137 Wash.App. 174
Court of Appeals of Washington,
Division 2.

**DAVITA**, INC., Appellant,

v.

**WASHINGTON STATE DEPARTMENT OF HEALTH**, Respondent,

and

**Olympic Peninsula Kidney Center**, Intervenor–Respondent.

No. **34249-9-II**. Feb. 6, 2007.

## Synopsis

**Background:** Dialysis service **center** sought judicial review of decision by **health** law judge (HLJ) awarding a Certificate of Need (CON) to **center's** competitor to open a new facility. The Superior Court, Thurston County, Gary R. Tabor, J., denied service **center's** petition for review, and service **center** appealed.

**Holdings:** The Court of Appeals, Bridgewater, P.J., held that:
1 HLJ's decision was the final agency decision that was subject to judicial review, and
2 HLJ applied proper "preponderance of the evidence" standard.

Affirmed.

## West Headnotes (9)

Change View

**1 Administrative Law and Procedure**

In reviewing an administrative action, the appellate court sits in the same position as the superior court, applying Washington's Administrative Procedure Act (WAPA) to the record before the agency. West's RCWA 34.05.510.

2 Cases that cite this headnote

| | |
|---|---|
| 15A | Administrative Law and Procedure |
| 15AV | Judicial Review of Administrative Decisions |
| 15AV(A) | In General |
| 15Ak681 | Further Review |
| 15Ak683 | Scope |

**2 Administrative Law and Procedure**

The appellate court reviews an agency's factual findings to determine whether they are supported by substantial evidence sufficient to persuade a fair-minded person of the declared premise.

2 Cases that cite this headnote

| | |
|---|---|
| 15A | Administrative Law and Procedure |
| 15AV | Judicial Review of Administrative Decisions |
| 15AV(E) | Particular Questions, Review of |
| 15Ak784 | Fact Questions |
| 15Ak791 | Substantial Evidence |

**3 Administrative Law and Procedure**

The appellate court overturns an agency's factual findings only if they are clearly erroneous.

1 Case that cites this headnote

| | |
|---|---|
| 15A | Administrative Law and Procedure |
| 15AV | Judicial Review of Administrative Decisions |
| 15AV(E) | Particular Questions, Review of |
| 15Ak784 | Fact Questions |
| 15Ak785 | Clear Error |

**4 Administrative Law and Procedure**

Although the appellate court gives weight to the agency's interpretation of the statutes it administers, the court review the agency's legal conclusions de novo.

1 Case that cites this headnote

| | |
|---|---|
| 15A | Administrative Law and Procedure |
| 15AV | Judicial Review of Administrative Decisions |
| 15AV(E) | Particular Questions, Review of |
| 15Ak796 | Law Questions in General |

**5 Health**

On appellate review of superior court's decision denying dialysis service provider's petition for review of the **Department** of **Health's** decision not to issue a Certificate of Need (CON) for provider to open a dialysis **center**, the agency action reviewed by the Court of Appeals was the **health** law judge's written order rather than the written evaluation of the **Department** of **Health's** CON Program.

1 Case that cites this headnote

| | |
|---|---|
| 198H | **Health** |
| 198HI | Regulation in General |
| 198HI(C) | Institutions and Facilities |
| 198Hk236 | Licenses, Permits, and Certificates |
| 198Hk245 | Review |

**6 Health**

In reviewing the decision by the **Department** of **Health's** Certificate of Need (CON) Program to grant a dialysis service provider's application to open a dialysis **center**, the **health** law judge (HLJ) was not required to give deference to the Program's expertise; the HLJ was the officer authorized to conduct adjudicative proceedings, and as the final decision maker on CON applications, it was within the HLJ's discretion to apply the agency's expertise. West's RCWA 34.05.010(2).

2 Cases that cite this headnote

| | |
|---|---|
| 198H | **Health** |
| 198HI | Regulation in General |
| 198HI(C) | Institutions and Facilities |
| 198Hk236 | Licenses, Permits, and Certificates |
| 198Hk245 | Review |

**7 Health**

In proceedings before a **health** law judge (HLJ) between two competing dialysis service **centers**, each of whom was seeking approval of its applications for a dialysis service **center**, both **centers** had the burden of proof for their respective applications; although the **Department** of **Health's** Certificate of Need (CON) Program had initially decided in favor of one of the **centers**, the HLJ's review was de novo, which placed the burden on both **centers** to prove their cases. WAC 246-10-602(2)(a).

1 Case that cites this headnote

| | |
|---|---|
| 198H | **Health** |
| 198HI | Regulation in General |
| 198HI(C) | Institutions and Facilities |
| 198Hk236 | Licenses, Permits, and Certificates |
| 198Hk245 | Review |

**8 Appeal and Error**

The appellate court reviews questions of law de novo.

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|---|---|
| 30 | Appeal and Error |
| 30XVI | Review |
| 30XVI(F) | Trial De Novo |

1 Case that cites this headnote

| | |
|---|---|
| 30k892 | Trial De Novo |
| 30k893 | Cases Triable in Appellate Court |
| 30k893(1) | In General |

9 **Health**

**Health** law judge (HLJ) applied the proper burden of proof in proceedings between two competing dialysis service **centers**, each of whom was seeking approval of its applications for a dialysis service **center**; although HLJ incorrectly used the phrase "substantial evidence," it was clear from the HLJ's decision that the proper "preponderance of the evidence" standard was applied.

2 Cases that cite this headnote

| | |
|---|---|
| 198H | **Health** |
| 198HI | Regulation in General |
| 198HI(C) | Institutions and Facilities |
| 198Hk236 | Licenses, Permits, and Certificates |
| 198Hk245 | Review |

## Attorneys and Law Firms

***1096** James Michael Beaulaurier, Seattle, WA, Kathleen Dell Benedict, Benedict Garratt Pond PLLC, Olympia, WA, for Appellant.

Melissa Ann Burke-cain, Atty. General's Office, Olympia, WA, for Respondent.

***1097** Douglas C. Ross, Lisa Rediger Hayward, Seattle, WA, for Intervenor–Respondent.

**PART PUBLISHED OPINION**

BRIDGEWATER, P.J.

**176* ¶ 1 **DaVita**, Inc., a large independent dialysis service provider, appeals a superior court decision **177* denying its petition for review of the **Department** of **Health's** decision not to issue a Certificate of Need (CON) for **DaVita** to open a dialysis **center** in Poulsbo. We hold that although the **Department** of **Health's** CON Program (Program), the unit that initially evaluates CONs, initially awarded the CON to **DaVita**, the **health** law judge's (HLJ) decision to reverse the Program was appropriate.

¶ 2 We hold that the HLJ's decision was the final agency decision that is subject to judicial review because the Secretary of **Health** delegated final authority over CON applications to the HLJ. We hold that substantial evidence supported the HLJ's decision that **Olympic Peninsula Kidney Center's** application was superior to **DaVita's** because it cost less and its commercial rates were lower. We also hold that **DaVita's** due process rights were not violated because the agency decision was discretionary and the HLJ complied with Washington's Administrative Procedure Act (WAPA). Thus, the trial court did not err in denying **DaVita's** petition. We affirm.

**FACTS**

¶ 3 In August 2003, **DaVita**, Inc. and the **Olympic Peninsula Kidney Center** both applied to the **Department** of **Health**[1] for a CON to build a **kidney** dialysis treatment **center** in Poulsbo, Washington. **DaVita** is a for-profit corporation operating 1,200 **kidney** treatment clinics in 32 states with 41,000 patients. **Olympic**, on the other hand, is a Washington corporation with **kidney** dialysis **centers** in Bremerton and Port Orchard. **Olympic** is currently the sole dialysis provider in the area.

¶ 4 A CON is a nonexclusive license for **health** care providers wishing to establish new facilities. *St. Joseph Hosp. & **Health** Care Ctr. v. Dep't of **Health***, 125 Wash.2d 733, 736, 887 P.2d 891 (1995). The Program processes all CON applications.

*178 ¶ 5 In this case, under the authority granted under RCW 70.38.115(7) and WAC 246–310–110(2)(d), the Program elected to treat the applications as competing and subject them to concurrent review. Both **DaVita** and **Olympic** were aware that, under concurrent review, only one application might be granted. Although either party could have requested a public hearing, neither did.

¶ 6 In December 2003, the Program closed the record and began the comparative review. Under concurrent review, the Program must "determine which of the projects may best meet identified needs." RCW 70.38.115(7). The administrative code establishes four criteria for evaluating CON applications: (1) need, WAC 246–310–210; (2) financial feasibility, WAC 246–310–220; (3) structure and process of care, WAC 246–310–230; and (4) cost containment, WAC 246–310–240.

¶ 7 On May 21, 2004, the Program issued its written evaluation, concluding that there was need for a 12–station **kidney** dialysis **center**. Because both applications met the criteria for need, financial feasibility, and structure and process of care, the Program focused on the last criterion, cost containment, as the method for evaluating competing proposals. WAC 246–310–240 requires that an applicant demonstrate that "[s]uperior alternatives, in terms of cost, efficiency, or effectiveness, are not available or practicable." WAC 246–310–240(1). The Program reasoned that if **DaVita's** application was a superior alternative, **Olympic** had failed to meet the cost containment criterion and its application should be denied. Thus, the Program decided that **DaVita's** application, as the superior alternative, should be granted.

¶ 8 Although the WACs indicate that the superior alternative is to be evaluated in "terms of cost, efficiency, or effectiveness," WAC 346–310–240(1), the Program justified its decision on the basis that **DaVita's** proposal would allow patients choice of providers **1098 and create price competition. According to Janis Sigman, the Program's manager, patient choice was the "tiebreaker" that elevated **DaVita's** application. *179 Administrative Record (AR) at 1894. Accordingly, on May 28, 2004, the **Department** of **Health** issued CON # 1285 to **DaVita**.

¶ 9 **Olympic** requested an adjudicatory hearing to appeal the Program's decision. The Secretary of the **Department** of **Health** has delegated the authority to make final decisions and enter final orders on a CON application to a HLJ. Here, **Health** Law Judge Zimmie Caner held a hearing on October 4 and 7, 2004, taking live testimony, depositions, and exhibits as evidence.

¶ 10 While admitting that patient choice and price competition could be factors in determining which proposal was the more "effective" and which fostered cost containment, the HLJ found that, contrary to the Program's determination, **DaVita's** application would not allow significant patient choice between the existing **Olympic** facilities and **DaVita's** proposed facilities. The HLJ based this decision, in part, on her finding that the drive times between the new facility, **Olympic's** existing facility in Bremerton, and the prospective patients foreclosed most patients from choosing between providers. The HLJ also found that the Program had no evidence that **DaVita's** proposal would create any price competition or lower fees.

¶ 11 Turning to the criteria listed in the WACs, the HLJ adopted the Program's findings about the need for **kidney** dialysis. And the HLJ determined that **DaVita** and **Olympic** would have similar structure and process (quality) of care. In the area of cost containment, relying on evidence **Olympic** presented, the HLJ also found that **DaVita's** commercial charges would be higher than **Olympic's**. With regard to financial feasibility, the HLJ found that **DaVita's** projected operating expenses were higher than **Olympic's**. In fact, the HLJ reasoned, **DaVita's** projection was lower than the actual expense because **DaVita** understated its rental expense by roughly a half-million dollars each year. As a result, the HLJ found that there was doubt about **DaVita's** financial feasibility and cost containment and found that, because of this, **DaVita** was not the better applicant.

*180 ¶ 12 The HLJ also noted that **Olympic's** projected time frame for building the Poulsbo **center** was 10 months shorter than **DaVita's** application projected. The HLJ specifically noted that **Olympic's** time frame was credible. In her conclusions, the HLJ explained that while the earlier opening date was not a factor listed in the statute or in the WACs, it was relevant to "efficiency" and "effectiveness" under WAC 246–310–240.

¶ 13 On February 28, 2005, the HLJ issued a final order reversing the Program's decision to grant **DaVita's** application and deny **Olympic's**. The HLJ directed the Program to issue a CON to **Olympic**. Both the Program and **DaVita** moved for reconsideration. On May 26, the HLJ's amended final order confirmed that **Olympic** should be granted a CON and reversed the Program's decision to grant a CON to **DaVita**.

¶ 14 **DaVita** filed a petition for judicial review. The superior court denied the petition under WAPA. Chapter RCW 34.05. The superior court determined that it was reviewing the HLJ's order. It held that substantial evidence supported the HLJ's factual findings and that the HLJ did not exceed her authority in issuing the final order.

## ANALYSIS

### I. Standard of Review

1 ¶ 15 All of the parties agree that WAPA governs this appeal. RCW 34.05.510 (indicating that WAPA "establishes the exclusive means of judicial review of agency action" with some exceptions not applicable here). In reviewing an administrative action, we sit in the same position as the superior court, applying WAPA to the record before the agency. *Towle v. Dep't of Fish & Wildlife*, 94 Wash.App. 196, 203, 971 P.2d 591 (1999). And the party challenging the validity of the agency's action bears the burden of showing the action was invalid. RCW 34.05.570(1)(a).

2 3 4 *181 ¶ 16 Under WAPA, we may grant relief only in limited circumstances. We may, for example, grant relief where the **1099 agency engaged in unlawful procedure, RCW 34.05.570(3)(c); the agency has erroneously interpreted or applied the law, RCW 34.05.570(3)(d); or substantial evidence does not support the agency's order. RCW 34.05.570(3)(e). We review an agency's factual findings to determine whether they are supported by substantial evidence sufficient to persuade a fair-minded person of the declared premise. *Towle*, 94 Wash.App. at 204, 971 P.2d 591. We overturn an agency's factual findings only if they are clearly erroneous. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wash.2d 568, 588, 90 P.3d 659 (2004). Although we give weight to the agency's interpretation of the statutes it administers, we review the agency's legal conclusions de novo. *Towle*, 94 Wash.App. at 204, 971 P.2d 591.

¶ 17 Before we can apply any of these standards in this case, we must identify the applicable "agency action." An "[a]gency action" is defined as "licensing ..., the adoption or application of an agency rule or order ..., or the granting or withholding of benefits." RCW 34.05.010(3). And an "[o]rder" is a "written statement ... that finally determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons." RCW 34.05.010(11)(a).

5 ¶ 18 Here, the HLJ is the Secretary's designee with the authority to make final decisions and issue a final order for CON applications. Thus, the agency action we review here is the HLJ's written order, not the Program's written evaluation. The HLJ's order "finally determine[d]" the legal rights of the parties in this case. RCW 34.05.010(11)(a). Therefore, we review the HLJ's order under WAPA standards described above. *Accord Tapper v. Employment Sec. Dep't*, 122 Wash.2d 397, 405–06, 858 P.2d 494 (1993) (holding that the agency's final decision maker's findings are those relevant on appeal).

¶ 19 We also clarify the HLJ's classification within WAPA's scheme. The HLJ seemed to believe she was a *182 reviewing officer as well. Under WAPA, "[t]he officer reviewing the initial order ... is ... termed the reviewing officer." RCW 34.05.464(4). WAPA provides that the "reviewing officer shall exercise all the decision-making power that the reviewing officer

would have had to decide and enter the final order had the reviewing officer presided over the hearing." RCW 34.05.464(4).

¶ 20 In this case, however, the HLJ was not acting as a reviewing officer. As RCW 34.05.464 (4) indicates, a reviewing officer is someone who does not preside over an adjudicatory hearing. But the HLJ did preside over a hearing. And the reviewing officer merely reviews "the whole record or such portions of it as may be cited by the parties." RCW 34.05.464(5). But the HLJ took evidence. Thus, the HLJ did not behave as a reviewing officer.

¶ 21 Instead, the HLJ was, as the **Department** of **Health** points out in its brief, the "[p] residing [o]fficer." Br. of Resp't at 2. WAPA provides that a presiding officer may be an administrative law judge designated by the agency to make the final decision and enter the final order. RCW 34.05.425(1)(b). And the presiding officer is defined in the **Department** of **Health** administrative code as "the person who is assigned to conduct an adjudicative hearing" who "may be an employee of the **department** who is authorized to issue a final decision as designee of the secretary." WAC 246–10–102.

¶ 22 Furthermore, rather than reviewing the record, the presiding officer actually takes the evidence, listens to oral argument, and issues her own findings and conclusions. RCW 34.05.449(2) and .461(4). The applicable WACs indicate that the presiding officer conducts the hearing de novo. WAC 246–10–602(2)(a). Thus, the HLJ possesses all the decision making power; she does not need to rely on RCW 34.05.464. In other words, she does not need to substitute her judgment for that of the fact finder; she is the agency's fact finder.

6 ¶ 23 **DaVita** argues that even if the HLJ may take evidence, she must give deference to the Program's expertise. ***183DaVita** cites to RCW 34.05.461(5), which indicates that "[w] here it bears on the issues presented, the agency's experience, technical competency, and specialized knowledge may be used in the evaluation of evidence." The ****1100** HLJ, **Department** of **Health**, and **Olympic** all argue that the HLJ need not give any particular deference to the Program analysts. We agree.

¶ 24 WAPA defines an agency as "any state board, commission, **department**, institution of higher education, or officer, authorized by law to make rules or to conduct adjudicative proceedings." RCW 34.05.010(2). Applied to this case, because the HLJ is an "officer, authorized by law to ... conduct adjudicative proceedings," she fits within WAPA's definition of an agency. RCW 34.05.010(2). And classifying the HLJ as the "agency" makes sense in this context. As the designee with the authority to make final decisions, she is the officer charged with exercising the agency's discretion. Thus, in this context, she decides how to apply the agency's expertise to evaluate the evidence. She is, after all, the one evaluating the evidence.

¶ 25 The **Department** of **Health's** administrative review is distinguishable from administrative review used in other agencies. For example, in the Employment Security **Department**, the **department** makes an initial decision on a claim. *See Tapper,* 122 Wash.2d at 400–01, 858 P.2d 494 (describing procedural history of an unemployment compensation claim). The employer may then appeal to an administrative law judge, and if still not satisfied, the employer can appeal that decision to the commissioner of the **department**. *Tapper,* 122 Wash.2d at 401, 858 P.2d 494. In that context, the commissioner, as the agency head has the "final authority for agency decisionmaking." *Tapper,* 122 Wash.2d at 405, 858 P.2d 494.

¶ 26 In contrast, the **Department** of **Health's** agency head has delegated final decision making authority to the HLJ. Although the HLJ is an administrative law judge, she is also the agency's final decision maker on CON applications. And in that position, it is within her discretion to apply the agency's expertise. **DaVita** complains that this arrangement ***184** collapses the **Department** of **Health's** adjudicative and decision making roles. **DaVita** is correct; the HLJ is both the adjudicative officer and the final decision maker. That is the intent of this statutory and regulatory scheme.

¶ 27 This does not mean that the HLJ is free to completely disregard the Program's decision. WAPA allows a court to intervene where the agency's action is arbitrary or capricious. RCW 34.05.570(3)(i). Accordingly, if the HLJ's decision to disregard the Program's decision rises to the level of an arbitrary agency action, relief may be warranted.

**II. Burden of Proof**

7 8 ¶ 28 With the applicable standard of review in mind, we turn to **DaVita's** first argument that we should reverse the HLJ because she applied an incorrect burden of proof. As this involves a question of law, our review is de novo. *Towle,* 94 Wash.App. at 204, 971 P.2d 591.

¶ 29 **DaVita** advances two arguments regarding the burden of proof. First, it argues that the HLJ should required **Olympic** to prove that "a preponderance of the evidence did not support the Program's decision to issue the CON to **DaVita** rather than [**Olympic**]." Br. of Appellant at 23. In other words, **DaVita** wants us to require **Olympic** to bear the burden of proof to demonstrate **DaVita's** application should have been denied. Second, **DaVita** argues that the HLJ applied a substantial evidence standard rather than a preponderance standard.

¶ 30 **DaVita** is partially correct; **Olympic** does have a burden of proof for its own application. The administrative code requires the "applicant to establish that the application meets all applicable criteria." WAC 246–10–606. And the code also provides that the "burden in all cases is a preponderance of the evidence." WAC 246–10–606. Thus, **Olympic** has the burden of proving that its application meets all the criteria for a CON. But **Olympic** does not bear the burden of showing that **DaVita's** application was incorrectly ***185** granted; **DaVita** carries the burden of showing its application met all of the criteria.

¶ 31 **DaVita** argues that this result is unfair because it requires it to prove its case before the Program and then before the ****1101** HLJ. **DaVita** suggests that, as the prevailing party under the Program's decision, it had no burden in the adjudicative proceeding. But this argument fails to take into account that the HLJ's review in this case was de novo. WAC 246–10–602(2)(a). Accordingly, the HLJ had to make factual findings on all material issues—including whether **DaVita** met its burden.

¶ 32 At first blush, assigning the burden of proof to both parties in a comparative review may seem nonsensical. Logically, parties in an adverse proceeding cannot both bear the burden of proof on a single issue. But this is not an adversary proceeding; it is competitive one. Both applicants had to prove to the State that they were entitled to a CON. It was possible, for example, that the Program could have rejected both applications. Thus, the burden of proof is on each applicant to prove that is application meets the applicable criteria. In this case, both **Olympic** and **DaVita** had the burden of proof for their respective applications.

9 ¶ 33 **DaVita's** next argument is that the HLJ misapplied the burden of proof. **DaVita** points to the HLJ's conclusion of law 2.7, which states:

> The burden of proof in an adjudicative proceeding regarding a CON is preponderance of the evidence. WAC 246–10–606. Evidence should be the kind that "reasonably prudent persons are accustomed to rely [on] in the conduct of their affairs." RCW 34.05.461(4). The Program's decision is not reasonable in light of substantial evidence to the contrary that **Olympic** is the "superior" applicant. WAC 246–310–240.

AR at 739. As **DaVita** notes, the phrase substantial evidence has a legal meaning usually associated with appellate review of findings of fact. *See Bering v. Share,* 106 Wash.2d 212, 220, 721 P.2d 918 (1986), *cert. dismissed,* 479 U.S. 1050, 107 S.Ct. 940, 93 L.Ed.2d 990 (1987). Thus, this conclusion of law appears ***186** inconsistent because it applied both a burden of proof and an appellate standard of review.

¶ 34 As indicated above, the HLJ's inquiry was de novo and the issue was whether by a preponderance of the evidence **Olympic** and **DaVita** met their burden to show that their

applications met the relevant criteria. Accordingly, if the HLJ had applied a substantial evidence test, it would have erred.

¶ 35 We have authority, as an appellate court, to interpret a lower tribunal's findings. *Tapper,* 122 Wash.2d at 406, 858 P.2d 494. We do not interpret conclusion of law 2.7 to mean that the HLJ used an incorrect standard. The rest of the HLJ's findings and conclusions of law do not display any indication that the HLJ applied a lower burden of proof to **Olympic**. In fact, in conclusion of law 2.19, the HLJ unequivocally concluded that "**Olympic** is the 'superior' and more 'efficient' applicant under WAC 246–310–240 with a better projected budget, projected fees, and a projected opening date." AR at 744.

¶ 36 Instead, we conclude that the "substantial evidence" language was an inadvertent use of a legal phrase, what might be termed loose language. If anything, the last sentence of this paragraph appears to be a factual finding that the Program's decision was not reasonable, not a legal conclusion that substantial evidence was the appropriate burden of proof. Given that the HLJ very clearly and correctly stated that the burden of proof in this case was a preponderance of the evidence, we reject **DaVita's** argument that the HLJ applied an incorrect burden of proof. At most, this was a misstatement and harmless.

¶ 37 Affirmed.

¶ 38 A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Unpublished Text Follows

**III. HLJ's Findings of Fact**

¶ 39 **DaVita** next argues that substantial evidence did not support the HLJ's final order. Unfortunately, **DaVita** does not assign error to any specific findings.[2] But **DaVita** does address several findings in its argument section. Specifically, **DaVita** disputes the HLJ's findings regarding (1) patient choice and the 20–minute drive time standard, (2) price competition, and (3) cost and time savings from an early opening date are not supported by substantial evidence.

¶ 40 As indicated above, our review of the HLJ's factual findings is limited to determining whether substantial evidence supports them. *Towle,* 94 Wash.App. at 204, 971 P.2d 591. Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise. *Towle,* 94 Wash.App. at 204, 971 P.2d 591. We do not make credibility determinations on review. Thurston *Cooper Point Ass'n. v. County,* 108 Wash.App. 429, 442 –43, 31 P.3d 28 (2001), *aff'd,* 148 Wash.2d 1, 57 P.3d 1156 (2002).

¶ 41 **DaVita** first challenges the HLJ's determinations regarding patient choice and the 20–minute drive time standard. The HLJ determined that in determining whether patients will have reasonable access to the new facility, "20 minutes [one way] is a reasonable maximum commute." AR at 727–28. The HLJ based this determination on (1) the distance between Poulsbo and Bremerton; (2) the fact that many patients use public transportation, which lengthens their commutes and limits their routes; and (3) a previous Program's CON decision. The previous CON decision explained:

> A long-standing planning standard of 30 minutes drive time is considered a default.... End stage renal disease [ESRD] presents a unique situation for **health** care services.... Given the nature of the dialysis services, the **department** determined the 30–minute drive time may be considered an unnecessary burden for patients. Reducing the default drive time from 30 minutes to a 20–minute drive time, which equates to 40 minutes round trip for ESRD patients is considered reasonable. Additionally consideration of the miles between the proposed sites and the existing **centers** is necessary when determining a service area.

AR at 1854.

¶ 42 These facts provide sufficient evidence from which a rational fact finder could conclude that a 20–minute standard was appropriate. The previous Program decision explains that **kidney** dialysis patients are special and that 20 minutes is appropriate. The HLJ determined that it was a 31–minute drive between the proposed Poulsbo sites and the Bremerton **center**. But because many of the patients in this case use public transportation, their routes are limited and the commute takes more time and the dialysis **centers** are even further apart in terms of actual travel time. It was therefore reasonable to apply a 20–minute standard.

¶ 43 **DaVita** argues that the Program has not consistently adopted a 20–minute drive time standard and that the decision should be made on a case-by-case standard. But **DaVita's** argument misses the point. The HLJ did not adopt a flat rule as **DaVita** seems to suggest. The HLJ determined that, given the Program's previous analysis that **kidney** dialysis patients require special treatment and the HLJ's finding that most patients have to use public transportation, a 20–minute standard was appropriate in this specific case.

¶ 44 This drive time standard factored significantly in the HLJ's finding with regard to patient choice. Examining population maps submitted by **Olympic**, the HLJ determined that a Poulsbo facility "would only provide choice to those patients who either live or work in a limited area between Poulsbo and Bremerton." AR at 728. She found that the proposed Poulsbo facility was 31 minutes north of **Olympic's** existing **center** via highway travel. Because of the 20–minute drive time standard, the only patients with a reasonable choice of providers would live somewhere between Poulsbo and **Olympic's** existing facility.

¶ 45 The HLJ also found that the number of people with a realistic choice may be "a small number of patients." AR 727. She relied on testimony **Olympic** presented that they had identified 35 current patients who would likely switch to the new Poulsbo facility. According to this testimony, of the 35 patients who would switch, only five were employed. And of those five, only two lived between Poulsbo and the existing facility.

¶ 46 **DaVita** argues that the HLJ misinterpreted the testimony about the 35 patients that **Olympic** identified. As **DaVita** points out, the testimony about the patients who worked does not indicate anything about the 30 other patients who did not work and does not take into account future population growth. **DaVita** cites to the Program's assertion that the number of Kitsap patients would double by 2007. This misinterpretation of the evidence, **DaVita** asserts, means that substantial evidence did not support the HLJ's finding.

¶ 47 But **DaVita's** arguments mischaracterize the HLJ's findings. The HLJ does not deny that approving a **DaVita** facility would create some patient choice; her concern is that this choice would only be realistic for a limited area. And she determined that the future growth projections were not clear enough to prove that **DaVita's** Poulsbo facility would create significant choice in the future.

¶ 48 As indicated above, substantial evidence supports these findings regarding patient choice. Moreover, in her conclusions of law, the HLJ concedes that patient choice was relevant to her consideration. She concluded, however, that because there was no evidence that there would be a significant number of patients with a choice, patient choice could not outweigh the other evidence she considered. This is essentially a question of the appropriate weight to give to the conflicting evidence. But we do not substitute our judgment for the fact finder's.

¶ 49 Thus, even if we credit **DaVita's** argument that the HLJ understated how much choice **DaVita** would provide to patients, there is substantial evidence to support her conclusion that choice would be limited and that it was not significant enough to warrant finding that **DaVita** was the superior applicant. We therefore uphold the HLJ's findings regarding drive times and patient choice.

¶ 50 **DaVita** next argues that the HLJ erred by finding that there was no evidence that granting a CON to **DaVita** would produce price competition. But this finding is based on the following testimony from the Program's analyst:

> Q: At the time that you prepared this evaluation ... did you have any evidence, even outside this record, that in situations where two dialysis providers are providing services in the same service area, price competition actually occurs?
>
> A: No, I don't have any third-party evidence of that.
>
> ....
>
> A: I relied on my beliefs and views articulated to me by [my supervisor] that this does occur.

AR at 2074. As this finding indicates, the Program had no evidence that **DaVita's** proposal would stimulate price competition.

¶ 51 In noting that the Program analyst's beliefs were not compelling, the HLJ cited to our Supreme Court's decision in *St. Joseph Hospital*, in which the court noted that "[t]he United States Congress and our Legislature made the judgment that competition had a tendency to drive **health** care costs up rather than down." St. Joseph Hosp., 125 Wash.2d at 741, 887 P.2d 891. The HLJ bolstered its position by noting that the classic laws of supply and demand are skewed in **health** care because patients lack sufficient knowledge to assess **health** care services and that **health** care costs are borne by third party payors.[3] The HLJ then found that given **Olympic's** lower projected commercial rates, it was unlikely that **DaVita** would stimulate price competition for the first three years of competition.

¶ 52 **DaVita** argues that the HLJ should have deferred to the Program analyst's assertion. But the role of a fact finder is to assign credibility and weight to evidence. Here, the HLJ discounted the Program analyst's beliefs. Moreover, **DaVita** again overstates the HLJ's findings against price competition as a factor. The HLJ concluded while "under some circumstances a second provider in a 'service area' may reduce prices providing an opportunity for competition, but not by through [sic] unnecessary duplication." AR at 737 (footnote omitted). She simply did not find that the facts of this case proved that price competition would occur.

¶ 53 Here, the HLJ determined that the evidence of **Olympic's** lower costs outweighed the Program analyst's belief that **DaVita's** facility would create price competition. We do not make such credibility determinations on appeal. We, therefore, uphold the finding.

¶ 54 **DaVita** also argues that **Olympic's** commercial rate projections were flawed. But **DaVita** concedes that it provided no projections of its commercial rates. The HLJ, as fact finder, acted within her discretion in relying on the evidence actually presented. Because the evidence in the record provides substantial evidence to support the HLJ's decision, we uphold her finding that **Olympic's** commercial rates would be lower.

¶ 55 Last, **DaVita** challenges the HLJ's finding that if granted the CON, **Olympic** would be able to open a new facility before **DaVita**. **DaVita** points out that **Olympic's** time estimate was based on CON approval in January 2004. **DaVita** argues that because **Olympic** did not receive approval in January 2004, **Olympic's** time estimate does not support the HLJ's finding.

¶ 56 But the HLJ's finding was based on testimony in the record from **Olympic** that it would be able to open its facility within five months of CON approval. **Olympic** testified that the space was vacant and ready for tenant improvements. And **DaVita's** application indicated that it would take more than a year to complete a facility after CON approval, specifically five fiscal quarters. This testimony supports the HLJ's conclusion that **Olympic** would be able to complete its facility sooner, especially where the HLJ entered a finding that "**Olympic's** estimated time to open is credible." AR at 735.

¶ 57 Thus, there was substantial evidence supporting the HLJ's findings that (1) a 20–minute commute time was appropriate and that **DaVita** failed to show that their proposal

would provide significant patient choice, (2) **DaVita's** proposal would not create significant price competition, and (3) **Olympic** would be able to open earlier than **DaVita**.

### IV. Number of Stations

¶ 58 **DaVita** next argues that the HLJ erred because it did not consider the fact that **DaVita's** proposal included 10 stations while **Olympic's** proposal was for 8 stations. **DaVita** argues that because its proposal supported two additional stations, it should be considered superior. We reject **DaVita's** arguments.

¶ 59 First, the HLJ did not disregard the Program's finding about need. In fact, the HLJ adopted the Program's analysis. The HLJ, nonetheless, determined that **Olympic** was the superior applicant. Such a factual determination weighing the need against the cost savings was within her discretion.

¶ 60 Second, even assuming that **DaVita** had an additional two stations, **DaVita's** application also fell short. The HLJ, following the Program, found that the projected future need was for 12 stations, not 10. If **DaVita's** argument was correct that the number of stations were a determining factor, **DaVita's** application would fail as well. In other words, **DaVita's** application should still be denied if this disparity was significant.

¶ 61 But the disparity is not significant. The Program specifically noted that:

> Each applicant has requested approval to build-out and operate 12 or 13 stations, though neither has presented utilization projections to support that capacity. The **department** notes that construction of stations in excess of [CON] approval is not inconsistent with **department** rules as long as the number of operational stations does not exceed the number approved by [CON] at any time. *In other words, either application would, upon approval, be free to build a facility capable of eventually operating 12 or 13 stations.*

AR at 17 (emphasis added). The Program also noted that "[t]he **department's** need projections differ markedly from each applicant's projections." AR at 18.

¶ 62 We interpret this to mean the Program approved the CON for less than 12 stations because that is what the **DaVita** and **Olympic's** figures showed as the projected need. But the Program also found that "either applicant" would be able to build additional stations if they were actually needed. AR at 17. Thus, **DaVita** and **Olympic's** proposed **centers** are functionally equivalent and substantial evidence supports the HLJ's finding.

### V. Due Process

¶ 63 The bulk of **DaVita's** argument on appeal is that the HLJ violated **DaVita's** due process rights by creating additional tiebreaking standards for granting or denying a CON. **DaVita** argues that it had no notice that the HLJ would consider (1) provision for an isolation station, (2) total operating costs, (3) a 20–minute drive standard, (4) comparison of projected commercial rates, (5) estimated facility opening dates, and (6) indications of support in the community. **DaVita** argues that by adding these new factors as the standards for denying its CON application, the HLJ denied **DaVita** the right to a meaningful hearing.

¶ 64 Initially, it is not clear whether **DaVita** had a property right to the CON after the Program's initial decision. We do not reach this question because **DaVita** also had a right to notice under WAPA. RCW 34.05.434(1). And we hold that **DaVita** received proper notice of the standards the HLJ used to evaluate **DaVita's** application.

¶ 65 The applicable standards are described in the statute and administrative code and **DaVita** admits it was aware of these statutory and regulatory provisions. As indicated above, the CON statute requires the agency to determine which proposal best meets identified needs. RCW 70.38.115(7). The WACs indicate that the four criteria for a CON are (1) need, (2) cost containment, (3) financial feasibility, and (4) structure and process of care. WAC 246–310–200(2).

¶ 66 The HLJ's analysis follows this format; it contains a section on each regulatory criterion. The HLJ determined that both proposals met the need and structure and process

of care criteria. With regard to financial feasibility, the HLJ found that because **DaVita** had higher costs and understated its rental expenses, there was significant doubt as to **DaVita's** financial feasibility.

¶ 67 But the focus of the HLJ's analysis, as well as the Program's analysis, was on the cost containment factor. WAC 246–310–240(1) requires the CON applicant to demonstrate that "[s]uperior alternatives, in terms of cost, efficiency, or effectiveness, are not available or practicable." The standards for evaluating which application is superior are contained in the WAC—cost, efficiency, or effectiveness. **DaVita** does not plead ignorance of these statutory categories. And these are the standards that the HLJ applied.

¶ 68 The HLJ expressly related each of its findings to the WACs' criteria. For example, the HLJ determined that patient choice was relevant to providing more "effective" and/or "efficient care." AR at 743. And as discussed above, the HLJ considered the 20–minute drive standard as relevant evidence to determine whether **DaVita's** proposal would allow patient choice.

¶ 69 The HLJ considered whether **Olympic's** operating costs and projected commercial fees were lower, as well was whether **DaVita** would create price competition in the section of its order dealing with costs. And the relative costs and fees of the services are relevant to determining which application is superior in terms of cost.

¶ 70 The HLJ also specifically explained the relevance of **Olympic's** early opening date and the patient letters. The HLJ found that the earlier opening date was relevant to cost, efficiency and effectiveness because it produced cost and time savings. Similarly, the HLJ explained that the letters regarding **Olympic's** patient satisfaction are relevant to determining whether an applicant can provide a cost effective service while maintaining quality of care. The HLJ pointed out that the CON statute " 'encourages' the 'involvement in **health** planning from both consumers and providers.' " AR at 738 (quoting RCW 70.38.015 (1)).

¶ 71 Considered as a whole, the HLJ's tiebreaking factors are not new standards as **DaVita** alleges. Instead, these tiebreaking factors are simply evidence from which the HLJ inferred that **Olympic** was the superior applicant under the standards from the WAC. As well, each of the allegedly new tiebreaking factors were not new. **Olympic** introduced the bulk of the evidence on which the HLJ relied during the Program's consideration and the rest at the adjudicative hearing. **DaVita** was not unfairly surprised by this evidence.

¶ 72 We hold that a **DaVita's** due process rights were not violated when the HLJ considered relevant evidence. **DaVita** had notice that the HLJ was going to determine which of the two proposals was superior in terms of cost, efficiency, and effectiveness. These are, in fact, the standards specified in the regulations. Thus, when the HLJ considered information relevant to these standards, **DaVita** cannot complain that the HLJ applied new standards.

### VI. Commercial Rates

¶ 73 **DaVita** next argues that the HLJ violated statutory and administrative rules by considering **DaVita's** failure to present evidence about its projected commercial rates and projected costs. **DaVita** points out that RCW 70.38.115(6) requires the **Department** of **Health** to specify the information required for CON applications. **DaVita** then reasons that because neither the Program nor the HLJ requested that **DaVita** provide evidence about projected commercial rates, the HLJ erred in considering **DaVita's** failure.

¶ 74 The CON statute requires that the "**department** shall specify information to be required for certificate of need applications." RCW 70.38.115(6). The applicable code provisions mirror the statute and provide that a CON application must contain "such information as the **department** has prescribed and published as necessary" to a CON application. WAC 246–310–090(1)(a). The statute then provides that "[a]pplications may be denied or limited because of a failure to submit required and necessary information." RCW 70.38.115(6).

¶ 75 Here, the HLJ specifically found that the Program failed to request information from **DaVita** on **DaVita's** customary commercial rates or its projected rates. With this factual finding uncontested, it is a verity on appeal. *In re Estate of Jones*, 152 Wash.2d 1, 8, 93 P.3d 147 (2004). Thus, if this were a situation in which the HJL denied **DaVita's** application because **DaVita** had failed to submit its commercial rates, it would be an error.

¶ 76 But that is not the factual scenario. Here, **Olympic** submitted its calculation of commercial rates and also submitted its estimation of **DaVita's** commercial rates. Nothing in the statute prohibits a party from submitting relevant evidence. And here, the WACs require an applicant to prove that "[s]uperior alternatives, in terms of cost, efficiency, or effectiveness, are not available or practicable." WAC 246–310–240(1). **Olympic's** estimation was relevant to determining if **DaVita's** application was superior in terms of cost.

¶ 77 An examination of the findings of fact indicates that the HLJ only considered **DaVita's** failure to submit its commercial rates in the context of evaluating the credibility of **Olympic's** estimate. Specifically, the HLJ found that:

> **Olympic** has significantly lower commercial rates and projected rates than **DaVita's** projected commercial rates. Evidence from **DaVita's** application and **Olympic's** analysis supports this conclusion. The Program did not find any error in **Olympic's** analysis, but merely made a general conclusion regarding projected rates by other for-profit and non-profit dialysis provider applicants. That response fails to address the specific facts in this case; **Olympic's** calculations indicates **DaVita** commercial/private fees will be higher. **DaVita** did not disclose its customary commercial rates or its projected rates. The Program failed to request that information. The Program failed to adequately address facts regarding **DaVita's** proposed higher: costs, annual net profit, annual operating revenue per treatment and resulting higher fees.

AR at 731–32 (citations and emphasis omitted). On close reading of this finding, it appears that the HLJ is merely explaining why she found **Olympic's** evidence regarding lower commercial rates persuasive. She acknowledged that **DaVita** did not provide its rates and that **Olympic** was estimating. Nonetheless, in the absence of any contrary evidence, she found **Olympic's** estimate credible and discounted the Program's explanation for why it did not consider **Olympic's** evidence.

¶ 78 Thus, the HLJ did not deny **DaVita's** CON application because **DaVita** failed to provide its commercial rates. She granted **Olympic's** CON application because **Olympic** proved that its application was superior in terms of cost and efficiency. Therefore, the HLJ did not violate the statute or the applicable WACs. And **DaVita** had the opportunity to present contrary evidence to the HLJ. We find no request by **DaVita** to present evidence of commercial rates or to keep the record open in order to gather and present that evidence. Thus, to the extent that **DaVita** claims that it was not allowed to present evidence of its commercial rates, it has waived that argument.

¶ 79 In conclusion, we hold that the trial court did not err in dismissing **DaVita's** petition. The HLJ was the designee of the Secretary of **Health** who made the final decision and thus expressed the agency action. The HLJ applied the correct burden of proof, and substantial evidence supported her findings that **Olympic** was the superior applicant in terms of cost, efficiency, or effectiveness. **DaVita** was on notice that these were the applicable regulatory factors and the HLJ's consideration of evidence relevant to these factors did not violate WAPA or due process.

¶ 80 Affirmed.

End of Unpublished Text

We concur: ARMSTRONG and HUNT, JJ.

**Parallel Citations**

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**Footnotes**

1 The **Department** of **Health** administers CON applications. RCW 70.38.105(1).

2 We note that the HLJ did include one finding the evidence did not support. **Olympic** concedes that the HLJ's finding regarding the isolation station is factually incorrect. Therefore, this finding lacks substantial evidence. But the HLJ found that the services the two applications described were similar and that she could not conclude that either was superior. The HLJ's decision regarding costs, efficiency, and effectiveness was independent of her finding regarding the structure and process of care. Because that finding is sufficient to support her order, this error is harmless.

3 The HLJ drew this argument from a law review article. Lauretta Wolfson, *State Regulation of **Health** Facility Planning: The Economic Theory & Political Realities of Certificate of Need,* 4 DEPAUL J. **HEALTH** CARE LAW, at 261, 263 (Winter/Spring 2001). **DaVita** does not argue that the HLJ erred in considering this article.

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