IN THE COURT OF COMMON PLEAS
LUCAS COUNTY, OHIO

IN THE MATTER OF: CAPITAL CARE NETWORK OF TOLEDO	:	**Case No. CI020143405**
Appellant,	:	**Judge Myron C. Duhart**
vs.	:	
STATE OF OHIO DEPARTMENT OF HEALTH	:	**APPELLANT CAPITAL CARE NETWORK OF TOLEDO'S REPLY BRIEF**
Appellee.	:	

Capital Care Network of Toledo appeals the Director of the Ohio Department of Health's ("ODH") adjudication order revoking and not renewing Capital Care's ambulatory surgical facility license. The Director found that the written transfer agreement Capital Care has with the University of Michigan Health System in Ann Arbor, Michigan is insufficient because the drive to Ann Arbor is 22 minutes too long. Capital Care challenges the Director's decision because it is not supported by reliable, probative, and substantial evidence. In addition, the law upon which the Director relies to revoke and not renew the license is unconstitutional. Capital Care is the last abortion clinic in Toledo. Capital Care has never needed to transfer a patient to a hospital since its owner, Terrie Hubbard began working there twelve years ago. Hubbard TR. 140; 142. The transfer agreement it has with a hospital in Ann Arbor satisfies ODH's regulation requiring the agreement be with a hospital. O.A.C. § 3701-83-19(E). Thus, Capital Care's license should be reinstated.

A. **The Director's Decision Is Not Supported by Reliable, Probative and Substantial Evidence.**

1. **The written transfer agreement statute is ambiguous and the Director's interpretation is not reasonable.**

Ohio Revised Code § 3702.303 requires that all ambulatory surgical facilities maintain "a written transfer agreement with a local hospital[.]" The word "local" is not defined in the statute; nor did the Director issue any regulations or otherwise alert Capital Care ("CCNT") how the term would be interpreted by ODH. At the hearing the Director offered his interpretation of "local" to mean a 30 minute drive. Prior to the hearing, without any guidance from the statute or ODH, Ms. Hubbard and her attorney interpreted "local" to mean 50 to 75 miles. She narrowed her search for a hospital from 120 to 150 miles away to 50 to 75 miles away. Her interpretation was supported by ODH Bureau Chief Tamara Malkoff, who testified 50 miles was reasonable. Malkoff TR. 30. Ms. Hubbard's interpretation was also supported by University of Michigan Health System in Ann Arbor, Michigan ("UMHS") which entered into the written transfer agreement ("WTA") with CCNT, which required CCNT to contract with a local hospital. Certainly UMHS thought it was local enough to CCNT to accept its emergency patients. (CCNT Ex. C). Thus, the meaning of "local" in O.R.C. § 3702.303 is ambiguous. ODH argues that its Director's interpretation is reasonable and thus must be given due deference. (ODH Brief pp. 5-6).

The record does not support the Director's interpretation as reasonable. Neither at the hearing, nor in its brief, does ODH explain why Dr. Wymyslo's credentialing standard for on-call physicians is relevant to his interpretation of term "local" in the WTA statute. Neither at the hearing, nor in its brief, does ODH explain the contradiction between Dr. Wymyslo's 30 minute drive interpretation and Bureau Chief Malkoff's 50 mile interpretation. ODH's offer of an

alternative dictionary definition of "local" from Black's Law Dictionary only exposes the ambiguity of the term, not the reasonableness of the Director's interpretation. The timing of Director's interpretation undermines it reasonableness. The Director did not give his interpretation before CCNT submitted its WTA with UMHS. He did not give his interpretation when he rejected the WTA. (ODH Ex. H). He waited until the hearing to interpret the statute. His delay indicates his interpretation was crafted to defeat CCNT's WTA and not to offer a reasonable interpretation of an ambiguous statute. Given that the Director's interpretation is not reasonable, it is not to be given any deference.

2. **Capital Care's Proposed Transfer Complies with the written transfer agreement statute.**

Capital Care filed this appeal of the Director's Adjudication Order, which approved the hearing officer's conclusion that because CCNT did not have an acceptable written transfer agreement with a local hospital it does not meet the licensing requirements. (Adjudication Order p. 3 ¶ 2). As a result, the Director issued his order refusing to renew and revoking CCN's ASF license. ODH argues in its brief that there was an additional reason for the Director to not renew and revoke the license: that CCNT does not have an effective procedure for the safe and immediate transfer of patients from its facility to the hospital. If that was a basis for the Director's Order, it should have been contained in the Order to put CCNT on notice of this ground for denial of its license.

Nonetheless, assuming the Director did deny CCNT's ASF license on the basis that it did not have a safe and immediate patient transfer method, the Director's decision is not supported by reliable, probative, and substantial evidence. In the rare event that a patient experiences a life threatening emergency requiring immediate medical attention, Capital Care will call 911 and the responding EMTs will transfer the patient via ambulance to the nearest hospital of the EMTs'

choice. Hubbard TR. 159; Report and Recommendation Finding of Fact No. 26 (adopted by Director in his Adjudication Order); Capital Care Ex. M. For patients needing to be transferred to UMHS in a non-emergency situation, Capital Care has made arrangements with Air Evac Life Team ("AELT") to provide helicopter service between CCNT and UMHS. Capital Care Ex. M; Hubbard TR. 171; Report and Recommendation Finding of Fact No. 27 & 28. AELT keeps helicopters at various bases across the state of Ohio. Hubbard TR. 168. The helicopter can transport a patient from Capital Care to UMHS in 15 to 20 minutes. Hubbard TR. 160; Report and Recommendation Finding of Fact No. 28. Capital Care would pay the transport cost. Hubbard TR. 160, 168. If the helicopter is not available or necessary, the patient will be driven to Ann Arbor, which is approximately 52 miles from Capital Care in Toledo. Hubbard TR. 46. The estimated drive (no lights and sirens) is 52 minutes.[1] The evidence of CCNT's transport method was unrebutted by any testimony or evidence.

Furthermore, O.R.C. § 3702.303 does not require ASFs and hospitals to specify the mode of transportation in the written transfer agreement. Of the twenty-two written transfer agreements in the record, none specifically define the actual transfer mechanism in the agreement. (Capital Care Ex. G). Most agreements simply make the ASF responsible for arranging the transport of the patient, including the mode of transportation. Thus, if the Director revoked and refused to renew CCNT's license based on its method of transportation to the hospital, such a decision was not supported by the evidence in the record.

[1] According to Google Maps the distance is 52.1 miles and a 52 minute drive via US 23. https://maps.google.com/maps?hl=en&tab=wl

B. ODH's Decision to Not Renew and Revoke Capital Care's License Is Contrary to Law Because the Written Transfer Agreement Statute is Unconstitutional As Applied to Capital Care.

1. The statute violates due process because the word "local" is unconstitutionally vague.

ODH argues that O.R.C. § 3702.303 is not vague just because CCNT disagrees with ODH's interpretation of the word "local." On the contrary, CCNT argues that the statute is vague because the law did not give fair warning as to what "local" meant so that a reasonable person was given fair notice to conform her actions to the law. *Grayned v. City of Rockford*, 408 U.S. 104, 108–109 (1972).

> "When a statute is challenged under the due-process doctrine prohibiting vagueness, the court must determine whether the enactment (1) provides sufficient notice of its proscriptions to facilitate compliance by persons of ordinary intelligence and (2) is specific enough to prevent official arbitrariness or discrimination in its enforcement." *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 84, citing *Kolender v. Lawson* (1983), 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903.

Columbia Gas Transm. Corp. v. Levin, 2008-Ohio-511, 117 Ohio St. 3d 122, 130, 882 N.E.2d 400, 410. A civil statute 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*. *Id.* (emphasis added). In *Columbia Gas*, Columbia Gas argued that the Tax Commissioner's interpretation of a tax statute was vague. Columbia Gas claimed when a company both transports and supplies natural gas the statutory definitions of "natural gas company" and "pipeline company" were vague because there was no objective basis for classifying a company as one or the other. *Id.*, 882 N.E.2d at *410-411*. The Court held that the tax statute definitions clearly distinguished between a natural gas company and a pipeline company, that these terms were well-understood in the industry, and that the statute established a primary-business test for distinguishing between the two types of companies. *Id.*

Unlike in *Columbia Gas*, the WTA statute contains no definitions or tests as to what a "local" hospital means. Nor is there any industry standard as to such a definition. University of Michigan Health System entered into the WTA with CCNT knowing that CCNT was seeking a WTA with a local hospital pursuant to O.R.C. § 3702.303 for emergency medical care. (CCN Ex. C). This fact indicates that the industry standard is that Ann Arbor is "local" for the purpose of transferring a Toledo patient for emergency medical care.

In addition, CCNT has submitted sufficient evidence that the word "local" is substantially incomprehensible. ODH itself offered conflicting interpretations of "local" ranging from a 50 miles distance to a 30 minute drive. (Compare Malkoff TR. 30 with Wymyslo TR. 75-76). ODH did not explain this conflict between its Bureau Chief and its Director. ODH failed to rebut Ms. Hubbard's testimony that she and her attorney interpreted local to mean meant 50-75 miles. Nor did ODH offer any evidence that her interpretation was unreasonable, especially given the fact that she narrowed her search for a hospital from 120 to 140 miles away to 50-75 miles away after she learned the new law required the hospital be "local." Furthermore, ODH's attempt to offer dueling dictionary definitions offering a narrower definition of "local" than CCNT's reference to Black's Law Dictionary's broader definition only highlights that ODH knew the word "local" as used in the statute is subject to conflicting interpretations.

Furthermore, CCNT submitted evidence that the statute is vague because ODH chose not to issue explicit standards of enforcement, as is required to avoid vagueness. *See, Fleming v. U.S. Dep't of Agric.*, 713 F.2d 179, 184 (6th Cir. 1983) *citing Grayned v. City of Rockford*, 408 U.S. 104, 108–109 (1972). ODH did not refute the fact that it had not publicly interpreted "local" by issuing regulations or even by informing CCNT what local meant during the months CCNT was searching for a hospital. ODH did not even inform CCNT of its interpretation at the

time the Director rejected the UMHS WTA. (ODH Ex. H). In fact, ODH withheld its interpretation until the Director was cross examined at the hearing. Playing "gotcha" with a surgery facility shows ODH knew the law was vague but chose not to issue explicit standards of what local meant until after CCNT had its WTA. ODH could have, but chose not to give CCNT fair notice of how to comply with law. *Norwood v. Horney*, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 (2006) (law must afford a reasonable individual of ordinary intelligence fair notice and sufficient definition and guidance to enable him to conform his conduct to the law). Such actions are further evidence that the law is void for vagueness.

Finally, ODH argues that the Court should use a less stringent vagueness standard here because ODH has stated in its brief that CCNT will not be subject to a fine for its failure to have a transfer agreement with a "local" hospital. ODH Brief p. 13. While CCNT appreciates ODH's assurance, ODH had the power to issue a monetary penalty to CCNT for not having a WTA with a local hospital. O.R.C. § 3702.30. Given ODH's power to fine CCNT, even if ODH has assured the Court it will not, requires the Court to hold the statute to a more stringent vagueness standard. *Colautti v. Franklin*, 439 U.S. 379 (1979).

2. **The statute violates due process as applied to Capital Care because it constitutes an unconstitutional delegation of licensing authority to private entities despite the Director's ability to grant a variance.**

ODH simply relies on *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 609 (6th Cir. 2006) for its argument that O.R.C. § 3702.303 is not an unconstitutional delegation of ODH's licensing authority to private entities. ODH ignores however that what made the WTA statute constitutional in *Baird* does not apply in this case. The WTA regulations at issue in *Baird* were constitutional because the Director, not a third party, had the final word whether to grant a variance of the WTA requirement. In the case at bar, CCNT did not request a variance because it

could not locate a physician who could serve as a backup doctor, as is required by HB 59 (See O.R.C. § 3702.304(B)(2)). In fact, ODH requires at least three backup doctors for a variance to be granted. Malkoff TR. 103. CCNT could not find even one doctor to serve. Hubbard TR. 163. Thus, CCNT could not request a variance. After the hearing CCNT further attempted to find a backup doctor in order to request a variance, but was unsuccessful. Hubbard Affidavit attached to CCNT Brief.[2] The fact that CCNT did not have a variance request pending at the time of the hearing and could not have satisfied the statutory requirements of a variance request at the time of the hearing, pursuant to O.R.C.§ 3702.304, distinguishes this case from *Baird*. Once the Director rejected CCNT's WTA with UMHS, CCNT was at the mercy of local hospitals to enter into a WTA. All the local hospitals refused. When the Director proposed to revoke and not renew CCNT's ASF license, the Director allowed third parties, the local hospitals, to control whether CCNT was eligible for an ASF license. Such unfettered discretion is unconstitutional in the hands of a state decision maker or a private third party. *Hallmark Clinic v. North Carolina Department of Human Resources*, 380 F.Supp. 1153, 1158 (E.D.N.C. 1974); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

3. The statute violates the single subject provision of the Ohio Constitution.

ODH argues this Court should give the state "great latitude" when deciding if HB 59 comports with the Ohio Constitution's "single-subject." Appellant disagrees. ODH has offered no proof that the HB 59's requirement that a WTA between a private ASF and a private hospital be "local" has anything to do with state appropriations or expenditures or the operation of state government. CCNT notes that a challenge to the constitutionality of HB 59 under Ohio's single

[2] ODH moves to strike this affidavit as not being admissible under ORC Chapter 119. An appellant may raise an as applied constitutional challenge on appeal. CCNT raised the issue in the administrative hearing and submitted evidence that existed at the time of the hearing. However, since the hearing ended CCNT made further attempts to find a backup doctor to support a variance application. The after-hearing evidence, contained in the Hubbard Affidavit, is submitted in support of CCNT's constitutional claim.

subject rule is still pending in *Preterm-Cleveland, Inc. v. Kasich, et al.*, CV-13-815214 (Cuyahoga Ct. Com. Pl.).

CONCLUSION

The decision of the Director of Health to not renew and to revoke Capital Care's ASF license is not supported by reliable, probative, and substantial evidence because Capital Care in fact has a written transfer agreement with the University of Michigan Hospital that complies with the requirements of O.R.C. § 3702.303. Furthermore, the Director's decision is not in accordance with law because O.R.C. §3702.303 is unconstitutionally vague, is an unconstitutional delegation of authority to a third party, and it violates the single subject rule of the Ohio Constitution. Therefore, Appellant Capital Care respectfully requests that the decisions be reversed and the Ohio Department of Health be ordered to not revoke or rescind Capital Care's ASF license.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served November 13, 2014 by U.S. Mail first class, postage prepaid and email on Lindsay Nash, Assistant Attorney General, Health and Human Services Section, 30 East Broad Street, 26th Floor, Columbus, OH 43215.

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From: Jennifer L. Branch

Re: Capital Care Network of Toledo v. State of Ohio Health Dept. (Case No. CI020143405
Appellant Capital Care Reply Brief
Judge Myron C. Duhart

Number of pages to follow: 10

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