IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

WOMEN'S MED CENTER OF DAYTON,	CASE NO.: 2016 CV 06088
Appellant,	JUDGE MARY WISEMAN
-vs-	**DECISION, ORDER AND ENTRY AFFIRMING THE OHIO DEPARTMENT OF HEALTH'S NOVEMBER 30, 2016 ADJUDICATION ORDER RE WOMEN'S MED CENTER OF DAYTON'S AMBULATORY SURGICAL FACILITY LICENSE**
STATE OF OHIO DEPARTMENT OF HEALTH,	
Appellee.	

This matter is before the Court on Appellant Women's Med Center of Dayton's ["Women's Med Center"] appeal from a November 30, 2016 Adjudication Order issued by the Ohio Department of Health that both refused to renew and revoked Women's Med Center's ambulatory surgical facility license due to its failure to have in place a written transfer agreement ("WTA") with a local hospital. (See 12/1/16 *Notice of Appeal* and attached Exh. A (copy of Adjudication Order)).

Before the Court are a transcript of the administrative record ["*Tr.*"], filed on December 21, 2016; the *Brief of Appellant Women's Med Center of Dayton* ["*Appellant's Brief*"], filed on January 30, 2017; the *Answering Brief of the Ohio Department of Health* ["*Appellee's Brief*"], filed on March 1, 2017; and the *Reply Brief of Appellant Women's Med Center of Dayton* ["*Appellant's Reply*"], filed on March 15, 2017. Oral argument on the issues presented occurred on August 17, 2018.

For the reasons that follow, the Ohio Department of Health's November 30, 2016 adjudication order re Women's Med Center of Dayton's ambulatory surgical facility license is AFFIRMED.

FACTUAL & PROCEDURAL BACKGROUND

Women's Med Center of Dayton ["WMCD"] is a clinic located in Kettering, Ohio, that provides reproductive services, including surgical abortions, to women from across Ohio and beyond. (See *Affidavit of W. Martin Haskell, M.D. in Support of Motion to Suspend and Stay the Order of the Ohio Department of Health* ["*Haskell Affid.*"] filed on 12/2/16, ¶¶1-2, 8); (see also 12/2/16 *Emergency Motion to Suspend and Stay the Order of the Ohio Department of Health from Which Appellant Appeals and Memorandum in Support* ["*Motion to Stay*"], attached Jt. Exh. A, "Stipulations of Fact" from administrative hearing, Stipulation #1). WMCD currently is the only facility in the greater Dayton, Ohio area that provides surgical abortions. (*Haskell Affid.*, ¶¶5, 7). WMCD's medical director, Dr. Martin Haskell, is a physician licensed in Ohio and is the sole shareholder of Women's Medical Group Professional Corporation, the company that has owned and operated WMCD since 1983. (*Id.*, ¶¶1-3); (*Motion to Stay*, Jt. Exh. A, Stipulations ##1-2).

Beginning in 2002, WMCD was licensed by the Ohio Department of Health ["ODH"] as an "ambulatory surgical facility" ["ASF"] in accordance with R.C. § 3702.30(A)(1). (*Motion to Stay*, Jt. Exh. A, Stipulations ##4, 6). R.C. § 3702.303(A) requires any ASF to have

> a written transfer agreement with a local hospital that specifies an effective procedure for the safe and immediate transfer of patients from the facility to the hospital when medical care beyond the care that can be provided at the ambulatory surgical facility is necessary, including when emergency situations occur or medical complications arise.

A copy of the WTA must be filed with the director of ODH, *id.*, and must be updated every two years. R.C. § 3702.303(B). However, the same statute provides an exception to the WTA requirement if the ODH director "has, pursuant to the procedure specified in section 3702.304 of the Revised Code, granted the facility a variance from the requirement." R.C. § 3702.303(C)(2).

In 2008, ODH granted WMCD's request for a variance from the WTA requirement. (*Motion to Stay*, Jt. Exh. A, Stipulation #6). The facility's ASF license also was renewed in 2008 and annually thereafter through 2011, based on the 2008 variance. (*Id.*).

In December of 2011, however, ODH notified WMCD that, beginning in 2012, it would be required to apply annually for both renewal of its ASF license and a WTA requirement variance. (*Motion to Stay*, attached Exh. 26 from administrative hearing, affidavit of Dr. Haskell, ¶22). In 2012, 2013, 2014 and 2015, WMCD filed timely license renewal and variance applications, but not until June 25, 2015, did ODH's director deny WMCD's variance requests for 2012, 2013 and 2014. (*Id.*, Exh. 26, ¶¶22-24, 27 and Jt. Exh. A, Stipulation #8). One reason given for that variance denial was that WMCD's 2013 and 2014 applications included "just two named back-up physicians," whereas the facility's prior applications had listed three back-up physicians. (See *Motion to Stay*, attached Exh. 10 from administrative hearing, 6/25/15 denial letter from ODH director, p. 1). The ODH director opined that "two back-up physicians cannot meet [ODH's] expectation for 24/7 back-up coverage and uninterrupted continuity of care, as a WTA with a hospital would provide." (*Id.*). The director gave WMCD 30 days to submit a new variance request or a WTA, absent which ODH "may propose revocation of [WMCD's] ambulatory surgical facility license." (*Id.*, p. 2).

WMCD thereafter submitted a renewed request for a WTA requirement variance for 2014 and 2015, naming a third back-up physician as well as adding the practice group of the three named physicians and another practice group as additional back-up should the three named physicians be unavailable. (*Motion to Stay*, attached Exh. 9 from administrative hearing, 7/24/15 letter from Gerhardstein & Branch, L.P.A., and attachments thereto). After reviewing the renewed variance application, the ODH director again denied WMCD's variance requests for 2012 through 2015. (*Motion to Stay*, attached Exh. 11 from administrative hearing, 9/25/15 denial letter from ODH director). The director therein stated that "[WMCD]'s provision of three named backup physicians does not meet my expectation that a variance provide the same level of patient health and safety that

a [WTA] with a local hospital assures for 24/7 back-up coverage." (*Id.*, p. 2). He also reiterated concerns that listing "un-named physicians in [a] group practice" does not satisfy statutory requirements, and that Miami Valley Hospital, "where the three named backup physicians have admitting privileges, has again shared its objection to any involvement with [WMCD]." (*Id.*, p. 2); (see also *Motion to Stay*, attached Exh. 16 from administrative hearing, 7/31/15 letter from Miami Valley Hospital President & CEO to ODH). By separate letter issued on the same date, the ODH director also proposed "to issue an Order revoking and refusing to renew" WMCD's ASF license due to the facility's lack of a WTA with a local hospital and ODH's denial of WMCD's request for a variance from the WTA requirement. (*Motion to Stay*, attached Exh. 12 from administrative hearing, 9/25/15 revocation letter from ODH director).

Following an April 26, 2016 administrative hearing on ODH's revocation/non-renewal proposal, the hearing examiner issued a report recommending that WMCD's ASF license be revoked and not renewed. (*Memo Opp.*, Exh. A, 9/2/16 "Report and Recommendation"). On November 30, 2016, the ODH director issued an "Adjudication Order refusing to renew and revoking [WMCD]'s health care facility [ASF] license" (12/1/16 *Notice of Appeal*, attached Exh. A, 11/30/16 "Adjudication Order," p. 3), to "become effective fifteen days after the date of this Adjudication Order" (*id.*, p. 4) – *i.e.*, on December 15, 2016.[1]

Appellant WMCD filed the instant appeal the day after the subject adjudication order was issued (*Notice of Appeal*), and soon thereafter sought to stay implementation of that order. (See *Emergency Motion to Suspend and Stay the Order of the Ohio Department of Health from which Appellant Appeals and Memorandum in Support*, filed on December 2, 2016). On December 12, 2016, this Court granted WMCD's motion, suspending and staying ODH's adjudication order pending a final decision on WMCD's appeal. (*Decision, Order and Entry Granting Appellant*

[1] As to certain of the history of the administrative regulations and statutes involved in this appeal, see Capital Care Network of Toledo v. Ohio Department of Health, 2015 Ohio Misc. Lexis 22536, affirmed, 2016-Ohio-5168, reversed, 2018-Ohio-440 and Women's Med. Prof'l Corp. v. Baird, 438 F. 3d 595 (6th Cir. 2006).

Women's Med Center of Dayton's Emergency Motion to Suspend and Stay the Order of the Ohio Department of Health). After the parties had filed their appellate briefs, however, both parties moved to stay this matter until the Ohio Supreme Court issued a decision in *Capital Care Network of Toledo v. State of Ohio Dep't of Health*, Supreme Court No. 2016-1348, a pending appeal involving related issues. (See 7/20/17 *Joint Motion to Stay this Case*). The Court granted that motion. (8/18/17 *Decision, Order and Entry Granting Joint Motion to Stay*).

As the Ohio Supreme Court has issued its decision in the relevant case, see *Capital Care Network of Toledo*, 2018-Ohio-440, reconsideration denied, 152 Ohio St. 3d 1449, 2018-Ohio-1600, 96 N.E.3d 302, the stay of proceedings in this matter has been lifted. (3/12/18 *Order and Entry Lifting Stay*). The Court now must decide the merits of the parties' competing positions.

THE PARTIES' CLAIMS

In its appellate brief, WMCD first argues that ODH's adjudication order should be reversed because it relies on a statute that violates the "Single Subject Provision" of the Ohio Constitution (*Appellant's Brief*, pp. 1, 5-9), and on regulations that have been superseded by statute. (*Id.*, pp. 9-11). In addition, WMCD contends that the denial of its variance request was invalid because WMCD was not afforded a hearing (*id.*, pp. 1, 11-14), and that the subject adjudication order is not supported by reliable, probative and substantial evidence. (*Id.*, pp. 1, 14-18). As to the latter point, WMCD urges that the evidence of record demonstrates that WMCD's variance proposal would "clearly achieve the same end of patient health and safety that a WTA with a local hospital would afford" (*id.*, p. 14), while no evidence supports the ODH director's speculative "concerns" to the contrary. (*Id.*, pp. 14-15). WMCD thus asks the Court to reverse ODH's Adjudication Order refusing to renew and revoking WMCD's ASF license, and WMCD further requests the Court reverse the ODH director's decision denying WMCD's variance request. (*Id.*, p. 1, 18).

In contrast, Appellee ODH asserts that the decision to revoke and not renew WMCD's license is supported by reliable, probative and substantial evidence because WMCD admittedly has neither a

WTA nor a current variance from the WTA requirement. (*Appellee's Brief*, pp. 1, 14-15). ODH maintains that the director's denial of WMCD's variance request is not subject to review by this Court, such that "any discussion" of the variance decision would be "wholly superfluous." (*Id.*, pp. 1, 4, 11-15). While urging that this Court "need not reach WMCD's constitutional attack" (*id.*, p. 1), ODH further insists that the relevant decision passes constitutional muster, because "either the rule or the statute" on which the decision relied must be valid. (*Id.*, pp. 4-11). ODH asks the Court to affirm the director's November 30, 2016 adjudication order. (*Id.*, p. 15).

LAW & ANALYSIS

Standard of Review Applicable to Administrative Appeals re Licensure

The applicable section of the Ohio Revised Code provides as follows, in pertinent part:

> Any party adversely affected by any order of an agency issued pursuant to an adjudication . . . revoking or suspending a license . . . may appeal from the order of the agency to the court of common pleas of the county in which the place of business of the licensee is located or the county in which the licensee is a resident . . .
>
> * * *
>
> The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of this finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law. The court shall award compensation for fees in accordance with section 2335.39 of the Revised Code to a prevailing party, other than an agency, in an appeal filed pursuant to this section.

R.C. § 119.12 (emphasis added).

According to the Ohio Supreme Court, "R.C. 119.12 requires a reviewing common pleas court to conduct two inquiries: a hybrid factual/legal inquiry and a purely legal inquiry." *Bartchy v. State Bd. of Educ.*, 120 Ohio St. 3d 205, 2008-Ohio-4826, ¶37, 896 N.E.2d 1096. As to the first form of inquiry, "determining whether an agency order is supported by reliable, probative and substantial

evidence essentially is a question of the absence or presence of the requisite quantum of evidence." *University of Cincinnati v. Conrad*, 63 Ohio St. 2d 108, 111, 407 N.E.2d 1265 (1980). The common pleas court "must give due deference to the administrative resolution of evidentiary conflicts." *Id.* "For example, when the evidence before the court consists of conflicting testimony of approximately equal weight, the court should defer to the determination of the administrative body, which, as the fact-finder, had the opportunity to observe the demeanor of the witnesses and weigh their credibility." *Id.*; see also *Robinson v. Ohio Dep't of Educ.*, 2012-Ohio-1982, ¶13, 971 N.E.2d 977 (2nd Dist.) (in deciding appeal under § 119.12, "[t]he trial court must give deference to the [agency]'s resolution of factual conflicts unless they are clearly unsupportable."); *Macon v. Ohio Dep't of Job & Family Servs.*, 10th Dist. No. 08A-1036, 2009-Ohio-3229, ¶20 (administrative hearing officer acts within province in making determinations as to witness credibility), appeal not allowed, 123 Ohio St. 3d 1496, 2009-Ohio-6015, 916 N.E.1d 1075, *cert. denied*, 562 U.S. 890, 131 S. Ct. 227 (2010).

A hearing officer also "may draw reasonable inferences and rely on his or her own common sense in evaluating the evidence." *State ex rel. Supreme Bumpers, Inc. v. Indus. Comm.*, 98 Ohio St. 3d 134, 2002-Ohio-7089, ¶69, 781 N.E.2d 170.

As defined by the Ohio Supreme Court,

> (1) "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) "Substantial" evidence is evidence with some weight; it must have importance and value.

Our Place, Inc. v. Ohio Liquor Control Comm., 63 Ohio St. 3d 570, 571, 589 N.E.2d 1303 (1992). "The credibility of witnesses generally is not subject to the 'reliable, probative and substantial standard,' but the establishment or non-establishment of the underlying violations is subject to such a standard." *Orth v. State Dep't of Educ.*, 10th Dist. No. 12AP-155, 2012-Ohio-4512, ¶21.

In addition to an evidentiary analysis, a reviewing court must conduct a second inquiry to determine whether the administrative decision is in accordance with law. See *Bartchy*, 2008-Ohio-4826, ¶38. Although the court "must construe the law on its own," *id.*, it also "must give due deference to an administrative interpretation formulated by an agency that has accumulated substantial expertise, and to which the General Assembly has delegated the responsibility of implementing the legislative command." *Bernard v. Unemployment Comp. Review Comm'n*, 136 Ohio St. 3d 264, 2013-Ohio-3121, ¶12, 994 N.E.2d 437; see also *N. Sanitary Landfill v. Nichols*, 14 Ohio App. 3d 331, 337, 471 N.E.2d 492 (2nd Dist. 1984). As such, "[a]n agency's findings of fact are presumed to be correct and must be deferred to by a reviewing court unless that court determines that the agency's findings are internally inconsistent, impeached by evidence of a prior inconsistent statement, rest upon improper inferences, or are otherwise unsupportable." *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St. 3d 466, 471, 613 N.E.2d 591 (1993). "[T]hat deference is owed no matter which way the agency rules . . . so long as the [agency's] interpretation is reasonable." *Bernard*, 2013-Ohio-3121, ¶12.[2]

Reviewing courts also must be mindful of Civ.R. 61, which provides that

> [n]o error or defect in any ruling or order . . . is ground . . . for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

That harmless error standard applies to an administrative body's misapplication of law. See *Madison Twp. Bd. of Trustees v. Donohoo*, 2nd Dist. No. 14007, 1994 Ohio App. LEXIS 4595, at *10 (Oct. 12, 1994) (reinstating administrative body's decision despite its application of wrong code section where "the error was harmless" because correct code section was "substantially similar").

[2] "And where the agency's decision is supported by sufficient evidence and the law, the common pleas court lacks authority to review the agency's exercise of discretion, even if its decision is 'admittedly harsh.'" Capital Care Network of Toledo, 2018-Ohio-440, ¶25, quoting Henry's Café, Inc. v. Bd. Of Liquor Control, 170 Ohio St. 233, 236-37, 163 N.E. 2d 678 (1959).

Law Governing Licensing of Ambulatory Surgical Facilities

Since September 29, 2013, the Ohio Revised Code has imposed the following requirements as to any "ambulatory surgical facility" operating in this state:

> (A) Except as provided in division (C) of this section, an ambulatory surgical facility shall have a written transfer agreement with a local hospital that specifies an effective procedure for the safe and immediate transfer of patients from the facility to the hospital when medical care beyond the care that can be provided at the ambulatory surgical facility is necessary, including when emergency situations occur or medical complications arise. A copy of the agreement shall be filed with the director of health.
>
> (B) An ambulatory surgical facility shall update a written transfer agreement every two years and file a copy of the updated agreement with the director.
>
> (C) The requirement for a written transfer agreement between an ambulatory surgical facility and a hospital does not apply if either of the following is the case:
>
> (1) The facility is a provider-based entity, as defined in 42 C.F.R. 413.65(a)(2), of a hospital and the facility's policies and procedures to address situations when care beyond the care that can be provided at the ambulatory surgical facility are approved by the governing body of the facility's parent hospital and implemented;
>
> (2) The director of health has, pursuant to the procedure specified in section 3702.304 of the Revised Code, granted the facility a variance from the requirement.

R.C. § 3702.303(emphasis added).

As to the "variance" exception referenced at R.C. § 3702.303(C)(2), the Code further provides as follows:

> (A)
>
> (1) The director of health may grant a variance from the written transfer agreement requirement of section 3702.303 of the Revised Code if the ambulatory surgical facility submits to the director a complete variance application, prescribed by the director, and the director determines after reviewing the application that the facility is capable of achieving the purpose

of a written transfer agreement in the absence of one. The director's determination is final.

(2) Not later than sixty days after receiving a variance application from an ambulatory surgical facility, the director shall grant or deny the variance. A variance application that has not been approved within sixty days is considered denied.

(B) A variance application is complete for purposes of division (A)(1) of this section if it contains or includes as attachments all of the following:

(1) A statement explaining why application of the requirement would cause the facility undue hardship and why the variance will not jeopardize the health and safety of any patient;

(2) A letter, contract, or memorandum of understanding signed by the facility and one or more consulting physicians who have admitting privileges at a minimum of one local hospital, memorializing the physician or physicians' agreement to provide back-up coverage when medical care beyond the level the facility can provide is necessary;

(3) For each consulting physician described in division (B)(2) of this section:

(a) A signed statement in which the physician attests that the physician is familiar with the facility and its operations, and agrees to provide notice to the facility of any changes in the physician's ability to provide back-up coverage;

(b) The estimated travel time from the physician's main residence or office to each local hospital where the physician has admitting privileges;

(c) Written verification that the facility has a record of the name, telephone numbers, and practice specialties of the physician;

(d) Written verification from the state medical board that the physician possesses a valid certificate to practice medicine and surgery or osteopathic medicine and surgery issued under Chapter 4731. of the Revised Code;

(e) Documented verification that each hospital at which the physician has admitting privileges has been

informed in writing by the physician that the physician is a consulting physician for the ambulatory surgical facility and has agreed to provide back-up coverage for the facility when medical care beyond the care the facility can provide is necessary.

(4) A copy of the facility's operating procedures or protocols that, at a minimum, do all of the following:

(a) Address how back-up coverage by consulting physicians is to occur, including how back-up coverage is to occur when consulting physicians are temporarily unavailable;

(b) Specify that each consulting physician is required to notify the facility, without delay, when the physician is unable to expeditiously admit patients to a local hospital and provide for continuity of patient care;

(c) Specify that a patient's medical record maintained by the facility must be transferred contemporaneously with the patient when the patient is transferred from the facility to a hospital.

(5) Any other information the director considers necessary.

(C) The director's decision to grant, refuse, or rescind a variance is final.

(D) The director shall consider each application for a variance independently without regard to any decision the director may have made on a prior occasion to grant or deny a variance to that ambulatory surgical facility or any other facility.

R.C. § 3702.304 (emphasis added).

The regulations promulgated as to those licensing requirements contain the following additional provisions relevant to any WTA:

(E) Each ASF shall have a written transfer agreement with a hospital for transfer of patients in the event of medical complications, emergency situations, and for other needs as they arise.

(1) A copy of the written transfer agreement shall be filed with the ASF's application for license renewal in accordance with paragraph (B) of rule 3701-83-04 of the Administrative Code.

> (2) A formal agreement is not required in those instances where the licensed ASF is a provider-based entity of a hospital and the ASF policies and procedures to accommodate medical complications, emergency situations, and for other needs as they arise are in place and approved by the governing body of the parent hospital.

O.A.C. § 3701-83-19.

Merits of Women's Med Center's Appeal

This is an abortion regulation case. WMCD has elected to pursue in federal court its federal constitutional claims arising in connection with the denial of its requested variance and the revocation and non-renewal of its license. *Appellant Brief*, p.5 n.2. Consequently, the issues presented in this administrative appeal are narrow, focusing predominantly on matters of settled administrative law. As to the single constitutional law argument raised in this appeal, attacking the WTA requirements as violative of Ohio Constitution, Article II, Section 15(D) ("[n]o bill shall contain more than one subject, which shall be clearly expressed in its title"), precedent dictates that " this court will not reach constitutional issues unless absolutely necessary." Capital Care Network of Toledo v. Ohio Dept. of Health, 2018-Ohio-440, ¶31; State ex rel Mason v. Griffin, 104 Ohio St. 3d. 279, 2004-Ohio-6384, ¶20, 819 N.E.2d 644 ("courts decide constitutional issues only when absolutely necessary.") Indeed, Capital Care quoted Chief Justice Roberts' admonition from PDK Laboratories, Inc. v. United States Drug Enforcement Admin., 362 F.3d 786, 799, 360 U.S. App. D.C. 344 (D.C. Cir 2004) (Roberts, J., concurring in part and concurring in judgment): "[I]f it is not necessary to decide more, it is necessary not to decide more." Capital Care, 2018-Ohio-440, ¶31.

Heeding this restraint, it is uncontroverted that WMCD has no WTA, nor any variance nor waiver of the WTA requirement. Hence, the director and ODH revoked and did not renew WMCD's licensure, following a hearing on that action, in a manner that was supported by reliable, probative, and substantial evidence and in accordance with the law. R.C. 119.12. The director's November 30,

2016 Adjudication Order relied upon, as independent bases, R.C. 3702.303(A) and O.A.C. 3701-83-19. To avoid this outcome, WMCD raises the following arguments:

(1) The statute is unconstitutional on single-subject grounds and the regulatory scheme was superseded by the invalid statutory scheme creating an utter void of enforceable laws as to WTAs; and

(2) The director's refusal to grant a variance is unsupported by any evidence, let alone reliable, probative and substantial evidence.

Within the parameters set forth above, the best place to begin the court's analysis is WMCD's arguments concerning the denial by the director of WMCD's application for a variance.

THE COURT LACKS JURISDICTION OVER ISSUES OR CLAIMS PERTAINING TO THE DIRECTOR'S DENIAL OF THE VARIANCE UNDER EITHER OR BOTH THE STATUTE AND REGULATION

WMCD argues that the director's denial of the requested variance equated to an adjudication order, requiring a hearing under R.C.119.06 and giving rise to appellate review. In response, ODH states that O.A.C. 3701-83-14(F) provides that the "refusal of the director to grant a variance or waiver, in whole or in part, shall be final and shall not be construed as creating any rights to a hearing under Chapter 119 of the Revised Code."[3] Relying on its assertion that the statutes superseded the regulations, WMCD counters that R.C. 3702.304(C) states: " The director's decision to grant, refuse, or rescind a variance is final." WMCD proposes that the statute, but not the regulation, envisions a hearing and an appeal, because the statute omits that language of the regulation stating "and shall not be construed as creating any rights to a hearing under Chapter 119 of the Revised Code." From this omission, WMCD infers a legislative intent to allow such appeals.

The determination of whether the September 25 variance denial letter constitutes an adjudication order is significant. If this letter is deemed an adjudication order, "it is of no force and

[3] See Women's Med. Prof'l Corp. v. Baird, 438 F.3d 595, 599 (6th Cir. 2006) (variance within director's sole discretion with no rights to a hearing; addressing O.A.C. 3701-83-14(D) and (E)).

effect and invalid pursuant to R.C. 119.06, since there was no opportunity for a hearing afforded [to WMCD] prior to issuance of the notice." Davison v. Andrews, 10th Dist. Franklin No. 76AP-363, 1976 Ohio App. LEXIS 7422, *6-7 (Oct. 5, 1976). However, if the variance denial is not an adjudication, it would be immaterial that the DOH did not provide WMCD with the opportunity for a hearing before denying its variance request. State ex rel. Bd. of Edn. v. State Bd. of Edn., 53 Ohio St.2d 173, 177, 373 N.E.2d 1238 (1978). "Adjudication" is defined as "the determination by the highest or ultimate authority of an agency of the rights, duties, privileges, benefits, or legal relationships of a specified person, but does not include the issuance of a license in response to an application with respect to which no question is raised, nor other acts of a ministerial nature." R.C. 119.01(D).

Upon review, the Court is unconvinced that the letter denying WMCD its requested variance constitutes an adjudication order within the meaning of the statute. In construing the language of R.C. 119.01(D), the Ohio Supreme Court has held that a "'refusal to act does not determine any rights, duties, privileges, benefits, or legal relationships * * *' of a complaining party." State ex rel. Bd. of Edn. v. State Bd. of Edn., 53 Ohio St.2d 173, 177, 373 N.E.2d 1238 (1978) (internal citation omitted) (holding that the refusal to grant the school district an additional exception under R.C. 3311.29 "was not an 'adjudication' within the meaning of R.C. 119.01(D)."). Therefore, the refusal to grant WMCD a variance of the WTA requirement did not determine any rights, duties, privileges, benefits, or legal relationships of WMCD. Moreover, in addressing this specific issue, at least one common pleas court has held that the denial of a variance is not an adjudication:

> The Clinic objects to the Magistrate's decision that the Clinic had no right to a due process hearing as to the Director's decision whether to grant or deny a variance from the requirement for a written transfer agreement. * * *
>
> In this case, prior to deprivation of the license and prior to deprivation of its variance the clinic received notice and was given the opportunity to present evidence for the Director's consideration as to the variance and present evidence to the hearing officer with respect to the licensing decision. Under Ohio Admin. Code 3701-83-14, the Director's refusal to grant a variance "shall be final and shall not be considered as

> creating any rights to a hearing under R.C. Chapter 119." This is an appeal under R.C. 119.12. This Court has no jurisdiction in this appeal to review either the decision of the Director or the procedure by which he made his decision apart from those matters committed to the administrative proceeding with respect to the license. The Court does not, accordingly, determine whether the clinic had a due process right to a pre-deprivation hearing with regard to its variance or whether the procedure employed with respect to no face-to-face hearing by the Director violated due process. Those matters are not committed to this Court in this proceeding and the Court has no jurisdiction to rule upon them.

Lebanon Road Surgery Center v. Dept. of Health, Hamilton C.P. No. A1400502 (Aug. 15, 2014) (attached to *Appellant's Brief*). Thus, as the denial of the variance cannot be deemed an "adjudication" within the meaning of R.C. 119.01(D), the Court lacks jurisdiction under R.C. 119.12. to review this decision. Springfield Fireworks, Inc. v. Ohio Dept. of Commerce, 10th Dist. Franklin No. 03AP-330, 2003-Ohio-6940, 2003-Ohio-6940, ¶ 25.

The Court further concurs in ODH's assessment that the codification, although using different verbiage than the regulation, was not intended to abolish nor diminish the administrative rules. Rather, the legislature intended to reinforce the regulation and vice-versa. "An administrative rule is designed to accomplish the ends sought by the legislation enacted by the General Assembly, and an administrative rule does not conflict with a statute to the extent that it provides a reasonable, supportable interpretation of it." Ohio Jur. 3d, Administrative Law § 40, pp. 212-213 (2016). "Thus, administrative rules are valid unless they are unreasonable or in clear conflict with the statutory intent of the legislation governing the subject matter, and the proper subject for determination is whether the rule contravenes an express provision of the statute." *Id.* at p. 213. "An administrative rule is not inconsistent with a statute unless the rule contravenes or is in derogation of some express provision of the statute." *Id.* at p. 214. "The finality of administrative action is a deterrent to judicial review, in that a statute may declare an administrative action to be final and, at least to some extent, preclude review by a court. No direct appeal may lie where a law provides that certain administrative orders or decisions shall be final." *Id.* at 144, pp. 356-357. The Court discerns that, upon the plain language used by the statute and the regulation, final means final. State v. Palmer, 2010-Ohio-2421, ¶20 (10th

Dist.). Nothing in the language used nor the legislative enactment context alters this plain meaning. The Court is further persuaded by ODH's assertion that where the General Assembly has granted hearing rights, it has done so explicitly; consequently, the Court should therefore refrain from inserting such language into R.C. 3702.304. See, e.g., R.C. 4731.22(C); R.C. 4723.28(C); R.C. 3721.03(B); R.C. 3702.20. The director's discretion as to granting or denying a variance is final, without the opportunity for a hearing and not subject to direct appellate review, whether the Court relies upon either the statute, the rule, or both. Consequently, the Court simply lacks jurisdiction to address WMCD's claims and arguments regarding the variance determination.[4]

Even if the denial of a variance created an appealable issue, the case before this Court is limited to the director's refusal to renew and his revocation of WMCD's license. As stated in WMCD's *Appellant's Brief*, p. 5, "[t]he Director ruled on November 30, 2016, affirming the hearing examiner's recommendations, and issuing an adjudication order refusing to renew and revoking the license. (Adjudication Order, RE p. 115). It is this order from which this appeal is made." WMCD attempts to bootstrap the variance issue onto this appeal because it possessed neither a WTA nor a variance of the WTA requirement. The Court is not convinced that this bootstrapping is proper. Rather, it would seem that an appeal effort ought to have been pursued from the denial of the variance, if, indeed, such an appeal right existed. That such an appeal was not taken perhaps reflects that no such appeal is allowed. In any event, the Court does not see how a viable appeal of the revocation/non-renewal adjudication would open more avenues for contesting the denial of the variance than an effort to appeal the variance itself. The Court concludes, therefore, that it lacks jurisdiction over the variance related issues. This conclusion significantly narrows WMCD's remaining arguments.

[4] It follows that WMCD's additional arguments premised upon the alleged impropriety of the variance denial rest upon an unsound foundation. The director's denial of the variance rests within his discretion and is not subject to direct judicial review.

With the issue of the variance resolved, the analysis must next turn to the significance of the director's use of both statutory grounds and administrative rule grounds as independent grounds to revoke and deny WMCD's license.

O.A.C. 3701-83-19 AND R.C. 3702.303 ARE SEPARATE AND INDEPENDENT BASES FOR THE REFUSAL TO RENEW AND REVOCATION OF WMCD'S ASF LICENSE

a. O.A.C. 3701-83-19(E)

WMCD argues that O.A.C. 3701-83-19 and 3701-83-14 are unenforceable because they conflict with R.C. 3702.303 and 3702.304. (*Appellant Brief*, pp. 9-11) ODH responds to this argument by positing that, if the statutory scheme is invalid, then no conflict exists between the WTA regulations and the statutory enactments addressing the same subject matter. (*Appellee Brief*, pp. 4-8). The Court agrees with ODH that no conflict exists between the statute and the administrative regulations; thus, if the statute is deemed invalid, that would leave only the administrative regulations as operative. Also, as ODH aptly notes, the director cited both the statutory scheme and the administrative regulations as separate grounds for his ruling. Either suffices if valid.

"A decision overruling a former statute as being unconstitutional is retrospective in its operation, and the effect is not that the former was bad law, but that it never was the law." Roberts v. Treasurer, 147 Ohio App. 3d 403 ¶20 (10th Dist. 2001), citing Peerless Elec. Co. v. Bowers, 164 Ohio St. 209, 210 (Ohio 1955). Applying this proposition, ODH argues that the invalidity of the statute, hypothetically assuming unconstitutionality, makes an analysis of the consistency between the two sources unnecessary. WMCD counters by asserting that, at the time the director ruled, both schemes were in place and both were unenforceable. WMCD notes that it was unable to submit a variance request without complying with HB 59's comprehensive variance provisions, R.C. 3702.304, nor did it have the right to request a waiver of the WTA rule.

WMCD's argument focuses on the issue of whether it would have been successful in its quest for a variance in the event that the statutory scheme had not existed, relegating the variance analysis

to only the administrative framework. It is solely within the director's discretion, however, as to whether a variance should be granted. Baird, 438 F. 3d at 599, citing O.A.C 3701-83-14(D). "The director's refusal to grant a variance or waiver does not create any rights to a hearing under Ohio law." *Id.*, citing 3701-83-14(E). As previously concluded above, the variance issue is beyond this court's jurisdiction, pursuant to the finality given to the director's variance determination by the express and plain language of both the administrative rule and the statute.

As to the remaining issue, (1) the director, for his revocation adjudication, relied on both the statutory scheme and the regulatory provisions; (2) the alleged invalidity of the statutory scheme would relegate the grounds for the director's decision to only the regulatory framework; (3) the surviving regulatory framework is valid; (4) WMCD has not demonstrated any meritorious defect in the director's application of the regulatory framework for the license non-renewal and revocation; and (5) the suggestion that, but for the statutory requirements, the director's conclusion under the regulatory framework would have been different amounts to mere conjecture. WMCD's argument that no valid construct existed for the director's final determination is without merit.

b. R.C. 3702.303(A)

WMCD argues that the WTA requirement codified in R.C. 3702.303 is void and unenforceable as HB 59 violates the single-subject clause of Article II, Section 15(D) of the Ohio Constitution. However, based upon the foregoing analysis, the Court finds that it is unnecessary to address this constitutional issue because ODH had the authority to revoke and refuse to renew WMCD's ASF license based upon its failure to comply with O.A.C. 3701-83-19(E). See Capital Care Network of Toledo v. Ohio Dept. of Health, 2018-Ohio-440, ¶¶31, 34. In short, the alternative grounds for the director's decision insulates that decision from a constitutional attack on the statutory grounds.

Therefore, upon review, the record demonstrates that WMCD violated O.A.C. 3701-83-19 and R.C. 3702.303 by failing to secure a required WTA, and DOH properly determined that WMCD

did not meet the licensing requirements of O.A.C. Chapter 3701-83. The Court finds that the director's Adjudication Order is supported by substantial, reliable, and probative evidence and is in accordance with the law. Accordingly, pursuant to R.C. 119.12(M), the Court hereby affirms the Adjudication Order issued by the DOH on November 30, 2016, refusing to renew and revoking WMCD's ASF license.

Pursuant to R.C. 119.12(E), "[i]f an appeal is taken from the judgment of the [common pleas] court and the court has previously granted a suspension of the agency's order as provided in this section, the suspension of the agency's order shall not be vacated and shall be given full force and effect until the matter is finally adjudicated." On December 12, 2016, this Court stayed and suspended execution of DOH's Adjudication Order. See *Decision, Order and Entry Granting Appellant Women's Med Center of Dayton's Emergency Motion to Suspend and Stay the Order of the Ohio Department of Health*. Accordingly, the stay remains in effect until the final adjudication of WMCD's appeal. See, e.g., Sutton v. State Pharm. Bd. of Ohio, 11th Dist. Trumbull No. 2008-T-0053, 2008-Ohio-6887, ¶¶ 27-29 (holding that appellant's administrative appeal was not "'finally adjudicated'" under R.C. 119.12 until the Ohio Supreme Court declined jurisdiction and ruled upon appellant's motion to reconsider its denial of jurisdiction); Giovanetti v. Ohio State Dental Bd., 63 Ohio App.3d 262, 265, 578 N.E.2d 551 (7th Dist. 1991) ("if a suspension of an order is initially granted by the common pleas court and a timely notice of appeal is filed from the judgment of the common pleas court, then the original suspension of the order of the [administrative agency] shall continue in effect until completion of the appellate process.").

CONCLUSION

For the foregoing reasons, the Court hereby affirms DOH's Adjudication Order revoking and refusing to renew WMCD's ASF license. The stay issued on December 12, 2016 will expire thirty (30) days after the date of this decision unless an appeal is filed in accordance with R.C. 119.12(N).

SO ORDERED:

JUDGE MARY WISEMAN

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General Divison

Montgomery County Common Pleas Court

41 N. Perry Street, Dayton, Ohio 45422

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Case Number: 2016 CV 06088

Case Title: WOMENS MED CENTER OF DAYTON vs STATE OF OHIO DEPARTMENT OF HEALTH

So Ordered

Mary Wiseman