

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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CHARLESTON AREA MEDICAL CENTER, INC.,  
RESPONDENT BELOW, PETITIONER

vs.

No. 22-ICA-169

RALEIGH GENERAL HOSPITAL,  
APPLICANT BELOW, RESPONDENT

and

THE WEST VIRGINIA HEALTH CARE AUTHORITY,  
RESPONDENT

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**Petitioner Charleston Area Medical Center, Inc.'s Reply Brief To Respondents Raleigh  
General Hospital And The West Virginia Health Care Authority**

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## SUMMARY OF ARGUMENT

This appeal presents a simple issue for this Court: whether the Health Care Authority's ("HCA") decision ("the Decision"), which grants Respondent Raleigh General Hospital's ("RGH's") application for a Certificate of Need ("CON") for cardiac or open-heart surgery services was rendered without the HCA properly analyzing evidence and issues presented at the hearing and whether the structure of the Decision was improper due to its lack of proper finding of fact and conclusions of law and, as such, should be reversed. Determination by the Court on the issues presented by Charleston Area Medical Center, Inc. ("CAMC") is important because if Raleigh General Hospital ("RGH") is permitted to offer cardiac or open-heart surgery, there are potential repercussions to CAMC's cardiac and open-heart surgeries by decreasing access to specialty cardiac services offered by CAMC and, consequently, cardiac surgery services in Southern West Virginia will not be improved.

On appeal, this Court is presented several examples of deficiencies in the HCA's Decision, including whether the Decision and the HCA's reasoning used are in compliance with the requirements under W. Va. Code §§16-2D-1 *et seq.*, the West Virginia State Health Plan Standards for Cardiac Surgery ("the Standards"), and the West Virginia Administrative Procedures Act ("APA"), W. Va. §§ 29A-5-1, *et seq.* For reasons detailed below, the HCA's Decision failed to comply with the statutory requirements of the APA as our Supreme Court interpreted in *Citizens Bank of Weirton v. West Virginia Board of Banking & Financial Institutions*, 160 W.Va. 220, 233 S.E.2d 719 (1977) as it does not discuss, analyze, or make proper findings of fact or conclusions of law on the majority of issues raised by CAMC at the two-day hearing. Respondents HCA and RGH both wrongfully assert in their Responses that the holdings of the Supreme Court in *Citizens Bank of Weirton* do not apply to the HCA's Decision at issue, *inter alia*, because of the page length of the HCA's Decision. Respondent HCA further states at page 3 of its Response that the "Decision

aply details the evidence heard during the two-day hearing.” As further discussed herein, the issue with the HCA’s Decision is not the length of the decision that certainly lists all of CAMC’s evidence. What is lacking here in the HCA’s Decision is any discussion of CAMC’s evidence and the adequacy of any analysis of CAMC’s evidence and the issues contained in it. That is where the HCA’s Decision is lacking, and this Court has no choice but to reverse the HCA’s Decision as written.

The Respondents also allege that the arguments and evidence brought up by CAMC at the hearing were only important to CAMC and not required under the statute or the Standards. This is not correct. The arguments and evidence presented by CAMC at the hearing were regarding Respondent RGH’s failure to meet the statute and Standards and, as a matter of law, had to be addressed in the HCA’s Decision. The arguments and evidence are mentioned in the HCA’s Decision, but there is no analysis or reason given by the HCA for its rejection of CAMC’s arguments and evidence. Further, there is no analysis or reason given by the HCA for the granting of Respondent RGH’s CON for the Cardiac Surgery program. The HCA’s deficiencies in this case are further amplified by the fact that there were no members of the HCA Board, which is the decision-making body, present at the hearing to hear and evaluate the evidence offered to render a proper decision. CAMC asks this Court to reverse the HCA’s Decision and find that the Decision rendered was in violation of statutory provisions, clearly wrong in view of the reliable, probative, and substantial evidence on the whole record, and is arbitrary and capricious, characterized by an abuse of discretion.

### **ARGUMENT**

#### **I. RESPONDENT RALIEGH GENERAL HOSPITAL’S CLAIMS THAT CHARLESTON AREA MEDICAL CENTER HAS WAIVED ITS ASSIGNMENTS OF ERROR ARE UNFOUNDED.**

Respondent RGH's initial argument is that Petitioner CAMC's appeal must be rejected by this Court because CAMC failed to appropriately cite to the record and failed to explain its assignments of error. This argument is baseless because CAMC's Petition for Appeal appropriately raised six assignments of error and for each assignment of error, CAMC properly cited to the designated record within its assignments of error, and it properly identified the legal support for each of its assignments of error. Further, CAMC in each of its six assignments of error properly referred to: (1) the errors identified within the HCA's decision; and, (2) the legal, regulatory and statutory requirements which the HCA's Decision failed to meet. The statutory requirements for a CON are set forth in W. Va. Code §§ 16-2d-1 *et seq.* and the State Health Plan, Certificate of Need Standards, and Cardiac Surgery Chapter ("the Standards"). HCA's Decision is not in proper form as it fails to include proper findings of fact and conclusions of law related to the evidence adduced at the two-day hearing. Further, as more fully discussed herein, HCA's Decision fails to analyze the evidence introduced by Petitioner CAMC and Respondent RGH at the hearing and therefore, the HCA did not properly determine whether RGH's CON Application should have been granted.<sup>1</sup> This Court should fully consider CAMC's six assignments of error and determine that it has properly raised these errors and this Court should reverse the HCA's Decision.

Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure mandate that an appellate brief "contain an argument clearly exhibiting clearly the points of fact and law . . . and citing the authorities relied on, under headings that correspond with the assignments of error." *See also* FN 4, *Woods v. Jefferds Corp*, 241 W. Va. 312 (2019). The Supreme Court has previously held that an

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<sup>1</sup> It should be noted that at page of the HCA's Response, it is stated that CAMC's argument that the HCA did not read the transcript is "pure speculation based on no credible evidence." CAMC respectfully requests that this Court read the HCA's Decision and review the transcript of the hearing and the evidence offered and see if it does not reach the same conclusion. It appears to the undersigned that it is self-evident based on the poor decision that the HCA did not read the transcript and it did not render a proper decision on Respondent RGH's CON Application.

inadequate assignment of error is one that “fails to cite to any authority or the record in support.” *In re Z.B.*, 2018 W. Va. LEXIS 827, \*8 (Memorandum Decision)(West Virginia 2018). CAMC’s six assignments of error contain both citations to the designated record (“D.R.”) and citations to appropriate case law, statutory and regulatory authority. As such, Petitioner CAMC’s six assignments of error are clearly in compliance with the requirements of West Virginia Rule of Appellate Procedure 10(c)(7) and this Court should disregard Respondent RGH’s baseless argument.

**II. THE SUPREME COURT’S HOLDING IN *CITIZENS BANK OF WEIRTON* IS APPLICABLE TO THE HCA’S DECISION AND, AS SUCH, IT MUST REVERSE THE HCA’S DECISION AS IT IS NOT IN PROPER FORM BECAUSE IT FAILS TO INCLUDE PROPER FINDINGS OF FACT AND CONCLUSIONS OF LAW.**

The HCA’s Decision is not in compliance with either the provisions of the APA, W.Va. Code §§ 29A-5-1, *et seq.*, or the requirements set forth by the Supreme Court in *Citizens Bank of Weirton*, *supra*. Respondent RGH and the HCA argues that the decision in *Citizens Bank of Weirton* does not apply to the HCA’s Decision because the *Citizens Bank of Weirton* agency’s order was only one page and did not contain any citations, whereas the HCA’s Decision on the Respondent RGH’s CON Application was over sixty pages and “clearly and sufficiently addressed the necessary facts in evidence and set forth reasonable findings of fact that supported its conclusions of law.” *See* Respondent RGH’s Response Brief, p. 11; Respondent HCA’s Response Brief, p. 10. This is simply not the case. While it is important to note the well-known premise that quantity does not equal quality, a decision can be both lengthy and not in compliance with statutory requirements. The Supreme Court’s decision in *Citizens Bank of Weirton*, clearly interpreted W. Va. Code§ 29A-5-3 and it ruled that:

However, in every contested case, W. Va. Code, 29A-5-3 (1964) *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.* In this regard, if the conclusion is predicated upon a change of agency policy from former practice, there should be an explanation of the reasons for such change. Whenever an agency may be permitted to state its findings of fact in bare statutory language, the decision may be rendered by a clerk or secretary who has been given the agency's conclusion, i.e., in this case, 'application granted,' and assigned the task of filling in the appropriate form. This is not the rational thought process contemplated by the Administrative Procedures Act. (emphasis added).

The issue is not the length of the decision, but the adequacy of the analysis of the issues contained in it. The HCA's Decision on the Respondent RGH's CON Application clearly did not address important factors that RGH must establish per the Standards. For example, the issue of the financial feasibility of the project was raised by CAMC, but the HCA's Decision failed to analyze it. The HCA's Decision merely noted several of CAMC's arguments, but the HCA never ruled on them or analyzed them.

Specific issues were raised by CAMC, such as Respondent RGH's overstated the payor mix, which would have an adverse impact on the program's revenues, but these issues were never discussed in the HCA Decision. Respondent RGH's failure to account for the costs of hiring locum tenens coverage for the physicians in the proposed Cardiac Surgical program were raised by CAMC, but were never addressed in the HCA's Decision. This specific issue alone would cost the proposed Respondent RGH's cardiac surgery program at least \$210,000 per year, but that was never addressed or discussed by the HCA. Other specific issues were raised and evidence was presented by Petitioner CAMC showing that Respondent RGH underestimated the costs associated with many of the physicians and nurses proposed for the Cardiac Surgical program (D.R. 0048), and even entirely omitted the \$400,000 in salary costs alone, not including benefits projected to be



24% of salary, associated with hiring a critical care physician that Respondent RGH admitted in responses to discovery that it would hire if approved.

At page 4 and again at page 13, Respondent HCA tries to argue that CAMC waived its objection to the improper discovery response concerning the critical care physician of Respondent RGH. Respondent HCA quotes from the transcript wherein CAMC's counsel objected and then proceeded with a question. D.R. 2078-79. What counsel for Respondent HCA completely omits is the later discussion at the hearing regarding this improper discovery response:

HEARING EXAMINER: Notwithstanding his explanation today, is that what the discovery response said?

ATTORNEY LUDWIG: Not explicitly. I mean, he read what it says. It says that they're going to hire one if the application is approved, but it doesn't provide a timeframe for that.

HEARING EXAMINER: It certainly implies though that they're going to hire one to do the program. Not that they're just going to hire somebody at some nebulous in the future. Again, the valid concern that the discovery is misleading.

ATTORNEY LUDWIG: I don't --- I don't know what else to say about that at this time.

HEARING EXAMINER: All right. You can address that in your findings and conclusions, and we'll address it in the decision.

ATTORNEY CASTO: Will do. (D.R. 2080-81)

It is significant to note that the Hearing Examiner likewise recognized that this discovery response issue was a "valid concern" and counsel for CAMC was told to brief the issue. Counsel for CAMC did extensively brief this issue at pp. 25-28 of its Response Brief filed before the HCA (D.R. 2291-94). But this was all for naught as the HCA's Decision never addressed and ruled upon this critical issue.

A thorough analysis of these issues, including the discovery issue, should have been done by HCA and that analysis would have shown that the projected profit for the Respondent RGH's

proposed Cardiac Surgery program as stated in its CON Application for year three, was badly overstated and, that the program, which projected a profit of only \$687,000 in year 3, would not have been profitable, or more accurately stated, would not have been financially feasible as required in Section VII of the Standards. However, the HCA's Decision fails to further discuss or make a ruling upon any of those issues. Instead, the HCA's Decision blindly concludes RGH's CON Application is within the requirements set forth in Section VII of the Standards. (D.R. 54).

Alongside financial feasibility concerns, CAMC also presented evidence on the need for the RGH Cardiac Surgery project, the adverse impact of the project on both CAMC and the patients in the RGH service area as a result of the loss of specialty services. (D.R. 1855, D.R. 1915-1920). Proof regarding need is part of Respondent RGH's required burden of proof set forth in the statute, W.Va. Code § 16-2D-12(a)(1) and (2) and (b)1) and the Standards, Sections IV, V, and VIII. Again, a thorough analysis of those issues was omitted from the HCA's Decision. Respondent RGH asserts that "the Decision is not required to address in extensive detail each item and argument presented at the hearing or in briefing."

Both Appellees argue that in the inclusion of Monroe County in the study area for the need calculation under the State Health Plan, Certificate of Need Standards is proper as it is consistent with the HCA's past practice in applying the Standards. *See* Respondent RGH's Response Brief, p. 11; Respondent HCA's Response Brief, p. 11. First, the HCA's interpretation does not conform to the language in the definition of the study area as outlined in Section IV(C) of the Standards. As admitted by the HCA, more than 50% of the residents of Monroe County, who obtain diagnostic cardiac catheterization services, obtain those services in Virginia hospitals. (D.R. 1629). If that 50% is excluded from the calculation, then Monroe County is in the service area. *Id.* However, excluding that 50% gives a totally false picture of the study area and an incorrect calculation of

the need for the services. Monroe County does not qualify as a study area county if the clear language of the Standard is applied. (D.R. 1597-98; 1628-29). Further, as noted by a witness at the hearing, out-of-state data was not universally available until recently (D.R. 2066-67), so cases that support the HCA's position that this interpretation of the requirement is a long-term interpretation is not persuasive. The data was not available when many of those cases were decided. It is now and was, in fact, obtained by RGH and it should have been considered by the HCA in making its Decision.

Although CAMC agrees that every piece of evidence need not be discussed, evidence on the issues that must be proven by the applicant as required by the statute or the Standards must be discussed, analyzed and specifically ruled upon. Is the HCA's Decision's silence on the fact that Respondent RGH did not account for at least \$210,000 in costs associated with hiring locum tenens physicians, a ruling that such costs need not be incurred? Is its silence on the issue of the payor mix a ruling that the mix of sources of revenue does not matter in deciding how reasonable the Respondent RGH's projection of revenues is, even though the difference between what a hospital is reimbursed for an open heart surgery by PEIA and private insurance is wildly different?

The HCA argues that CAMC's concerns regarding the HCA Board's failure to address these factors are "clearly speculative" and the factors are just "facts that are deemed important to the Petitioner." Respondent HCA's Response Brief, p. 8. The need for RGH's hired cardiac surgeons to take time off is not speculative. The program is required to operate 24/7. Surgeons cannot work 24/7. Locum tenens physicians will have to be hired. That is not speculation, it is an irrefutable reality. The difference in reimbursement between PEIA and private insurance is not speculative. It is also an irrefutable reality. These issues are not minor additional issues raised in passing by CAMC.

The financial feasibility of the project is required to be proven by statute, W.Va. Code § 16-2D-12(a)(2), and in the Standards, Section VII. The fact that CAMC pointed out deficiencies in Respondent RGH's projections that result in a change from a small profit to a large loss must be addressed. It was not addressed in the HCA's Decision. The need for the project is also required to be proven by statute, W.Va. Code § 16-2D-12(a)(1), and the Standards. The fact that CAMC pointed out issues involved in Respondent RGH's proof including the faulty establishment of the study area and the incorrect calculation of the use rate as discussed fully in the Petitioner CAMC's Brief must be addressed. They were not addressed in the HCA's Decision. The adverse impact of the project is required to be dealt with by statute, W.Va. Code § 16-2D-12(b)(1). CAMC presented compelling evidence on this issue by a cardiac surgeon. It should have been addressed in the HCA's Decision. It was ignored. If the HCA did not choose to accept the evidence presented by CAMC it needed to say so and to support that with reasons. It did neither.

The Supreme Court has ruled that the provisions of 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." *Citizens Bank of Weirton*, 160 W. Va. at 230, 233 S.E.2d at 727. The APA and *Citizens Bank of Weirton* require more than a mere inclusion or rushed reference to an issue raised; there must be a ruling and an explanation offered as to how the HCA came to its conclusions to award Respondent RGH with a CON. The HCA's Decision is in violation of these statutory provisions, was developed through an unlawful decision-making procedure, and is arbitrary or capricious, characterized by an abuse of discretion and it should be reversed by this Court under W.Va. Code § 29A-5-4(g).

**III. THIS COURT MUST REVERSE THE HCA'S DECISION BECAUSE THE HCA BOARD FAILED TO MEET THE ATTENDANCE REQUIREMENT OF WEST VIRGINIA CODE § 16-29B-12(a) DEEMED NECESSARY TO PROPERLY RENDER A DECISION.**

W. Va. Code § 16-29B-12(a) requires that “[t]he board shall conduct such hearings as it deems necessary for the performance of its functions and shall hold hearings when required by the provisions of this chapter or upon a written demand by a person aggrieved by any act or failure to act by the board regulation or order of the board...” As clearly demonstrated by the record, none of the members of the HCA board fulfilled its requirements to conduct such a hearing by actually being present for the two days it went on. (D.R. 1536-37, 1838-39).<sup>2</sup> When comparing the hearing transcript to the final Decision, it is clear that the Board didn’t attend the hearing, they did not even review the hearing transcript prior to rendering their decision. This is demonstrated, for example, by the total lack of discussion about the evidence presented by the open-heart surgeon called to testify as a fact and expert witness on behalf of CAMC. The complete lack of even a cursory mention of the cardiac surgeon’s testimony is clear evidence that the HCA Board didn’t perform its statutory duties. *Garris v Governing Bd. of the State Reinsurance Facility*, 333 S.C. 432, 511 S.E.2d 48 (1998) (holding that “The

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<sup>2</sup> Respondent HCA argues at page 7 of its Response that CAMC waived this issue since it did not raise any objection to no HCA member present at the hearing. On that same page, at footnote 4 it is noted that HCA Analyst Timothy Adkins was present and that was the current practice for the HCA. CAMC’s counsel, Thomas Casto has practiced before the HCA for over 25 years and he is aware that the practice used to always be that at least one member of the HCA attended each CON hearing. In this case, he did not realize it would be such an issue until he saw the completely deficient HCA Decision and realized that no member of the HCA took the time to review and analyze the testimony at the hearing. Once the error was observed, it was promptly raised in this appeal. To the extent it should have been raised earlier, Petitioner CAMC would contend that it can still be raised as plain error. Syl. pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995) (“[t]o trigger application of the ‘plain error’ doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.”). This Court may review this issue and recognize that the HCA’s Decision is lacking because no member was present to hear the evidence.

persons legally responsible for an administrative agency's decision must be informed and unbiased, must hear the case, and must in fact make the decision.” *Flav-o-Rich, Inc. v. NLRB*, 531 F.2d 358, 362 (6th Cir. 1976); *KFC Nat'l Mgt. Corp. v. NLRB*, 497 F.2d 298, 304 (2d Cir. 1974).

W.Va. Code § 16-29B-12(e) requires that “[a]fter any hearing, after due deliberation, and in consideration of all the testimony, the evidence and the total record made, the board shall render a decision in writing. The written decision shall be accompanied by findings of fact and conclusions of law as specified in section three, article five, chapter twenty-nine-a of this code...” By failing to attend the hearing, the HCA Board set itself up for failure. As is clearly evident in the Decision, it did not analyze or even account for all of the relevant testimony and evidence presented during the two-day hearing. This is clearly reflected in the HCA’s Decision where no proper findings of fact and conclusions of law are presented.

Respondent RGH raises three points in defense of the HCA’s Decision, none of which carry sufficient weight to persuade this Court to uphold the HCA’s Decision. The first point raised by Respondent RGH is that Timothy Adkins, the Interim Director of the West Virginia CON program, attended the hearing. Respondent RGH argues that Mr. Adkins plays a “crucial role in the CON process and actively participated in the hearing where he is permitted and often expressly solicited by the hearing examiner, to question witnesses presented by the parties. Respondent RGH’s Brief, p. 21. Mr. Adkins was at the hearing, but he is a staff member, not a Board member. He has no ability to decide or vote on questions related to CONs. Only a quorum of the Board has the ability to vote.

The second argument raised by Respondent RGH is that the Board holds meetings pursuant to W. Va. Code § 16-29B-5 and that the purpose of these meetings is for the board to

evaluate pending CON applications. RGH insists that even though none of the HCA Board members attended the hearings on March 21 and 22, 2022, there were two separate board meetings on August 10, 2022, and August 24, 2022, which were prior to the Decision being issued on September 12, 2022. These are merely just statements of occurrences that prove nothing. Not only does Respondent RGH offer zero evidence or point to anywhere in the record suggesting that the CON Application or the hearing was discussed at these meetings, which occurred five months after the hearing, the Decision itself clearly reflects that the facts and conclusions presented by CAMC at the hearing were never discussed or evaluated by Board Members.

The last point raised by Respondent RGH is that clearly because the Decision was signed by four members of the Board that indicates to the Court that the “Board members played a crucial role in evaluating and issuing the Decision.” First, the Decision was actually signed only by one Board member, who signed for the other three. Second, the signing of a Decision does not warrant that the members of the Board attended the hearing or read the transcript. Again, the best evidence of those facts are the obvious ones. No Board members were in attendance at the hearing and the sheer volume of what was ignored in the Decision speaks clearly to the fact that the Board members did not perform their required duties.

**IV. THIS COURT MUST REVERSE THE HCA’S DECISION BECAUSE IT FAILS TO INCLUDE PROPER FINDINGS OF FACT AND CONCLUSIONS OF LAW TO ESTABLISH THAT RESPONDENT RGH PRESENTED SUFFICIENT EVIDENCE TO MEET THE STATE HEALTH PLAN STANDARDS.**

W. Va. Code § 16-2D-12(a)(2) provides that a CON may only be issued if the proposed health service is consistent with the State Health Plan. Section IV of the Standards requires that an applicant for a cardiac surgery Certificate of Need must demonstrate that the program will

perform at least 250 cardiac surgeries annually by 36 months after initiation of the services. (D.R. 1603). Section VII of the Standards requires that an applicant must show that revenues will equal expenses by the end of the third year of operation. Respondent RGH did not present evidence to satisfy these requirements and the HCA Decision stating that these requirements were met is improper for the multiple reasons stated above and in the Petitioner's Brief. Section VIII(C) of the Standards requires that the provision of cardiac surgery services must be available twenty-four hours per day, seven days per week. By not including *locum tenens* costs for cardiac surgeons, much less the many other providers necessary to run such a program in the financial projections, Respondent RGH implicitly admits that the services will not be available twenty-four hours per day, seven days per week.

RGH failed to demonstrate all these matters and the HCA failed to properly discuss, analyze, and rule on all of them in its Decision. As a result, RGH's CON Application was not consistent with the State Health Plan and it should not have been approved. The HCA's Decision fails to properly deal with all these issues and it is therefore clearly in error.

HCA's Decision is made in violation of statutory provisions, is clearly wrong in view of the reliable, probative, and substantial evidence on the whole record, and is arbitrary and capricious, characterized by an abuse of discretion and it must be reversed under W.Va. Code § 29A-5-4(g).

### **CONCLUSION**

Based on the foregoing reasons, this Court should follow the APA standards under W. Va. Code § 29A-5-4(g) and the Supreme Court's *Citizens Bank of Weirton, supra*, and reverse the HCA's Decision and deny Respondent RGH's CON Application to permit it to engage in open heart surgery. In the alternative, this Court should remand this matter to the HCA with instructions



that the HCA should conduct a new hearing, with HCA Board members in attendance, and require the HCA Board to consider each issue discussed herein. This Court should award such further relief as the interests of justice so require.

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and

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RESPONDENT

CERTIFICATE OF SERVICE

I, Thomas G. Casto, counsel for Petitioner, do hereby certify that on April 3, 2023, I electronically filed the foregoing *Petitioner Charleston Area Medical Center, Inc.'s Reply Brief to Respondents Raleigh General Hospital and The West Virginia Health Care Authority* with the Clerk of the Court using the File & Serve Xpress electronic filing system, which will send notification of such filing to the following counsel of record:

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