

**BEFORE THE OFFICE OF JUDGES**

**IN RE: ROANE GENERAL HOSPITAL, INC.**

**CON File No. 21-5-12124-P  
Appeal Docket No. 22-HC-02**

**RESPONSE BRIEF OF THE WEST VIRGINIA  
HEALTH CARE AUTHORITY**

Comes now the West Virginia Health Care Authority ("Authority"), by counsel, B. Allen Campbell, Senior Assistant Attorney General, pursuant to the Office of Judges' ("OOJ") Scheduling Order dated June 6, 2022, and submits the following Response Brief in the above-styled matter. The Authority responds to the Appeal Brief filed by Minnie Hamilton Health Care Center, Inc. d/b/a Minnie Hamilton Health System ("MMHC") June 24, 2022, in which MMHC seeks reversal of an adverse Decision approving an application for a Certificate of Need ("CON") submitted by Roane General Hospital, Inc. ("RGH") to relocate one of its on-campus rural health clinics to an off-campus site in Arnoldsburg, Calhoun County, West Virginia. This relocation is reviewable by the Authority because it results in the development of an ambulatory health care facility.

**PROCEDURAL HISTORY AND STATEMENT OF FACTS**

West Virginia's CON program is created pursuant to West Virginia Code § 16-2D-1, *et seq.* These code sections provide that any proposed new health service as defined therein, shall be subject to review by the Authority prior to the offering or development of the service. See W. Va. Code § 16-2D-3(a)(1); W. Va. Code § 16-2D-8.

On July 12, 2021, the Authority received a Letter of Intent from RGH. (Exhibit 1) The Application for the project and the appropriate filing fees were received July 22, 2021, and the Application was deemed complete on July 30, 2021. (Exhibits 3, 5). In its Application RGH submitted a description of the project.

RGH operates a 25 bed critical access hospital ("CAH") with a 35 bed distinct part skilled nursing facility located in Spencer, Roane County, West Virginia. In addition to inpatient and outpatient hospital services, RHG operated four rural health clinics ("RHC"), two on the hospital campus and two off the hospital campus. RGH proposed moving one of its on-campus RHCs to an off-campus site in Arnoldsburg, Calhoun County, West Virginia. The relocation would result in the development of an ambulatory health care facility. Additionally, RGH proposed rotating specialists through the clinic one day a week.

RGH submitted that the objectives of the project were to improve the provision of primary care and specialty practitioner services to residents of Arnoldsburg and related zip codes through the relocation of an existing RHC. This would provide more accessible services for many patients of RGH who reside in those zip codes. (Exhibit 3, Section C).

The Authority issued a Notice of Review on August 2, 2021 (Exhibit 6). On August 26, 2021, the Authority received a Notice of Appearance, Request for Affected Party Status, and Request for Administrative Hearing on Behalf of MHHC. (Exhibit 7). On August 27, 2021, the Authority received a Notice of Appearance on behalf of RGH. (Exhibit 9). The Authority issued the Hearing Order (Exhibit 10) and the Notice of Prehearing Conference and Administrative Hearing (Exhibit 11) on September 14, 2021. RGH filed Replacement Pages to the Application on October 6, 2021. (Exhibit 12). Pursuant to the discovery schedule, the parties engaged in discovery. The Authority

received MMHC's Motion to Compel on December 1, 2021, (Exhibit 18) and RGH's Response to the Motion on December 6, 2021 (Exhibit 19). On December 7, 2021, the Authority held a prehearing conference at which the parties exchanged Witness Lists and Exhibits. Additionally, the Authority heard arguments regarding the Motion to Compel. The Motion to Compel was granted in part and denied in part.

A public hearing was held on December 14, 2021, at which both parties were present and were allowed to present evidence, call witnesses, and present their arguments. At the conclusion of the hearing, the parties were given the opportunity to file written briefs arguing their positions and present proposed decisions for the Authority's consideration. After considering the substantial evidence of record, the Authority approved the Application for CON in a Decision dated April 29, 2022.

MMHC filed a Request for Review with the Office of Judges on, or about May 25, 2022. The Office of Judges issued a Scheduling Order on June 6, 2022. The Authority files this Response Brief pursuant to that Scheduling Order.

### **STANDARD OF REVIEW**

The standard of review for a decision of the Authority by a Circuit Court is set forth in W. Va. Code § 16-2D-16 which provides, in pertinent part, that an appeal be processed "in accordance with the provisions governing the judicial review of contested administrative cases in article five, chapter twenty-nine-a of this code." See also *Princeton Community Hospital v. State Health Planning and Development Agency*, 174 W.Va. 558, 328 S.E.2d 164 (1985). The specific standard of review is found at W. Va. Code § 29A-5-4(g), which provides

(g) The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate, or modify the order or

decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision, or order are

- (1) In violation of the constitutional or statutory provision; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative, and substantial evidence of the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Consequently, the Circuit Court may not re-weigh the evidence but must limit the inquiry to the existence of substantial evidence to support the Authority's prior Decision. Only if the evidence does not in any reasonable way support the findings of fact or if the findings of fact do not support the conclusion of law, will the decision be found to be clearly erroneous and subject to reversal. *See West Virginia Health Care Cost Review Authority v. Boone Memorial Hospital*, 196 W.Va. 326, 472 S.E.2d 411 (1996).

Additionally, the West Virginia Administrative Procedures Act ("APA") provides that

Every final order or decision rendered by any agency in a contested case shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law . . . Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings . . . .

W. Va. Code § 29A-5-3.

The West Virginia Supreme Court of Appeals has held that W. Va. Code § 29A-5-

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contemplates a reasoned, articulate decision . . . the ideal order would set forth (1) the agency's basic value judgments which are dictated by its interpretation of the statutory purposes; (2) the random facts which have been presented to the agency in support of various positions which the agency determines to be relevant to the agency decision; (3) the

methodology by which those facts have been evaluated . . . (4) an integrating theory which organizes the random evidentiary facts in an intelligent and comprehensible way; and (5) a conclusion based upon the theory developed, supported by the facts, concerning whether a proposed action is in furtherance of the purposes set forth in the statute, along with an explanation of any change in agency policy from former practice.

*Citizens Bank of Weirton v. WV Bd. Of Banking and Financial Institutions*, 160 W. Va. 220, 230, 233 S.E.2d 719, 726 (1977). While the Court identified this standard as the ideal, it was careful to curtail this stringent requirement for every administrative decision. The Court clearly stated it did not intend to imply that this ideal order is required in every case. Rather, the complexity of the agency opinion should be in keeping with the complexity of the case. *Id.* The Court held that at its essence W. Va. Code § 29A-5-3 contemplates a decision in which the agency sets forth the underlying evidentiary facts which lead the agency to its conclusion, along with an explanation of the methodology by which any complex scientific, statistical, or economic evidence was evaluated. *Id.*

## **ARGUMENT**

Petitioner argues the Authority's Decision in this matter is "fundamentally flawed" because it failed to include a reasoned, articulate decision which sets forth the underlying evidentiary facts which led the Authority to its conclusion. Petitioner posits that the Authority has not made an "articulate decision" because in several instances it makes a conclusory statement that after a "careful review and consideration of the facts, evidence, and arguments of both parties" the Authority found the Applicant had complied with the Standards. Petitioner asserts that by making this conclusory statement, the Authority "arrogates [sic] its responsibility to examine and weigh underlying evidentiary facts which led the agency to its conclusions." Petitioner's arguments are entirely without merit. The Authority's Decision complied both with the requirements of the APA and the caselaw



promulgated by the West Virginia Supreme Court of Appeals. A review of the Decision shows the Authority set forth the underlying facts along with an explanation of how the evidence was evaluated.

Petitioner essentially asserts the Authority's Decision did not comply with the APA. Specifically, Petitioner cites examples on pages 11, 18, 30, 37, and 47, to support this contention. Petitioner states at these places in the Decision the Authority did not make an articulate decision. Rather, it simply made findings citing a conclusory statement that it had made a "careful review and consideration of facts, evidence, and arguments of both parties."

The content of what is required in administrative decisions is found in West Virginia Code § 29A-5-3 which requires the following:

Every final order or decision rendered by any agency in a contested case shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. Prior to the rendering of any final order or decision, any party may propose findings of fact and conclusions of law. If proposed, all other parties shall be given the opportunity to except to such proposed findings and conclusions, and the final order or decision shall include a ruling on each proposed finding. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. A copy of the order or decision and accompanying findings and conclusions shall be served upon each party and his attorney of record, if any, in person or by registered mail.

The West Virginia Supreme Court of Appeals, in its decision in *Muscatelli v. Cline*, 196 W. Va. 588, 598; 474 S.E. 2d 518, 528 (1996), discussed the substance of administrative decisions.

Nothing in the findings of fact of the Commissioner advises this Court why the Commissioner resolved this conflict in the testimony of the trooper in favor of the direct testimony and disregarded the cross examination. We have no separate evaluation of the evidence by the hearing examiner who observed the demeanor of the witness on this critical issue before us. We

have said, with respect to decisions of administrative agencies following from findings of fact and conclusions of law proposed by opposing parties, that the agency must rule on the issues raised by the opposing parties with sufficient clarity to assure a reviewing court that all those findings have been considered and dealt with, not overlooked or concealed. *See, St. Mary's Hospital v. State Health Planning and Development Agency*, 178 W. Va. 792, 364 S.E.2d. 805 (1987). We have also said that in requiring an order by an agency in a contested case to be accompanied by findings of fact and conclusions of law, "the law contemplates a reasoned, articulate decision which sets forth the underlying evidentiary facts which lead the agency to its conclusions . . . ." *Syl. pt. 2, in part, Citizens Bank v. W. Va. Board of Banking and Financial Institutions*, 160 W. Va. 220, 233 S.E.2d 719 (1977). The purpose of these rules is not to burden an administrative agency with proving or recording the obvious. **The purpose is to allow a reviewing court (and the public) to ascertain that the critical issues before the agency have indeed been considered and weighed and not overlooked or concealed**, Indeed a reviewing court cannot accord to agency findings the deference to which they are entitled unless such attention is given to at least the critical facts upon which the agency has acted. (Emphasis added).

Throughout the Decision the Authority sets forth each and every required element of the applicable Standards, the Applicant's explanation for why it has met that particular criterion of the standard, any argument from the Affected Party as to why it believes the Applicant has not met the Standard, a determination of whether the Applicant has shown it has met the Standard's requirements, and why it accepted or rejected arguments from the parties.

In addressing Petitioner's first instance on page 11, the conclusion by the Authority concerned the proposed service area. On page 9 of the Decision the Authority sets forth the arguments of RGH. On page 10 of the Decision the Authority sets forth the arguments of MMHC. However, contrary to Petitioner's assertions, the Authority did not simply begin and end its analysis with a conclusory statement. After stating the parties' positions the Authority found the Applicant had properly calculated the service area in accordance with the standards. The Authority set forth the relevant part of the Standard, and found that

Ambulatory Care Standards do not impose a county-wide service area requirement. The Authority went on to state that it had recently approved a primary care-related CON application which encompassed a single zip code service area as well as other CON applications with zip code-specific service areas throughout the years. The Authority made citations to those Decisions. The Authority further found, citing the Standards, that Applicants are required to formulate a service area "from which the center is expected to draw patients." The Authority found in the instant case that the zip codes selected were the top three, non-Roane County, zip codes of patients served by RGH at its on-campus RHC's. The Authority found these three zip codes rationally and objectively reflect "the expected areas around the ambulatory care facility from which the center is expected to draw patients." Moreover, the Authority found that Raymona Kinneberg, who was recognized as an Expert Witness in Health Planning, testified that a zip code analysis is her usual and preferred method to delineate service areas for purposes of primary care related CON applications. (Ex. 25, pp. 23-24). Additionally, Ms. Kinneberg testified that the web site utilized for zip code data is the most reliable data available for zip codes, and is what is currently available for this information. (Exhibit 25, p. 73). This is certainly sufficient to ascertain that the critical issues before the Authority have been considered and weighed and not overlooked.

Pages 12 through 17 discuss need methodology in Primary Care, Cardiology, and for a General Surgeon. The Authority extensively analyzed the need methodologies submitted by RGH as well as MMHC's argument that the need calculations are flawed because of the population data. The Authority did note that after careful review and consideration of the facts, evidence, and argument of both parties, it determined RGH



reasonably and rationally calculated the service area population and properly established the expected utilization for the health services proposed in the Application. However, this was far from a simple conclusory statement. The Authority found that RGH reasonably and properly calculated the then-current and five-year projected population of the service area based on the most recent data which was publicly made available by the Authority and other readily obtainable, publicly available information. The Authority noted that aside from proclaiming it is of questionable accuracy and unverified, MMHC failed to present any testimony or offer any evidence to refute the credibility of the zip code reference utilized by RGH. Moreover, the Authority expressly made a finding it rejected MMHC's inference that the Application's population analysis is flawed because the zip code reference was not specifically identified as a source in the application. The Authority found the existence/identity of the zip code reference, as well as the rationale for its use to interpolate the Authority provided population data, was fully established in the record for consideration. The Authority goes on for two additional paragraphs on page 19 explaining why MMHC's contention that the Application improperly omitted population projections for the years 2022 through 2025 is without merit. Again, this is more than sufficient to ascertain that the critical issues before the Authority were considered and weighed and not overlooked.

On page 30, the Authority finds that RGH has sufficiently established that its project will be adequately staffed. The Authority notes MMHC argued that the staffing levels encompassed by the financial projection set forth at Exhibit N-2 of the Application are inadequate for the patient volume levels projected in year three of the project's

operation, and may result in quality and consistency of care issues. The Authority found MMHC's assertion to be speculative at best.

On page 37, the Authority addressed its findings regarding the Financial Projections. From pages 32 to 36 the Authority recounts the parties' arguments regarding the Financial Projections, including testimony from witnesses from RGH and MMHC. The Authority's Decision does state that after a careful review and consideration of the facts, evidence, and arguments of the parties, it finds the Financial Projection was based upon reasonable and historical utilization, expense, and revenue assumptions. However, the Authority goes on to find that the Financial Projection, taken in conjunction with the project's cost-based reimbursement and the financial health of RGH, demonstrates that the project satisfies the financial feasibility requirements of the Ambulatory Care Centers Standards. The Authority goes on for another four paragraphs explaining its findings and why it rejected MMHC's arguments.

Finally, on page 47, the Authority stated that after careful review and consideration of the facts, evidence, and arguments of both parties, the Authority finds the project represents the superior alternative in terms of cost, efficiency, and appropriateness, and that the development of alternatives is not practicable. The Authority then goes on in the next two paragraphs to explain why it believes the proposed project is the superior alternative, and cites evidence of record to support its finding.

The Authority issued a 54 page Decision setting forth the correct Standards, analyzing the Application, setting forth both parties' positions, citing evidence and testimony from the record, and determining if the application complied with the Standards. Contrary to Petitioner's assertions, the Authority did not simply make conclusory

statements regarding findings without setting forth the parties' positions, analyzing the testimony and evidence, and setting forth an explanation of its findings. At each and every instant cited by Petitioner, the Authority's Decision is sufficient to ascertain that the critical issues before the Authority were considered and weighed and not overlooked or concealed. The Decision does not indicate the Authority abrogated its responsibility in any manner. The Decision complies with the APA and relevant caselaw. The Decision details the facts and arguments in the matter and the Authority made explicit findings. Consequently, the Authority's Decision complies with the requirements of the APA and *Muscatelli supra*.

Notably, Petitioner's appeal does not assert any assignments of error other than the Authority's Decision is flawed because it makes summary declarations based upon "careful review and consideration of the facts, evidence, and arguments of the parties." Petitioner's references to service area, need methodology, zip code utilization, and financial projections are all offered as examples of how the Decision is allegedly deficient. Petitioner makes no assignment of error regarding these issues individually. For the reasons stated more fully above, the Authority's Decision comports with the requirements of the APA, is not in violation of constitutional and statutory provisions; not in excess of the statutory authority or jurisdiction of the Authority; not made upon unlawful procedures; not affected by other errors of law; not clearly wrong in view of the reliable, probative, and substantial evidence on the whole record; not arbitrary, capricious, characterized by abuse of discretion and not characterized by clearly unwarranted exercises of discretion.

Wherefore, for the reasons stated more fully above, the Decision of the West Virginia Health Care Authority should be AFFIRMED.

Respectfully submitted,

WEST VIRGINIA HEALTH CARE AUTHORITY

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**BEFORE THE OFFICE OF JUDGES**

**IN RE: ROANE GENERAL HOSPITAL, INC.**

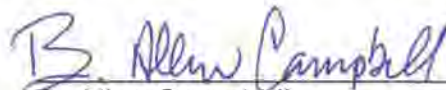
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Appeal Docket No. 22-HC-02**

**CERTIFICATE OF SERVICE**

I, B. Allen Campbell, Senior Assistant Attorney General, do hereby certify I have served the foregoing "**Response Brief of the West Virginia Health Care Authority**", this 26<sup>th</sup> day of July, 2022, via hand delivery and electronic mail with the Office of Judges and to counsel of record as addressed below by electronic mail and by United States Mail, postage prepaid.

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