the situation [it] would have been in had the [agency] not acted improperly.” Getty v. Federal Savings & Loan Corp., 805 F.2d 1050, 1061 (D.C. Cir. 1986) (citing Delta Data Systems Corp. v. Webster, 744 F.2d 197, 206 (D.C. Cir 1984)). However, a remand order cannot serve to improve a party’s position while simultaneously placing the other party at a significant disadvantage, which is exactly the result the Court of Appeals’ Opinion will achieve in any administrative proceeding involving a time-sensitive issue should this Court allow the Opinion to stand. Id.

Long-standing Kentucky law supports the above-referenced purpose of remand proceedings, acknowledging that, “if the rule were otherwise, litigation would be interminable and reversals might be had without number, first upon one ground and then upon another, so that it would be advantageous to parties to hold back for future service matters which might well have been tried originally.” Phillips v. Charles, 267 S.W.2d 748, 750 (Ky. 1954). The Court of Appeals’ Opinion contravenes long-standing precedent directly applicable to this case. A remand hearing utilizing the *State Health Plan* calculations in effect at the time of the hearing and decision assures that all parties are treated fairly and uniformly during the remand proceedings. The Court of Appeals’ Opinion sweepingly eradicates a meaningful appeals process as Family will be improperly precluded from even proceeding to a hearing. Such a result violates Family’s due process rights, and the due process rights of all other similarly situated parties who, through no fault of their own, will have meaningless appeal rights if subjected to a different set of rules upon remand. The Franklin Circuit Court’s September 2, 2009 Opinion and Order enforced Kentucky law by allowing Professional and Whitley County

to develop and present a case related to the *State Health Plan* figures under which Family's application was approved.

Based on sound legal directives, the Franklin Circuit Court correctly made the following determination:

This appeal was about the fact that [Professional and Whitley County] were not given adequate notice of the significant change in the SHP numbers in time for the October 16, 2006 filing deadline. The remedy to which they are entitled upon remand is what the Cabinet should have granted in the first place – the opportunity to develop and present a case based on those changes....The relevant decision here is the 2006 decision; the relevant issue is whether Family Home Health Care was entitled to the 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.

(Appendix 5.) This ruling enables Professional and Whitley County to produce evidence that they could have presented had their request for continuance been granted and avowal exhibits admitted. In remanding the action for this purpose, the Franklin Circuit Court properly defined the scope of the hearing as the need calculation in the 2006 *State Health Plan*, a binding regulation, on which Family's application was heard and approved. These are critical distinctions simply overlooked by the Court of Appeals that must now be rectified by this Court to protect case law and Family's due process rights.

Further, while the Court of Appeals acknowledges the Kentucky legal precedent specifies that remand hearings should not proceed in a manner that improperly improves one party's position while simultaneously placing the other party at a significant disadvantage, if allowed to stand, its Opinion mandates such a result. The impact of this ruling is far reaching across the Commonwealth as remands for administrative and other proceedings are common remedies pursuant to statutory appeals. The Court of Appeals' Opinion eradicates the due process rights of any party to an administrative proceeding

controlled by a statute or regulation that, pursuant to legal mandates such as the *State Health Plan* in this instance, changes or is regularly updated. Such regulations inevitably and directly impact the parties' status in the process. This holding clearly contradicts Kentucky law.

The actual essence of the Appellees' position in this appeal is their dissatisfaction with the hearing procedures and the fact that the *State Health Plan* calculations ultimately showed a need for additional home health services in Whitley County. While the Appellees have contended that the September 2, 2009 Opinion will not provide them the ability to "develop . . . an analysis of the October 16 Plan figures and their mathematical accuracy," nothing can be further from the truth. (Appellees' Court of Appeals Brief, p. 14.) The Franklin Circuit Court's directive on the scope of remand properly provides the Appellees with "the opportunity to develop and present a case based on those changes [in the *State Health Plan*]." It is clear that the Appellees actually seek an unlimited scope on remand to attempt to eradicate the *State Health Plan* need projected for Whitley County.

Because the Appellees will be allowed to develop an evidentiary record on the *State Health Plan* need methodology during the remand hearing, the Franklin Circuit Court's September 2, 2009 Opinion and Order is consistent with its May 15, 2009 Opinion and Order as well as decisions from this Court. As such, it should be affirmed and the Court of Appeals' Opinion reversed. This decision in no way denies the Appellees due process or limits their ability to present the evidence that they would have used if the Cabinet had continued the hearing or conducted a reconsideration hearing, the two alleged errors underlying the remand order. Moreover, the September 2, 2009 Opinion and Order does not restrict the Hearing Officer's discretion on remand to decide

what arguments and evidence will be accepted, rejected, or afforded any weight. However, the Court of Appeals' Opinion eradicates Family's due process rights and should be reversed.

II. THE COURT OF APPEALS ERRED BY IMPROPERLY INTERPRETING THE CERTIFICATE OF NEED LAW WHICH SPECIFICALLY ADDRESSES THE *STATE HEALTH PLAN* ISSUE.

The Court of Appeals essentially ignored Technical Note 6 of the *State Health Plan*, the regulatory provision promulgated by the Cabinet to provide CON applicants with finality and certainty. On the other hand, the Franklin Circuit Court's ruling acknowledges the agency's legal guidance without affording remand recipients an entirely new administrative hearing covering issues that were not even the subject of the appeal. In its ruling, the Franklin Circuit Court correctly found that utilization of the *State Health Plan* calculations in effect in October 2006 affords the Appellees the opportunity to develop and present a case on those figures.

Due to the changing status of the *State Health Plan*, the Cabinet specifically addressed the version that is applicable and governing to applications in its Technical Note 6. As recognized by the Court of Appeals, Technical Note 6 of the *State Health Plan* requires that, "[a]ll certificate of need decisions shall be made using the 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." (See Appendix 1, p. 9.) Moreover, the CON regulation in effect at the time of the decision on Family's CON application stated as follows:

In determining whether an application is consistent with the State Health Plan, 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 cabinet's decision.

900 KAR 6:050 Section 7(1)(b) (emphasis added). While Family agrees that the clear language of the regulation and Technical Note 6 dictate what data governs the CON process, the Court of Appeals misapplied this applicable law to the specific, narrow issue presented herein. Because the CON process, by necessity, is based on constantly changing data, the Cabinet recognized and promulgated a detailed regulation addressing the need to expressly set forth which *State Health Plan* calculations are controlling for each CON application. The Court of Appeals erred by overlooking this important fact. Therefore, its ruling is inconsistent with the plain meaning of the governing CON regulation and Technical Note 6 to the *State Health Plan*, both of which clearly call for the 2006 figures that were in effect at the time of the Cabinet's decision, *i.e.*, the November 15, 2006 decision approving Family's application, to govern the remand proceedings.

In reaching its Opinion, the Court of Appeals mistakenly relied on Family Home Health Care, Inc. v. Saint Joseph Health System, Inc. d/b/a Seton Home Health, et al., Case No. 2008-CA-001790-MR (Ky. App. Aug. 7, 2009) (*unpublished decision*) ("FHHC Decision").² Although the cases both involve home health decisions, the reality is that there are distinguishing factors between the two cases that the Court of Appeals simply overlooked. Unlike the FHHC Decision, the *State Health Plan* need figures for Whitley County continued to show a need for the approval of an additional home health agency long after the approval of Family's application. Conversely, in the FHHC

² While Family is mindful that the FHHC Decision is an unpublished case, it is not citing or using it as authority in this appeal as prohibited by CR 76.28(4)(c). Rather, Family only references the FHHC Decision in this Brief in direct response to the Court of Appeals' Opinion, which states that the factual and legal bases behind it are similar to the case at bar.

Decision, the *State Health Plan* figures showed an insufficient need on the date the Hearing Officer issued the Final Order on the application. Thus, in the FHHC decision case, the *State Health Plan* in effect at the time of the final decision did not permit approval; a remand under that *State Health Plan* or the current 2011 *State Health Plan* does not change the parties' positions. Because the Court of Appeals overlooked this critical distinction, it erred as a matter of law by basing its Opinion on alleged "parallels" between this case and the FHHC Decision that do not exist.

More importantly, the Cabinet has consistently supported Appellant's legal position as it directly complies with the Cabinet's long-standing interpretation of the governing CON statutes and regulations. (See Cabinet's Response to Motion for Discretionary Review.) The statutes and regulations at issue herein were enacted to afford CON applicants a full and fair opportunity to develop and present a case under the *State Health Plan* calculation applicable to the original administrative hearing and decision. This long-standing interpretation of such statutes and regulations is reasonable and entitled to considerable deference. "In most cases, an agency's interpretation of its own regulations is entitled to substantial deference. A construction of a law or regulation by officers of an agency continued without interruption for a long period of time is entitled to controlling weight. It is usually the practice to conform to an agency's construction when that agency was responsible for a regulation's adoption." Hagan v. Farris, 807 S.W.2d 488, 490 (Ky. 1991). In other words, an administrative agency's construction of its statutory mandate, particularly its construction of its own regulations, is entitled to respect and is not to be overturned on appeal unless clearly erroneous. Homestead Nursing Home v. Parker et al., 86 S.W.3d 424, 426 (Ky. App. 1999); see also J.B.

Blanton Company v. Lowe, 415 S.W.2d 376 (Ky. 1967); Hughes v. Kentucky Horse Racing Authority, 179 S.W.3d 865 (Ky. App. 2004).

The Court of Appeals ignored the plain meaning and agency interpretation in this instance. Further, its Opinion is premised on a conclusion that the 2006 *State Health Plan* numbers are “wrong” and remanding for consideration under these numbers would not “effectuate justice.” (Appendix 1, p. 12). There is absolutely no evidence in the record that the numbers in the 2006 *State Health Plan* at the time of decision were “wrong.” In fact, the Appellees’ entire appeal is based on the allegation that it could not effectively challenge the 2006 *State Health Plan*’s accuracy due to a continuance denial by the Hearing Officer. Since inability to produce evidence on the subject is the crux of the alleged appellate violation as recognized by the Court of Appeals on page 4 of its Opinion, its conclusion that the numbers were “wrong” is both perplexing and blatantly erroneous. Whether or not the 2006 numbers were right or wrong will be the very subject of the remand hearing, explored in depth and ruled upon by the Hearing Officer.

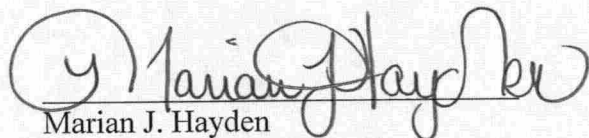
Possibly, the Court of Appeals is referring to the fact that the 2006 *State Health Plan* numbers were updated again in December of 2006 or other times since that date. Regardless, the irony in the Court’s statement is that it fully supports Family’s due process argument in this case. Administrative applicants are entitled to due process rights as guaranteed by both the Kentucky and United States Constitutions. Finality and certainty are basic premises of such rights. Accordingly, the Cabinet mandated a date on which all parties to the proceedings could have a clear indication of their status under a binding regulation that, by its nature and pursuant to Kentucky law, is updated with regularity. The “date of certainty” for the *State Health Plan* is the date of the decision on

the CON application. To find otherwise allows potential manipulation through appeals, deprives successful Appellants of a remedy upon remand and ignores the agency's regulation on the issue.

CONCLUSION

The Opinion of the Court of Appeals should be reversed because it directly contradicts existing Kentucky precedent on remand by improperly improving the Appellees' position while simultaneously placing Family at a significant disadvantage. A remand hearing under the current *State Health Plan* completely precludes Family's approval. If allowed to stand, this Opinion will also have a profound impact on parties not even before this Court by stripping away the due process rights of any party in an administrative proceeding with a time-sensitive nature. In light of the frequency of remand hearings in administrative matters, it is imperative that all participants in administrative processes, including the parties, hearing officer, and counsel, be afforded a clear understanding of the appropriate purpose and scope of a remand hearing. Such a decision from this Court will clearly establish the legal standards governing remand proceedings, which will promote judicial economy, eliminate potential gamesmanship by taking away litigants' opportunity to hold legal arguments in reserve, and reduce the need for future appeals on this important procedural issue.

Respectfully submitted,

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