IN THE SUPREME COURT OF MISSISSIPPI

CITY OF CLEVELAND and MISSISSIPPI STATE DEPARTMENT OF HEALTH — **APPELLANTS**

V. — **NO. 2008-SA-00223**

MID-SOUTH ASSOCIATES, LLC — **APPELLEE**

APPEAL FROM THE DECISION OF THE DESOTO CHANCERY COURT

REPLY BRIEF FOR APPELLANTS

ORAL ARGUMENT NOT REQUESTED

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TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Rebuttal Argument 1

I. The Standard of Review in This Case Requires Deference to the Department 1

II. The Department Did Not Commit Any Error of Law in Disapproving the Proposal 3

A. Miss. Code Ann. § 41-7-191(1) 4

B. *St. Dominic-Madison County Medical Center* 5

C. Miss. Code Ann. § 41-7-191(1)(c) 6

III. Mid-South Fails to Show That the Department Lacked Substantial Evidence to Find the Proposal Not in Compliance with Its Criteria and with the State Health Plan 8

Conclusion 12

Certificate of Service ..... *following Conclusion*

TABLE OF AUTHORITIES

Page

Cases:

Grant Ctr. Hosp. of Miss., Inc. v. Health Group of Jackson, Miss., Inc., 528 So. 2d 804 (Miss. 1988) 8

Hale v. Ruleville Health Care Ctr., 687 So. 2d 1221 (Miss. 1997) 12

Miss. Dep't of Transp. v. Johnson, 873 So. 2d 108 (Miss. 2004) 2

Pub. Employees' Ret. Sys. v. Marquez, 774 So. 2d 421 (Miss. 2000) 2

St. Dominic-Jackson Mem'l Hosp. v. Miss. State Dep't of Health, 910 So. 2d 1077 (Miss. 2005) 3

St. Dominic-Madison County Med. Ctr. v. Madison County Med. Ctr., 928 So. 2d 822 (Miss. 2006) 5

United Cement Co. v. Safe Air for the Envir., Inc., 558 So. 2d 840 (Miss. 1990) 12

Statutes:

Miss. Code Ann. § 41-7-191 ..... 4, 6, 8

Miss. Code Ann. § 41-7-201 ..... 12, 13

REBUTTAL ARGUMENT

I. The Standard of Review in This Case Requires Deference to the Department.

Despite its recourse to such authorities as the *Encyclopedia of Mississippi Law*, Mid-South's discussion of the standard of review is confused — or perhaps, intended to confuse. At section I.A. of its brief, Mid-South concedes the "routine" nature of the traditional standard of review, but then proposes as "equally serious" the agency's duty to "make a reasoned decision," which evidently cannot include adopting proposed findings and conclusions. Br. at 8.[1] For this inference, that adopting proposed findings and conclusions makes the decision invalid, Mid-South cites no authority, encyclopedic or otherwise.

It's clear from the record in this case that Mid-South is in fact arguing in bad faith. *Both sides* presented the hearing officer with proposed findings of fact and conclusions of law, as directed by the hearing officer. Mid-South did not place on the record any objection to that directive, or otherwise attempt to make plain to the hearing officer that she should not adopt Mid-South's proposed findings and conclusions, and thus abandon her "serious" duty. Is there any doubt that, had the hearing officer (and the State Health Officer) adopted Mid-South's proposed findings verbatim, we would not be hearing from Mid-South that the Department's decision was automatically invalid on that basis? Although Mid-South repeatedly states or implies that the hearing officer exercised *no* independent judgment, the obvious fact remains that she *did* make the independent decision, based on the evidence and the testimony over which she presided, to adopt the City's proposed findings and conclusions, not Mid-South's. The spurned suitor often blames fickleness for his rejection.

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[1]We cite the Brief for Appellee as "Br." and the Record Excerpts for Appellants as "R.E."

Having invented a supposed legal requirement not to adopt proposed findings of fact and conclusions of law, Mid-South then goes on to argue (at part I.B.) that the hearing officer's decision was a verbatim adoption of Appellants' proposed findings and conclusions — a fact which is not in dispute. Mid-South waves away in a footnote (Br. at 9 n.1) the discussion of the chancellor's mistaken reliance on *Mississippi Department of Transportation v. Johnson*, 873 So. 2d 108 (Miss. 2004) as "merely academic." We trust that this Court finds the correct application of its own precedents more than "academic."

Tucked into the same footnote is the peculiar assertion that "no evidence exists the Hearing Officer actually reviewed the record in this case." As would seem to be indicated by the term "hearing officer," the hearing officer in the present case presided over the hearing and *heard* the record testimony presented by both sides. She also signed the proposed findings and conclusions submitted by the City of Cleveland, which stated her "careful review and consideration of the Application, evidence, and testimony presented at the hearing of this matter." R.E. 3 at 3. If Mid-South means to suggest that the hearing officer lied when she signed that document, then perhaps Mid-South ought to present an argument, not merely an insinuation.

Appellants do not dispute that this Court "must look at the full record before it in deciding whether the agency's findings were supported by substantial evidence, and should not "wear[] blinders" in doing so. *Pub. Employees' Ret. Sys. v. Marquez*, 774 So. 2d 421, 427 (Miss. 2000) (quoted in Br. at 10). We would further submit that this ordinary duty of the appellate court suffices to address any concerns raised by the adoption of proposed findings and conclusions. If the hearing officer chose to concur with one side's presentation of the case, then

the question is simply this: did the record support that decision? If this Court finds substantial evidence to support the decision, then deference to the Department is proper and mandatory.

As was demonstrated at some length at issue I of the Brief for Appellants, the courts do not have the option to decide for themselves whether or not deferential review of administrative actions is a good or bad idea. "Our constitution does not allow for the courts to conduct a de novo retrial of matters on appeal from administrative agencies. That is, the judiciary is not permitted to make administrative decisions." *St. Dominic-Jackson Mem'l Hosp. v. Miss. State Dep't of Health*, 910 So. 2d 1077, 1081 (Miss. 2005) (citations omitted).

In short, Mid-South effectively concedes that this Court must affirm factual findings of the Department where those are based on substantial evidence, and goes on to hang its hopes on this Court's agreeing with Mid-South that the chancery court reversed the Department on a matter of law. The Department did no such thing, as we now will show.

II. The Department Did Not Commit Any Error of Law in Disapproving the Proposal.

Despite the chancellor's having admitted to reviewing the *record* de novo (R.E. 2 at 2), Mid-South attempts to frame the chancery court's decision as having reviewed the alleged legal errors of the Department de novo. That of course would bring the chancery court within the proper standard of review. However, no such legal error was committed by the Department.

Mid-South hinges its entire case on the theory that the Department was obliged to read off Table 8-H from the State Health Plan on bed need for Bolivar and DeSoto Counties, and premise its decision on that basis alone. As reported in the State Health Plan, Bolivar County was overbedded by 92, and DeSoto County underbedded by 567. Thus, Mid-South contends, the Department was bound by those figures to approve the transfer of 60 beds from Bolivar to

DeSoto, and never mind the other requirements of the State Health Plan or of the CON Review Manual.

While Mid-South's proposed "methodology" would certainly simplify the Department's work, requiring merely the comparison of two numbers with no discretion or expertise required, Mid-South has misapprehended the Department's duties and its legal obligations. There simply *is no methodology* in the State Health Plan for evaluating a relocation of nursing-home beds from one place to another. Therefore, the Department applied the general criteria reproduced at R.E. 7, none of which says anything about comparing bed-need projections in two counties in order to make a final decision regarding need. Mid-South does not have authority to impose on the Department an imaginary methodology of its own choosing.

In an effort to convince this Court otherwise, Mid-South points to three legal authorities which supposedly support its argument. We address these in turn.[2]

A. Miss. Code Ann. § 41-7-191(1).

Mid-South attempts to rely upon Miss. Code Ann. § 41-7-191(1):

> **A certificate of need shall not be granted or issued** to any person for any proposal, cause or reason, unless the proposal has been reviewed for **consistency with the specifications and the criteria** established by the State Department of Health **and substantially complies with the projection of need** as reported in the state health plan in effect at the time the application for the proposal was submitted.

(emphasis added). According to Mid-South (at 12), this obliges the Department to approve the transfer of 60 beds from Bolivar County to DeSoto County. But, first, the statute says that a

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[2]We do *not* address Miss. Code Ann. § 41-7-191(1)(b), which Mid-South says "requires a certificate of need be granted authorizing the relocation of a health care facility as proposed by Mid-South." Br. at 11. We admit that reading this gave us a bad turn, as we knew of no statute *requiring* that Mid-South be granted a CON. But it turns out that § 41-7-191(1)(b) actually requires that a CON be *obtained* before relocating a facility.

certificate of need "shall *not* be granted or issued" unless the application "substantially complies with the projection of need." This is a negative command — do *not* issue a CON — with permissible exceptions (consistency, substantial compliance). The Department cannot violate this statute by *not* issuing a CON, because the statute speaks only to the permissible conditions for its choosing to issue a CON.

Second, the Department has discretion to grant a CON where two separate conditions have been met: "consistency with the specifications and the criteria established by" the Department, *and* "substantial compli[ance] with the projection of need." It is not enough if the application "substantially complies with the projection of need," if the application is not also consistent with the Department's "specifications" and "criteria." As we saw in the Brief for Appellants, the application did not satisfy those criteria.

Third, it is not the *Department* which is commanded to "substantially comply" with the State Health Plan's projection of need. Rather, it is the "proposal" — the CON application filed by Mid-South — which must "substantially comply."

Therefore, there is no issue of the Department's committing legal error where § 41-7-191(1) is concerned.

B. St. Dominic-Madison County Medical Center.

The second legal authority relied upon by Mid-South, and allegedly violated by the Department, is said to be this Court's opinion in *St. Dominic-Madison County Medical Center v. Madison County Medical Center*, 928 So. 2d 822 (Miss. 2006). However, the language quoted by Mid-South (at 12) is actually taken from the chancery court decision quoted by this Court in that opinion, in a section of that opinion that merely set forth what the chancery court held. *Id.*

at 826. While the chancery court's decision was, properly, affirmed by this Court, that does not amount to the adoption of every holding and dictum set forth by the lower court.

In fact, the *St. Dominic* case had nothing to do with projections of need. The issue in that case was whether or not a new facility proposed by St. Dominic was a new hospital or a relocation of existing hospital beds. *Id.* at 828-29. That is why Mid-South found it necessary to pass off a quotation from the chancery court as if it were this Court's holding — because this Court itself said nothing about "projections of need." Even the chancery court, when Mid-South's quotation is viewed in context (as this Court actually quoted it, *id.* at 826), was not discussing need projections but rather the proper need criterion for a new versus a relocated hospital.

Thus, Mid-South's citation to this Court's opinion in the 2006 *St. Dominic* case is misguided and fails to support its argument.

C. Miss. Code Ann. § 41-7-191(1)(c).

Finally, Mid-South alleges that the Department violated Miss. Code Ann. § 41-7-191(1)(c). This subsection forms part of a list of activities that are prohibited without having first obtained a CON. Mid-South plucks out part of subsection (1)(c), which we quote in full. A CON is required for

> [a]ny change in the existing bed complement of any health care facility through the addition or conversion of any beds or the alteration, modernizing or refurbishing of any unit or department in which the beds may be located; **however, if a health care facility has voluntarily delicensed some of its existing bed complement, it may later relicense some or all of its delicensed beds without the necessity of having to acquire a certificate of need. The State Department of Health shall maintain a record of the delicensing health care facility and its voluntarily delicensed beds and continue counting those beds as part of the state's total bed count for health care planning purposes.** If a health care facility that has voluntarily delicensed some of its beds later desires to relicense some or all of its voluntarily delicensed beds, it shall notify

> the State Department of Health of its intent to increase the number of its licensed beds. The State Department of Health shall survey the health care facility within thirty (30) days of that notice and, if appropriate, issue the health care facility a new license reflecting the new contingent of beds. However, in no event may a health care facility that has voluntarily delicensed some of its beds be reissued a license to operate beds in excess of its bed count before the voluntary delicensure of some of its beds without seeking certificate of need approval[.]

(emphasis added). The emphasized portion is what Mid-South quotes in its brief. Taken in context, however, this subsection is not relevant to the present case. The purpose of this subsection is to provide for voluntarily delicensing beds without losing the right to restore them at a later time, without having to obtain a CON. Because those beds could possibly be relicensed without a CON's being obtained, the Department is directed to include those beds in its "total bed count" for the state. For instance, if the state had a need for 1,000 hospital beds and 1,000 beds were in place, and 50 were voluntarily delicensed, then the total bed count would not be lowered to 950. That is because, if it were, then there would seem to be a need for 1,000 beds but only 950 open, and someone could get a CON for 50 beds. Then the holder of the delicensed beds might reopen them, leaving the state with a need for 1,000 beds but 1,050 beds in place — clearly not what the CON laws are meant to achieve.

What Mid-South wants this Court to do is to pluck out that language and say that, in every health-planning decision that the Department makes, the delicensed beds must be treated as open beds (even though the beds cannot be put back into use without passing a licensure inspection, which they may or may not meet). But that is not what the statute means. That is not even what the statute *says*. It says that the delicensed beds must be included in "the state's total bed count." It does *not* say that they must be treated as open beds for all health planning purposes. This Court regularly defers to the Department's construction of the CON laws where that interpretation is not directly contrary to the plain language of the statute:

> The administrative agency which has by law been charged with interpretation and enforcement of the CON procedure has read the statute as in effect meaning that the application must refer to the state health plan in effect when the application was submitted. **The agency that works with a statute frequently, if not daily, that sees it in relation to other law in the field, necessarily develops a level of insight and expertise likely beyond our ken. When such agencies speak, courts listen.**

Grant Ctr. Hosp. of Miss., Inc. v. Health Group of Jackson, Miss., Inc., 528 So. 2d 804, 810 (Miss. 1988) (emphasis added). The Department is not obliged to defer to Mid-South's interpretation.

Thus, here too, Mid-South has failed to show that the Department committed any legal error.

III. Mid-South Fails to Show That the Department Lacked Substantial Evidence to Find the Proposal Not in Compliance with Its Criteria and with the State Health Plan.

The decisive issue for this case, addressed at issue II of the Brief for Appellants, is that the Department found that Mid-South's CON application failed to meet three of the criteria in the CON Review Manual, which (as we saw above) form a separate requirement from the requirement that the application "substantially complies with the projection of need as reported in the state health plan." Miss. Code Ann. § 41-7-191. It is necessary, but not sufficient, that Mid-South's application comply with the projected need as reported in the State Health Plan. Nothing in the Plan, in the CON Review Manual, or in the CON statutes, however, prohibits the Department from conducting its own need analysis, provided that this analysis is not more permissive than any need criterion in the State Health Plan.

As shown in the Brief for Appellants, the Mid-South application failed to meet criteria 5(a), 5(b), and 5(e) of the CON Review Manual's general criteria. Failure to meet a single one of these criteria was sufficient for the Department to deny a CON.

Mid-South's tactic is to argue that these criteria, which address "whether a need for the project exists" (R.E. 7 at 59), are superseded by the bed-need projections in the State Health Plan: the Plan says that Bolivar County has too many beds, and DeSoto County has too few, so there is nothing else to think about, and let's relocate the beds! However, these criteria are *in addition to* the projected bed need in the Plan. In particular, the Department is authorized to consider "the extent to which all residents of the area" have access, and "the need that the population presently served has for the service." Access for "*all* residents of the area" considers the access of the Bolivar County residents — for whom the Department had substantial evidence that a relocation would work hardships upon them, as we saw in the Brief for Appellants — and the access of DeSoto County residents, who have easy access to the Greater Memphis area and its nursing homes.

Likewise, as already noted in the Brief for Appellants, criterion 5(b) directs the Department to address "the effect of the relocation of the service on the ability of low income persons . . . to obtain needed health care," and Mid-South's proposal would drop the percentage of Medicaid beneficiaries in its 60 beds from 62% to 33%. R.E. 4 at 7. While reducing Medicaid expenditures is apparently a priority for some elements of state government, the Department's focus in criterion 5(b) lies elsewhere, and the Department was well within its discretion to find that the relocation's reduction of care to the low-income residents of the Delta was a bar to the Mid-South proposal. Not to be redundant, but the Department has express discretion to reject a CON proposal that fails to meet *even one* of the general criteria. The Department certainly had substantial evidence, evidence from which reasonable persons could reach the same conclusion, to support rejecting Mid-South's plan to move its beds from the Delta to the prosperous DeSoto area.

Although Mid-South is offended that the Department took into consideration factors which suggest that the bed need in DeSoto County may be less than that projected in the Plan, and that the bed need in Bolivar County may be greater, nothing in the Plan or in the CON Review Manual prohibits the Department from considering such evidence. Criterion 5(c) for instance expressly allows for the Department to treat other data than the Plan as more reliable, where that is "clearly shown" to be the case. R.E. 7 at 59.[3] This is simply not consistent with Mid-South's insistence that the Department must base all its decisions on the figures provided in the Plan. And as the Brief for Appellants showed, the Department had clear evidence from the witnesses at the hearing, including Dr. John Hyde, that the facts on the ground in DeSoto County did not support the proposition that DeSoto is especially underbedded.

Finally, irrespective of the bed need, the Department was authorized to consider "significant opposition to the proposal" under criterion 5(e). Mid-South mocks this as "a wholly subjective public referendum" (Br. at 23), but the criterion says what it says. On this criterion alone, the Department had substantial evidence from which to find that the proposal could be rejected.

As for the Mid-South proposal's failures under the four main goals of the State Health Plan, Mid-South attempts to reduce the four goals to one — "need" — and, again, to argue that this issue is foreclosed by the Plan's need projections. Br. at 23-24. But there are four goals, not one, and "need" is not mentioned in any of them. To recap from the Brief for Appellants (at 27-29):

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[3]Criterion 5(c) refers to "data where available from the Division of Health Planning and Resource Development," which is the entity responsible for drawing up the State Health Plan.

- "unnecessary duplication of health services" — given that the proposal merely shifts 60 beds around inside Long Term Care Planning District I (which includes Bolivar and DeSoto counties), building a redundant new facility and abandoning a functional one is unnecessary;
- "cost containment" — despite Mid-South's implications, this factor does not mean merely *public* costs; there is no such thing as a free lunch, the $4.9 million for the new facility will be recouped from Mississippi residents one way or another;
- "improving the health of Mississippi residents" — under this factor, the Department was authorized to consider not only the health of the residents served by the 60 beds, but the health of the residents in Bolivar County whose health-care options would be injured by the effect of the relocation on existing providers in Bolivar County; Mid-South appears to have no regard for the health of anyone not in one of its beds, but the Department is required to consider "the health of Mississippi residents," not merely the health of Mid-South's residents; and
- "increasing the accessibility, acceptability, continuity, and quality of health services" — the Department was authorized to find, as it did, that Bolivar County's access to health services (*all* health services, given the impact of losing the 60 beds) would be diminished more than any countervailing increase in DeSoto County, a booming area with no shortage of patients for its physicians and other health care providers.

Against these findings, Mid-South attempts to rely on the chancery court's having "found in the record" the existence of "testimony about the new facility which indicated that . . . the four goals of the [State Health Plan] . . . will be met." Br. at 24. Mid-South, and the chancery court, again fundamentally misunderstand the standard of review. The issue is not whether there is, "in the

record," evidence to support the Department's doing other than what it did. Rather, the issue is whether substantial evidence exists to *support* the Department's decision. "Therefore, if the evidence is there, the decision stands even though the Chancellor or this Court might have made a different decision." *United Cement Co. v. Safe Air for the Envir., Inc.*, 558 So. 2d 840, 842 (Miss. 1990). The agency, as finder of fact, is free to choose between two conflicting positions, each of which is supported by substantial, credible evidence. *Hale v. Ruleville Health Care Ctr.*, 687 So. 2d 1221, 1224-25 (Miss. 1997).

The Department had substantial evidence from which to conclude that the relocation of 60 nursing-home beds from the Delta to DeSoto County did not serve the health care needs of Mississippi's residents, as those needs are set forth by the CON Review Manual and the State Health Plan. The lower court was therefore required by law to affirm the Department's decision, but did not do so. This Court should reverse the lower court's erroneous judgment and render a judgment for the Department, reinstating its decision disapproving the Mid-South proposal. And because Mid-South has sought to overturn a CON decision, this Court should direct Mid-South to pay the reasonable attorney fees and costs incurred in defending that decision on appeal, pursuant to Miss. Code Ann. § 41-7-201(f).

CERTIFICATE OF SERVICE

The undersigned counsel hereby attests that he has caused the foregoing document to be served via United States mail (postage prepaid) on the persons listed below:

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So certified, this the ***18th*** day of August, 2008.

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