

No. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SCA EFiled: Dec 18 2024
03:08PM EST
Transaction ID 75259069

STATE OF WEST VIRGINIA *ex rel.*
STONEWALL JACKSON MEMORIAL
HOSPITAL COMPANY,

Petitioner,

v.

WEST VIRGINIA DEPARTMENT
OF HEALTH, HEALTH CARE AUTHORITY,
and, STATE OF WEST VIRGINIA
ex rel. ST. JOSEPH'S HOSPITAL OF
BUCHANON, INC.,

Respondents.

VERIFIED PETITION FOR WRIT OF PROHIBITION AND
WRIT OF MANDAMUS

Counsel for Petitioner

Thomas G. Casto (WVSB 676)
Webster J. Arceneaux, III (WVSB 155)
Hannah K. W. Petros (WVSB 14311)
Lewis Gianola PLLC
300 Summers Street, Suite 700
Charleston, West Virginia 25301
Phone: (304) 345-2000
Fax: (304) 343-7999
tcasto@lewisgianola.com
wjarceneaux@lewisgianola.com
hpetros@lewisgianola.com

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I. QUESTIONS PRESENTED

1. Whether this Court has exclusive jurisdiction over its Stay Order, entered on July 25, 2024, in *St. Joseph’s Hospital of Buchannon, Inc. v. Stonewall Jackson Memorial Hospital Company, et al.*, Case No. 23-347 (Appx. 0001).

2. Whether the Respondent West Virginia Department of Health, Health Care Authority (“Authority”), has exceeded its legitimate powers and committed clear legal error by making a Stay Decision, without any written findings, that determined the scope of that Stay Order and applying it to stay Petitioner Stonewall Jackson Memorial Hospital Company’s (“Stonewall”) August 21, 2024, Determination of Reviewability (DOR) with regard to the complete relocation of an ambulatory health care facility (AHCF) located at 456 Market Place Mall in Weston, Lewis County, West Virginia to a separate and distinct medical office building to be constructed by Petitioner Stonewall on Staunton Drive in Weston, Lewis County, West Virginia. (Appx. 0117-0118).¹

3. Whether Respondent Authority exceeded its legitimate powers and committed clear legal error by failing to act within 45 days on Stonewall’s AHCF DOR application to comply with the requirements of W. Va. CSR § 65-32-18.4, which regulation requires that the Respondent Authority “shall issue its ruling [on a DOR] within 45 days of its receipt of the request if all of the necessary information has been provided to the Authority in a timely manner...”

4. Whether Respondent Authority failed to comply with its mandatory non-discretionary duty by failing to act within 45 days on Stonewall’s AHCF DOR application to comply with the mandatory requirements of W. Va. CSR § 65-32-18.4, which regulation requires

¹ An “ambulatory health care facility” (AHCF) is defined in W. Va. Code § 16-2D-2(2) as “a facility that provides health services to noninstitutionalized and nonhomebound persons on an outpatient basis.” In general terms, it is a hospital owned physician’s medical practice office.

that the Respondent Authority “shall” rule on a DOR application “within 45 days of its receipt of the request if all of the necessary information has been provided to the Authority in a timely manner...”

II. STATEMENT OF THE CASE

On August 21, 2024, Petitioner Stonewall sent a verified letter to Respondent Authority requesting a DOR with regard to the complete relocation of an AHCF located at 456 Market Place Mall in Weston, Lewis County, West Virginia, to a separate and distinct medical office building to be constructed by Petitioner on Staunton Drive in Weston, Lewis County, West Virginia. (Appx. 0002-0004). On August 28, 2024, Respondent Authority met and agreed that the proposed relocation of the AHCF from one location in Weston, Lewis County, West Virginia to another, was non-reviewable. (Appx. 0120). As such, Respondent Authority issued an AHCF DOR decision. (Appx. 0005-0008). Thereafter, Respondent Authority advised Petitioner Stonewall that the August 28 meeting had not been properly noticed on the West Virginia Secretary of State’s website due to an oversight. As a result, the AHCF DOR decision issued by Respondent Authority was not valid and would be reconsidered at Respondent Authority’s September 25, 2024, meeting. (Appx. 0009).

After Respondent Authority voided its AHCF DOR decision, counsel for Respondent St. Joseph’s Hospital of Buchannon, Inc. (SJH) sent a September 23, 2024, letter to the Respondent Authority. In the letter, SJH objected to that AHCF DOR decision based upon lack of notice of the Petitioner Stonewall’s letter since it was not properly advertised on the West Virginia Secretary of State’s website. (Appx. 0011-0051). Respondent SJH’s counsel also stated in its letter that it thought this Court’s Stay Order, entered on July 25, 2024, in *St. Joseph’s Hospital of Buchannon, Inc. v. Stonewall Jackson Memorial Hospital Company, et al.*, Case No. 23-347 (Appx. 0001), was

applicable to Petitioner Stonewall's AHCF DOR application, and any consideration by the Respondent Authority of Petitioner Stonewall's AHCF DOR application was precluded. Respondent SJH's counsel also suggested that the proposed medical office building was a sham because, in its opinion, the site was too small to accommodate both a medical office building and a hospital. (*Id.*). Further, counsel for Respondent SJH noted that the property for the proposed construction for the medical office building was the same property at issue in the hospital relocation case before this Court in Case No. 23-347. (*Id.*).

Respondent SJH's counsel listed the following additional objections to the Petitioner Stonewall's proposed AHCF DOR:

- The AHCF DOR did not estimate the capital expenditure associated with the proposal;
- The AHCF DOR to construct a medical office building is a subterfuge to start working on the hospital facility;
- The AHCF DOR to construct a medical office building will require significant funds for site preparation, and it is doubtful such funds would be expended for a small AHCF; and
- The AHCF DOR site is small, and it is doubtful that it can accommodate both a hospital and a medical office building, this is a sham to circumvent this Court's July 25 Stay Order. (*Id.*).

By letter sent on that same date, Respondent Authority advised that it would review Respondent SJH's request regarding Petitioner Stonewall's AHCF DOR application at its next regularly scheduled meeting. (Appx. 0010). Thereafter, on September 25, 2024, Respondent Authority met and announced that its decision on Petitioner Stonewall's AHCF DOR application was tabled. (Appx. 0125). Petitioner Stonewall's counsel then wrote a letter on September 25, 2024, to Respondent Authority in opposition to Respondent SJH's request for a stay. (Appx. 0052-

0053). In that September 25 letter, Petitioner Stonewall’s counsel argued that Respondent SJH’s argument for a stay was not supported:

The first issue involved the stay issued by the Supreme Court in the appeal involving the approval of the construction of a new hospital. The stay was issued by the Supreme Court, and it provides “that all proceedings below are stayed pending resolution of this appeal.” The proceedings below deal with the construction of the new hospital. The stay attaches to those proceedings. It does not run with the property. It does not prohibit the development of that property in any way except as it pertains to the construction of the hospital. SJH’s argument otherwise is wrong.

SJH argues that the stay attached to the project proposed in the DOR because it proposes the construction of a health care facility. The argument is not just an expansive reading of the stay order, it is an incorrect reading of it. The health care facility proposed in the DOR is separate and apart from the hospital. If the hospital is built, the office building will be located near it. If the hospital is not built, the office building will be in the same place and will be used for the purposes stated in the DOR. It has absolutely nothing to do with the proceedings below and SJH’s argument to the contrary is specious. (*Id.*).

In addition, in that September 25 letter, Petitioner Stonewall’s counsel discussed the suggestion that the proposed construction of a separate and distinct medical office building as a subterfuge for the hospital relocation was nothing more than speculation on the part of Respondent SJH. He also discussed the scope of the proposed medical office building, the site preparation issues, and explained why it did not need a Certificate of Need (CON)² and, therefore, a DOR decision should be issued:

As a part of that argument, SJH argues that the DOR was deficient because it did not fully disclose the scope of the project, and that the information contained in it was insufficient. Again, SJH’s argument is simply false, but in the interest of full disclosure, something that

² As an established rule, a Certificate of Need (CON) is not needed for an AHCF under W. Va. Code § 16-2D-8 when the expenditure minimum of \$100 million W. Va. Code § 16-2D-2(15) is not met. Here, as set forth in the September 25 letter, the project was well under the expenditure minimum, and no CON was needed.

one of SJH's related entities did not undertake in a recent filing with the Authority, the project that is going to be undertaken involves the total relocation of a physician to a newly constructed medical office building with a projected cost of approximately \$10,000,000. The building is to be located on approximately 1.9 acres of the larger lot where the hospital is proposed to be located. As a side note, SJH's arguments regarding site costs are uninformed. The road to the lot is paved. In fact, the road also has two fast food businesses and a hotel on it. Also, all needed utilities run to the property line. Like the rest of SJH's assertions, this one is misleading at best. (*Id.*).

Finally, in that September 25 letter, Petitioner Stonewall's counsel pointed out that the Respondent Authority did not have jurisdiction to consider this request for a stay, and that Respondent SJH should have requested a stay from this Court, if it felt one was appropriate:

The Supreme Court issued the stay. If SJH feels that this project violates the stay order it should go to the entity that issued the stay and can enforce it, the Supreme Court. The Authority has no power to interpret and enforce a stay issued by the Supreme Court and asking it to do so is legally unsupportable. The project proposed in the DOR is a project that the Authority has approved countless times in the past. It is the same project recently undertaken by United Hospital Center, even if it did not fully disclose the total project. It is the same project that the Authority has already approved and SJH's letter, which is akin to throwing spaghetti against the wall to see what sticks, raises nothing that should change that. The DOR should be approved again. (*Id.*).

In response to this letter, counsel for Respondent SJH sent a second letter to Respondent Authority dated October 4, 2024. (Appx. 0054-0114). In that letter, counsel for Respondent SJH continued to argue that the site was not appropriate for a relocated hospital and a relocated medical office building, that the site preparation costs would exceed Petitioner Stonewall's estimates, and that this proposed AHCF DOR application violated this Court's July 25, 2024, Stay Order, and this position was agreed to by the Attorney General's office. Petitioner Stonewall's counsel responded on that same date with another letter. (Appx. 0115-0116). In that letter, counsel for Petitioner Stonewall foremost emphasized that this Court's July 25, 2024, Stay Order (Appx.

0001), was not applicable. Petitioner Stonewall’s counsel also relayed that when a representative from the Attorney General’s office, serving as counsel Respondent Authority, was asked why the Stay Order was applicable, the Attorney General’s office failed to articulate a reason. Further, counsel for Petitioner Stonewall pointed out that this Court’s July 25, 2024, Stay Order only related to the relocation of the hospital and that it did not apply to “the construction of a building that was not contemplated in the underlying proceedings.” (*Id.*). In his letter, counsel for Petitioner Stonewall further advised Respondent Authority that the lot size for the relocated hospital and relocated medical office building was 20 acres, not the 7.8 acres suggested by counsel for Respondent SJH. (*Id.*). Counsel for Petitioner Stonewall further reiterated that the site preparation costs were irrelevant in the AHCF DOR unless they exceeded the \$100 million expenditure minimum, which the AHCF DOR application clearly did not exceed.

Respondent Authority again tabled the Petitioner Stonewall’s proposal at its meeting on October 9, 2024. (Appx. 0129). On October 23, 2024, Respondent Authority met, essentially reversed its original approval of the AHCF DOR application, and decided that it agreed with Respondent SJH that Petitioner Stonewall’s AHCF DOR was stayed by the Supreme Court’s Stay Order entered on July 25, 2024. (Appx. 0132). The Respondent Authority’s informal decision to apply this Court’s Stay Order to the AHCF DOR stay was later reduced to writing, and it failed to set forth any written reasons for a stay in that written decision. (Appx. 0117-0118).³ Based on

³ It should be noted that the Respondent Authority’s written Stay Decision was not received by counsel for Petitioner Stonewall until December 2, 2024, but it was dated October 23, 2024. On December 2, 2024, counsel for Petitioner Stonewall wrote to counsel for the Authority to point out this discrepancy and to note that any appeal period had already expired based on that date. (Appx. 0119). Counsel for Respondent SJH wrote in response to the Authority on December 3, 2024, and stated its position that the Stay Decision was not an appealable order. (Appx. 0120-0121). Since the date of those letters, the Respondent Authority has not clarified its Stay Decision or changed the date of that decision.

this Stay Decision, Respondent Authority has refused to timely act on Petitioner Stonewall's AHCF DOR application, and this Writ of Prohibition and Writ of Mandamus has been filed.

III. SUMMARY OF ARGUMENT

Petitioner Stonewall now seeks a Writ of Prohibition and Writ of Mandamus regarding Respondent Authority's decision to stay its AHCF DOR application. In particular, Petitioner Stonewall challenges the Respondent Authority's application of this Court's Stay Order, entered on July 25, 2024, in *St. Joseph's Hospital of Buchannon, Inc. v. Stonewall Jackson Memorial Hospital Company, et al.*, Case No. 23-347 to its AHCF DOR application. (Appx. 0001). First and foremost, if Respondent SJH thought that Petitioner Stonewall's AHCF DOR application to completely relocate a medical office building was in violation of this Court's Stay Order, it should have requested this Court to review the matter. Instead, SJH raised the stay issue with Respondent Authority. Only this Court has the sole jurisdiction over its Stay Order, including the scope of that Stay Order.

This Court's Stay Order entered on July 25, 2024, states in pertinent part: "Upon consideration and review, the Court is of the opinion to and does grant the motion to stay. It is ORDERED that all proceedings below are stayed pending resolution of this appeal." (Appx. 0001). This Stay Order was issued in response to Respondent SJH's Motion for a Stay, filed with this Court in Case No. 23-347, that stated in part at pages 3-4:

Accordingly, St. Joseph's has appealed to this Court. On June 7, 2024, St. Joseph's moved the ICA for a stay pending the outcome of St. Joseph's appeal (Ex. 7), and the ICA summarily denied that motion (Ex. 8). While Stonewall opposed St. Joseph's motion (Ex. 9), the Authority agreed that "the balance of the parties' respective harms suggests that the Court should issue a stay" (Ex. 10, p. 6). St. Joseph's respectfully requests that the Court stay the Authority's Amended Decision and the ICA's Opinion pending the outcome of St. Joseph's appeal.

The net effect of this Court's Stay Order in Case No. 23-347 was to halt the Respondent Authority's DOR, which permitted Petitioner Stonewall to completely relocate its hospital by constructing a new one. This Court's Stay Order certainly does not relate to Petitioner Stonewall's proposed AHCF DOR application for the complete relocation of a separate and distinct medical office building, a project that had not even been proposed prior to July 2024.

Petitioner Stonewall contends that Respondent Authority, by granting a stay, has exceeded its legitimate powers and committed clear legal error. This Court's July 25, 2024, Stay Order is unrelated to Petitioner Stonewall's AHCF DOR application to completely relocate a separate and distinct medical office building. The scope of this Court's July 25, 2024, Stay Order pertains to a different DOR application related to the complete relocation of a hospital proposed by Petitioner Stonewall. It has nothing to do with Petitioner Stonewall's AHCF DOR application that concerns the proposed complete relocation of a separate and distinct medical office building that is now in issue. As a matter of law, Petitioner Stonewall's AHCF DOR application should not have been stayed by Respondent Authority because it had no jurisdiction to interpret and expand the scope of this Court's July 25, 2024, Stay Order. Respondent Authority improperly interpreted the scope of this Court's Stay Order, and it exceeded its legitimate powers and committed clear legal error. This Court should issue a Writ of Prohibition to require Respondent Authority to lift its stay and issue a timely decision on Petitioner Stonewall's DOR application.

Further, Respondent Authority is obligated as a matter of law to comply with the requirements of W. Va. CSR § 65-32-18.4, which regulation requires that Respondent Authority "shall issue its ruling [on a DOR] within 45 days of its receipt of the request if all of the necessary information has been provided to the Authority in a timely manner..." Petitioner Stonewall seeks both a Writ of Prohibition and a Writ of Mandamus for the Respondent Authority's failure to act

within 45 days. When presented with Petitioner Stonewall's DOR application, the Respondent Authority had three choices to make within 45 days: 1) it could approve it; 2) it could reject it and find that a CON was needed; or, 3) it could determine that the application was incomplete and request additional information. This Court may note that the Respondent Authority never declared that Petitioner Stonewall's AHCF DOR application was incomplete or asked it to provide any additional information outside of the original AHCF DOR application. As discussed herein, Petitioner Stonewall voluntarily supplied additional information that went above and beyond the information that is normally provided for an AHCF DOR application.

As will be more fully discussed herein, prior to Respondent Authority's October 23, 2024, decision to stay the AHCF DOR, the 45-day period to act had already expired. Respondent Authority's stay was clear legal error, warranting a Writ of Prohibition. Further, a Writ of Mandamus is warranted because the Respondent Authority clearly violated its mandatory non-discretionary duties as W. Va. CSR § 65-32-18.4 clearly states that the Respondent "shall" act within 45 days. As of the filing of this Petition, Respondent Authority has failed to decide Petitioner Stonewall's AHCF DOR application and instead has stayed Petitioner Stonewall's AHCF DOR application without providing any written reasons for that decision. This Court should issue a Writ of Prohibition and a Writ of Mandamus to require Respondent Authority to lift its stay and issue a timely decision on Petitioner Stonewall's AHCF DOR application.

IV. STATEMENT REGARDING ORAL ARGUMENT

Petitioner requests oral argument under Rule 20 of the West Virginia Rules of Appellate Procedure because this case involves novel issues of first impression and fundamental public importance that would be assisted by oral argument before this Court. If the Court prefers, an expedited memorandum decision that also grants the two Writs requested herein could be issued.

V. ARGUMENT

A. *This Court Should Grant a Writ of Prohibition and a Writ of Mandamus.*

(1) **Standard for a Writ of Prohibition.**

This Court has original jurisdiction to issue a Writ of Prohibition under Section 3 of Article VIII of the West Virginia Constitution and W. Va. Code § 53-1-2. In Syllabus Point 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996), this Court established the standard for a Writ of Prohibition for a lower tribunal as follows:

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

It should be noted that this Court's *Berger* decision arose in the context of a challenge to the West Virginia Board of Medicine's statutory authority to issue a subpoena duces tecum to a court reporter. This Court found that the Board did not have that legal authority and issued a Writ to halt the subpoena. In a related case, *State ex rel. Hoover v. Smith*, 198 W. Va. 507, 482 S.E.2d 124 (1997), this Court also issued a Writ against a Hearing Examiner of the Medical Board that refused to issue a subpoena or allow for pre-hearing discovery. This Court has also granted Writs of Prohibition against other West Virginia administrative agencies. *See e.g., State ex rel. Miles v.*

West Virginia Board of Registered Professional Nurses, 236 W. Va. 100, 777 S.E.2d 669 (2015) (Granting Writ to prohibit nursing board from proceeding against a nurse's license beyond one year); *State ex rel. York v. West Virginia Real Estate Appraiser Licensing and Certification Board*, 236 W. Va. 608, 760 S.E.2d 856 (2014) (Granting Writ to prohibit the Real Estate Board from proceeding in an untimely fashion and without a hearing); and *State ex rel. Fillinger v. Rhodes*, 230 W. Va. 560, 741 S.E.2d 118 (2014) (Granting Writ because the Nursing Board failed to timely hold a hearing on complaints, and the complaints were therefore ordered dismissed with prejudice by this Court).

Based upon the foregoing, as more fully discussed herein, this Court has original jurisdiction over this matter under Section 1 of Article XII of the West Virginia Constitution, and it should issue a Writ of Prohibition and require the Respondent Authority to lift its stay and timely decide Petitioner Stonewall's DOR application.

(2) Standard for a Writ of Mandamus.

This Court has original jurisdiction to issue a Writ of Mandamus under Section 3 of Article VIII of the West Virginia Constitution and W. Va. Code § 53-1-2; *State ex rel. McLaughlin v. W. Virginia Court of Claims*, 209 W. Va. 412, 415, 549 S.E.2d 286, 289 (2001). "Mandamus is a proper remedy to require the performance of a non-discretionary duty by various governmental agencies or bodies." Syl. Pt. 2, *State ex rel. McLaughlin v. W. Virginia Court of Claims*, 209 W. Va. 412, 549 S.E.2d 286 (internal citations omitted). The standard for a Writ of Mandamus in this State is well-settled:

"A writ of mandamus will not issue unless three elements co-exist- (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969); Syl. Pt. 1, *State ex rel. Brown v. Corporation*

of Bolivar, 217 W. Va. 72, 614 S.E.2d 719 (2005); see also Syl. Pt. 1, *State ex rel. Dickerson v. City of Logan*, 221 W. Va. 1, 650 S.E.2d 100 (2006); Syl. Pt. 1, *Graf v. Frame*, 177 W. Va. 282, 352 S.E.2d 31 (1986).

A Writ of Mandamus will issue to require the discharge by a public official of a mandatory non-discretionary duty. *State v. Huntington*, 147 W. Va. 728, 131 S.E.2d 160 (1963); *State v. Battle*, 147 W. Va. 841, 131 S.E.2d 730 (1963); *State ex rel. Cassinelli v. Bassett*, 148 W. Va. 697, 137 S.E.2d 232 (1964); *Reed v. Hansbarger*, 173 W. Va. 258, 314 S.E.2d 616 (1984). A fuller statement of this rule is that mandamus will lie where there is a clear legal right to the performance of a particular act or duty at the hands of the respondent and such act or duty is of a ministerial nature, rather than one involving the exercise of discretion. *State v. Huntington*, 147 W. Va. 728, 131 S.E.2d 160 (1963); *State v. Battle*, 147 W. Va. 841, 131 S.E.2d 730 (1963); *State ex rel. Cassinelli v. Bassett*, 148 W. Va. 697, 137 S.E.2d 232 (1964); *Reed v. Hansbarger*, 173 W. Va. 258, 314 S.E.2d 616 (1984).

Mandamus will issue to compel performance of a mandatory non-discretionary duty of an administrative officer though another remedy exists, where it appears that the official, under misapprehension of law, refuses to recognize the nature and scope of his duty and proceeds on the belief that he has discretion to do or not to do the thing demanded of him. *Walter v. Ritchie*, 156 W. Va. 98, 191 S.E.2d 275 (1972); *Potomac Edison Co. v. Jefferson County Planning & Zoning Comm'n*, 204 W. Va. 319, 512 S.E.2d 576 (1998).

Based upon the foregoing, as more fully discussed herein, this Court has original jurisdiction over this matter under Section 1 of Article XII of the West Virginia Constitution, and it should issue a Writ of Mandamus and require the Respondent Authority to lift its stay and timely decide Petitioner Stonewall's DOR application.

B. The Respondent Authority Had No Jurisdiction to Determine the Scope of This Court's Stay Order.

This Court has the sole and exclusive jurisdiction to determine the scope of its Stay Order, entered on July 25, 2024, in *St. Joseph's Hospital of Buchannon, Inc. v. Stonewall Jackson Memorial Hospital Company, et al.*, Case No. 23-347. (Appx. 0001). The Respondent Authority was on notice of Petitioner Stonewall's position as of its September 25, 2024, letter. (Appx. 0052-0053). The September 25, 2024, letter relayed to the Respondent Authority that if Respondent SJH thought that Petitioner Stonewall's AHCF DOR application was in violation of this Court's Stay Order, it should have requested this Court to review the matter. (*Id.*). In its October 4, 2024, letter to Respondent Authority, Respondent SJH argued that this Court's July 25, 2024, Stay Order was binding upon Respondent Authority. (Appx. 0054-0114). Therefore, Respondent SJH argued that Respondent Authority was compelled to comply with this Court's Stay Order. (Appx. 0054-0114). This argument is specious at best. This Court's Stay Order only applies to the complete relocation of a hospital, not the complete relocation of a separate and distinct medical office building. The practical effect of this Court's Stay Order was to stop Petitioner Stonewall from constructing a new hospital pending this Court's consideration of Respondent SJH's appeal in Case No. 23-347. This Court's Stay Order imposed no legal duties on Respondent Authority, and it was duplicitous for Respondent SJH to suggest otherwise. Only by unlawfully expanding the scope of this Court's July 25, 2024, Stay Order was Respondent Authority able to make this unwarranted conclusory leap that this Court's stay of the complete relocation of a hospital also applied to the complete relocation of a separate and distinct medical office building.

In *State ex rel. West Virginia Department of Health & Human Resources v. Bloom*, 247 W. Va. 433, 880 S.E.2d 899 (2022), this Court dealt with its jurisdiction regarding a stay in a slightly different context at footnote 12, when a stay order had been entered by this Court, and it stated:

When this Court grants a stay of proceedings, the circuit court no longer has the authority to preside over the matter unless it receives permission to proceed from this Court. See Syl. pt. 3, *Fenton v. Miller*, 182 W. Va. 731, 391 S.E.2d 744 (1990) ("Once this Court takes jurisdiction of a matter pending before a circuit court, the circuit court is without jurisdiction to enter further orders in the matter except by specific leave of this Court."). A stay operates as "[a] suspension of the case or some designated proceedings within it. It is a kind of injunction with which a court freezes its proceedings at a particular point. . . ." Black's Law Dictionary 1267 (5th ed. 1979)." *State ex rel. Dye v. Bordenkircher*, 168 W. Va. 374, 378, 284 S.E.2d 863, 866 (1981).

"In this case, we took jurisdiction of the matter pending[,] and the circuit court had no jurisdiction to enter any further orders absent specific leave of this Court or ancillary jurisdiction." *Hanson v. Bd. of Educ. of the Cnty. of Mineral*, 198 W. Va. 6, 9, 479 S.E.2d 305, 308 (1996).

Courts in other jurisdictions have likewise ruled that any alleged violation of a court order should be brought before the Court that issued that order. "A claim that a party is acting in violation of court order ordinarily should be brought before the court that issued that order[.]" *Asbury Park Board of Education. v. New Jersey Department of Education*, 369 N.J.Super. 481, 483, 849 A.2d 1074 (Super.App.Div.2004).

Based upon the foregoing, Petitioner Stonewall contends that Respondent Authority had no jurisdiction over the scope of this Court's Stay Order, entered on July 25, 2024, in *St. Joseph's Hospital of Buchannon, Inc. v. Stonewall Jackson Memorial Hospital Company, et al.*, Case No. 23-347 (Appx. 0001), and it should not have considered Respondent SJH's request for a stay. This Court has the sole and exclusive jurisdiction to determine the scope of its July 25, 2024, Stay Order. Only this Court can determine if its stay of the complete relocation of a hospital applies to the complete relocation of a separate and distinct medical office building. If Respondent SJH thought that Petitioner Stonewall's AHCF DOR application was in violation of this Court's Stay Order, it should have requested this Court to review the matter. This Court should issue a Writ of

Prohibition and require the Respondent Authority to lift its stay and timely decide Petitioner Stonewall's DOR application.

C. The Respondent Authority Lacks Any Statutory Ability, Express or Implied, to Impose a Stay Regarding Petitioner Stonewall's AHCF DOR Application.

Respondent Authority's Stay Decision has exceeded its legitimate powers and committed clear legal error. "Administrative agencies are creatures of statute and delegates of the Legislature." *Walter v. Ritchie*, 156 W.Va. 98, 104, 191 S.E.2d 275 (1972). As the power of an administrative agency is completely dependent upon statutes, an agency must derive its exercise of any authority from statute. *See Atlantic Greyhound Corporation v. Public Service Commission of West Virginia*, 132 W.Va. 650, 54 S.E.2d 169 (1949). While an administrative agency possesses certain implied powers which are reasonable and necessary, those implied powers must arise from or be related to the exercise of the agency's duties to accomplish the purpose of the statute. *See Colvin v. State Workmen's Compensation Commissioner*, 154 W. Va. 280, 175 S.E.2d 186 (1970); *Mohr v. The County Court of Cabell County*, 145 W. Va. 377, 115 S.E.2d 806 (1960). *See also, Wilhite v. Public Service Commission of West Virginia*, 150 W. Va. 747, 149 S.E.2d 273 (1966); 1 Am. Jur. 2d *Administrative Law* §§ 44 and 70.

W. Va. Code § 16-2D-3 sets forth the Respondent Authority's general statutory powers and duties. This Court may review that section and see that the Respondent Authority was not granted any general statutory power to grant a stay of any applications. W. Va. Code § 16-2D-7 specifically controls in this case, as it governs the Petitioner Stonewall's AHCF DOR application at issue in this case. This section provides:

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. The authority may require that a person submit certain information in order to make this determination. A person shall pay a \$100 fee to the authority to

obtain this determination. A person is not required to obtain this determination before filing an application for a certificate of need or an exemption.

Respondent Authority also has the power to promulgate rules under W. Va. Code § 16-2D-4, and it has established rules at W. Va. CSR § 65-32-18 that pertain to DOR applications. As previously discussed, W. Va. CSR § 65-32-18.4 is one pertinent regulation that the Respondent Authority has promulgated that requires that the Respondent Authority “shall issue its ruling [on a DOR] within 45 days of its receipt of the request if all of the necessary information has been provided to the Authority in a timely manner...” The regulations at W. Va. CSR § 65-32-18 provide no power for the Respondent Authority to stay Petitioner Stonewall’s AHCF DOR application.

Based on the foregoing, Respondent Authority had no statutory or regulatory authority to grant a stay. As previously discussed, the Respondent Authority had only three choices under the regulatory scheme for a DOR: approve, reject, or request additional information. Respondent Authority exceeded its legitimate powers and committed clear legal error by granting a stay that improperly expanded the scope of this Court’s July 25, 2024, Stay Order to apply to the relocation and construction of a separate and distinct medical office building. The appellate record reflects that the separate and distinct medical office building is not and has never been at issue in *St. Joseph’s Hospital of Buchannon, Inc. v. Stonewall Jackson Memorial Hospital Company, et al.*, Case No. 23-347 (Appx. 0001). This Court should issue a Writ of Prohibition and require the Respondent Authority to lift its stay and timely rule upon Petitioner Stonewall’s AHCF DOR application.

D. The Factors for a Writ of Prohibition Have Been Met.

- (1) Petitioner Stonewall Has No Other Adequate Means, such as Direct Appeal, to Obtain the Desired Relief.**

The first factor to consider whether a Writ of Prohibition should be granted under this Court's *Berger* decision is whether the Petitioner Stonewall has some other means of relief, such as a direct appeal. Petitioner Stonewall is aware that as a general rule, appeals from all administrative agencies, including Respondent Authority, lie with the Intermediate Court of Appeals of West Virginia (ICA) pursuant to W. Va. Code § 51-11-4(b)(4). In this instance, however, Petitioner Stonewall argues that it is not appropriate to appeal the Respondent Authority's stay to the ICA for several reasons.

First and foremost, Petitioner Stonewall would contend that an appeal of the Respondent Authority's stay should not be made to the ICA because fundamentally what is at issue in this case is the proper scope of this Court's Stay Order, entered on July 25, 2024, in *St. Joseph's Hospital of Buchannon, Inc. v. Stonewall Jackson Memorial Hospital Company, et al.*, Case No. 23-347 (Appx. 0001). Only this Court has jurisdiction to consider the scope of its July 25, 2024, Stay Order and whether it applies to Petitioner Stonewall's AHCF DOR application for the complete relocation of a medical office building located at 456 Market Place Mall in Weston, Lewis County, West Virginia, to a separate and distinct medical office building to be constructed by Petitioner on Staunton Drive in Weston, Lewis County, West Virginia. Petitioner Stonewall contends that the scope of the Stay Order only pertained to the complete relocation of its hospital, which is all that is at issue in Case No. 23-347, that is currently pending before this Court. Petitioner Stonewall recognizes that only this Court can decide the scope of its Stay Order and that is why the instant Petition has been filed. The ICA certainly has no jurisdiction or ability to properly consider the scope of this Court's July 25, 2024, Stay Order.

In addition, Petitioner Stonewall has previously argued that a DOR is not an appealable order to the ICA in any event. Judge Lorensen noted in his separate opinion in *St. Joseph's*

Hospital of Buckhannon, Inc. v. Stonewall Jackson Memorial Hospital Company, et al., 903 S.E.2d 247, 2024 W. Va. App. LEXIS 135 (2024), that appeals of DOR are not permitted under “W. Va. Code § 16-2D-16a(a)(2) (2021) which provides that: “An appeal of a *final decision in a certificate of need review*... shall be made to the West Virginia Intermediate Court of Appeals....” (emphasis added).” The majority at page 6, footnote four, disagreed with this position, but Petitioner Stonewall respectfully suggests that Judge Lorensen is correct and that a direct appeal with the ICA does not lie regarding a DOR decision. Here, we are only dealing with a Stay Decision of the Respondent Authority, not even a formal DOR decision. Petitioner Stonewall would also contend that a Stay Decision, as rendered herein by Respondent Authority, is not an appealable order.

Here, it appears that Respondent SJH is in agreement with this argument that the Respondent Authority’s stay is not appealable, as it recently stated in its December 3, 2024, letter to the Authority (Appx. 0120-0121), the following:

St. Joseph's objects to Stonewall's request because the Authority's Stay Order is not appealable. An appeal may only be made from "a final decision in a certificate of need review[.]" See W. Va. Code § 16-2D-16a (emphasis added); *see also* W. Va. Code § 16-298-13 ("A final decision of the board . . . shall ... be reviewed . . ."). In a recent case, the Intermediate Court of Appeals ("ICA") held that "a 'final order' is defined as '[a]n order that is dispositive of the entire case.'" *Dye v. W. Va. Bd of Architects*, No. 23-ICA-273, 2024 W. Va. App. LEXIS 98, *7 (W. Va. App. Ct. 2024) (quoting *Final Order*, *Black's Law Dictionary* (11 ed. 2019)). Here, it is clear that the Stay Order is not a final order disposing of Stonewall's request for a determination of reviewability and therefore the Order cannot be appealed. *See id.* at *7-8 ("because the statutes and rules governing this appeal only grant appellate review to final orders, . . . the Board's suspension of Mr. Dye is only reviewable on appeal once the Board enters a decision which meets the definition of a final order[.]").

With regard to this first factor, this Court should determine that Petitioner Stonewall has no other means of relief to consider the Respondent Authority’s Stay Decision and the scope of

this Court's July 25, 2024, Stay Order, such as a direct appeal, and upon that basis, issue a Writ of Prohibition and require the Respondent Authority to lift its stay and timely rule upon Petitioner Stonewall's AHCF DOR application.

(2) Petitioner Stonewall Will be Damaged or Prejudiced in a Way that is Not Correctable on Appeal.

The second factor to consider whether a Writ of Prohibition should be granted under this Court's *Berger* decision is whether the Petitioner Stonewall will be damaged or prejudiced in a way that is not correctable on appeal. Pending before the Respondent Authority is whether Petitioner Stonewall should receive a DOR for the complete relocation of an AHCF located at 456 Market Place Mall in Weston, Lewis County, West Virginia, to a separate and distinct medical office building to be constructed by Petitioner Stonewall on Staunton Drive in Weston, Lewis County, West Virginia. Without stating any written reasons, Respondent Authority has decided to stay the DOR application because of this Court's Stay Order, entered on July 25, 2024, in *St. Joseph's Hospital of Buchannon, Inc. v. Stonewall Jackson Memorial Hospital Company, et al.*, Case No. 23-347 (Appx. 0001).

Petitioner Stonewall contends that it, the Weston medical community and the community at large, will be damaged by the delay in construction of the medical office building. This proposal would bring a modern medical office building to the residents of Weston. Its construction would involve good paying construction and health care jobs for the Weston community. Respondent Authority's Stay Decision is clearly erroneous, and Petitioner Stonewall and the community should not be required to wait through several years of appeals to bring this project to fruition. Further, as discussed in the preceding section, Petitioner Stonewall does not see any avenue to appeal the Stay Decision of the Respondent Authority, so this Writ of Prohibition is actually the only legal alternative available at this time.

With regard to this second factor, this Court should determine that Petitioner Stonewall and the Weston community will be damaged by any delay and, upon that basis, issue a Writ of Prohibition and require the Respondent Authority to lift its stay and timely rule upon Petitioner Stonewall's AHCF DOR application.

(3) Respondent Authority's Stay Decision is Clearly Erroneous as a Matter of Law.

The third factor, and the most important factor to consider whether a Writ of Prohibition should be granted under this Court's *Berger* decision, is whether Respondent Authority's stay is clearly erroneous as a matter of law. Petitioner Stonewall argues that Respondent Authority's Stay Decision is clearly erroneous as a matter of law for several reasons.⁴ First and foremost, Respondent Authority knows full well that, as a matter of law, a DOR should have been granted for the complete relocation of an AHCF located at 456 Market Place Mall in Weston, Lewis County, West Virginia, to a separate and distinct medical office building to be constructed by Petitioner on Staunton Drive in Weston, Lewis County, West Virginia. As a general rule, a Certificate of Need (CON) is not needed for an AHCF under W. Va. Code § 16-2D-8 when the expenditure minimum of \$100 million (W. Va. Code § 16-2D-2(15)) is not met. Here, as clearly stated in Petitioner Stonewall's September 25 letter, the proposed construction for the separate and distinct medical office building was well under the expenditure minimum, and no CON was needed: "the project that is going to be undertaken involves the total relocation of a physician to a newly constructed medical office building with a projected cost of approximately \$10,000,000."

⁴ This Court stated in *State ex rel. Hoover v Berger*, 199 W. Va. at 21 and 483 at 21: "Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." More recently, this Court in *State ex rel. Berg v. Ryan*, 249 W. Va. 657, 667, 900 S.E.2d 83, 93 (2024) issued a Writ of Prohibition when a showing had been made that the second and third factors were met.

(Appx. 0053). The fact that Petitioner Stonewall did not need a CON for this project was known to Respondent Authority as evidenced by its initial response when it quickly issued its original AHCF DOR decision on August 28, 2024. (Appx. 0005-0008). But for the overlooked public notice provision, this decision would have stood, and this Writ would not have been filed.

In this case, Respondent SJH argued, and Respondent Authority accepted, that this Court's Stay Order entered on July 25, 2024, in *St. Joseph's Hospital of Buchannon, Inc. v. Stonewall Jackson Memorial Hospital Company, et al.*, Case No. 23-347 (Appx. 0001), controlled and precluded any consideration by the Respondent Authority of Petitioner Stonewall's AHCF DOR application. Only this Court has the legal jurisdiction to determine the scope of its July 25, 2024, Stay Order and whether or not it applied to Petitioner Stonewall's AHCF DOR application for the relocation of its separate and distinct medical office building or not. Petitioner Stonewall argues that this Court's July 25, 2024, Stay Order only relates to the complete relocation of the hospital that is at issue in Case No. 23-347, and that Stay Order did not contemplate nor did it consider Petitioner Stonewall's AHCF DOR application for the complete relocation of its separate and distinct medical office building located at 456 Market Place Mall in Weston, Lewis County, West Virginia, to a new location to be constructed by Petitioner on Staunton Drive in Weston, Lewis County, West Virginia. That project had not even been proposed as of July 25, 2024, and could not have been contemplated by this Court in its July 25, 2024, Stay Order. Respondent Authority's decision to expand the scope of the Stay Order and issue its own Stay Decision, without setting forth any written reasons, was clearly erroneous as a matter of law, and that decision cannot be allowed to stand. In *State ex rel. West Virginia Department of Health & Human Resources v. Bloom, supra*, this Court found in footnote 12 that the Circuit Court's orders entered after the stay

lacked authority and should not be considered. This Court should make a similar decision in this case.

In addition, this Court in *State ex rel. Miles*, *State ex rel. York*, and *State ex rel. Fillinger*, *supra*, analyzed the underlying statutes and regulatory requirements at issue in each case, and this Court issued Writs in all three cases when the agencies failed to meet their own statutory and regulatory requirements. In this case, as clearly stated in Petitioner Stonewall's September 25 letter, the proposed construction for the separate and distinct medical office building was well under the expenditure minimum, and no CON was needed: "the project that is going to be undertaken involves the total relocation of a physician to a newly constructed medical office building with a projected cost of approximately \$10,000,000. (Appx. 0053). Petitioner Stonewall's AHCF DOR was summarily granted initially because it complied with the law. This Court should find that Respondent Authority's decision to stay Petitioner Stonewall's AHCF DOR is erroneous as a matter of law.

Finally, as previously discussed, Respondent Authority has ignored the clear provisions in W. Va. CSR § 65-32-18.4 that provides that a DOR must be considered and ruled upon in 45 days:

18.4. Upon receipt of a request for declaratory ruling or a ruling regarding reviewability, the Authority shall issue its ruling within 45 days of its receipt of the request if all of the necessary information has been provided to the Authority in a timely manner... (emphasis added).

Respondent Authority has failed to fulfill its regulatory obligations by timely considering Petitioner Stonewall's DOR verified letter.⁵ The application was filed by Petitioner Stonewall on

⁵ In *Reed v. Staffileno*, 239 W. Va. 538, 542, 803 S.E.2d 508, 512 (2017), this Court examined an appeal of a DMV licensure revocation proceeding that raised an issue of undue delay and it stated:

this Court has long recognized the constitutional mandate that "'justice shall be administered without . . . delay.'" W. Va. Const. Art. III, § 17."

August 21, 2024, and it should have been acted upon within 45 days, or October 7, 2024. Instead, in an untimely fashion, the Respondent Authority finally decided to stay the application on October 23, 2024, 16 days after its regulatory deadline. This Court long ago recognized that a dentist lacked an adequate alternative remedy when the Dental Board failed to act. *State ex rel. Sheppe v. West Virginia Board of Dental Examiners*, 147 W.Va. 473, 480-82, 128 S.E.2d 620, 624-25 (1962). This Court cannot allow the Respondent Authority's erroneous decision to stand.

This Court in *State ex rel. Miles*, *State ex rel. York*, and *State ex rel. Fillinger*, *supra*, specifically addressed the timeliness of agency actions, and this Court issued Writs in all three cases when the agencies failed to timely act in accordance with their own regulatory requirements. So too in this case, this Court should determine that the third factor has been met, and Respondent Authority's decision to stay Petitioner Stonewall's AHCF DOR is erroneous as a matter of law and that its failure to decide Petitioner Stonewall's AHCF DOR application within 45 days is erroneous as a matter of law. Upon that basis, this Court should issue a Writ of Prohibition and require the Respondent Authority to lift its stay and timely rule upon Petitioner Stonewall's AHCF DOR application.

(4) Respondent Authority's Stay Decision is an Oft Repeated Error or Manifests Persistent Disregard for Either Procedural or Substantive Law.

Frantz v. Palmer, 211 W. Va. 188, 192, 564 S.E.2d 398, 402 (2001). We further have recognized that "administrative agencies performing quasi-judicial functions have an affirmative duty to dispose promptly of matters properly submitted." Syl. pt. 7, in part, *Allen v. State Human Rights Comm'n*, 174 W. Va. 139, 324 S.E.2d 99 (1984).

More recently in *Frazier v. Derechin*, 246 W. Va. 36, 866 S.E.2d 101 (2021), this Court recognized that in considering timely agency action, "due process operates as an outer limit," relying upon *Holland v. Miller*, 230 W. Va. 35, 39, 736 S.E.2d 35, 39 (2012). Here, it cannot be disputed that the Respondent Authority had a legal duty to timely act on Petitioner Stonewall's AHCF DOR, and it has not done so in this case.

The fourth factor to consider whether a Writ of Prohibition should be granted under this Court's *Berger* decision is whether Respondent Authority's conduct is an oft repeated error or manifests persistent disregard for either procedural or substantive law. Respondent Authority has addressed this matter at four separate meetings. At the first meeting, Petitioner Stonewall's AHCF DOR was summarily approved, as it should have been. (Appx. 0120). That approval was voided because the meeting was not properly noticed. (Appx. 0009). At the second and third meetings, the decision on the AHCF DOR application was tabled. (Appx. 0125 and 0129). Counsel for Respondent SJH's second letter to Respondent Authority dated October 4, 2024, stated that Petitioner Stonewall's AHCF DOR application violated this Court's July 25, 2024, Stay Order, and this position was agreed to by the Attorney General's office. (Appx. 0054-0114). At the fourth meeting, the Respondent Authority seemingly followed their counsel's misguided advice as Respondent Authority concluded that this Court's July 25, 2024, Stay Order applied to Petitioner Stonewall's AHCF DOR application. (Appx. 0132). Thereafter, the Respondent Authority issued a written Stay Decision without providing any written reasons for that decision. (Appx. 0117-0118). Respondent Authority made an erroneous decision to stay any final decision, and this Court should issue a Writ of Prohibition to provide otherwise.

Given the fact that the DOR was originally approved, this series of events suggests a pattern of manifest and persistent disregard for procedural and substantive law by Respondent Authority. As heretofore discussed, a CON was not needed for Petitioner Stonewall's AHCF under W. Va. Code § 16-2D-8 when the expenditure minimum of \$100 million (W. Va. Code § 16-2D-2(15)) was not met. Here, the project was well under the expenditure minimum, and no CON was needed. This fact is self-evident and consistent with the initial determination of Respondent Authority when it rendered its decision on August 28, 2024. (Appx. 0005-0008). This Court in *State ex rel.*

Miles, *State ex rel. York*, and *State ex rel. Fillinger*, *supra*, analyzed the underlying statutes and regulatory requirements at issue in each case, and this Court issued Writs in all three cases when the agencies failed to meet their own statutory and regulatory requirements.

In addition, Respondent Authority clearly exceeded its legitimate powers and committed legal error by failing to act within 45 days on Stonewall’s AHCF DOR application to comply with the requirements of W. Va. CSR § 65-32-18.4, which regulation requires that the Respondent “shall issue its ruling [on a DOR] within 45 days of its receipt of the request if all of the necessary information has been provided to the Authority in a timely manner...” This Court in *State ex rel. Miles*, *State ex rel. York*, and *State ex rel. Fillinger*, *supra*, specifically addressed the timeliness of agency actions, and this Court issued Writs in all three cases when the agencies failed to timely act in accordance with their own regulatory requirements.

This Court should determine that the fourth factor has been met, and Respondent Authority’s decision to stay Petitioner Stonewall’s AHCF DOR application is a manifest disregard of the law and, upon that basis, issue a Writ of Prohibition and require the Respondent Authority to lift its stay and timely rule upon Petitioner Stonewall’s AHCF DOR application.

(5) Respondent Authority’s Stay Decision Raises New and Important Problems or Issues of Law of First Impression.

The fifth and final factor to consider whether a Writ of Prohibition should be granted under this Court’s *Berger* decision is whether the Respondent Authority’s Stay Decision raises new and important problems or issues of law of first impression. Petitioner Stonewall argues that Respondent Authority’s decision to stay its AHCF DOR application presents two important legal problems and issues of first impression for this Court. First and foremost, Petitioner Stonewall has argued that the Respondent Authority had no jurisdiction to consider the scope of this Court’s July 25, 2024, Stay Order and that jurisdiction to consider the scope of the Stay Order lies

exclusively with this Court. This Court has addressed the scope of its stay order in the context of a Circuit Court in *State ex rel. West Virginia Department of Health & Human Resources v. Bloom*, *supra*, but it has not considered the issue with regard to the jurisdiction of an administrative agency. This Court should accept the Petition and consider that important jurisdictional issue. Specifically, this Court should determine that the Respondent Authority had no jurisdiction to expand this Court's July 25, 2024, Stay Order from the hospital project at issue to the completely separate and distinct AHCF project. That jurisdiction lies exclusively with this Court. If Respondent SJH wanted to contend that Petitioner Stonewall's AHCF DOR application was in violation of this Court's July 25, 2024, Stay Order, its sole remedy was to bring that issue to this Court for resolution.

In addition, Respondent Authority clearly exceeded its legitimate powers and committed legal error by failing to act within 45 days on Stonewall's AHCF DOR application to comply with the requirements of W. Va. CSR § 65-32-18.4, which regulation requires that the Respondent "shall issue its ruling [on a DOR] within 45 days of its receipt of the request if all of the necessary information has been provided to the Authority in a timely manner..." In *State ex rel. Miles*, *State ex rel. York*, and *State ex rel. Fillinger*, *supra*, this Court specifically addressed the timeliness of agency actions, and it issued Writs in all three cases when the agencies failed to timely act in accordance with their regulatory requirements. Respondent Authority's failure to timely act is an important problem that can only be remedied by this Court granting a Writ of Prohibition in this case.

This Court should determine that the fifth factor has been met, and Respondent Authority's decision to stay Petitioner Stonewall's AHCF DOR application raises new and important problems or issues of law of first impression, particularly with regard to the issue of timeliness and, upon

that basis, issue a Writ of Prohibition and require the Respondent Authority to lift its stay and timely rule upon Petitioner Stonewall's AHCF DOR application

E. The Factors for a Writ of Mandamus Have Been Met.

(1) Petitioner Stonewall Has a Clear Legal Right to the Relief Sought.

Respondent Authority is obligated as a matter of law to comply with the requirements of W. Va. CSR § 65-32-18.4, which regulation requires that Respondent Authority "shall issue its ruling [on a DOR] within 45 days of its receipt of the request if all of the necessary information has been provided to the Authority in a timely manner..." Petitioner Stonewall seeks a Writ of Mandamus for the Respondent Authority's failure to act within 45 days. When presented with Petitioner Stonewall's DOR application, the Respondent Authority had three choices to make within 45 days: 1) it could approve it; 2) it could reject it and find that a CON was needed; or, 3) it could determine that the application was incomplete and request additional information. This Court may note that the Respondent Authority never declared that Petitioner Stonewall's AHCF DOR application was incomplete or asked it to provide any additional information outside of the original AHCF DOR application.

A Writ of Mandamus is warranted in this case because the Respondent Authority clearly violated its mandatory non-discretionary duties as W. Va. CSR § 65-32-18.4 clearly states that the Respondent "shall" act within 45 days. This Court may take note that Petitioner Stonewall's application for a DOR was made by verified letter dated August 21, 2024. (Appx. 0002-0004). In applying the 45 day deadline, the Respondent Authority had until October 5, 2024, to act. It did not do so. After it first granted the application, Respondent Authority twice tabled Petitioner Stonewall's proposal at its meetings on September 25, 2024, (Appx. 0125) and October 9, 2024. (Appx. 0129). On October 23, 2024, Respondent Authority met and decided that it agreed with

Respondent SJH that Petitioner Stonewall's AHCF DOR application was stayed by the Supreme Court's Stay Order entered on July 25, 2024. (Appx. 0132). All of the actions taken after October 5, 2024, were untimely and failed to meet Respondent Authority's mandatory non-discretionary regulatory duties.

This Court has recognized that a party may seek a Writ of Mandamus when procedural time periods have not been met. *See e.g., Trozzi v. Bd. of Review of the W.Va. Bureau of Empl. Programs*, 214 W. Va. 604, 591 S.E.2d 162 (2003) (awarding attorney's fees for mandamus, concluding that the Board of Review failed to comply with its procedural duties); *State ex rel. W. Va. Dep't of Health & Hum. Res. ex rel. Chastity D. v. Hill*, 207 W. Va. 358, 532 S.E.2d 358 (2000) (granting mandamus relief to compel circuit court to hold dispositional hearings). *See also*, Syl. pt. 1, *State ex rel. Allstate Ins. Co. v. Union Pub. Serv. Dist.*, 151 W. Va. 207, 151 S.E.2d 102 (1966) ("Mandamus is a proper remedy to require the performance of a mandatory non-discretionary duty by various governmental agencies or bodies.").

In *Freeland v. Marshall*, 249 W. Va. 151, 895 S.E.2d 6 (2023), this Court recognized that the term "shall" in a statute or regulation creates a mandatory non-discretionary duty. It further recognized that such a legal duty created a correlated legal right for a party to have that obligation met:

Hence, the Legislature's use of the word "shall" normally imposes a mandatory, non-discretionary duty to perform the action mandated. We therefore conclude that West Virginia Code § 15A-4-17(i)(2) imposes upon the Commissioner a clear legal duty to (and correspondingly in this case grants to the Petitioner a legal right to have the Commissioner) adopt a written policy effectuating the purposes of "this subsection."

249 W. Va. at 158, 895 S.E.2d at 13. This Court should determine that the first factor for a Writ of Mandamus has been met, that Petitioner Stonewall has a legal right to an AHCF DOR decision

in 45 days, and Respondent Authority by issuing a stay has failed to follow W. Va. CSR § 65-32-18.4, which regulation requires that Respondent Authority “shall issue its ruling [on a DOR] within 45 days of its receipt of the request if all of the necessary information has been provided to the Authority in a timely manner...” Upon that basis, this Court should issue a Writ of Mandamus and require the Respondent Authority to lift its stay and timely rule upon Petitioner Stonewall’s AHCF DOR application.

(2) Respondent Authority Has a Legal Duty to do the Thing Which Petitioner Stonewall Seeks to Compel.

Respondent Authority has failed to follow W. Va. CSR § 65-32-18.4, which regulation requires that Respondent Authority “shall issue its ruling [on a DOR] within 45 days of its receipt of the request if all of the necessary information has been provided to the Authority in a timely manner...” The critical operative word in this regulation is “shall.” Justice Neely, writing for this Court in *Perry v Miller*, 166 W. Va. 138, 139, 272 S.E.2d 678, 679 (1980), succinctly discussed the word “shall” and stated:

... the crux of the issue is whether the words mean what they say or something else, in this case specifically whether "shall" means "shall" or whether it means "may." Also, as usual, we hold that words mean what they say and that "shall" means "shall;" therefore, we award the writ.

Around that same time, this Court also discussed the word “shall” in *Currey v. State Human Rights Comm'n*, 166 W. Va. 163, 166, 273 S.E.2d 77, 79 (1980) as follows:

The use of the word "shall" throughout this section indicates that the commission's duties are nondiscretionary. *Woodring v. Whyte*, 161 W. Va. 262, 242 S.E.2d 238 (1978); *Bounds v. State Workmen's Compensation Com'r.*, 153 W. Va. 670, 172 S.E.2d 379 (1970).

More recently, this Court has not deviated from its longstanding interpretation of the term “shall” as it relied upon *Currey* and it discussed the term “shall” in *Freeland v. Marshall*, 249 W. Va. 151, 158, 895 S.E.2d 6, 13 (2023):

We find the text of West Virginia Code § 15A-7-17(i) is plain. The final sentence of West Virginia Code § 15A-4-17(i)(2) uses the word "shall." "It is well established that the word 'shall,' in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation." Syl. Pt. 1, *Nelson v. W. Va. Pub. Emps. Ins. Bd.*, 171 W. Va. 445, 300 S.E.2d 86 (1982). Further, the Legislature's use of the word "shall" in a statute also ordinarily indicates that the duty imposed is non-discretionary. *Currey v. State of W. Va. Hum Rts. Comm'n*, 166 W. Va. 163, 166, 273 S.E.2d 77, 79 (1980) ("The use of the word 'shall' throughout this section indicates that the commission's duties are nondiscretionary."). Hence, the Legislature's use of the word "shall" normally imposes a mandatory, non-discretionary duty to perform the action mandated. We therefore conclude that West Virginia Code § 15A-4-17(i)(2) imposes upon the Commissioner a clear legal duty to (and correspondingly in this case grants to the Petitioner a legal right to have the Commissioner) adopt a written policy effectuating the purposes of "this subsection."

This Court should determine that the second factor for a Writ of Mandamus has been met, that Respondent Authority has a legal duty to follow W. Va. CSR § 65-32-18.4, which regulation requires that Respondent Authority “shall issue its ruling [on a DOR] within 45 days of its receipt of the request if all of the necessary information has been provided to the Authority in a timely manner...” This Court should find that Respondent Authority has not met this legal duty and, upon that basis, this Court should issue a Writ of Mandamus and require the Respondent Authority to lift its stay and timely rule upon Petitioner Stonewall’s AHCF DOR application.

(3) Petitioner Stonewall Has No Other Adequate Remedy at Law.

In the context of discussing the first factor for a Writ of Prohibition previously in this Petition, Petitioner Stonewall has already discussed the fact that it has no other remedy at law, such as an appeal, available to it in this case. That discussion is incorporated herein by reference

and not repeated for the sake of brevity. This Court in *Freeland v Marshall*, 249 W. Va. at 160, 895 S.E.2d at 15, discussed the issue of an appropriate remedy of law for a Writ of Mandamus as follows:

While "[g]enerally mandamus is not an appropriate remedy where another sufficient and specific remedy exists[.]" *State ex rel. Lawhead v. Kanawha Cnty. Ct.*, 129 W. Va. 167, 169, 38 S.E.2d 897, 898 (1946), "if such other remedy is inadequate or is not equally as beneficial, convenient and effective, mandamus will lie." *State ex rel. Smoleski v. County Court*, 153 W. Va. 307, 312, 168 S.E.2d 521, 524 (1969).

This holding is consistent with this Court's earlier decision in *Cooper v. Gwinn*, 171 W. Va. 245, 298 S.E.2d 781, 793, (1981) when this Court held:

While it is true that mandamus is not available where another specific and adequate remedy exists, if such other remedy is not equally as beneficial, convenient, and effective, mandamus will lie. *State ex rel. Lemley v. Roberts*, 164 W.Va. 457, 260 S.E.2d 850 (1979); *State ex rel. Smoleski v. County Court*, 153 W. Va. 307, 168 S.E.2d 521 (1969); *State ex rel. Bronaugh v. City of Parkersburg*, 148 W. Va. 568, 136 S.E.2d 783 (1964). Furthermore, the trend in this Court has been to enlarge the scope of mandamus, especially where there is an urgent question of public policy or where there is no reason for delaying adjudication of the issue by the highest court of the State. *Walls v. Miller*, 162 W. Va. 563, 251 S.E.2d 491 (1979).

This Court should determine that the third factor for a Writ of Mandamus has been met, that Petitioner Stonewall has no adequate remedy at law that is equally as beneficial, convenient, and effective, and, therefore, mandamus will lie in this case. This Court should find that Petitioner Stonewall has shown that it has no other adequate remedy and, upon that basis, this Court should issue a Writ of Mandamus and require the Respondent Authority to lift its stay and timely rule upon Petitioner Stonewall's AHCF DOR application.

VI. CONCLUSION

Petitioner Stonewall Jackson Memorial Hospital Company respectfully prays that the Supreme Court of Appeals of West Virginia should, on an expedited basis:

A. Issue a rule to show cause against Respondent Authority on the relief Petitioner seeks;

B. Issue a Writ of Prohibition against Respondent Authority finding that it exceeded its legitimate powers and committed clear legal error by issuing a Stay Decision precluding consideration of the Petitioner Stonewall Jackson Memorial Hospital Company's August 21, 2024, Determination of Reviewability application with regard to the complete relocation of an ambulatory health care facility located at 456 Market Place Mall in Weston, Lewis County, West Virginia to a separate and distinct medical office building to be constructed by Petitioner Stonewall on Staunton Drive in Weston, Lewis County, West Virginia;

C. Issue a Writ of Prohibition and Writ of Mandamus against Respondent Authority finding that it exceeded its legitimate powers and committed clear legal error by failing to act within 45 days on Stonewall's DOR to comply with the requirements of W. Va. CSR § 65-32-18.4, which regulation requires that the Respondent "shall issue its ruling [on a DOR] within 45 days of its receipt of the request if all of the necessary information has been provided to the Authority in a timely manner...";

D. Issue a Writ of Prohibition against Respondent Authority and require it to lift its Stay Decision and immediately consider Petitioner Stonewall's AHCF DOR application;

E. Issue a Writ of Mandamus against Respondent Authority finding that it failed to meet its mandatory non-discretionary duties by failing to act within 45 days on Stonewall's DOR to comply with the requirements of W. Va. CSR § 65-32-18.4, which regulation requires that the

Respondent “shall issue its ruling [on a DOR] within 45 days of its receipt of the request if all of the necessary information has been provided to the Authority in a timely manner...”;

- F. Give and award Petitioner its attorney fees and costs for bringing this Petition; and
- G. Give Petitioner such other relief at law or in equity as it deems proper and just.

**STONEWALL JACKSON MEMORIAL
HOSPITAL COMPANY,
By counsel,**

/s/ Thomas G. Casto
Thomas G. Casto (WVSB 676)
Webster J. Arceneaux, III (WVSB 155)
Hannah K. W. Petros (WVSB 14311)
Lewis Gianola PLLC
300 Summers Street, Suite 700
Charleston, West Virginia 25301
Phone: (304) 345-2000
Fax: (304) 343-7999
tcasto@lewisgianola.com
wjarceneaux@lewisgianola.com
hpetros@lewisgianola.com

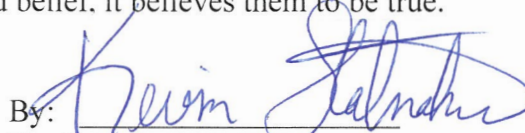
I. VERIFICATION

STATE OF WEST VIRGINIA,

COUNTY OF LEWIS, to-wit:

Kevin Stalnaker, Chief Administrative Officer of Stonewall Jackson Memorial Hospital, after being first duly sworn, says that the statements and allegations contained in the foregoing are true, except insofar as they are therein stated to be upon information and belief, and insofar as they are therein stated to be upon information and belief, it believes them to be true.

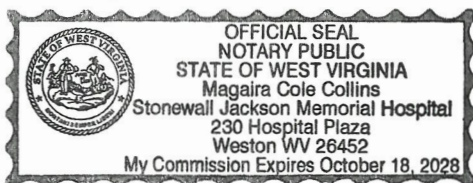
By:



Kevin Stalnaker, Chief Administrative Officer
Stonewall Jackson Memorial Hospital

Taken, subscribed and sworn before me this 26 day of November, 2024.

My commission expires: October 18, 2028.



{affix notary seal}



Notary Public

No. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**STATE OF WEST VIRGINIA *ex rel.*
STONEWALL JACKSON MEMORIAL
HOSPITAL COMPANY,**

Petitioner,

v.

**WEST VIRGINIA DEPARTMENT
OF HEALTH, HEALTH CARE AUTHORITY,
and, STATE OF WEST VIRGINIA
ex rel. ST. JOSEPH'S HOSPITAL OF
BUCHANON, INC.,**

Respondents.

CERTIFICATE OF SERVICE

I, Thomas G. Casto, counsel for Petitioner, do certify that a true copy of the foregoing VERIFIED PETITION FOR WRIT OF PROHIBITION AND WRIT OF MANDAMUS was duly served on December 18, 2024, with the Clerk of the Court using the File & Serve Xpress electronic filing system, which will send notification of such filing to all counsel of record.

/s/ Thomas G. Casto
Thomas G. Casto (WVSB 676)