COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2012-SC-000090-D

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

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

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

BRIEF FOR APPELLEE COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief for Appellee was filed with the Clerk of the Supreme Court, State Capitol, Room 235, 700 Capitol Avenue, Frankfort, KY 40601-3415; I also certify that a copy of this Brief for Appellee was mailed this 11th day of January, 2013, to the following: Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Honorable Thomas D. Wingate, Judge, Franklin Circuit Court, P. O. Box 678, Frankfort, KY 40602-0678; Marian J. Hayden and Holly Turner Curry, Cull & Hayden, P.S.C., 210 Washington Street, P. O. Box 1515, Frankfort, KY 40602-1515; and Carol D. Christian, Wyatt, Tarrant & Combs, LLP, 500 West Jefferson Street, Suite 2800, Louisville, KY 40202.

ANN TRUITT HUNSAKER

INTRODUCTION[1]

This case is an appeal from the Court of Appeals on a decision by the Cabinet for Health and Family Services ("Cabinet") pursuant to KRS Chapter 216B to grant a Certificate of Need ("CON") to Appellant for increasing services provided by a Home Health Agency ("HHA") in a specific geographic area of the Commonwealth.[2] The issue before the Court of Appeals and before this Honorable Court involves data on need requirements as set out in KRS 216B.040(2)(a)2.b. and implementing regulations. The Cabinet uses data submitted to it at regular periodic intervals by various health facilities and health providers throughout the Commonwealth. The data is used to calculate need for additional health facilities and services in different geographic areas of the Commonwealth. The data is analyzed and calculations made by the Cabinet and its contractors using specific methodologies. From time to time, data is corrected and analyses are adjusted and re-published by the Cabinet. When a CON application is filed, the applicant is required to establish it meets the various criteria to obtain a CON, including the need criteria. KRS 216B.040(2)(a)2.a. through e. Historically, and pursuant to KRS Chapter 13A, the Cabinet has limited the consideration of need to data that is published at the time of the Cabinet's hearing on the CON application. The

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[1] Comprehensive Home Health Services, Inc. d/b/a Family Home Health Care S.E. ("Family"), filed the original Motion for Discretionary Review in this case which the Supreme Court granted. The Cabinet for Health and Family Services ("Cabinet") is designated as an Appellee. However, the Cabinet supported the granting of the Motion for Discretionary Review and herein supports the position set out by Family in its Appellant Brief.

[2] The Certificate of Need application by Family was opposed by Professional Home Health Care Agency, Inc. ("Professional") and Whitley County Health Department d/b/a Whitley County Home Health ("Whitley County"), Appellees in this Supreme Court review.

Cabinet maintains that is the proper interpretation of the statute and its regulation. The Court of Appeals failed to give the Cabinet's interpretation the proper deference required by law.

STATEMENT CONCERNING ORAL ARGUMENT

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

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The Cabinet, in the interest of judicial economy and brevity, fully adopts the Statement of the Case set out by the Appellant at pages 1 through 4 as though set out herein in this the Cabinet's filing.

ARGUMENTS

I. THE COURT OF APPEALS FAILED TO GIVE PROPER DEFERENCE TO THE CABINET'S INTERPRETATION AND ITS DULY PROMULGATED REGULATION.

Since the CON law was enacted by the legislature over 30 years ago, the Cabinet has interpreted its provisions in such a way as consistent with the provisions in KRS 216B.010, the findings and purpose provision:

> [I]t is the purpose of this chapter to fully authorize and empower the Cabinet for Health and Family Services to perform any certificate-of-need function and other statutory functions necessary to improve the quality and increase access to health-care facilities, services, and providers, and to create a cost-efficient health-care delivery system for the citizens of the Commonwealth.

This statement by the Legislature is more than merely authorizing the Cabinet to promulgate regulations. It is a full delegation of power authorizing and empowering the Cabinet to perform functions necessary to increase access to health care facilities and services and create a cost efficient health care delivery system. In doing so, the Cabinet is ever mindful that the General Assembly set out what the responsibilities of the Cabinet are in relation to issuance of the CON law. KRS 216B.040 could not be clearer:

> (1) The cabinet shall have four (4) separate and distinct functions in administering this chapter:

(a) To approve or deny certificates of need in accordance with the provisions of this chapter, except as to those applications which have been granted nonsubstantive review status by the cabinet;

(b) To issue and to revoke certificates of need;

(c) To provide a due process hearing and issue a final determination on all actions by the cabinet to deny, revoke, modify, or suspend licenses of health facilities and health services issued by the cabinet; and

(d) To enforce, through legal actions on its own motion, the provisions of this chapter and its orders and decisions issued pursuant to its functions. [Emphasis added.]

In relation to carrying out these four separate and distinct functions, the legislature delegated to the Cabinet responsibilities to accomplish the following as set out in KRS 216B.040:

(2) The cabinet shall:

(a) Promulgate administrative regulations pursuant to the provisions of KRS Chapter 13A:

1. To establish the certificate of need review procedures, including but not limited to, application procedures, notice provisions, procedures for review of completeness of applications, and timetables for review cycles.

2. To establish criteria for issuance and denial of certificates of need which shall be limited to the following considerations:

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(3) The cabinet may:

(a) Issue other administrative regulations necessary for the proper administration of this chapter;

The question before the Court of Appeals was not whether there is a "better" interpretation of the statutes and regulations. Rather the question was whether the Cabinet's construction of the statute is, at the very least, a reasonable one and if it is, the Court is required to afford it "controlling weight." *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 414, 65 S.Ct. 1215, 89 L.Ed.2d 1700 (1945). See also, *Thomas Jefferson University v. Shalala,* 512 U.S. 504, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994). As noted previously and by Appellant Family, the Court of Appeals essentially ignored Technical Note 6 of the *State Health Plan*, the regulatory provision promulgated by the Cabinet to provide CON applicants with finality and certainty.[3]

While the interpretation of a statute is a matter of law, the courts are required to follow the rules of statutory construction in determining the law. As the Court of Appeals held in *Monumental Life Insurance Company v. Department of Revenue,* 294 S.W.3d 10, 19 (Ky. App. 2008), noting prior decisions, the primary purpose of judicial construction is to carry out the intent of the legislature.

It is also a well-established that the rules of statutory construction also apply to regulations. *Commonwealth, Revenue Cabinet v. Joy Technologies,* 838 S.W.2d 406, 409 (Ky.App. 1992). If a court believes there is a conflict between a statute and regulation, the court must first "ascertain the purpose of the General Assembly" and then "give effect to the legislative purpose if it can be ascertained." *Abul-Ela v. Kentucky Board of Medical Licensure,* 217 S.W.3d 246, 250 (Ky.App. 2003). In situations in which a statute appears to be subject to more than one construction, a reviewing court must adopt the "construction that will accomplish the purpose of the law." *King v. Sermonis, 313*

[3] Promulgated pursuant to KRS 13A.224, incorporation by reference.

Ky. 338, 481 S.W.2d 652,654 (Ky. 1950). This Honorable Court held that a reviewing court must, if possible, resolve apparent conflicts between statutory and regulatory language by "giving effect to both sections." *Lewis v. Jackson Energy Co-op Corporation,* 189 S.W.3d 87, 91 (Ky. 2005)(citing *DeStock No. 14, Inc. v. Logsdon,* 993 S.W.2d 952 (Ky. 1999)).

It is a well settled standard of administrative law that the courts must show deference to an administrative agency when interpreting the statutes and regulations the agency is charged with administering, especially when such regulations require scientific or technical expertise. *Camera Center, Inc. v. Revenue Cabinet,* 34 S.W.3d 39 (Ky. 2000); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Specifically, the Franklin Circuit Court and the Court of Appeals ignored its own ruling in *Hughes v. Kentucky Horse Racing Authority,* 179 S.W.3d 865, 872 (Ky.App. 2004) in which it said, "A reviewing court is not free to substitute its judgment as to the proper interpretation of the agency's regulations so long as that interpretation is compatible and consistent with the statute under which it was promulgated and is not otherwise defective as arbitrary or capricious." Appellee Professional all along has failed to establish that the Cabinet's interpretation of its own regulation is plainly erroneous or inconsistent with the law. *Auer v. Robins,* 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997).

The Supreme Court of the United States addressed the issue of an agency's power to administer a legislative created program in *Mayo Foundation for Medical Education*

and Research v. United States, ___ U.S. ___, 131 S.Ct. 704, 178 L.Ed.2d 588 (2011).[4]

Chief Justice Roberts said:

> *Chevron* [*U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984] recognized that an agency's power "'to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left . . . by Congress.' " 467 U.S., at 843, 104 S.Ct. 2778. Filling gaps in the Internal Revenue Code plainly requires the Treasury Department to make interpretive choices for statutory implementation at least as complex as the ones made by other agencies in administering their statutes.
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> Since . . . , however, the administrative landscape has changed significantly. We have held that *Chevron* deference is appropriate "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." [*United States v. Mead Corp.*, 533 U.S. 218, 226-227, 121 S.Ct. 2164, 150 L.Ed.2d 191 (2001)]. Our inquiry in that regard does not turn on whether Congress's delegation of authority was general or specific. For example, in *National Cable & Telecommunications Assn.* [*v. Brand X Internet Services*, 545 U.S. 967, 981, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005)] we held that the Federal Communications Commission was delegated "the authority to promulgate binding legal rules" entitled to *Chevron* deference under statutes that gave the Commission "the authority to 'execute and enforce,' " and "to 'prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions' of," the Communications Act of 1934. 545 U.S., at 980–981, 125 S.Ct. 2688 (quoting 47 U.S.C. §§ 151, 201(b)).

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[4] It is important to distinguish here that the Cabinet is not interpreting a provision of the Constitution or general provisions of law applicable to all executive branch agencies. If that were the case then the rule to follow is that deference will not permit an abdication of the court's responsibility to finally construe the same statutes. In matters of statutory construction, the courts have the ultimate responsibility. *Delta Air Lines, Inc. v. Commonwealth, Revenue Cabinet,* 689 S.W.2d 14, 20 (Ky.1985).

> See also *Sullivan v. Everhart*, 494 U.S. 83, 87, 88–89, 110 S.Ct. 960, 108 L.Ed.2d 72 (1990) (applying *Chevron* deference to rule promulgated pursuant to delegation of "general authority to 'make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions' " (quoting 42 U.S.C. § 405(a) (1982 ed.)).

The Supreme Court follows a line of cases that provides considerable deference to agencies charged with implementation and interpretation of legislative created programs when "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority," *United States v. Mead Corp.*, 533 U.S. 218, 226–227, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001).

Accordingly, the Cabinet mandated a date on which all parties to the proceedings could have a clear notice of the data to be used in taking evidence on the need requirement – the date of the decision with well-known filing deadlines. The "date of certainty" for the *State Health Plan* is the date of the decision on the CON application. To find otherwise allows potential manipulation through appeals, deprives successful Appellants of a remedy upon remand and ignores the agency's regulation on the issue.

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

The Cabinet, in the interest of judicial economy and brevity, fully adopts the Argument at I. that the Court of Appeals erred in ruling as set out in pages 4 through 9 by the Appellant as though set out herein in this the Cabinet's filing.

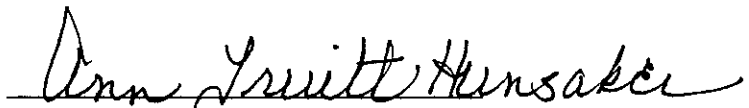
III. THE COURT OF APPEALS ERRED BY IMPROPERLY INTERPRETING CERTIFICATE OF NEED LAW WHICH SPECIFICALLY ADDRESSES THE *STATE HEALTH PLAN* ISSUE.

The Cabinet, in the interest of judicial economy and brevity, fully adopts the Argument at II. that the Court of Appeals erred in ruling as set out in pages 9 through 13 by the Appellant as though set out herein in this the Cabinet's filing.

CONCLUSION

The Court of Appeals held: "In light of the foregoing, we vacate the September 2, 2009 amended opinion and order of the Franklin Circuit Court requiring the use of the [State Health Plan] figures in existence at the time of the October 25, 2006 hearing, reinstate the original opinion and order, and remand without limiting the evidence to be consider on remand." Opinion, page 13. What this does is create a situation in which it is likely that there will be perpetual hearings on one application for a Certificate of Need in which the Cabinet is required to use ever changing data with each subsequent appeal and the end result may be that no health facilities or services are approved and the needs of Kentucky citizens for health services and facilities are never met. Clearly the Court of Appeals has misinterpreted the intent of the legislature in passing the provisions of KRS Chapter 216B.

Respectfully submitted,



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