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IN THE COURT OF COMMON PLEAS
LUCAS COUNTY, OHIO

CAPITAL CARE NETWORK OF TOLEDO Appellant, v. STATE OF OHIO DEPARTMENT OF HEALTH Appellee.	:	CASE NO. C1020143405 JUDGE MYRON DUHART

BRIEF OF APPELLEE, OHIO DEPARTMENT OF HEALTH

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I. INTRODUCTION

The Director of the Ohio Department of Health (ODH) properly revoked and refused to renew the license of Appellant, Capital Care Network of Toledo (CCN), because it failed to obtain a written transfer agreement with a local hospital as R.C. 3702.303(A) and Ohio Adm.Code 3701-83-19(E) require. R.C. 3702.32(D)(2) authorizes the Director to revoke, and to refuse to renew, a license for failure to have a written transfer agreement with a local hospital. Reliable, probative and substantial evidence support the conclusion that CCN does not have a transfer agreement with a local hospital; thus, this Court should affirm the Order revoking CCN's license. *Our Place, Inc. v. Ohio Liquor Comm.*, 63 Ohio St.3d 570, 589 N.E.2d 1303 (1992).

II. STATEMENT OF THE CASE AND FACTS

An ambulatory surgical facility (ASF) is a free-standing facility where outpatient surgeries are routinely performed. R.C. 3702.30(A)(1). Under Ohio law, an ASF must obtain a license from ODH to operate, which must be renewed annually by submitting a written application to ODH. R.C. 3702.30(E)(1); Ohio Adm.Code 3701-83-04(B). ASFs perform medical care and services in the areas, for example, of cosmetic and laser surgery, abortion, gastroenterology, lithotripsy, digestive endoscopy, dermatology, urology and orthopedics. *Id.* R.C. 3702.30(B) authorizes the director of ODH to establish quality standards for ASFs. As part of these quality standards, the director promulgated a requirement that all ASFs have a written transfer agreement with a hospital. Ohio Adm.Code 3701-83-19(E). This rule has been in place in Ohio since 1996, and ensures that the ASF can transfer patients to the hospital "in the event of medical complications, emergency situations, and for other needs as they arise." *Id.* This requirement applies to all ASFs regardless of the type of medical care and services they provide.

In September 2013, the General Assembly enacted R.C. 3702.303(A), which mirrors the Rule's language, but clarifies that the written transfer agreement must be with a local hospital:

> Except as provided in division (C)[1] of this section, an ambulatory surgical facility *shall* have a written transfer agreement with a *local* hospital that specifies 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. A copy of the agreement shall be filed with the director of health. R.C. 3702.303(A) (emphasis added).

In 2012, CCN entered into a written transfer agreement with the University of Toledo Hospital as required by Ohio Adm.Code 3701-83-19(E). (TR. 146). The University of Toledo Hospital chose not to renew that written transfer agreement and it expired on July 31, 2013. (TR. 147). Upon learning that CCN's then-existing transfer agreement with the University of Toledo had lapsed, ODH instructed CCN to immediately submit a new written transfer agreement by July 31, 2013, in order to comply with ASF licensure requirements. (State's Ex A; TR. 20). CCN did not submit a new written transfer agreement as requested by ODH. (TR. 21-22; TR. 46). Therefore, on August 2, 2013, ODH issued an order proposing to revoke and refusing to renew CCN's ASF license for its failure to have a written transfer agreement as required by Ohio Adm.Code 3701-83-19(E). (State's Ex. D).

CCN continued to operate without a transfer agreement from August 1, 2013, to January 15, 2014. CCN does not dispute that, during that time, CCN was out of compliance with ASF licensing requirements. (TR 46).

[1] The exceptions in division (C) apply to provider based entities (ASFs that operate in a licensed hospital) and to ASFs that have been granted a variance of the written transfer agreement requirement. Neither exception applies to CCN. CCN has never requested a variance from ODH.

On January 16, 2014, CCN entered into a transfer agreement with the University of Michigan Health System in Ann Arbor, MI, in Washtenaw County, Michigan. (State's Ex. G, TR. 46). CCN submitted this transfer agreement to ODH on January 16, 2014. (State's Exhibit H). The University of Michigan Hospital and CCN are 52 miles apart.[2] The Director reviewed it and determined that the transfer agreement did not comply with the statute, which required a written transfer agreement be with a "local" hospital. R.C. 3702.303(A). Therefore, on February 14, 2014, the Director issued a second notice proposing to revoke CCN's license to operate an ASF. (State's Ex. H).

CCN requested a hearing, which was held on March 26, 2014. The Hearing Officer issued a Report and Recommendation on June 10, 2014, which found that the transfer agreement with the University of Michigan Hospital was not with a "local" hospital as required by R.C. 3702.303(A) and that the Director's determination that it was not a "local" hospital is reasonable and consistent with R.C. 1.42 and 3702.303(A). (Report and Recommendation, Conclusions of Law, p. 9-10). The Director adopted the Hearing Examiner's Report, in its entirety, and issued an Adjudication Order on July 29, 2014. CCN filed an appeal of the Adjudication Order with this Court, as well as a Motion for Stay of the revocation, which, in effect, allows CCN to continue to operate pending the outcome of this appeal. This Court granted the Motion for Stay of the Adjudication Order on August 11, 2014.

III. STANDARD OF REVIEW

A common pleas court's review of an order from an administrative agency is limited to whether the order is supported by reliable, probative and substantial evidence and is in

[2] According to Mapquest.com, the distance between the University of Michigan Medical Center and Capital Care Network of Toledo is 52.06 miles.

accordance with law. R.C. 119.12. This standard of review is well-settled and the Ohio Supreme Court has affirmed it repeatedly. *VFW Post 8586 v. Ohio Liquor Control Comm.*, 83 Ohio St.3d 79, 679 N.E.2d 655 (1998); *Our Place, Inc. v. Ohio Liquor Control Comm.*, 63 Ohio St.3d 570, 589 N.E.2d 1303 (1992).

In *Our Place*, the Ohio Supreme Court defined the standard of review for an administrative order on appeal to a Common Pleas Court: (1) **'Reliable'** evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) **'Probative'** evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) **'Substantial'** evidence is evidence with some weight; it must have importance and value. *Id.* at 571. (emphasis added).

Where an administrative order is supported by reliable, probative and substantial evidence and is in accordance with law, a court may not substitute its judgment for that of the agency, but *must* affirm the order. *Pons v. Ohio State Medical Board*, 66 Ohio St.3d 619, 621, 614 N.E.2d 748 (1993); *Henry v. Lewis*, 69 Ohio St.2d 577, 433 N.E.2d 223 (1982); *Arlen v. State*, 61 Ohio St.2d 168, 399 N.E.2d 251 (1980); *Henry's Cafe, Inc. v. Board of Liquor Control*, 170 Ohio St.233, 163 N.E.2d 678 (1959); *Farrao v. Bureau of Motor Vehicles,* 46 Ohio App.2d 120, 346 N.E.2d 227 (1975) (syllabus). Accordingly, if the standards of R.C. 119.12 are met, and a statute authorizes the sanction imposed, a reviewing court may not alter the agency's determination, even if it disagrees with the agency. *Id.*

This is the only standard of review that applies to this case. CCN has the burden here of showing that the Adjudication Order was not supported by reliable, probative and substantial evidence.

IV. LAW AND ARGUMENT

CCN acknowledges the correct standard of review to apply to this case: whether reliable, probative, and substantial evidence supports the Adjudication Order and whether the sanction it imposes is permitted by law. (CCN's Brief, p. 1). If the Adjudication Order is supported by reliable, probative and substantial evidence, and is in accordance with law, a court may not substitute its judgment for that of the agency, but *must* affirm the order. *Pons*, 66 Ohio St.3d 619, 621, 614 N.E.2d 748 (1993).

An administrative agency's construction of a statute or rule that the agency is empowered to enforce must be accorded due deference. *See, e.g., Leon v. Ohio Bd. of Psychology*, 63 Ohio St.3d 683, 687, 590 N.E.2d 1223, 1226 (1992) (citing *Lorain City Bd. of Edn. v. State Emp. Relations Bd.*, 40 Ohio St.3d 257, 533 N.E.2d 264 (1988)). Unless the construction of a statute or rule is unreasonable or impermissible, reviewing courts should follow the construction given to it by the agency. *See Leon, above; see also Morning View Care Center—Fulton v. Ohio Dept. of Human Servs.*, 148 Ohio App.3d 518, 2002-Ohio-2878, 774 N.E.2d 300, at ¶ 43 (10th Dist. 2002).

In spite of this well-settled law CCN encourages this Court to substitute its judgment for that of the administrative process and seeks to strip the Director of his discretion in refusing to renew and revoking CCN's license.

A. Reliable, probative and substantial evidence supports the director's decision.

1. The Director's interpretation of "local" is reasonable and CCN cannot substitute its preferred definition for the Director's.

Before an ASF can be licensed by ODH, Ohio law requires that it have a written transfer agreement with a local hospital. R.C. 3702.303(A). ODH's interpretation of its own statute requiring that the transfer agreement be with a "local hospital" is entitled to deference. An

administrative agency's construction of a statute or rule that the agency is empowered to enforce must be accorded due deference. *See, e.g., Leon v. Ohio Bd. of Psychology*, 63 Ohio St.3d 683, 687, 590 N.E.2d 1223, 1226 (1992) (citing *Lorain City Bd. of Edn. v. State Emp. Relations Bd.*, 40 Ohio St.3d 257, 533 N.E.2d 264 (1988)). Unless the construction of a statute or rule is unreasonable or impermissible, reviewing courts should follow the construction given to it by the agency. *See Leon, above; see also Morning View Care Center—Fulton v. Ohio Dept. of Human Servs.*, 148 Ohio App.3d 518, 2002-Ohio-2878, 774 N.E.2d 300, at ¶ 43 (10th Dist. 2002).

At the hearing, that interpretation was explained by former ODH Director, Dr. Theodore Wymyslo, M.D, who explained why he read "local" to reflect a thirty-minute response. Dr. Wymyslo was the Director when CCN submitted its transfer agreement and testified at the administrative hearing about this decision regarding the transfer agreement. Dr. Wymyslo is a family practice physician, board certified in Family Medicine, with over thirty years of experience before he became the Director of the Ohio Department of Health. (State's Ex. M). Dr. Wymyslo served on the Credentials Committee for Miami Valley Hospital. (TR. 57 and State's Exhibit M). That Committee's role was to ensure that on-call physicians were available to hospital patients within thirty minutes in an emergency. (TR. 57-58). Dr. Wymyslo considered this thirty-minute requirement to be the standard in the medical community and found it applied here. (TR. 124-125). He testified:

> And so we had many conversations, not only with other medical staff members, but also with consultants nationwide. And they recommended to us that we use the thirty-minute availability rule to determine whether or not back up was readily available for the clinicians that were covering call. (TR. 58)

When asked why Miami Valley Hospital had this requirement for on call-physicians, Dr. Wymyslo explained:

> Well, because in an emergency situation, we wanted to be sure for patient safety and also for high quality of care, that we had the capability of responding to patients and their needs in a timely manner. And we felt that by phone 15 minutes and in person 30 minutes was the time period that for us would safeguard patients. TR. 59.

When CCN submitted to ODH its transfer agreement with the University of Michigan, ODH reviewed the agreement. When conducting that review, Dr. Wymyslo considered it in light of this 30-minute *maximum* standard that he had previously applied to ensure high quality patient care and safety. (TR. 59). Dr. Wymyslo's determination that a hospital 52 miles away that did not meet this 30-minute standard is not a "local" hospital is afforded deference. Dr. Wymyslo relied on the plain meaning of the word "local," his experience with transporting patients and arranging for on-call physicians, and a concern for patient safety and continuity of care. (TR. 65-66, 68-69). Dr. Wymyslo's testimony supports the conclusion that his determination was reasonable.

This Court's review is confined to whether the Director's decision is reasonable and supported by reliable, substantial and probative evidence. *Pons*, 66 Ohio St.3d 619, 614 N.E.2d 748 (1993); R.C. 119.12. If the agency meets the requirements under R.C. 119.12, a reviewing court may not substitute its judgment for that of the agency, even if the court may have reached a different conclusion. *Henry's Café Inc.*, 170 Ohio St. 233, 163 N.E.2d 678 (1959).

Regardless of whether this Court would have reached a different conclusion about the definition of the word "local," the decision of the Director must be affirmed if the Director's decision is reasonable and supported by reliable, probative and substantial evidence.

CCN's contrary position is simple, but untenable: Its definition of "local" should be substituted for that of the Director's. In support of CCN's definition of "local" it offered the testimony of Terrie Hubbard, a registered nurse and the owner of Capital Care. She testified that

her definition of "local" includes a hospital 50-75 miles away to which a patient experiencing a medical complication or emergency can be transported. (TR. 156). Conveniently, the University of Michigan hospital with which CCN has a transfer agreement falls within this 50-75 mile. Apart from Ms. Hubbard's self- serving testimony, CCN offered no witnesses or evidence at the hearing to support its position that the University of Michigan is a "local hospital" to a clinic located in Toledo, Ohio.

2. ***Even if CCN has a transfer agreement with a "local" hospital, it failed to prove that it had an effective procedure for the safe and immediate transfer of patients from the facility to the hospital with which it has the agreement.***

The distance between CCN and the University of Michigan hospital is not CCN's only hurdle. That is, even if for purposes of R.C. 3702.303(A) a hospital 50-75 miles were considered "local," Ms. Hubbard's own testimony casts doubt on whether CCN has in place an effective procedure for the safe and immediate transfer of patients from the facility to the hospital, as required by R.C. 3702.303(A). As Ms. Hubbard testified, if CCN had to transport a patient from Toledo to Ann Arbor, it would do so by helicopter, which she conceded it does not have. (TR 49) CCN further lacks a contract or any formal written arrangement with a helicopter company, but, according to Ms. Hubbard, "all [she] has to do is call the facility [Air Vac Life Team.]" (TR. 49). And while Ms. Hubbard testified that, once called, a helicopter could transport a patient from CCN to Ann Arbor, Michigan, in "fifteen minutes, weather permitting; 20 minutes on a bad day," she also conceded that that the helicopter company she plans to use (but with whom she does not have a contract) does not have any helicopters in the Toledo area. (TR. 160, 169). Instead, the helicopter service's home base is in Licking County, Ohio, *which is a 50-60 minute helicopter flight away from Toledo.* (TR. 169).

But even if the company had a helicopter in Toledo, it might not be able to land at CCN. CCN does not have a helicopter landing pad. It is instead planning to land the helicopter in "an empty lot right beside [the] clinic." (TR. 160). Yet CCN did not present any evidence that the helicopter company has permission to land in the vacant lot, or whether obstacles such as buildings, streetlights, telephone wires, or other common obstructions or temporary structures or objects would even permit such a landing. It presented no evidence about whether the helicopter could land, or even fly, in heavy rain, fog, snow or wind. In short, CCN's "plan" to use this helicopter service was so vague as to leave a reasonable individual doubting whether it was an actual plan at all.

Notably, Ms. Hubbard also had no answer when questioned about how much a helicopter transfer would cost. (TR. 160). Equally absent was any testimony regarding what types of insurance the helicopter service would accept or whether it would transport uninsured patients. Ms. Hubbard did not testify about what would happen if the helicopter service could not fly to Toledo due to weather, mechanical problems, or other commitments.

Indeed, Ms. Hubbard essentially admitted that the Ann Arbor-by-helicopter plan was illusory. When questioned about whether CCN would use the helicopter plan to service its transfer agreement, Ms. Hubbard testified that "it depends." (TR. 51, 166). According to Ms. Hubbard, "if they [patients] are in that dire need of a medical emergency, 911 is going to be called and they're going to be taken to the nearest hospital, regardless of a transfer agreement." Thus, CCN itself realizes that a transfer agreement with a hospital 52 miles away would not serve the statute's purpose of ensuring and facilitating a transfer to a "local" hospital for quality emergency care.

As Ms. Hubbard's testimony shows, the agreement between CCN and the University of Michigan Hospital was submitted to ODH merely to try to satisfy the legal requirement. CCN acknowledges that if the type of medical emergency that the written transfer agreement is designed to address actually arises, a 52 mile transport is not a viable option. Simply put, even CCN realizes that calling a helicopter from 50-60 minutes away, to—weather permitting—pick up a patient in Toledo and transfer her an additional 15-20 away is not a reasonable or responsible plan to care for patients needing emergency hospital care. Thus, even if "local" included a hospital 52 miles away, CCN's failure to present evidence that it had in place an effective procedure for the safe and immediate transfer of patients (from the facility to the hospital) is dispositive of this appeal. *See*, R.C. 3702.303(A).

3. The Court must strike CCN's additional evidence because it is not part of the administrative record

CCN's attempt to admit additional evidence (CCN's Brief, Exhibits 3 and 4) in this appeal violates the statutory and administrative provisions governing the composition of the record in administrative appeals taken pursuant to R.C. 119.12. In addition to not being part of the record on appeal, these exhibits are inadmissible hearsay.

This Court may properly receive and consider only three possible items as the official record in an appeal pursuant to R.C. 119.12. Those items are:

1. The certified record as filed with the court by the agency within 30 days after the notice of appeal is filed, which consists of the agency's decisions and all the documents filed with the agency in relation to the case (*see* R.C. 119.12; *See, e.g., Sicking v. Ohio State Medical Board*, 62 Ohio App.3d 387, 392-93, 575 N.E.2d 881 (10th Dist. 1991);

2. A transcript of the hearing; and

3. "Newly discovered evidence" as contemplated by R.C. 119.12.

Because none of CCN's "additional evidence" falls into any of the three foregoing categories, it may not be properly received or considered by this Court in the context of this appeal. The "additional evidence" is not part of the certified record that ODH filed with this Court on August 1, 2014. It is not part of the transcript of the administrative hearing. Finally, none of these exhibits qualify as "newly discovered evidence." In the context of R.C. 119.12, the term "newly discovered" evidence:

> Refers to evidence that was *in existence at the time of the administrative hearing* but which was incapable of discovery by due diligence; however, newly discovered evidence does not refer to newly created evidence.

Steckler v. Ohio State Bd. of Psychology, 83 Ohio App.3d 33, 38, 613 N.E.2d 1070 (11th Dist. 1992) (emphasis added). Evidence created after the administrative hearing is not admissible. *See Northfield Park Assoc. v. Ohio State Racing Comm.*, 10th Dist. Franklin No. 05AP-749, 2006-Ohio-3446, ¶ 59 (citing *Golden Christian Academy v. Zelman*, 144 Ohio App.3d 513, 517, 760 N.E.2d 889 (2001)).

CCN's Exhibit 3 is a newspaper article by the Toledo Blade published on March 28, 2014, *after* the conclusion of the administrative hearing. It was not in existence at the time of the hearing, and does not meet the definition of "newly discovered" evidence. Likewise CCN's Exhibit 4 is a "newly created" affidavit of Ms. Hubbard that was executed on September 25, 2014, more than six months *after* the administrative hearing was concluded. In this affidavit, Ms. Hubbard attempts to supplement the administrative record by offering additional testimony that she did not present at the hearing. CCN had the opportunity to elicit this testimony during the hearing. Its failure to do so does not mean that the evidence is "newly discovered."

Furthermore, both Exhibits 3 and 4 are inadmissible hearsay under Evid. R. 801 and they do not fall into any of the Article VIII exceptions which would allow for their admissibility. They should not be considered by the Court in its review.

B. The statute enjoys a presumption of constitutionality and CCN's as-applied challenges to the statute fail

1. The statute is not unconstitutionally vague, and CCN faces no threat of fine or imprisonment for its violation

R.C. 37023.303 is not unconstitutionally vague simply because CCN disagrees with the Ohio Department of Health's definition of "local." Rather, CCN has failed to prove, as it must, that R.C. 3702.303 is so vague and indefinite that it sets forth no standard or rule or that it is substantially incomprehensible. *Columbia Gas Transm. Corp. v. Levin,* 117 Ohio St.3d 122, 131 (2008) ("A civil statute that does not implicate the First Amendment is unconstitutionally vague only if it is so vague and indefinite that it sets forth no standard or rule or if it is substantially incomprehensible.") A statute is not void "simply because it could be worded more precisely or with certainty." *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶96 (2006) (citing *State ex rel. Rear Door Bookstore v. Tenth Dist. Court of Appeals*, 63 Ohio St.3d 354, 588 N.E.2d 116 (1992)). Rather, the ordinary inquiry is "whether the law affords a reasonable individual of ordinary intelligence fair notice and sufficient definition and guidance to enable him to conform his conduct to the law; those laws that do are not void for vagueness." *Norwood*, 110 Ohio St.3d at 380 (citing *Grayned v. Rockford*, 408 U.S. 104, 108–109, 92 S.Ct. 2294, 33 L.E.2d 222 (1972) (holding that anti-noise ordinance that prohibited noise which would disturb the peace, near a school, was not unconstitutionally vague because the statute gives fair notice to those at whom it is directed).

Importantly, this standard is an *objective* one that asks of what a "reasonable individual" would have notice. *Id.* Thus, Ms. Hubbard's *subjective* misunderstanding of the meaning of the word "local" has little, if any, bearing on the vagueness inquiry. If (as CCN urges) it did, every statute could be rendered unconstitutional if the person to whom it applies simply claims to not understand its meaning. Overturning a presumptively constitutional statute demands more.

Further, the standard for definiteness is less stringently measured here in the absence of either criminal penalties or potential interference with constitutionally protected rights. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). It is undisputed that R.C. 3702.303 does not threaten to impose fine or imprisonment for its violation. Both of the cases CCN relies on to the contrary are inapposite, as they involve statutes that impose a monetary or criminal penalty. *See Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390 (6th Cir. 1987); *City of Akron v. Akron Ctr. For Reprod. Health, Inc.*, 462 U.S. 416, 451 (1983). CCN has not been (and will not be) subject to fine or imprisonment for its failure to have a transfer agreement with a "local" hospital.

But even if it did, the meaning of the word "local" is easily ascertained. In his report and recommendation, the hearing examiner found that, although "local" was not defined in statute or regulation, it has a "common, ordinary and accepted meaning." (Report and Recommendation, p. 7). This ordinary, accepted meaning was supported by the definitions found in the American Heritage Dictionary and Random House Unabridged Dictionary, both of which confined local to a city or town, rather than a larger area. *Id.*

Finally, when the persons affected by the regulations are a select group with specialized understanding of the subject being regulated, the degree of definiteness required to satisfy due

process concerns is measured by the common understanding and commercial knowledge of the group. *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1336-37 (6th Cir.1978) Thus, even if a general dictionary definition of the term "local" did not provide guidance, as Dr. Wymyslo's unrefuted testimony established, the term "local hospital" falls within the 30-minute standard of availability for physicians in an on-call emergency situation. The meaning of the word "local" is well-within the common understanding of the specialized group to which that term applies, namely, medical professionals. *See, Diebold, Inc.*, 585 F.2d 1327.

2. *The Statute is Not an Unconstitutional Delegation of Licensing Authority to a Third Party*

The Sixth Circuit has already rejected Appellant's claim that Ohio's ASF licensing scheme is an unconstitutional delegation of licensing authority. See, *Women's Med. Prof'l Corp. v. Baird*, 483 F.3d 595, 609 (6th Cir. 2006). In *Baird*, the Court upheld the licensing requirements, concluding that because the Director had the ability to grant a waiver from the transfer agreement requirement, hospitals were prevented from having an unconditional third party veto. *Id.* at 610. The enactment of R.C 3702.303 and 3702.304 did not change Ohio's licensing scheme. An ASF can still get a written transfer agreement with a local hospital or seek a variance of that requirement by signing an agreement with physicians who have admitting privileges at a local hospital.

Baird extensively examined the procedural due process rights due the licensee, who had applied for a variance. The clinic was unable to obtain a written transfer agreement with a hospital and sought a waiver of that requirement by identifying a group of back-up physicians who would provide care in the event of an emergency. *Id.* at 598. The clinic failed to identify any of these physicians by name. *Id* at 599. The Director denied the clinic's request for a variance based on this lack of information. *Id.* at 600. The Sixth Circuit upheld the Director's

decision and determined there is no property interest in a variance or waiver under Ohio Admin Code 3701-83-19(E) due to the absolute discretion Ohio law gives the Director to decide whether to grant a variance. Ohio Admin. Code 3701-83-14(D); *Id.*, 615.

Notably, CCN has not presented any evidence that any third-party's refusal to enter into a written transfer agreement gave that party "veto" power over CCN's ability to obtain an ASF license. Further, it is undisputed that CCN never attempted to request a variance from the Director. (TR. 31, 167). Appellants cannot complain of a third-party veto that never occurred, or the absence of a variance that was never requested. In light of these factual failures and in light of *Baird,* CCN's claim that the ASF licensing provisions unconstitutionally delegate licensing authority to a third party must fail.

In support of their argument that this is an unconstitutional delegation of licensing authority, Plaintiffs cited the following cases: *Planned Parenthood v. Danforth*, 428 U.S. 52 (1974) and *Hallmark Clinic v. North Carolina Department of Human Resources,* 380 F. Supp. 1153 (E.D.N.C. 1974). In both of those cases, the challenged regulations were subject to a strict scrutiny analysis. In 1992, The United States Supreme Court held that these regulations should be reviewed under the rational basis test rather than strict scrutiny. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 841, 112 S.Ct. 2791, 120 L.E.2d 674 (1992). This standard established in *Casey* is the current standard. This court's review of this statute is whether it is "rationally related" to a legitimate state interest. *Id.* Certainly, the State of Ohio has a legitimate interest in ensuring that patients who suffer medical complications during a surgical procedure at an ASF are safely and immediately transferred to a local hospital.

3. *The Written Transfer Agreement Language of HB 59 Regulates the Operation of State Government and Does Not Violate the Single-Subject Rule*

When analyzing whether comprehensive legislation, such as HB 59, comports with the Ohio Constitution's "single-subject" rule, Ohio Const. Art. II, § 15(D), courts must afford the Ohio General Assembly "great latitude." *State ex rel. Ohio Civ. Serv. Emps. Assn, AFSCME Local 11, AFL-CIO v. State Emps. Relations Bd.*, 104 Ohio St.3d 122, 2004-Ohio-6363, 818 N.E.2d 688 ¶ 27. Thus, while Article II, § 15(D) provides that "[n]o bill shall contain more than one subject, which shall be clearly expressed in its title," a court's role in enforcing the single-subject rule is limited. *Id.* Instead, "[t]he mere fact that a bill embraces more than one topic is not fatal, as long as a common purpose or relationship exists between the topics." *Hoover v. Bd. of Cnty. Commrs.*, 19 Ohio St.3d 1,5, 482 N.E.2d 575 (1985). Appropriations bills, in particular, require special treatment because they, by necessity, contain numerous topics joined together by the common treat of appropriations." *OCSEA,* 104 Ohio St.3d at ¶ 30.

The written transfer agreement provisions of Am. Sub. H.B. 59 fall within the unity of the purpose of the bill: to make operating appropriations for the biennium and to provide authorization and conditions for the operation of programs, including reforms for the efficient and effective operation of state and local government. As such, these provisions properly fall within the appropriation bill's purpose of "deal[ing] with the operations of the state government." *ComTech Systems, Inc. v. Limbach*, 59 Ohio St. 3d 96, 99, 570 N.E.2d 1089 (1991). It is a valid restriction on the expenditure of those state resources, and is, therefore, a proper provision in a budget bill. CCN's challenge to the contrary must be rejected.

V. CONCLUSION

Reliable, probative and substantial evidence supported the conclusion that CCN failed to have a written transfer agreement with a local hospital. The Director's Order to revoke and not renew CCN's license as an ASF was well within the sanctions authorized for such a failure. This Court should deny CCN's appeal and affirm the Director's Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Brief of the Ohio Department of Health was sent via regular U.S. Mail on October 23, 2014, to:

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