IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

**ST. JOSEPH'S HOSPITAL OF BUCHANNON, INC.
D/B/A ST. JOSEPH'S HOSPITAL, PETITIONERS**

V. **NO. 23-ICA-265**

**STONEWALL JACKSON MEMORIAL HOSPITAL COMPANY
APPLICANT BELOW, RESPONDENT,**

AND

**WEST VIRGINIA HEALTH CARE AUTHORITY,
REPSONDENT.**

RESPONSE BRIEF ON BEHALF OF WEST VIRGINIA HEALTH CARE AUTHORITY

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PATRICK MORRISEY
ATTORNEY GENERAL

HEATHER A. CONNOLLY
ASSISTANT ATTORNEY GENERAL
W. Va. State Bar #: 7666
100 Dee Drive
Charleston, WV
(304) 558-7000

Counsel for Respondent WV Health Care Authority

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RESPONSE BRIEF OF THE WEST VIRGINIA HEALTH CARE AUTHORITY

Comes now the West Virginia Health Care Authority (Authority sometimes Board), by counsel, Heather A. Connolly, Assistant Attorney General, pursuant to the Intermediate Court of Appeals Scheduling Order dated June 28, 2023, and submits the following Response Brief in the above-styled matter. The Authority is responding to Petitioner's October 16, 2023 Appeal Brief seeking reversal of an adverse Decision determining a Certificate of Need (CON) for Stonewall Jackson Memorial Hospital Company (Stonewall) to replace and relocate its entire hospital to a location 4.2 miles away, in the same service district, serving the same patients, and providing the same services at a projected cost of $56M was *not* required because the project was no longer reviewable by the Authority following the April 2023 legislative change substantially increasing the minimum capital expenditure from $5.4M to $100M. This is true even when the identical project was denied a CON less than a year ago because the Authority views the two projects as separate decisions to be made independently of one another and so rendered two different decisions that led to conflicting outcomes because the Authority believed they were properly administering the CON program in accordance with both past practices and the recent legislative changes.

The Authority acted in their administrative and adjudicatory capacities in conformance with past practices and the CON law. They are named as respondents but factually are filing this brief as an explanation to this court for their actions in this matter. As such, this response brief will focus on the reasons the Authority acted the way they did and will not focus on the extensive record that has been developed and submitted to this court by the Authority who maintains the official record.

STATEMENT OF THE CASE AND INTRODUCTION

The Authority is a division within the DHHR and administers the CON program, which is created pursuant to W. Va. Code §16-2D-1, *et seq.* The Authority's adjudicatory body is a five-member bipartisan board of review (Board) appointed by the governor, with the advice and consent of the senate. *See,* W. Va. Code §16-29B-5. None of the Board members are lawyers.

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. If a proposed project does fall within the CON law, it is determined to be reviewable by the Authority and moves forward with a CON application and all processes related thereto. *Id.* Within CON law at W. Va. Code §16-2D-7 is also the ability of a party to request a determination of reviewability (RDOR) instead of a CON. It is the latter legal authority the Authority relied on when it came to the determination that the proposed project was not reviewable and therefore did not require a CON.

BACKGROUND AND SUMMARY

The Authority received a Request for Determination of Reviewability (RDOR) from Stonewall on March 29, 2023, pursuant to W. Va. Code §16-2D-7. (D.R. 0004-0005). Section 16-2D-7 states that "[a] person may make a written request to the authority for it to determine whether a proposed health service is subject to the certificate of need or exemption process." Stonewall filed the request to build a replacement acute care facility and move its hospital to Staunton Drive, 4.2 miles away.

On April 20, 2023, the Authority received a Response letter from Petitioner opposing, on multiple grounds, Stonewall's RDOR, now designated CON File #23-7-12659-X, insisting that the project was a collateral attack on the CON law and must be rejected by the Authority, especially

given the recent denial by the Authority of the exact same project less than a year prior for a multitude of reasons, not the least being Petitioner would lose its Critical Access Hospital[1] status because the move would put the two hospitals too close together for Petitioner to continue to meet CAH criteria (D.R. 0441-0449).

The Authority issued a Decision on Request for Ruling on Reviewability (2023 Decision) on June 15, 2023, finding that Stonewall's proposed construction of its new hospital no longer requires a CON because 1) the project was a complete relocation and because 2) the Capital Expenditure Associated with the project of $56M was less than the Expenditure Minimum raised to $100M (D.R. 0004-0005). The Authority's 2023 Decision was based on decades of past practices wherein the Authority does not require CONs for projects involving the complete relocation of facilities within the same service area offering the same services to the same patients unless the proposed replacement project exceeded the minimum capital expenditure. (D.R. 0475). The Authority has evenly applied this to projects even when such relocation requires construction or affects bed count/bed capacity because the services are already in existence and not new. Partial relocation, or relocation outside the service area, or relocation with a minimum capital expenditure of more than $100M, are still reviewable and still require a CON.

Petitioner disagrees with the accuracy of those statements as well as the Authority's conclusion that in cases of complete relocation the matter of minimum capital expenditure is a dispositive issue. Petitioner points out this implied exemption is not found in CON law, even though several express exemptions already exist. Moreover, Petitioner argues the Authority was not free to stop their inquiry into reviewability at the capital expenditure limit but should also have

[1]For a thorough discussion of the importance of critical access hospitals to rural communities throughout the state, see page 2 of Petitioner's Response Letter dated April 20, 2023 (D.R. 0442).

insisted on a CON because 1) the project relocates and changes both the number of beds and bed capacity, and 2) it also involves new construction. Petitioner argues both of those actions require CONs and the Authority's failure to impose that burden was a failure in their duty to uphold the CON laws and clearly wrong.

To complicate matters further, as stated in the 2023 Decision and 2023 Amended Decision, this is not the first time the Authority has seen this case and dealt with the facts before them. (D.R. 0469-0470) Stonewall's CON application to build a replacement facility and move its hospital to Staunton Drive was denied in the June 13, 2022, Decision. (D.R. 0469-0470). There the Authority found that no CON should issue because the proposed move of Stonewall's entire hospital campus and construction of a replacement hospital at Staunton Drive was not a superior alternative as required by law and would cause Petitioner to lose its CAH status which would have significant detrimental financial effect on Petitioner. The Decision also found Stonewall improperly failed to explore any other potential sites to relocate its hospital other than Staunton Drive. (D.R. 0551-0552).

However, as discussed throughout the 2023 Decision, after the 2022 Decision and before the instant RDOR, an intervening event occurred when Senate Bill 613 (SB613) passed and was signed into law, effective from passage. (D.R. 0471). Amongst other changes to CON law, SB613 increased the capital expenditure from $5.4M to $100M. Exceeding the minimum capital expenditure triggers CON review. *See*, W.Va. Code §16-2D-8(a)(3) "[a]n obligation for a capital expenditure incurred by or on behalf of a healthcare facility in excess of the expenditure minimum" is subject to CON review. Almost immediately after SB613 went into effect Stonewall requested the instant RDOR of the project (rather than a CON) because, for the first time, relocation of large

projects such as hospitals, that heretofore were usually well over the previous minimum capital expenditure of $5.4M, would no longer be reviewable.

Here, as plainly stated in the 2023 Decision, the Authority took the position that their authority to administer the CON law meant they had to respond to Stonewall's RDOR. (D.R. 0474-0475). Ignoring the RDOR risked an action in mandamus, because the RDOR was squarely within their administrative charge and had to be acted upon. The Authority's actions are clearly and plainly stated in their 2023 Decision when they ultimately determined "[t]he proposal by Stonewall for the complete relocation of the hospital toa new location in its service area is not subject to CON review because their project is a replacement and relocation of the same services, in the same service area, and does not exceed the minimum capital expenditure." (D.R. 0476).

ASSIGNMENTS OF ERROR

Petitioner asserts four assignments of error, two claim the Authority failed to properly administer the CON program when they ignored their own recent denial of a CON to Stonewall for the exact relocation project, and ignored the plain language in W. Va. Code §16-2D-8(a)(5) related to bed relocation and substantial change in bed capacity as a basis for a CON. Next, Petitioner assigns error asserting the Authority ignored the plain language in W. Va. Code §16-2D-8(a)(1) related to the construction of a healthcare facility as a basis for a CON. Finally, Petitioner assigns error to the Authority's issuance of their Amended Decision while Petitioner's Appeal to this court was pending and therefore it is void and ultra vires.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case raises no substantial questions of law, and the Petitioner fails to identify any credible prejudicial error. Consequently, oral argument is not necessary, and a memorandum decision affirming the ruling below is appropriate. *See,* W. Va. R. App. P. 21.

STANDARD OF REVIEW

The Court "reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong." Syl. pt. 1, *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996). West Virginia courts show significant "deference to the administrative factfinder." *Frymier-Halloran v. Paige*, 193 W. Va. 687, 695, 458 S.E.2d 780, 788 (1995) (saying courts will "presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis"). Indeed, a court reviewing the factual findings of an administrative agency must not substitute its judgment for that of the hearing examiner. *Curry v. W. Va. Consolidated Pub. Ret. Bd.*, 778 S.E.2d 637 (W. Va. 2015).

West Virginia Code §16-2D-16 says Authority decisions are reviewed under the Administrative Procedure Act's familiar framework. That provision says that a court may 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.

W. Va. Code § 29A-5-4(g). *See also W. Va. Div. of Envt'l Protection v. Kingwood Coal Co.*, 200 W. Va. 734, 746, 490 S.E.2d 823, 835 (1997).

ARGUMENT

I. *The Authority properly exercised its administrative discretion and acted upon Stonewall's April 2023 request for determination of reviewability following the 2023 legislative change to CON law whereby the minimum capital expenditure amount was raised from $5.4M to $100M, and the Authority's actions are in conformance with their charge to administer the CON program.*

This is a very simple case challenging whether the Authority 1) had the jurisdiction and authority to evaluate Stonewall's RDOR while the CON denial of the same project was being appealed, and whether the Authority 2) properly found the project was not subject to CON review based on changes to the CON law. The case is one of first impression for the Authority following legislative changes that will ultimately depend on the wisdom of this court to decide. As discussed above and in the 2023 Decision, there was the 2022 Decision wherein the Authority denied an application for a CON for the identical project being proposed by Stonewall in their RDOR. That denial found the relocation of Stonewall to Staunton Drive would negatively affect Petitioner's CAH status, was not the superior alternative, and that no other sites were considered. (D.R. 0471-0472).

The Authority maintains it had a duty to act, was acting lawfully, and within the scope of their administrative authority when they took up Stonewall's RDOR. This duty to act was triggered by the change in CON law. The Authority understood they would be required to apply the new law to the RDOR because it was effective from passage, and they were not at liberty to refuse to act on Stonewall's request. The Authority disagrees with Petitioner's view that the Authority lacked jurisdiction over the RDOR due to the ongoing CON appeal, noting here, as they

did in their decision that the matters were brought under two separate code sections and asked for two separate actions from the Authority (D.R.0474 and 0476).

The Authority was in a quandary, if they ignored the RDOR or claimed they lacked jurisdiction they risked a mandamus action. If they followed the change in the law and ruled the matter was nonreviewable they risked the instant appeal. If they ruled the matter was reviewable, they risked an appeal from Stonewall for failing to incorporate the new law. After considering all their past practices, consultation with their analysts and acting CON director, as well as legal counsel, the Authority determined they did have the jurisdiction to issue a decision on Stonewall's RDOR and their decision would follow their long-standing practice of finding that the complete replacement of health care services under the capital expenditure limit were not subject to reviewability. As discussed in the Decision, the Authority routinely takes up RDORs for replacement and relocation of certain health facilities but until the recent change, those projects had to come in with a capital expenditure of less than $5.4M to be nonreviewable. "The Authority has allowed healthcare facilities to relocate when the cost of relocation to house existing services is under the minimum capital expenditure without CON review." (D.R. 0474). With the passage of SB613, the capital expenditure was raised to $100M. Practically, this meant the Authority now had to incorporate the new increased amount into their RDOR review and it led to the logical conclusion that because the proposed replacement and relocation project was less than $100M it was now nonreviewable. The Authority knew, no matter what decision they reached, it would likely be appealed to this court and so relied on conformance with their past practices and their past interpretation of the CON law when writing their decision.

II. *The Authority's 2023 Decision contained factual errors attributable to legal representation that were corrected in the 2023 Amended Decision. Language related to the discussion of bed capacity and relocation was removed in the*

Amended Decision because, while it was a topic of discussion by the board, it ultimately did not inform their final decision and should not have been included. Importantly, none of the changes affected the outcome of the original Decision.

Petitioner is correct that the Amended Decision issued by the Authority was well after the appeal was filed by Petitioner in this matter. The Amended Decision was submitted to correct mistakes made by the undersigned who began representation of the Authority in late March 2023. While reviewing the record and drafting the recommended decision for the Board, I included the wrong procedural posture of the case, as well as confusing language related to changes in bed capacity that should not have been in the Decision. There were also a few typographical errors. After discussions with Authority staff, I took these mistakes to the Board and told the Board they could either issue an Amended Decision correcting the mistakes, or the mistakes could be explained during the briefing process if appealed, as I am doing now. The Board decided to correct my mistakes by issuing an Amended Decision over the objection of counsel for Petitioner who was present at the public meeting. Importantly, the Amended Decision did not affect the outcome of the original Decision whatsoever and can be stricken without affecting the original Decision.

Specifically, there were two significant non-typographical areas of change. The Amended Decision changes the incorrect procedural posture of the case on page 2, second paragraph, from "After the appeal was filed but before the matter came on for hearing in the ICA" to the correct procedural posture of the case "After the appeal was filed, fully briefed and argued". (D.R. 0601) Next, on page 7, I removed paragraph 7 and its footnote number 6 discussing bed capacity and bed counts because the matter was discussed by the Board, ultimately it did not inform the RDOR determination, and the Authority staff believed it to be confusing. (D.R. 0606) Likewise, on page 8, paragraph 4, I removed the discussion relating to beds and a tie in to RDOR's because not only was it confusing, but it was also wrong-the Authority does not rely on changes to beds when

making RDOR determinations of replacement and relocation projects. (D.R. 0607). The changes to the 2023 Amended Decision were made to clarify the record and accurately reflect the actions of the Authority. This court should not punish the Authority for my mistakes as their legal counsel, however well intentioned. Even if this court finds the corrections contained in the Amended Decision are ultra vires and void, it will still have no effect on the 2023 Decision's outcome because, as stated there, the determination rested solely on the fact the project was a replacement project and below the capital expenditure with the new change in the law.

III. *The Authority relied on past practice and longstanding interpretation of the applicable CON law to determine that Stonewall's entire relocation project was not reviewable because, as proposed in the RDOR, the hospital relocation project did not exceed the minimum capital expenditure as defined by law. The Authority did not consider new construction or the relocation and/or change to bed capacity as urged by Petitioner's because those items are not considered on complete replacement and relocation projects.*

As stated throughout their 2023 Decision, the Authority views the minimum capital expenditure to be a threshold question when determining reviewability for complete relocation projects. After extensive consultation with senior staff, the Authority decided to follow long-standing past practices. According to staff, for as long as they can recall, in some instances, decades, unless the capital expenditure of a complete relocation project exceeded the capital expenditure minimum, the Authority would determine the project was not reviewable. Following the 2023 legislative increase to the minimum capital expenditure the Authority determined the project's minimum capital expenditure was below the new $100M amount set by SB 613.

Moreover, although the Board did discuss the number of beds that could be affected by this RDOR, ultimately a change to the number of beds was not a factor and did not inform their decision. The Authority determined Stonewall's project was not reviewable based on two facts only 1) the move would entirely relocate Stonewall to a new location within the same service area,

providing the same services, whereupon Stonewall would cease operations at the old location, and 2) the projected capital expenditure for Stonewall's project was $56M, well below the newly raised $100M minimum capital expenditure.

CONCLUSION

The Authority lawfully decided Stonewall's RDOR pursuant to the authority vested in them to administer the CON program. The Authority issued a decision, later amended, that explained the issue to be decided, contained proposed findings of fact and conclusion of law, finding the proposed project was not subject to reviewability by the Authority because it was the complete replacement and relocation of an existing healthcare facility within their existing service area with an expected capital expenditure of $56M, well below the recent increase in the minimum expenditure to $100M. Any mistakes made in the 2023 Decision were the fault of the undersigned and my new representation of the Authority coupled with my imperfect understanding of healthcare laws and should not be considered the act of the Authority. Once brought to their attention, the Authority agreed to issue an amended decision correcting my mistakes, namely, correcting the procedural posture of the case and removing discussion related to bed count and bed capacity. Ultimately, both the 2023 Decision and 2023 Amended Decision reach the same conclusion and same outcomes, whichever this court relies upon.

The Authority faithfully carried out their statutory duties to administer the CON program. The 2023 Decision and 2023 Amended Decision made all the findings required by the applicable statutes and regulations. The Authority's findings and conclusions are not clearly wrong, arbitrary or capricious. The Court should afford deference to the Authority and presume the Authority's actions are valid if, as was done here, the Decision is supported by a rational basis. Because the

record supports the findings that were made here, the Authority's 2023 Decision should be AFFIRMED.

PATRICK MORRISEY
ATTORNEY GENERAL

/s/ Heather A. Connolly
HEATHER A. CONNOLLY
ASSISTANT ATTORNEY GENERAL
W. Va. State Bar #: 7666
100 Dee Drive
Charleston, WV
(304) 558-7000

Counsel for Respondent WV Health Care Authority

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CERTIFICATE OF SERVICE

I, Heather A. Connolly, do hereby certify that I have served the foregoing "***Response Brief on Behalf of the West Virginia Health Care Authority***" on this 30th day of November, 2023, via the Court's electronic filing system, which caused a true and exact copy of the same to be served upon counsel of record:

Alaina N. Crislip (WVSB# 9525)
Neil C. Brown (WVSB#13170)
JACKSON KELLY PLLC
1600 Laidley Tower
P.O. Box 553
Charleston, WV 25322
Counsel for St. Joseph's Hospital of Buckhannon, Inc.

Thomas G. Casto (WVSB#676)
LEWIS GIANOLA PLLC
300 Summers Street, Suite 700
Charleston, WV 25301
Counsel for Stonewall Jackson Memorial Hospital Company

/s/ Heather A. Connolly
Heather A. Connolly
Assistant Attorney General