IN THE COURT OF COMMON PLEAS
MONTGOMERY COUNTY, OHIO

IN THE MATTER OF:	:	**Case No. 2016-CV-06088**
WOMEN'S MED CENTER OF DAYTON,	:	
	:	**Judge Mary Wiseman**
Appellant,	:	
vs.	:	
STATE OF OHIO DEPARTMENT OF HEALTH	:	**BRIEF OF APPELLANT WOMEN'S MED CENTER OF DAYTON**
Appellee.	:	**ORAL ARGUMENT REQUESTED**

I. INTRODUCTION

The Director of the Ohio Department of Health has refused to renew and has revoked WMCD's ambulatory surgery center license. (Adjudication Order November 30, 2016, RE p. 115). The Director's decision is contrary to law and should be reversed because the statute he relied on violates the Ohio Constitution and the regulation he relied on has been superseded by state law. In addition, the Director's decision is contrary to law because the denial of WMCD's request for a variance of the written transfer agreement requirement was not a valid adjudication order. Finally, even if this Court were to find the Director's actions were not contrary to law, the Director's decision to deny WMCD a variance was not supported by any evidence, let alone supported by reliable, probative and substantial evidence. For these reasons, WMCD requests that the Court reverse the Director's refusal to renew and revocation of WMCD's license, and the Director's decision to deny WMCD a variance of the written transfer agreement requirement.

II. STANDARD OF REVIEW

A decision of the Ohio Department of Health is appealable under R.C. § 119.12. On appeal this Court must determine whether the Department of Health's decision is supported by reliable, probative, and substantial evidence and is in accordance with law. "In the absence of this finding, [this Court] may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law." R.C. § 119.12. "[A]n agency's findings of fact are presumed to be correct and must be deferred to by a reviewing court unless that court determines that the agency's findings are internally inconsistent, impeached by evidence of a prior inconsistent statement, rest upon improper inferences, or are otherwise unsupportable." *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 471, 613 N.E.2d 591 (1993). In this case, the agency's findings of fact are unsupportable and its conclusions of law are contrary to law.

III. STATEMENT OF FACTS

WMCD is an ASF located in Kettering, Ohio which provides surgical abortions to women. (JX A, Stipulation 1, RE p. 28[1]). Dr. Martin Haskell is the medical director of WMCD and the sole shareholder of Women's Medical Group Professional Corporation ("WMGPC"), the company that has owned and operated WMCD since 1983. (WMCD Ex. 26, Haskell Hearing Affidavit, ¶ 2, RE p. 321 (hereinafter referred to as Haskell Hearing Affidavit). WMCD has been providing pregnancy testing, abortions (including pre-op and post-op care), and birth control for over 33 years. (Haskell Hearing Affidavit, ¶ 3, RE p. 321). WMCD applied for its first ASF license in 2002. (Haskell Hearing Affidavit, ¶ 4, RE p. 321-22). After prolonged

[1] The administrative record has been filed with the court. RE cites are to the page in the record where the exhibit or transcript page can be found).

litigation, WMCD has operated as a licensed ASF since 2008. Prior to that date, WMCD provided abortions without an ASF license.

In 2008, WMCD applied for a ***variance*** of the WTA Requirement. The Director of ODH granted WMCD's variance request, based on WMCD's hospital transfer protocol and relationship with backup physicians who could admit a WMCD patient to a local hospital. ODH also granted WMCD's ASF license renewal in 2008 and each year after through 2011. The 2008 variance remained in place during this time. (Haskell Hearing Affidavit, ¶¶ 20-22, RE p. 325).

In December 2011, ODH notified WMCD that it would be required to apply annually, starting in 2012, for renewal of the variance of the WTA requirement at the same time that it submitted its annual license renewal request. (Haskell Hearing Affidavit, ¶ 22, RE p. 325). Since this rule change was implemented at the end of 2011, WMCD has filed timely license renewal and variance applications each year in 2012, 2013, 2014, and 2015. (Haskell Hearing Affidavit, ¶ 22, RE p. 325). ODH did not rule on WMCD's variance applications in 2012, 2013, or 2014. Nonetheless, under Ohio law, R.C. § 119.06, it was permitted to continue operating while its license renewal application each year was pending. Thus, WMCD continued to operate under its 2011 ASF license because its renewal applications were timely filed each year. (Haskell Hearing Affidavit, ¶ 23, RE p. 325-26).

A. Administrative History

On June 25, 2015, Director Hodges denied WMCD's variance requests for 2012, 2013, and 2014 solely for the reasons contained in Director Hodges's letter. (JX A, Stipulation 8, RE p. 29). Among the reasons ODH Director Hodges gave for denying the variances in 2015 was that the 2013 and 2014 variance requests named only 2 back-up physicians. (WMCD Ex. 10 p. 1, June 25, 2015 variance denial, RE p. 258-59). Director Hodges stated that naming only two

back-up physicians was not sufficient. Director Hodges testified that he denied the variance with only two names because WMCD had had three named in the past. (Hodges TR, RE p. 450-51).

ODH gave WMCD thirty days to add a third backup physician. On July 24, 2015 WMCD submitted a renewed variance request and added a third backup physician. (WMCD Ex. 9, July 2015 variance request, RE p. 222; JX A, Stipulation 9, RE p. 29). Two months later, on September 25, 2015, Director Hodges denied WMCD's variance requests for 2012, 2013, 2014, and 2015 because they now needed four backup physicians. (WMCD Ex. 11, RE p. 261). This time, the Director stated that naming three back-up physicians was not sufficient, even though in his June letter he stated three would be sufficient. At the administrative hearing the Director never explained why three names were no longer sufficient (Hodges TR, RE p. 456-59, RE p. 482-83).

Also on September 25, 2015, Director Hodges provided notice that he proposed to revoke and not renew WMCD's ASF license because WMCD did not have a WTA with a local hospital as required by R.C. § 3702.303 and O.A.C. § 3701-83-19 (E). All of Director Hodges's reasons for proposing to revoke and not renew WMCD's ASF license are contained in Director Hodges's notice. (Hodges TR., RE p. 431; WMCD Ex. 12, RE p. 264-66). WMCD timely filed a hearing request. (WMCD Ex. 21, RE p. 305).

On April 26, 2016, an administrative hearing was held regarding the proposed revocation and non-renewal of WMCD's license. (Hearing TR., RE p. 331). WMCD presented evidence that it could achieve the purpose of the WTA in the absence of one, and was therefore entitled to a variance of the WTA requirement under R.C. § 3702.304. On September 2, 2016, the Hearing Examiner issued a report recommending non-renewal and revocation of WMCD's license. (Report & Recommendation, RE p. 89). WMCD filed objections on September 15, 2016.

(Objections, RE p. 103). The Director ruled on November 30, 2016, affirming the hearing examiner's recommendations, and issuing an adjudication order refusing to renew and revoking the license. (Adjudication Order, RE p. 115). It is this order from which this appeal is made.

B. Grounds for Revocation of the License

ODH has ordered WMCD's license to be revoked and non-renewed because it alleges that WMCD has failed to meet the requirements of R.C. § 3702.303, the WTA statute, and O.A.C. § 3701-83-19(E), the prior WTA rule. However, R.C. § 3702.303 is unconstitutional and unenforceable. Furthermore, O.A.C. § 3701-83-19(E) has been superseded by statute. Finally, WMCD met the statutory variance requirements under R.C. § 3702.304.

IV. ARGUMENT[2]

A. ODH's Decision to Not Renew and Revoke WMCD's License Pursuant to R.C. § 3702.303 Is Contrary to Law Because HB 59's Written Transfer Agreement Requirement Violates the Single Subject Provision of the Ohio Constitution.

Ohio Constitution, Article II, Section 15(D) expressly provides that "no bill shall contain more than one subject, which shall be clearly expressed in its title." This provision, known as the single subject rule, unambiguously requires every piece of legislation to address only a single subject and serve a single purpose. Its purpose is to promote an "orderly and fair legislative process" by prohibiting "logrolling"—"the practice of combining and thereby obtaining passage for several distinct legislative proposals that would probably have failed to gain majority support if presented and voted on separately." *See In re Nowak*, 104 Ohio St.3d 466, 2004-Ohio-6777, 820 N.E.2d 335, ¶ 31 (citing *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 495-96, 715 N.E.2d 1062 (1999)). A blatant violation of the single subject rule will cause

[2] WMCD has elected to pursue its federal constitutional claims in the federal courts, and thus has not waived those claims by not raising them in this action. See *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 421 (1964); *Wicker v. Bd. of Educ. of Knott Cnty., Ky.*, 826 F.2d 442, 443 (6th Cir. 1987).

an enactment to be invalidated. *Id.* at ¶¶ 38, 46, 52-54. Courts find such violations where there is "'an absence of common purpose or relationship between specific topics in an act.'" *Id.* ¶ 44 (quoting *State ex rel. Dix v. Celeste*, 11 Ohio St.3d 141, 145, 464 N.E.2d 153 (1984)). An act may involve multiple topics, so long as they share a common purpose or relationship. However, where there is a "disunity of subject matter such that there is no discernible practical, rational or legitimate reason for combining the provisions in one Act," *State ex rel. Ohio Civ. Serv. Emps. Ass'n v. State Emp. Relations Bd.*, 104 Ohio St.3d 122, 2004-Ohio-6363, 818 N.E.2d 688, at ¶ 28 ("*OCSEA v. SERB*") (internal quotation marks omitted), the Court must invalidate the law "'in order to effectuate the purpose of the rule.'" *In re Nowak* at ¶ 44 (quoting *Dix* at 145); *see also Sheward*, 86 Ohio St.3d at 497, 1999-Ohio-123, 715 N.E.2d 1062; *State ex rel. Hinkle v. Franklin Cty. Bd. of Elections*, 62 Ohio St.3d 145, 148, 580 N.E.2d 767 (1991).

Although budget bills "encompass many items, all bound by the thread of appropriations," the legislature is not free to disregard the single subject rule in the context of appropriations. *Hoover v. Bd. of Cnty. Comm'r*, 19 Ohio St.3d 1, 5, 482 N.E.2d 575 (1985). Appropriations bills "present[] a special temptation" to attach unrelated provisions because they are necessary and often popular bills which are certain of passage. *Simmons-Harris v. Goff*, 86 Ohio St. 3d 1, 16, 711 N.E.2d 203 (1999) (citation omitted). The Ohio Supreme Court has not hesitated to strike provisions from appropriations bills based on the single subject rule where the provision is not directly related to the state budget and appropriation. See *OCSEA v. SERB*, 104 Ohio St. 3d 122, 2004-Ohio-6363, 818 N.E.2d 688, ¶ 36 (Ohio Supreme Court striking down state employee collective bargaining provision inserted into budget bill which was only tenuously related to appropriations); *Simmons-Harris*, 86 Ohio St. 3d at 17, 711 N.E.2d 203

(Ohio Supreme Court striking down controversial provision creating school voucher program inserted into appropriations bill).

Indeed, in a case similar to this one, the Eighth District Court of Appeals struck down provisions relating to local governments' authority to regulate food nutrition information and consumer incentive items at food service operations that were "tucked away" inside a "massive" omnibus budget bill. *Cleveland v. State*, 2013-Ohio-1186, 989 N.E.2d 1072, at ¶¶ 42-44 (8th Dist.). Although the court "accepted, in theory," that the challenged provisions "could *potentially* impact the budgets of municipalities," it rejected the State's argument that "such a tenuous, tangential link" between the provisions and the remainder of the appropriations bill was sufficient to save it. *Id.* at ¶ 52 (Emphasis in original).

The WTA requirement (R.C. § 3702.303) and the variance requirement (R.C. § 3702.304) were enacted by the Ohio legislature as part of HB 59, the 2013 omnibus budget bill. As the Sixth District Court of Appeals has already correctly concluded, "[t]he inclusion of the licensing provisions in the budget bill is a clear example of logrolling." *Capital Care Network of Toledo v. State of Ohio Dep't of Health*, 2016-Ohio-5168, 58 N.E. 3d 1207, ¶ 42 (6th Dist.).[3] The stated purpose of the bill is "[t]o amend sections . . .; to enact new sections . . . and to repeal sections of the Revised Code; . . . to make operating appropriations for the biennium beginning July 1, 2013, and ending June 30, 2015; [and] to provide authorization and conditions for the operation of state programs . . ." 2013 HB 59. However, the Bill addressed at least four distinct topics: (1) budget and appropriations; (2) regulation of abortion and abortion providers; (3) regulation of health care facilities; and (4) creation of a new parenting and pregnancy support

[3] ODH has appealed the Court's decision. *See, Capital Care Network of Toledo v. State of Ohio Dep't of Health*, Case No. 2016-1348 (Ohio Supreme Court). As of the date of this filing, the Ohio Supreme Court has not ruled whether to accept jurisdiction.

program. As the Sixth District declared in *Capital Care*, it is an "unnatural combination of provisions." *Capital Care Network of Toledo* at ¶ 42.

The provisions at issue here, R.C. § 3702.303 and 3702.304, require ambulatory surgical facilities to obtain a written transfer agreement with a local hospital. ODH has failed "to proffer any explanation as to how licensing provisions align with the bulk of HB 59." *Id*. The statute doesn't restrict state spending, or reform the effective operation of the state government. In fact, the statute does not require any action on the part of the government at all. There is simply "no discernible practical, rational or legitimate reason for combining the provisions in one Act." *SERB*, 104 Ohio St. 3d 122, 2004-Ohio-6363, 818 N.E.2d 688, ¶ 28. The fact that HB 59 was an appropriations bill "does not shield the licensing provisions from the one-subject requirement." *Capital Care Network of Toledo* at ¶ 42. There is simply "no common nexus between the licensing provisions and the budget-related items in H.B. 59." *Id.*

Furthermore, the written transfer agreement provisions were not passed on their own merits, but rather were added as riders to the State's biennial budget bill. *Capital Care Network of Toledo v. State of Ohio Department of Health*, Lucas C.P. No. CI0201403405, 2015 WL 10732709, *15 (June 19, 2015) (finding that WTA provision was nothing more than a 'rider'). At the end of the state budget process Ohio legislators buried controversial anti-abortion provisions in the several thousand pages of a budget bill that was sure to pass. The written transfer agreement provisions were initially added to HB 59 in the House Committee during its final hearing, despite numerous previous hearings on the bill. No opportunity for public testimony was given. The provisions were later amended to target abortion providers in the final hearing of the Senate Committee, again despite numerous prior hearings on the bill and again without an opportunity for public testimony. *See* HB 59 (codified at R.C. § 3727.60). The

written transfer agreement provisions, which are inherently controversial and of significant constitutional import, were not debated and approved during a fair and open legislative process. *Cf. Cleveland v. State*, 2013-Ohio-1186, 989 N.E.2d 1072, at ¶¶ 44-45 (noting that the lack of testimony and hearings on nutrition- and food-service-related provisions in a budget bill "create[d] a strong suggestion" of impermissible logrolling). HB 59 frustrates the single subject rule's purpose of preventing logrolling and ensuring "a more orderly and fair legislative process." *Dix*, 11 Ohio St.3d 141, 142-43, 464 N.E.2d 153; *In re Nowak*, 104 Ohio St.3d 466, 2004-Ohio-6777, 820 N.E.2d 335, ¶ 31.

ODH revoked WMCD's license because WMCD violated R.C. § 3702.303 (A)'s requirement of maintaining a WTA with a local hospital. Because there is no common purpose or relationship between the provisions of HB 59, HB 59 and its Written Transfer Agreement Provision are void and unenforceable. Thus, ODH's decision to revoke and non-renew for violating an unconstitutional statute is contrary to law, and should be reversed.

B. The Adjudication Order is Contrary to Law Because it is Based in Part on Administrative Regulations That Were Superseded by Statute.

The Director also premised his adjudication order in part upon O.A.C. § 3701-83-14 and O.A.C. § 3701-83-19. These administrative rules were codified in 2015 when the Ohio legislature passed R.C. § 2702.303 and R.C. § 3702.304. Because the earlier regulations conflict with R.C. § 3702.303 and R.C. § 3702.304, they are unenforceable.

Administrative rules that conflict with statutory enactments covering the same subject matter are invalid and unenforceable. *Columbus Green Cabs, Inc. v. Bd. of Review, Bureau of Unemployment Comp.*, 88 Ohio Law Abs. 107, 184 N.E.2d 257, 262 (C.P. 1961), citing *State ex rel. De Boe v. Indus. Comm.*, 161 Ohio St. 67, 117 N.E.2d 925 (1954). "Where the true meaning is clear from the statute, the agency cannot nor can the Court affirm them in their failure to

follow the strict language of the statute." *Id.* at 264. The Ohio Supreme Court has discussed what it means for two laws to be "in conflict" in the context of state law preempting a local law. "In determining whether an ordinance is in 'conflict' with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa." *Struthers v. Sokol*, 108 Ohio St. 263, 140 N.E. 519 (1923), paragraph two of the syllabus; see, also, *Fondessy Enterprises, Inc. v. Oregon*, 23 Ohio St.3d 213, 492 N.E.2d 797 (1986), paragraph two of the syllabus. "An administrative rule cannot add or subtract from the legislative enactment." *Smith v. Med. Bd. of Ohio*, 2012-Ohio-2472, 971 N.E.2d 487, ¶ 24 (10th Dist.), citing *Cent. Ohio Joint Vocational School Dist. Bd. of Edn. v. Ohio Bur. of Emp. Servs.*, 21 Ohio St.3d 5, 10, 487 N.E.2d 288 (1986).

Ohio Administrative Code Chapter 3701-83 governs licensing provisions for health care facilities. However, at least two of the provisions at issue in Chapter 3701-83 are in conflict with Revised Code sections and are therefore invalid and unenforceable. Revised Code § 3702.303 (the WTA statute) requires that all ASFs have a WTA with a "local hospital" and that it specify "an effective procedure for the safe and immediate transfer of patients from the facility to the hospital when medical care beyond the care that can be provided at the ambulatory surgical facility is necessary, including when emergency situations occur or medical complications arise." The statute also requires that the WTA be updated every two years. R.C. § 3702.303 (B). The regulation in place before this statute was passed did not contain any of these requirements. O.A.C. § 3701-83-19 (E). The regulation required only that an ASF "have a written transfer agreement with a hospital for transfer of patients in the event of medical complications, emergency situations, and for other needs as they arise." Now that R.C. § 3702.303 is in place,

the Director does not have the power to approve a WTA that complies with the regulation but does not comply with the statute.

Similarly, the Director could not grant a variance to an ASF that met the requirements of the variance regulation (by satisfying the WTA requirement in an alternative manner) if the ASF did not also meet all of the requirements of R.C. § 3702.304, the statute governing variances from the WTA requirement. Revised Code § 3702.304 requires that a variance application include, among many other things, a contract with at least one backup doctor and detailed information regarding the facility's protocol for transferring a patient. While O.A.C. § 3701-83-14 allows the Director to grant a variance of safety requirements, it is not specific to the WTA requirement. It requires only that a facility show that it can meet the intent of the requirement in an alternative manner. Moreover, the Director does not have the authority to grant a variance pursuant to O.A.C. § 3701-83-14 because a written transfer agreement is now mandated by R.C. § 3702.303. Under O.A.C. § 3701-83-14, the Director may only grant a variance of a safety requirement established by Chapter 3701-83 of the Administrative Code if requirement is not mandated by statute.

Because the administrative rules O.A.C. § 3701-83-14 and O.A.C. § 3701-83-19 (E) are invalid and unenforceable, the Director of Health could not rely upon them as grounds for revoking WMCD's license. Therefore, the Director's adjudication order is contrary to law and should be reversed.

C. The Director's Decision to Revoke WMCD's ASF License Is Contrary to Law Because the Denial of WMCD's WTA Variance Was Not a Valid Adjudication Order.

Under R.C. § 119.06, an adjudication order triggers the Chapter 119 right to a hearing. Revised Code § 119.01 (D) defines "adjudication" as "the determination by the highest or

ultimate authority of an agency of the rights, duties, privileges, benefits, or legal relationships of a specified person, but does not include the issuance of a license in response to an application with respect to which no question is raised, nor other acts of a ministerial nature." Where an agency issues an adjudication order, it is required to hold a hearing pursuant to R.C. 119.06 prior to issuing the order unless one of the enumerated exemptions to the statute is applicable.[4] *Ohio Boys Town, Inc. v. Brown*, 69 Ohio St. 2d 1, 5, 429 N.E.2d 1171 (1982).

The Director's decision to grant or deny a variance is a determination by the head of the Department of Health regarding an ASF's duty to comply with the written transfer agreement, and thus falls within the definition of an adjudication order. See, *e.g*., *House of Esther Marie v. State*, 10th Dist. Franklin No. 81AP-304, 1981 WL 3639, at *1 (Dec. 3, 1981) (where hearing examiner offered Director of Health recommendation on whether to grant a variance to nursing home, and petitioner appealed Director's decision to common pleas). The adjudication of the variance does not fit into any of the narrow categories of decisions which are effective without a hearing under R.C. § 119.06 (A)-(C). Therefore, WMCD was entitled to a hearing prior to the Director making a final decision regarding the variance. *Liberty Bell, Inc. v. State, Dep't of Transp.*, 34 Ohio App. 3d 267, 518 N.E.2d 32, syllabus (11th Dist. 1986) (finding that an agency

[4] R.C. § 119.06 reads in part:
"No adjudication order shall be valid unless an opportunity for a hearing is afforded in accordance with sections 119.01 to 119.13 of the Revised Code. Such opportunity for a hearing shall be given before making the adjudication order except in those situations where this section provides otherwise.

The following adjudication orders shall be effective without a hearing:

(A) Orders revoking a license in cases where an agency is required by statute to revoke a license pursuant to the judgment of a court;

(B) Orders suspending a license where a statute specifically permits the suspension of a license without a hearing;

(C) Orders or decisions of an authority within an agency if the rules of the agency or the statutes pertaining to such agency specifically give a right of appeal to a higher authority within such agency, to another agency, or to the board of tax appeals, and also give the appellant a right to a hearing on such appeal."

is required by R.C. § 119.06 to hold a hearing prior to issuing an adjudication order, unless one of the exemptions set forth in the statute applies). The Director specifically denied WMCD a hearing on the variance denial and did not address the decision to deny the variance in his adjudication order.

The State has taken the position that the denial of the variance created no right to a hearing under Chapter 119, O.A.C. 3701-83-14(F). That regulation specifically stated, "The refusal of the director to grant a variance or waiver, in whole or in part, shall be final and shall not be construed as creating any rights to a hearing under Chapter 119 of the Revised Code." O.A.C. 3701-83-14 (F). The State relies on *In the Matter of Lebanon Road Surgery Center*, where the Hamilton County Court of Common Pleas relied on O.A.C. 3701-83-14 (F) in concluding that it had no jurisdiction to consider whether a variance was appropriate prior to a decision by the Director. *Lebanon Road Surgery Center v. Ohio Department of Health*, Hamilton C.P. No. A1400502, p. 2 (Aug. 15, 2014) (attached).

However, as WMCD has shown, O.A.C. 3701-83-14 (F) was replaced with R.C. § 3702.304, the WTA variance statute and is therefore unenforceable. In contrast to the administrative regulation, R.C. § 3702.304 does not include the language denying the ASF a right to a hearing or an appeal. If "it is axiomatic in statutory construction that words are not inserted into an act without some purpose," then we must also assume that words left out of a statute were left out on purpose. *State ex rel. Carmean v. Hardin Cty. Bd. of Edn.*, 170 Ohio St. 415, 422, 165 N.E.2d 918 (1960). It is the duty of a court interpreting a statute to "'give effect to the words used, not to delete words used or to insert words not used.'" *Ne. Ohio Reg'l Sewer Dist. v. Bath Twp.*, 144 Ohio St. 3d 387, 2015-Ohio-3705, 44 N.E.3d 246, ¶ 13 (2015), reconsideration denied, 144 Ohio St. 3d 1411, 2015-Ohio-4947, 41 N.E.3d 448, ¶ 13, quoting

Columbus–Suburban Coach Lines, Inc. v. Pub. Util. Comm., 20 Ohio St.2d 125, 127, 254 N.E.2d 8 (1969). By not including the language from the regulation, the legislature indicated that it intended to grant ASFs Chapter 119 rights with respect to variance denials.

ODH refused to give WMCD a hearing prior to variance denial issued on September 25, 2015. (WMCD Ex. 11, RE p. 261). The denial letter explicitly stated that it was a final decision and that WMCD would have no right to a hearing. *Id.* at RE p. 262. While WMCD was permitted by the Hearing Examiner to present some evidence regarding the variance at the hearing which took place April 26, 2016, the Hearing Examiner declined to make a recommendation regarding the variance citing OAC § 3701-83-14 (F). (Report & Recommendation, RE p. 98-99). The Director of Health affirmed the Hearing Examiner's decision, finding that issues relating to the variance were not within the administrative hearing purview. (Adjudication Order, RE p. 116). Because no opportunity for a hearing was provided prior to the Director's final decision to deny WMCD a variance on September 25, 2015, the Director's decision is not valid and contrary to law. Therefore, the Director's decision to revoke and non-renew WMCD's ASF license should be reversed.

D. The Director's Decision to Not Renew and Revoke WMCD's License is Not Supported by Reliable, Probative, and Substantial Evidence

If this Court were to find that the unconstitutional statutes are constitutional or, in the alternative, assuming that the voiding of those statutes caused the WTA administrative code provisions to spring back into life, a modest contribution of common sense to the application of those statutes or provisions to the facts presented yields the conclusion that the requested variance should have been granted. WMCD's backup doctors and hospital transfer protocol clearly achieve the same end of patient health and safety that a WTA with a local hospital would afford. (WMCD Ex. 9, RE p. 222). The denial of WMCD's request for a variance is not

supported by reliable, probative and substantial evidence. In fact, it is not supported by any evidence at all. Unarticulated, unsubstantiated, subjective "concerns" cannot rationally be fitted into the definition of evidence.

This Court has jurisdiction and authority under R.C. § 119.12 to review the Director's Decision to deny WMCD a variance. Like the right to a hearing, the Chapter 119 right to an appeal is triggered by an adjudication order by an agency. R.C. § 119.12. Neither a hearing, nor a request for a hearing is a prerequisite to the right of appeal under R.C. § 119.12. *Matter of Turner Nursing Home*, Franklin C.P. No. 85AP-610, 1985 WL 3878, at *1 (Nov. 21, 1985).

The fact that R.C. § 3702.304 states that the Director of health's variance decision is "final" does not preclude this Court from reviewing it under R.C. § 119.12. In fact, the variance decision could not be appealed under Chapter 119 unless it were final. The Ohio Supreme Court has held in several cases that an agency's order may not be appealed unless it is "final." See *S. Cmty., Inc. v. State Employment Relations Bd.*, 38 Ohio St. 3d 224, 229, 527 N.E.2d 864 (1988)(appeal under R.C. § 119.12 is strictly limited to appeals of final orders as defined by R.C. § 2505.02); *Hamilton Cty. Bd. of Mental Retardation & Developmental Disabilities v. Professionals Guild of Ohio*, 46 Ohio St. 3d 147, 153, 545 N.E.2d 1260 (1989) (finding that SERB order must comply with finality requirement of R.C. § 2505.03 to be appealable); *Stewart v. Midwestern Indem. Co.*, 45 Ohio St. 3d 124, 126, 543 N.E.2d 1200 (1989) (holding that decision of arbitration court may only be appealed to common pleas if it is a "final appealable order" under R.C. § 2505.02).

While a court of common pleas may not substitute its judgment for that of an administrative agency, an agency's decision should be overturned if it is not supported by the preponderance of reliable, probative, and substantial evidence. R.C. § 119.12 (M). The

Director's decision to deny WMCD a variance was not supported by any evidence whatsoever, let alone reliable, substantial, and probative evidence. In proposing to deny WMCD a variance of the WTA requirement, the Director of Health wrote that "WMC's provision of only three named backup physicians does not meet my expectation that a variance provide the same level of patient health and safety that a written transfer agreement with a local hospital assures for 24/7 back-up coverage." (WMCD Ex. 11, RE p. 262). The Director cited no testimony or evidence to support the assertion that WMCD's three backup doctors cannot provide the same level of protection as a WTA with a local hospital. Nor did the Director introduce any such evidence at the hearing. In his adjudication order, the Director did not rely on any evidence to support the assertion that WMCD's three backup doctors cannot provide the same level of protection as a WTA with a local hospital. While the Director's adjudication order relied on the hearing officer's findings of fact, the hearing officer did not find that three backup doctors were insufficient. In fact, the hearing officer declined to make findings related to the variance.

WMCD proved at the hearing that its emergency protocol and system of backup doctors achieve the purpose of a written transfer agreement. R.C. § 3702.304 (A). This evidence was uncontradicted. The purpose of a WTA is to provide for the safe transfer of patients from the facility to the hospital in the event of an emergency. R.C. § 3702.303 (A). In order to achieve the purpose of the WTA, WMCD maintains three named backup physicians. In addition, WMCD contracts with a physician's practice group, Wright State Physician's Women's Health Care ("WSPWHC"), to admit a patient who needs to be transferred to a hospital for an emergency or other medical reason. (Haskell Hearing Affidavit, ¶¶ 31-32, RE p. 327-28). These contracts guarantee that a qualified doctor will be available to admit a patient that must be transferred from WMCD to Miami Valley Hospital. In addition, Miami Valley Hospital has

assured the Director that "[a]s required by Ohio and federal law, Miami Valley Hospital will continue to treat any and all patients presenting to our Emergency Department." (WMCD Ex. 16, RE p. 287). These protections are more than sufficient to ensure that a patient who requires treatment at a hospital will be admitted.

Furthermore, the Director's finding that the three back-up doctors do not provide 24/7 coverage is irrelevant. Revised Code § 3702.304 does not require an ASF to have 24/7 backup coverage in order to obtain a variance. Under that statute, an ASF need only show that it can achieve the purpose of a WTA. A WTA provides protection for patients only during the hours when an ASF is seeing patients and a transfer from the ASF to a hospital might be necessary. (Haskell Hearing Affidavit, ¶ 15, RE p. 324). Therefore, a backup agreement that provides adequate coverage during the hours when the ASF is in operation is sufficient to obtain a variance. WMCD's three named doctors, in addition to the services of Wright State Physician's Women's Health Care, go above and beyond what is required by R.C. § 3702.304 and what ODH has previously required under the regulation since the first variance was granted to WMCD in 2008.

Finally, the Director concluded that the physician practice group named by WMCD as additional backup does not satisfy R.C. § 3702.304 without providing names of specific doctors within the practice group. While R.C. § 3702.304 (B) does require specific information for ***one or more*** consulting physicians, the statute does not prohibit an ASF from using an entire practice group as a means of supplementing the named physicians. The addition of WSPWHC only serves to strengthen the variance application. It is not a cause for concern. The names of the practice group are a matter of public record and the CEO and President of the practice group signed the contract.

For these reasons, the Director's decision to revoke and non-renew WMCD's license because it did not have a variance is not supported by reliable, probative and substantial evidence and must be reversed.

V. CONCLUSION

The Director's adjudication order revoking and non-renewing WMCD's ASF license should be reversed. Appellant requests that this Court reverse the Director's order revoking WMCD's ASF license and the Director's decision denying WMCD a variance of the Written Transfer Agreement requirement pursuant to R.C. § 119.12 (M). Appellant further requests that the Court enter an order granting WMCD's variance request pursuant to R.C. § 119.12 (M).

Respectfully submitted,

/s/ Jennifer L. Branch
Jennifer L. Branch (0038893)
Alphonse A. Gerhardstein (0032053)
Attorneys for Appellant
GERHARDSTEIN & BRANCH CO. LPA
441 Vine Street, Suite 3400
Cincinnati, Ohio 45202
PHONE: (513) 621-9100
FAX: (513) 345-5543
E-MAIL: agerhardstein@gbfirm.com
jbranch@gbfirm.com

/s/ David C. Greer
Attorney Reg. No. 0009090
Attorney for Appellant
BIESER, GREER & LANDIS, LLP
6 North Main Street, Suite 400
Dayton, OH 45402-1908
PHONE: (937) 223-3277
FAX: (937) 223-6339
E-MAIL: dcg@biesergreer.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was e-mailed on January 30, 2017 to:

JAMES T. WAKLEY
STEVEN R. KOCHHEISER
Senior Assistant Attorney General/Unit Supervisor
Health and Human Services Section
30 East Broad Street, 26th Floor
Columbus, OH 43215
E-Mail: james.wakley@ohioattorneygeneral.gov
E-Mail: Steven.Kochheiser@ohioattorneygeneral.gov

/s/ Jennifer L. Branch

ENTERED
AUG 15 2014

FOR COURT USE ONLY
S. C. Line # : 18

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

LEBANON ROAD SURGERY CENTER
APPELLANT

-vs-

STATE OF OHIO DEPARTMENT OF HEALTH,
APPELLEE.

D107424481

CASE NO. A1400502

JUDGE JEROME METZ, JR.

ENTRY OVERRULING APPELLANT'S OBJECTIONS TO THE MAGISTRATE'S DECISION OF JULY 10, 2014 AND ADOPTING THE MAGISTRATE'S DECISION WITH MODIFICATIONS

This matter came before the Court for a hearing on the record of August 15, 2014, on Appellant Lebanon Road Surgery Center's objections to the Magistrate's Decision of July 10, 2014.

The Court has reviewed the briefs, the objection, the response to the objection, and the complete record of the proceedings. The Court heard arguments on the objection on the record of August 15, 2014. For the reasons expressed on the record of August 15, 2014, the Court hereby overrules Appellant Lebanon Road Surgery Center's objections to the Magistrate's Decision and adopts the Magistrate's Decision of July 10, 2014, with modifications.

This case is an administrative appeal under R.C. 119.12. That section provides that a Common Pleas Court's review of an order from an administrative appeal is limited to whether the order is supported by reliable, probative, and substantial evidence and is in accordance with the law. The Court finds that the order of the Director of the Board of Health is supported by reliable, probative, and substantial evidence and is in accordance with the law.

The Clinic objects to the Magistrate's decision that the Clinic had no right to a due process hearing as to the Director's decision whether to grant or deny a variance from the requirement for a

written transfer agreement. In *Women's Med. Prof. Corp. v. Baird*[1], the Court held that with regard to deprivation of an ambulatory surgical facilities license, there must be "some chance to react to proposed governmental action before deprivation occurs." And, the Court held further that a fact issue for a pre-deprivation hearing was whether the alternative arrangements for patients will adequately protect them.[2] *Baird* was a § 1983 action challenging the constitutionality of the deprivation in that case and the federal court clearly had jurisdiction to consider those issues. *Baird* determined that the Director could not simply issue a cease and desist order without an opportunity to respond.

In this case, prior to deprivation of the license and prior to deprivation of its variance the clinic received notice and was given the opportunity to present evidence for the Director's consideration as to the variance and present evidence to the hearing officer with respect to the licensing decision. Under Ohio Admin. Code 3701-83-14, the Director's refusal to grant a variance "shall be final and shall not be considered as creating any rights to a hearing under R.C. Chapter 119." This is an appeal under R.C. 119.12. This Court has no jurisdiction in this appeal to review either the decision of the Director or the procedure by which he made his decision apart from those matters committed to the administrative proceeding with respect to the license. The Court does not, accordingly, determine whether the clinic had a due process right to a pre-deprivation hearing with regard to its variance or whether the procedure employed with respect to no face-to-face hearing by the Director violated due process. Those matters are not committed to this Court in this proceeding and the Court has no jurisdiction to rule upon them.

Lebanon Road Surgery Center further argues that the stay previously ordered by the Court under R.C. 119.12 should remain in place pending the outcome of the appeal to the First District Court

---

[1] 438 F.3d 595, 599, 614 (6th Cir. 2006).

[2] *Id.*

of Appeals and potentially the Ohio Supreme Court. The Clinic concedes, however, that the suspension order is interlocutory and subject to review in this Court before judgment. R.C. 119.12 provides that "[i]f it appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order pending determination of the appeal, the court may grant a suspension and fix its terms." The Court shall consider four factors when determining whether suspension of the agency's order is appropriate. "Those factors are: (1) whether appellant has shown a strong or substantial likelihood or probability of success on the merits; (2) whether appellant has shown that it will suffer irreparable injury; (3) whether the issuance of a stay will cause harm to others; and (4) whether the public interest would be served by granting a stay."[3] The Court's suspension order addresses those issues and determined that the balance tipped in favor of suspension in large part because the factor of whether the Appellant has shown a strong likelihood of success on the merits was given little weight at the beginning stages of this proceeding. At this point, the Court has had an opportunity to fully review the record and briefs and has heard the arguments of counsel and has now ruled on the merits of the appeal. The Court finds that the factors now weigh against keeping the stay in place because Appellant cannot at this stage show a strong or substantial likelihood of probability of success on the merits given the limits on the Court's jurisdiction. The stay entered by this Court on January 31, 2014 shall expire at 4:00 p.m. five days after the date of this order.

The Conclusions of law in the Magistrate's decision are amended as follows:

> 4. It is solely within the Director's discretion whether to grant or deny a variance from the written transfer agreement and the Director's refusal to do so does not create any rights to an appeal under R.C. Chapter 119. Ohio Admin. Code 3701-83-14(D). Accordingly the Court lacks

[3] *Bob Krihwan Pontiac-GMC Truck, Inc. v. GMC*, 141 Ohio App. 3d 777 , 783 (10th Dist.).

jurisdiction in this appeal to determine whether the Director's decision on the variance, or his procedure in revoking it, comport with due process.

5. The Stay granted in this matter on January 31, 2014 shall end at the close of business (4 p.m.) five days after this Entry is docketed.

The Magistrate's decision is otherwise adopted as the decision of the Court.

ENTERED

AUG 15 2014

COURT OF COMMON PLEAS
ENTERED JEROME J. METZ, JR. JUDGE

SO ORDERED.

JEROME J. METZ, JR., JUDGE

THE CLERK SHALL SERVE NOTICE TO PARTIES PURSUANT TO CIVIL RULE 58 WHICH SHALL BE TAXED AS COSTS HEREIN.

cc: counsel of record