IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

FRESENIUS MEDICAL CARE OF ILLINOIS, LLC,	)	
Plaintiff,	)	
vs.	)	**No.: 12 MR 2591**
ILLINOIS HEALTH FACILITIES AND SERVICES REVIEW BOARD, et al.,	)	
Defendants.	)	

ORDER

This matter coming before the Court after hearing on the Complaint for Declaratory Judgment and Administrative Review, with due notice having been given and the Court having considered the briefs and arguments of counsel, as well as the applicable statutory and case law, it is ORDERED:

Complaint for Administrative Review

Plaintiff, Fresenius Medical Care of Illinois, LLC (hereinafter "Fresenius" or "Plaintiff"), filed this Complaint for Declaratory Judgment and Administrative Review seeking judicial review of the Illinois Health Facilities and Services Review Board (hereinafter "Board") decision approving the application of DaVita, Inc., and Pekin Dialysis Center, LLC (hereinafter collectively "DaVita") for a Certificate of Need (hereinafter "CON") permit for an eight station dialysis unit, four months after denying Fresenius' application for a nine-station dialysis unit in the same Health Service Area. The Complaint includes the Board and its members in their official capacities, as well as the Illinois Department of Public Health (hereinafter "IDPH") and DaVita.

The Complaint relays the history of the Fresenius application for CON, which started in January 2012, and notes the similarities in the Fresenius and DaVita applications. The Complaint notes that at the public hearings for the Fresenius application, comments were made by opposing parties about a competing application for a similar facility and there were comments made by Board members about Fresenius' market share as a reason for the denial of the Fresenius application and that thereafter the Fresenius application was denied.

The Complaint further alleges that in June 2012, DaVita filed its application for a CON permit for a facility; that the IDPH staff reviewed DaVita's application and determined that DaVita failed to meet three criteria of the Board's requirements; that Fresenius filed oppositions to the DaVita application that showed that the DaVita application was virtually identical to the

Fresenius application; that letters were sent to the Board opposing the DaVita application; that thereafter the Board issued a CON letter approving the application; that in approving the DaVita application, the Board cited factors which are not part of the statutory or regulatory criteria for CON review; that the Board ignored virtually identical findings and conclusions of the Staff reports which found that the DaVita application exceeded projected need in the same way as the Fresenius application; that the Board considered factors which exceed its statutory and regulatory authority and has acted arbitrarily and capriciously and against the manifest weight of the evidence; that the Board continues its longstanding practice of denying Fresenius' applications solely for the stated purpose of limiting Fresenius' market share; that in using the CON process to control the applicant's market share, the Board is acting beyond its authority. Count II of the Complaint seeks administrative review of the decision and asks this Court to reverse the decision of the Board.

Decision of the Board

On November 7, 2012, the Board issued a letter to an attorney representing DaVita stating:

> On October 31, 2012, the Illinois Health Facilities and Services Review Board approved the application for permit for the referenced project based upon the project's substantial conformance with the applicable standards and criteria of Part 1110 and 1120. In arriving at a decision, the State Board considered the findings contained in the State Agency Report, the application material, and any testimony made before the State Board.

(Rec. at pp. 472-73.)

Standard of Review

> Section 3-110 of the Administrative Review Act states:
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> Every action to review any final administrative decision shall be heard and determined by the court with all convenient speed. The hearing and determination shall extend to all questions of law and fact presented by the entire record before the court. No new or additional evidence in support of or in opposition to any finding, order, determination or decision of the administrative agency shall be heard by the court. The findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct.

735 Ill. Comp. Stat. Ann. 5/3-110 (West). The applicable standard of review depends on whether the question presented to the court is one of fact, of law or a mixed question of fact and law. In addition, the standard of review also determines the degree of deference given to the agency's decision. AFM Messenger Service v. Department of Employment Security, 198 Ill. 2d 380, 390, 763 N.E.2d 272, 279 (2001).

If the case on review presents a question of fact, the applicable review standard is whether the agency's finding of facts are against the manifest weight of the evidence. It is the role of the agency to resolve conflicts in the evidence, to assess the credibility of witnesses and

to assign weight to their testimony. See Paganelis v. Industrial Comm'n, 132 Ill. 2d 468, 483-84, 548 N.E.2d 1033 (Ill. 1989); Edward Hines Precision Components v. Industrial Comm'n, 356 Ill. App. 3d 186, 825 N.E.2d 773 (2d Dist. 2005); Navistar International Transp. Corp. v. Industrial Comm'n, 331 Ill. App. 3d 405, 771 N.E.2d 35 (1st Dist. 2002). The reviewing court will not set aside the Commission's decision unless it is contrary to law or its fact determinations are against the manifest weight of the evidence. Roberson v. Industrial Comm'n, 225 Ill. 2d 159, 866 N.E.2d 191 (Ill. 2007). In order for a finding of fact to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent. Edward Hines Precision Components, 356 Ill. App. 3d at 194, 825 N.E.2d at 782.

If the case presents a pure question of law, then the standard of review is de novo. Carpetland v. Illinois Department of Employment Security, 201 Ill. 2d 351, 369, 776 N.E.2d 166, 177 (2002). When the review involves a mixed question of law and fact – that is questions that require an examination of the legal effect of a given set of facts – the standard is whether the Board's decision was clearly erroneous. Oleszczuk v. Dept. of Employment Security, 336 Ill. App. 3d 46, 782 N.E.2d 808 (1st Dist. 2002). Applying this standard provides deference to the agency's experience and expertise. City of Belvidere v. Illinois State Labor Relations Board, 181 Ill.2d 191, 692 N.E.2d 295 (1998). An agency decision is clearly erroneous when the review of the record leaves the court with a "definite and firm conviction that a mistake has been committed." Oleszczuk, 336 Ill. App. 3d at 50, 782 N.E.2d at 812. In Provena Health v. Illinois Health Facilities Planning Bd., 382 Ill. App. 3d 34, 886 N.E.2d 1054 (Ill. App. Ct. 2008), the Court stated:

> A mixed question of law and fact "involves an examination of the legal effect of a given set of facts." City of Belvidere v. Illinois State Labor Relations Board, 181 Ill. 2d 191, 205, 229 Ill. Dec. 522, 692 N.E.2d 295 (1998). The Board's decision is, in part, factual because it involves deciding whether the facts support the issuance of a permit to Sherman. The Board also had to determine the legal effect of its regulations and resolve the potential conflict between the statute and the regulations. Accordingly, we apply a clearly erroneous standard of review. City of Belvidere, 181 Ill. 2d at 205, 229 Ill. Dec. 522, 692 N.E.2d 295.
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> Under this standard, while the agency's decision is accorded deference, a reviewing court will reverse the decision where there is evidence supporting reversal and the court "is left with the definite and firm conviction that a mistake has been committed." AFM Messenger Service, Inc. v. Department of Employment Security, 198 Ill. 2d 380, 393, 261 Ill. Dec. 302, 763 N.E.2d 272 (2001), quoting United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746, 766 (1948). . . .

Provena Health, 382 Ill. App. 3d at 38-39, 886 N.E.2d at 1059-60.

Fresenius contends that the comments made during its public hearing, as well as comments made during the DaVita public hearing, statements by the Board, and the identical nature of the two applications establish that the Board considered market share and competition, which is beyond the scope of its review and improper. Fresenius further contends that the Board compared the two applications, which is improper.

In Provena Health v. Illinois Health Facilities Planning Bd., 382 Ill. App. 3d 34, 38-39, 886 N.E.2d 1054, 1059-60 (Ill. App. Ct. 2008)

> The purpose of the Act is "to establish a procedure designed to reverse the trends of increasing costs of health care resulting from unnecessary construction or modification of health care facilities." 20 ILCS 3960/2 (West 2004). Under the Act, no person may construct, modify, or establish a health care facility without first obtaining a permit or exemption from the Board. 20 ILCS 3960/5 (West 2004).
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> The Board has the power to prescribe rules and regulations to carry out the purpose of the Act and to develop criteria and standards for health care facilities planning. 20 ILCS 3960/12(1), (4) (West 2004). The Department shall "review applications for permits and exemptions in accordance with the standards, criteria, and plans of need established by the State Board under this Act and certify its finding to the State Board." 20 ILCS 3960/12.2(1) (West 2004). As the CON applicant, [the applicant] has the burden of proof on all issues pertaining to its application. 77 Ill. Adm.Code § 1130.130(a) (2006).
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> The Board is to approve and authorize the issuance of a permit if it finds (1) the applicant is fit, willing, and able to provide a proper standard of health care service for the community, (2) economic feasibility is demonstrated, (3) safeguards are provided assuring that the establishment or construction of the health care facility is consistent with the public interest, and (4) the proposed project is consistent with the orderly and economic development of such facilities and equipment and is *in accord with standards, criteria, or plans of need adopted and approved pursuant to the provisions of Section 12 of this Act.* (Emphasis added.) 20 ILCS 3960/6(d) (West 2004).

Provena Health, 382 Ill. App. 3d at 39, 886 N.E.2d at 1060.

Recently, in Medina Nursing Center, Inc., v. The Health Facilities and Services Review Board, 2013 IL App (4th) 120554, ___ Ill. App. 3d ___, No. 4-12-0554, slip op. (4th Dist. July 12, 2013), the Court confronted a very similar situation. In that case, Pecatonica (hereinafter "the applicant") filed an application with the Board for a new nursing facility. Medina, supra, ¶ 8. Plaintiffs were competitors. As required by the Illinois Health Facilities Planning Act, public hearings were held by IDPH where testimony and written comments were provided by the Plaintiffs in opposition to the application. Medina, supra, ¶¶ 10-11. Plaintiffs objected that the proposed facility failed to meet the requirements of the Act and that there was no need for a new facility. Medina, supra, ¶11. Thereafter, IDPH Staff prepared its report where it was determined that the application met some criteria but that it failed to meet other criteria. Medina, supra, ¶ 12. Thus, the IDPH Staff concluded that the application was not in substantial conformance with parts 1110 and 1120 of the Board's regulations under 77 Ill. Adm. Code 1110, 1120. Medina, supra, ¶12.

Thereafter, the Board held a meeting where it considered the applicant's application, as well as some others. Medina, supra, ¶14. The Board heard a short presentation by the applicant and there was some dialogue between Board members and applicant's representatives. Medina, supra, ¶ 15. The chairman of the Board asked if there were questions, and hearing none, called

for a motion to approve the application, which was made and passed with all members in attendance voting yes. Medina, supra, ¶ 15.An approval letter was thereafter issued, addressed solely to applicant, which stated:

> On March 21, 2011, the Illinois Health Facilities and Services Review Board approved the application for permit for the referenced project based upon the project's substantial conformance with the applicable standards and criteria of Part[s] 1110 and 1120. In arriving at a decision, the State Board considered the findings contained in the State Agency Report, the application material, and any testimony made before the State Board.

Medina, supra, ¶ 17.

Plaintiffs filed a complaint for administrative review arguing that there was no reasoning provided for the Board's decision. Medina, supra, ¶¶ 19-20. The Court noted that the approval letter contained no reasoned explanation for the decision and did not note which standards and criteria were even applicable, let alone which ones the project met or did not meet, if any. Medina, supra, ¶ 23. The Court further noted that the letter contained no specific findings, but only the conclusion that the project substantially conformed to "the applicable standards and criteria" and stated:

> Without such written findings by the agency, we cannot comply with section 3-110 of the Administrative Review Law (735 ILCS 5/3-110 (West 2010)). That section says, under the heading "Scope of Review," that "[t]he findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct." Id. Obviously, to hold the Board's findings of fact to be prima facie true and correct, we must be informed by the Board what, precisely, those findings of fact are. We do not know which standards and criteria in parts 1110 and 1120 the Board found the project to meet and which ones the Board found the project not to meet. The Board did not adopt the state agency report. Obviously, the Board disagreed with the Department's conclusion that the project did not substantially conform to parts 1110 and 1120. We have the Department's findings and conclusions, but we do not have the Board's findings and conclusions.
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> "[I]f the requirement of findings means anything, it must compel administrative agencies adequately to articulate the bases of their action, showing a rational connection between the facts found and the choice made." Schwartz, supra, at 460. The grounds of the administrative decision must be " 'adequately sustained,' " that is, by a reasoned explanation. Reinhardt, 61 Ill. 2d at 103 (quoting Chenery Corp., 318 U.S. at 94). "The necessity for administrative agencies to provide a statement of reasons *** is a fundamental principle of administrative law." Brooks v. Atomic Energy Comm'n, 476 F.2d 924, 926-27 (D.C. Cir. 1973). Due process requires the administrative decisionmaker to "state the reasons for his determination." Goldberg v. Kelly, 397 U.S. 254, 271 (1970). See Schwartz, supra, at 463 ("Our system may thus be moving toward a more general requirement for reasoned administrative decisions.").

Medina, supra, ¶¶ 23-24. The Court did not attempt to determine the reasoning for the Board's decision and determined that the better course was to remand the matter for "the Board to issue a reasoned opinion so as to make possible a meaningful judicial review." Medina, supra, ¶ ¶ 26-27. The Court thus remanded the matter to the Board with directions. Medina, supra, ¶ 29.

In this case, the Board's decision approving the permit has almost the exact same one paragraph of language approving the application. However, the decision contains no findings of fact, no adoption of the SAR, no indications as to which criteria and standards were met or were not met, and no conclusions by the Board. As such, it is not possible to determine what the Board relied upon to issue its decision. As such, like the above recent case, this case is remanded to the Board for further explanation.

WHEREFORE, this matter is REMANDED to the Board. The Clerk is ORDERED to return the record to the Board. Clerk to notify via facsimile.

7/15/13
Date

Hon. Bobbi N. Petrungaro