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Re: Supreme Court No. 90486-3 - Washington State Hospital Association v. Washington State Department of Health

Counsel:

Enclosed is a copy of the RULING signed by the Supreme Court Commissioner on September 4, 2014, in the above entitled case.

Sincerely,

Susan L. Carlson
Supreme Court Deputy Clerk

RRC:wg

Enclosure as stated

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON STATE HOSPITAL ASSOCIATION,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH,

Appellant.

NO. 90486-3

RULING

The Department of Health asks this court to stay, pending the resolution of its appeal, a Thurston County Superior Court order granting the petition of the Washington State Hospital Association (WSHA) for administrative review of an agency rule and invalidating and preventing enforcement of WAC 246-310-010(54). This subsection, which became effective on January 23, 2014, added a definition of the statutory term "[s]ale, purchase, or lease" to the list of definitions applicable to certificate of need requirements and programs. The stated purpose of the rule is to broaden the range of transactions resulting in a change of control of existing hospitals that undergo certificate of need review.

The words "sale, purchase, or lease" appear in RCW 70.38.105. That statute authorizes and directs the department to implement the certificate of need program, provides that no person shall engage in any undertaking which is subject to

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certificate of need review without first having received a certificate of need or a properly granted exception, and specifies the actions that are subject to certificate of need review. RCW 70.38.105(1), (3), and (4). The actions that require certificate of need review include "[t]he sale, purchase, or lease of part or all of any existing hospital as defined in RCW 70.38.025 including, but not limited to, a hospital sold, purchased, or leased by a health maintenance organization or by a combination of health maintenance organizations" with exceptions not relevant here. RCW 70.38.105(4)(b). With the adoption of WAC 246-310-010(54) the department undertook to define heretofore undefined terms: "'Sale, purchase, or lease' means any transaction in which the control, either directly or indirectly, of part or all of any existing hospital changes to a different person including, but not limited to, by contract, affiliation, corporate membership restructuring, or any other transaction."

The rulemaking process that culminated in the adoption of WAC 246-310-010(54), was initiated after Governor Inslee issued "Directive of the Governor 13-12" to the department on June 28, 2013. That directive stated that "the Certificate of Need process, as set forth in chapter 70.38 RCW and chapter 246-310 WAC, has not kept current with the changes in the health care delivery system in preparation for the implementation of health reform in Washington" and directed the department to commence rulemaking and to "consider how the structure of affiliations, corporate restructuring, mergers, and other arrangements among health care facilities results in outcomes similar to the traditional methods of sales, purchasing, and leasing of hospitals, particularly when control of part or all of an existing hospital changes from one party to another." The directive stated that "[t]he Certificate of Need process should be applied based on the effect that these transactions have on the accessibility of health services, cost containment, and quality, rather than on the terminology used in describing the transactions or the representations made in the preliminary

documents." The directive further instructed that the department's rulemaking process "shall also consider the factors in RCW 43.06.155, the principles and policies in the implementation of health reform, including the guarantee of choice for patients."[1]

On February 13, 2014, the WSHA filed a petition for declaratory judgment and injunctive relief pursuant to chapter 34.05 RCW, alleging the rule amendment exceeds the statutory authority of the department, was adopted without compliance with statutory rulemaking procedures, and is arbitrary and capricious. RCW 34.05.570(2)(c). The superior court concluded that the department exceeded its statutory authority in promulgating WAC 246-310-010(54), and thus it did not reach the remaining WSHA arguments. On June 13, 2013, the superior court entered an order granting the WSHA's petition, declaring WAC 246-310-010(54) invalid, and providing "therefore, the Department cannot enforce WAC 246-310-010(54)."

The department appealed to this court and filed a motion for a stay of the superior court decision pending appeal. The department's motion for a stay relates that "[t]he terms sale, purchase, and lease are undefined in statute, and the Department previously interpreted the terms somewhat restrictively. But increasingly, hospitals have started using new terms such as 'affiliation' to describe their transactions, thereby evading certificate of need review." The department contends that certificate of need review helps to ensure patient access to services, noting "[t]he Department can require the entity in control of the hospital to maintain access to services as a condition of the certificate of need." *See* WAC 246-310-490(3) (the department may issue a conditional certificate of need if the department finds the project is justified only under specific circumstances and the conditions relate directly to the project being reviewed and to review criteria).

[1] RCW 43.06.155(1) sets forth principles to guide the state of Washington in its health care reform deliberations.

The department seeks a stay of this superior court order pursuant to RAP 8.1(b)(3). RAP 8.1(b) provides that a trial court decision may be enforced pending appeal or review unless stayed, and provides a means for an appellate court to stay enforcement of a trial court decision. RAP 8.1(b)(3) applies in civil cases that do not involve a money judgment or decision affecting property. In considering a motion for a stay under RAP 8.1(b)(3), the appellate court (1) determines whether the moving party has presented "debatable issues," and (2) compares the injury the moving party will suffer if a stay is denied with the injury the nonmoving party will suffer if a stay is granted. Additionally, this court "has authority to issue orders, before or after acceptance of review, ... to insure effective and equitable review, including authority to grant injunctive or other relief to a party." RAP 8.3. *See also Purser v. Rahm*, 104 Wn.2d 159, 177-78, 702 P.2d 1196 (1985) (stating that whether a stay should be granted pending appeal depends on whether the issue presented by the appeal is debatable and whether a stay is necessary to preserve for the movant the fruits of a successful appeal, considering the equities of the situation).[2]

The department contends that the appeal presents a "debatable issue," noting the weight this court gives to an agency's interpretation of an ambiguous statute within its area of special expertise, *Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004), and the importance of the

[2] The department has not referenced RAP 8.3 and has not asserted that a stay is necessary to preserve the fruits of a successful appeal. And neither party has addressed what relief might be available if a transaction within the scope of WAC 246-310-010(54) is completed during the pendency of this appeal and the superior court order invalidating the rule is later reversed. Nor has the department addressed the availability or efficacy of remedies under RCW 70.38.125 to address some of the potential harms it identifies. For example, the department expresses concern that "a number of transactions which were previously described as traditional sales, purchases or leases" are evading the public process and certificate of need review merely by relabeling a transaction as something other than a sale or purchase. But RCW 70.38.125(6) provides the department with authority to bring any action to enjoin a violation or the threatened violation of the provisions of chapter 70.38 RCW, and to the extent the department asserts such a transaction would violate the chapter without regard to WAC 246-310-010(54), the superior court's order would not appear to prevent a legal proceeding to enforce the statute.

underlying legislative purposes in determining the proper meaning of a statute, *Washington Public Ports Ass'n v. Department of Revenue*, 148 Wn.2d 637, 645, 62 P.3d 462 (2003). The department argues the undefined statutory terms "sale, purchase, and lease" are ambiguous, that the dictionary definitions of these terms could support either a restrictive or a broad reading, and that a broad reading best accomplishes the overriding purpose of the certificate of need program, which is to provide access to health services. *See* RCW 70.38.015(1). *See also Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 55, 239 P.3d 1095 (2010) (promotion and maintenance of access to health care services for all citizens is the overriding purpose of the certificate of need program, and the goals of controlling costs of medical care and promoting prevention are of secondary significance). Under the broad reading the department advances, purchases and sales encompass any transaction in which a person transfers something of value or acquires something of value in exchange for some kind of consideration, and such consideration need not be monetary. The department acknowledges it has previously interpreted these terms to apply to a narrower range of transactions in a number of "applicability determinations" that evaluated, at the request of a person considering a transaction, whether the transaction would be subject to certificate of need requirements.[3] It argues that an agency's interpretation of a statute is not frozen in time and may change to adapt to changing circumstances. Here the department points to changes in the healthcare industry brought about by the federal Patient Protection and Affordable Care Act.

[3] These "applicability determinations" or "determinations of non-reviewability" are issued in a process that allows any person wanting to know whether an action the person is considering is subject to certificate of need requirements to submit information and a written request to the department for a determination of applicability of the certificate of need requirements to the action. The department issues a written determination that the action is or is not subject to certificate of need requirements, and such applicability determinations are binding on the department. WAC 246-310-050(5).

The WSHA contends this case does not present a debatable issue, arguing that the superior court gave the phrase "sale, purchase, or lease of part or all of any existing hospital" its plain and ordinary meaning in determining that the definition in WAC 246-310-010(54) exceeded the department's statutory authority. It argues that the legislature did not provide the department with rulemaking authority to decide which types of transactions require a certificate of need, and that the broad definition in the rule would capture transactions the legislature did not intend to regulate under the certificate of need law. And the WSHA presents various "applicability determinations" the department issued before adoption of the rule to demonstrate that the department previously interpreted this phrase to exclude many transactions encompassed by WAC 246-310-010(54).

Each party claims that legislative acquiescence favors its interpretation of the statutory term. The department points to the fact the legislature did not amend the statute in response to its adoption of WAC 246-310-010(54) during the 2014 legislative session, and the WSHA notes the legislature did not amend the statute in prior years despite the applicability determinations that the statutory term did not include transactions the new rule would now bring within the scope of the certificate of need law.

Pre-RAP caselaw establishes that the "debatability" standard contemplates a limited inquiry, not an extensive assessment of the merits. *See Shamley v. City of Olympia*, 47 Wn.2d 124, 127, 286 P.2d 702 (1955); *Kennett v. Levine*, 49 Wn.2d 605, 607, 304 P.2d 682 (1956). A return to this "debatability" standard was one purpose of 1990 amendments to RAP 8.1(b), and the drafters of the amendments commented that the "debatability" standard does not weigh the strength of the issues; rather, once it is determined a debatable issue is presented, the relative harm to the parties is then weighed. 2A KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE RAP 8.1

at 632 (7th ed. 2011). As illustrated by this case, a motion for a stay frequently will be presented on preliminary legal arguments before full briefing, and only a preliminary inquiry can be carried out, essentially to explore whether there is a plausible argument on which the party seeking the stay might ultimately prevail.

The department has presented a debatable issue under this standard. There are several factors a court considers in deriving the plain meaning of a statute as an expression of legislative intent, even if the court determines a statute is unambiguous. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002) (the plain meaning is derived from the context of the entire act as well as any related statutes which disclose legislative intent about the provision in question). And if the court finds the statute is subject to more than one reasonable interpretation, it may apply additional principles of statutory construction relevant to interpretation of an ambiguous statute. These principles include according weight to the interpretation of an agency charged with the administration and enforcement of a statute, provided the interpretation does not conflict with the statute. *St. Joseph Hosp. & Health Care Ctr. v. Dep't of Health*, 125 Wn.2d 733, 743, 887 P.2d 891 (1995); *Waste Mgmt. of Seattle v. Util. & Transp. Comm'n*, 123 Wn.2d 621, 627-28, 869 P.2d 1034 (1994). These principles have not previously been applied to the particular language in the certificate of need law at issue in this case, and resolution of the legal question this case presents is not certain. In short, the issue presented is debatable.

Once a debatable issue is shown, the court is to look at the potential harm to both sides. *Purser*, 104 Wn.2d at 177-78. In its motion for a stay the department contends that precluding enforcement of WAC 246-310-010(54) during the pendency of the appeal would add to incremental harm that has been occurring since 2009.[4] The

[4] Janis Sigman, who has served as program manager of Washington's certificate of need program since 1987, observes that transactional documents involving hospitals "changed in approximately 2009 to use terms such as 'affiliations, corporate reorganizations, strategic alliance or partnerships, or system integration.'"

department says that since that time, and at an increasing rate, transactions are described with terms such as affiliation, corporate reorganization, strategic alliance or partnership, or system integration, and are completed without undergoing certificate of need review. The department asserts this pattern may result in reduced patient access to hospital services with little or no advance information or opportunity to comment provided to the public. The absence of certificate of need review prevents the department from evaluating whether a proposed transaction would reduce existing services and precludes conditioning a certificate of need approval on the maintenance of certain services. *See* WAC 246-310-210(1)(a) and WAC 246-310-210(2). Under these circumstances, the department indicates, it cannot ensure that access to services will not be curtailed by a transaction during the pendency of the appeal. By way of illustration it points to the 2011 affiliation between Providence Health and Services and Swedish Health Services. (These organizations described the proposed affiliation in a request for a determination of non-reviewability submitted to the department, which concluded the affiliation was not subject to certificate of need review and approval.) There Swedish indicated it would cease performing elective abortions out of respect for Providence, but would help underwrite a Planned Parenthood center that would provide such services. The department notes that "[i]n a large community like Seattle, it was possible to arrange for services by an alternative provider but such an alternative might not be available in a smaller community."

The WSHA responds with specific details of the transactions of concern listed by the department to show either that they would not have been subject to certificate of need review even with the application of the challenged rule, or that there was no evidence that the transactions impacted any community's ability to access patient services.[5] Referring to the specific patient access concerns of

[5] The department is concerned that it "has no idea" whether several of the transactions it lists would or would not be subject to certificate of need review "because

reproductive and end-of-life services, the WSHA notes that the Providence affiliate involved in one of the transactions the department identified of concern is not subject to the Catholic Ethical and Religious Directives. Further, it notes that the Office of Financial Management (OFM) was tasked by the Governor with a review of these specific access concerns and reported that it found no evidence that communities with religiously owned or affiliated hospitals have less access to these services, observing that these services for the most part are not provided in a hospital inpatient setting. The department replies that it is concerned about access to all services, not just the services studied by OFM.

On the WSHA's side of the scale of potential harm, it contends that a hospital may affiliate with another hospital to achieve efficiencies and better quality patient care, or in some instances to ease severe financial pressure. It argues that granting the stay would delay, and possibly deny, the benefits these transactions achieve and that some hospitals under financial pressure may curtail services if other options are not available. The WSHA contends a stay could delay better quality care and increase the costs of care to the detriment of the public interest. It also cites the costs and delays attendant to a certificate of need application and process, though the parties dispute the magnitude of both.

A balance of the harms is not easy to weigh in these circumstances. The impacts predicted by each of the two sides are uncertain, unquantifiable, and incremental over time. The department describes transactions that have been occurring since 2009 and the incremental injury that could be suffered in the absence of a stay: "the public injury arising from even more hospital affiliations occurring

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they were not submitted to the Department to make a determination." But no rule adopted by the department requires notice of transactions that might be subject to certificate of need review so the department can make such a determination in close cases. Instead, submittal for an applicability determination is a voluntary submission by "[a] person wanting to know whether an action the person is considering is subject to certificate of need requirements." WAC 246.310.050(1).

with no public involvement, no approval process, no transparency, and no assessment of the need to continue certain health care services needed within the community." But though access to health care services for all citizens is the overriding purpose of the certificate of need program, I am not able to say that a stay of the superior court order will promote this purpose during the pendency of this appeal. To require hospitals to fully comply with the new rule despite the superior court order invalidating the rule may result in irretrievable delay or loss of benefits that contribute to patient care, just as certificate of need review of some transactions may contribute to availability of services through conditions attached to the issuance of a certificate of need.

And the department's submittals do not address what remedies it would have to reverse any loss of services that may result from transactions completed during the pendency of this appeal if the superior court order invalidating the rule is reversed. Neither party has addressed the consequences if transactions subject to the certificate of need requirements under this rule are concluded during the pendency of a successful appeal—whether what is done could be undone, or whether a hospital's provision of services could be impacted. *See* RCW 70.38.105(3) (no person shall engage in any undertaking which is subject to certificate of need review without first having received a certificate of need or been granted an exception).

It is possible that during the pendency of this appeal some entities may choose to avoid uncertainties and risks that arise from the potential application of WAC 246-310-010(54) and the certificate of need review process by seeking an applicability determination or a certificate of need under the new rule before proceeding with a transaction. Certainly, it would be inappropriate for an applicability determination to be processed in a manner that ignores the adoption of the rule during the pendency of this appeal, with a determination then binding on the department.

In light of these considerations, the superior court order that "the Department cannot enforce WAC 246-310-010(54)" is stayed to the following extent:

> 1. The department may apply WAC 246-310-010(54) in responding to a request for a written determination of applicability of the certificate of need requirements submitted in accordance with WAC 246-310-050, provided it advises the requester that a superior court has entered an order declaring WAC 246-310-010(54) invalid and that the department's appeal of that order is pending.
>
> 2. The department may accept and process any certificate of need applications submitted by an applicant for a transaction defined in WAC 246-310-010(54) as the sale, purchase, or lease of part or all of any existing hospital.

Except as noted above, the motion for a stay is denied.

As noted, nothing in this ruling or the superior court's order deprives the department of its ability to bring an action under chapter 70.38 RCW to the extent the department asserts a transaction violates the chapter without regard to WAC 246-310-010(54). Further, the department may renew its motion for a stay if it becomes aware of new developments that pose an identifiable threat of reduced patient access to hospital services. The department is also urged to submit its appellant's opening brief on or before the current due date of September 25, 2014, to facilitate an earlier decision by this court on whether to retain this appeal or transfer it to the Court of Appeals, which decision will then allow the department to seek accelerated review by the appropriate court.

COMMISSIONER

September 4, 2014