
IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Charleston Area Medical Center, Inc.,

Petitioner Below, Petitioner,

v.

Thomas Memorial Hospital Association, d/b/a Thomas Memorial Hospital,

Applicant Below, Respondent,

and

West Virginia Health Care Authority,

Respondent.

BRIEF OF PETITIONER CHARLESTON AREA MEDICAL CENTER, INC.

**From The West Virginia Health Care Authority
CON File No. 24-3-13064-PV**

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I. TABLE OF CONTENTS

I.	TABLE OF CONTENTS.....	<i>i</i>
II.	TABLE OF AUTHORITIES	<i>ii-iii</i>
III.	ASSIGNMENT OF ERROR	1
IV.	STATEMENT OF THE CASE.....	2
V.	SUMMARY OF THE ARGUMENT	3
VI.	STATEMENT REGARDING ORAL ARGUMENT AND DECISION	5
VII.	STANDARD OF REVIEW.....	5
VIII.	ARGUMENT	6
	1. The Health Care Authority improperly withheld information from CAMC that was used as a basis for the critical finding in the Potential Violation Order	6
	2. The Health Care Authority Potential Violation Order improperly applied the provisions of W. Va. Code § 16-2D-8(a)(12)	11
	3. The Health Care Authority erroneously backdated the Potential Violation Order causing CAMC statutory appeal period to be cut in half	16
IX.	CONCLUSION.....	18

II. TABLE OF AUTHORITIES

Cases

<i>Appalachian Power Co. v. State Tax Dep't of W. Virginia</i> , 195 W. Va. 573, 578, 466 S.E.2d 424, 429 (1995)	6, 13
<i>CNG Transmission Corp. v. Craig</i> , 211 W.Va. 170, 564 S.E.2d 167 (2002)	6
<i>Deyerle v. W. Va. Dep't of Health & Human Res.</i> , 2019 W. Va. LEXIS 51, *5-6, 2019 WL 856254 (2019)	16
<i>Lawyer Disciplinary Bd. v. Allen</i> , 198 W. Va. 18, 35, 479 S.E.2d 317, 335 (1996)	13
<i>Monongahela Power Co. v. Buzminsky</i> , 243 W. Va. 686, 691, 850 S.E.2d 685, 690 (2020)	13
<i>Phillips v Larry's Pharmacy</i> , 220 W.Va. 484, 491, 647 S.E.2d 920, 927 (2007)	14
<i>Shane Grp., Inc. v. Blue Cross Blue Shield</i> , 825 F.3d 299, 305-06 (6th Cir. 2016)	8
<i>State ex rel. Appleby v. Recht</i> , 213 W. Va. 503, 510, 583 S.E.2d 800, 807 (2002)	15
<i>State ex rel. Brooks v. Zakaib</i> , 216 W. Va. 600, 602, 609 S.E.2d 861, 863 (2004)	8
<i>State ex rel. Comm'r v. Swope</i> , 230 W. Va. 750, 742 S.E.2d 438 (2013)	16
<i>State ex rel. Johnson v. Tsapis</i> , 187 W. Va. 337, 419 S.E.2d 1 (1992)	8, 9, 10
<i>State ex rel. W. Va. Consol. Pub. Ret. Bd. v. Nibert</i> , 235 W. Va. 203, 772 S.E.2d 609 (2015) ...	16
<i>Tax Assessment Against Purple Turtle, LLC v. Gooden</i> , 223 W.Va. 755, 679 S.E.2d 587 (2009)	16
<i>War Mem'l Hosp., Inc. v. W. Virginia Health Care Auth.</i> , 248 W. Va. 49, 53, 887 S.E.2d 34, 35 (2023)	6
<i>West Virginia Health Care Cost Review Auth. v. Boone Mem. Hosp.</i> , 196 W. Va. 326, 337, 472 S.E.2d 411, 422 (1996)	13, 14
<i>West Virginia State Police v. Walker</i> , 246 W. Va. 77, 866 S.E.2d 142 (2021)	5

Statutes

W. Va. Code § 16-2D	5
W. Va. Code § 11-3-25	17
W. Va. Code § 16-29B-12(a)	18
W. Va. Code § 16-29B-12(f)	8
W. Va. Code § 16-29B-13	5
W. Va. Code § 16-2D-1	1
W. Va. Code § 16-2D-16(a)	16
W. Va. Code § 16-2D-16a(a)(2)	5
W. Va. Code § 16-2D-2(1)(E)	7
W. Va. Code § 16-2D-8(a)(12)	passim
W. Va. Code § 29A-5-4	5, 16
W. Va. Code § 6C-2-5(c)	16

Rules

Rule 20 of the West Virginia Rules of Appellate Procedure	5
W. Va. CSR § 65-32-19	8
W. Va. CSR § 65-32-8.25	7
W. Va. R.C.P. 26	8, 9
W. Va. R.C.P 26(c)	10

Treatises

Webster's Third New International Dictionary of the English Language Unabridged 1913 (1970)	13
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III. ASSIGNMENTS OF ERROR

Charleston Area Medical Center, Inc. (“CAMC”) appeals from a written decision of the West Virginia Health Care Authority (the “Authority”) issued verbally on August 13, 2025 and as a written Potential Violation Order on August 28, 2025 (the “Order”)(DR 0100), in the matter of *In re: Thomas Memorial Hospital Association d.b.a. Thomas Memorial Hospital*, CON File No. 25-3-13064, which determined that Thomas Memorial Hospital (“Thomas”) was not in violation of W. Va. Code § 16-2D-1 et seq. by developing a new ambulatory health care facility without first obtaining a Certificate of Need (“CON”). CAMC raises the following assignments of error:

1. The Authority’s Order states that Thomas “has presented information, as required by the Board, which shows that at no time has the Teays Valley Location ceased all operations for twelve (12) months.” (DR 0100). CAMC was a party to this matter, it originally filed the complaint and it made and responded to filings in the matter. The Authority prohibited CAMC from inspecting the information presented by Thomas to the prejudice of CAMC. The Authority is a public body that has no power to prohibit parties from viewing evidence in a proceeding. CAMC could not respond to the information that was presented by Thomas without first being offered the opportunity to inspect it. Such a restriction was in violation of constitutional and/or statutory provisions, in excess of the statutory authority or jurisdiction of the agency, made upon unlawful procedures, clearly wrong in view of the reliable, probative, and substantial evidence on the whole record, and arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
2. The Authority’s Order states that Thomas “has presented information, as required by the Board, which shows that at no time has the Teays Valley Location ceased all operations for twelve (12) months.” (DR 0100). W. Va. Code § 16-2D-8(a)(12) provides that a CON is required for “[t]he addition of health services offered by or on behalf of a health care facility which were not offered on a regular basis by or on behalf of the health care facility within the 12-month period prior to the time the services would be offered.” The Authority applied a non-statutory standard of ceasing all services at the location to the matter. Misapplying the plain language of the code is in violation of constitutional or statutory provisions, in excess of the statutory authority or jurisdiction of the agency, made upon unlawful procedures, clearly wrong in view of the reliable, probative, and substantial evidence on the whole record, and arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

3. The Authority backdated the Order approximately fifteen (15) days from the date the Order was made publicly available. The Order is dated August 15, 2025, but CAMC had no access to it and did not receive it until August 28, 2025. Such action by the Authority is in error and is prejudicial to CAMC as the thirty (30) day statutory time period in which to file the Notice of Appeal is decreased by half. Backdating an Order is now a common practice by the Authority, as this is at least the second time that it has happened to CAMC and it is in violation of constitutional or statutory provisions, in excess of the statutory authority or jurisdiction of the agency, made upon unlawful procedures, clearly wrong in view of the reliable, probative, and substantial evidence on the whole record, and arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

IV. STATEMENT OF THE CASE

This case began with CAMC's filing of a letter on August 15, 2024, with the Authority requesting that the Authority investigate the possible violation of CON law by Thomas. (DR 0002). The violation involved the opening of an ambulatory health care facility in Teays Valley, Putnam County. CAMC's allegation was that the location had not been recently operational and that the opening of the location, after years of it being nonoperational, was a violation of W. Va. Code § 16-2D-8(a)(12), which provides that a CON is required for "[t]he addition of health services offered by or on behalf of a health care facility which were not offered on a regular basis by or on behalf of the health care facility within the 12-month period prior to the time the services would be offered."

This matter was preceded by another similar matter that took place in 2021. (See DR 0004-0030). In that case, Thomas attempted to open the same Teays Valley location as a free-standing Emergency Room. In that matter, CAMC made the same allegation, that the location had been closed for longer than 12 months and that the reopening of it required a CON. In that matter, the Authority requested that Thomas produce data to demonstrate that the facility had been open and was providing health services there on a regular basis. DR 0012-0013. Thomas' response was to

provide a copied document that showed it had provided two simple radiation therapy procedures in the last twelve months. (See DR 19). The Authority requested additional data, and Thomas withdrew the Determination of Reviewability (“DOR”) filed to open the facility. DR 0021-0030.

When CAMC filed the August 15, 2024, complaint letter regarding a potential violation (DR 0002), the issues over this location began again.¹ Over the next year the parties exchanged letters arguing about the issues before the Authority. At some point during the process, the Authority entered into an Agreed Protective Order (DR 92,94) with Thomas governing the submission of utilization data and other unknown information regarding Thomas’ services at the Teays Valley location. From a review of the Designated Record in this case, it does not appear that Thomas ever filed a Motion for a Protective Order nor were its grounds for a protective order ever stated in any letter from counsel for Thomas contained in the Designated Record in this case. CAMC was not a party to the negotiations of the Agreed Protective Order, it did not endorse the Agreed Protective Order, and it was not made aware of the Protective Order or the disclosure until well after the date of the Order. This information was obviously critical to the outcome of the case as it was relied upon by the Authority in its Order issued on August 28, 2025. (DR 0100).

V. SUMMARY OF THE ARGUMENT

The arguments in this matter are simple. The Authority ruled that Thomas could reopen the site because Thomas “has presented information, as required by the Board, which shows that no time has the Teays Valley Location ceased all operations for twelve (12) months.” (DR 0100). First, the Authority refers to information presented by Thomas. There are at least four significant

¹ This matter was processed somewhat simultaneously with another matter regarding a Determination of Reviewability request filed by Thomas to purchase a linear accelerator and provide radiation therapy services at the same Teays Valley location. CON File No. 25-3-13268-X. The Authority issued a separate decision in that matter finding that Thomas was required to first obtain a CON before purchasing the linear accelerator.

problems with the way the Authority acted in this matter: 1) the authority entered an Agreed Protective Order (DR 0092 - 0095) without Thomas ever filing a Motion for Protective Order, or even requesting one in writing; 2) further, it is undisputed that the Agreed Protective Order was unknown to the moving party, CAMC, and it is undisputed that CAMC's counsel did not endorse the Agreed Protective Order; 3) while the Agreed Protective Order is styled as a Protective Order, this is a misnomer at best, as it was actually an Order Sealing the evidence, as no evidence was ever provided to counsel for CAMC for inspection or refutation; and, 4) the Authority considered the evidence, which was the sole evidence in the case, but refused to provide the evidence, or even a summary of it, to CAMC. CAMC cannot judge the veracity or appropriateness of evidence it cannot inspect.

Second, the Authority ruled that Thomas could reopen the site because Thomas had not ceased all operations for twelve (12) months at the facility. W. Va. Code § 16-2D-8(a)(12) clearly provides that the issue is whether Thomas had or had not offered services at the facility on a "regular basis" within the preceding twelve-month period. Ceasing operations is not remotely the same as offering services on a regular basis. Finally, the Authority decided that Thomas had not committed a violation at its regularly scheduled Board Meeting on August 13, 2024. It did not issue a written Order outlining the reasons for the decision until on or about August 28, 2025. (DR 0100). At that time, the Order was backdated to August 13, 2025. That two-week delay cut CAMC's time to appeal this matter to this Court in half, prejudicing CAMC's ability to properly analyze the law and facts in this matter.

CAMC contends that each of these errors warrant reversal of the Authority's August 28, 2025 Order. These grounds will be more fully discussed herein.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is not suitable for a memorandum decision and oral argument is appropriate pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure because the case involves an issue of fundamental public importance, to wit, the Authority's refusal to share key evidence in this matter with all parties to the matter resulting in the Authority making findings that could not be challenged except on appeal.

VII. STANDARD OF REVIEW

At least three applicable West Virginia statutes (W. Va. Code § 29A-4-1, W. Va. Code § 16-2D - W. Va. Code § 16-2D-16a(a)(2), & W. Va. Code § 16-29B-13) establish that the Authority's Order is subject to judicial review under the standard of review for contested cases set forth in W. Va. Code § 29A-5-4, which provides as follows:

(g) The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

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

Under W. Va. Code § 29A-5-4, the Court "reviews questions of law presented *de novo*" and "findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong." Syl. Pt. 1, in part, *West Virginia State Police v. Walker*, 246 W. Va. 77, 866 S.E.2d 142 (2021) (quoting Syl. Pt. 1, *Muscatell v. Cline*, 196 W. Va. 588,

474 S.E.2d 518 (1996)).

“Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review.” Syl. Pt. 1, *Appalachian Power Co. v. State Tax Dep't of W. Virginia*, 195 W. Va. 573, 578, 466 S.E.2d 424, 429 (1995). As the Supreme Court of Appeals has noted, “[t]he judiciary is the final authority on issues of statutory construction, and [is] obliged to reject administrative constructions that are contrary to the clear language of a statute.” Syl. Pt. 3, *War Mem'l Hosp., Inc. v. W. Virginia Health Care Auth.*, 248 W. Va. 49, 53, 887 S.E.2d 34, 35 (2023) (Syl. Pt. 5, *CNG Transmission Corp. v. Craig*, 211 W.Va. 170, 564 S.E.2d 167 (2002).

VIII. ARGUMENT

1. The Health Care Authority improperly withheld information from CAMC that was used as a basis for the critical finding in the Potential Violation Order.

With regard to the first assignment of error, CAMC argues that the August 28, 2025 Order was entered into in error because it was premised on an Agreed Protective Order that was entered without a motion or a showing of good cause. CAMC sent a letter to the Authority dated August 15, 2024, requesting that the Authority investigate whether Thomas was operating the Teays Valley location in violation of W. Va. Code § 16-2D-8(a)(12). (DR 0002). That statute provides that a CON is required for “[t]he addition of health services offered by or on behalf of a health care facility which were not offered on a regular basis by or on behalf of the health care facility within the 12-month period prior to the time the services would be offered.” As a part of that investigation, the Authority would necessarily need to request utilization data at the location from Thomas. That data was requested, and some data was submitted by Thomas to the Authority as it is referenced in the Order. The Order states that Thomas “has presented information, as required by the Board, which shows that at no time has the Teays Valley Location ceased all operations for twelve (12) months.” (DR 0100). However, there are at least four significant problems with the

way the Authority acted in this matter: 1) the Authority entered an Agreed Protective Order (DR 92,94) without Thomas ever filing a Motion for Protective Order, or even requesting one in writing; 2) further, it is undisputed that the Agreed Protective Order was unknown to the moving party, CAMC, and it is undisputed that CAMC's counsel did not endorse the Agreed Protective Order; 3) while the Agreed Protective Order is styled as a Protective Order, this is a misnomer at best, as it was actually an Order Sealing the evidence, as no evidence was ever provided to counsel for CAMC for inspection or refutation; and, 4) the Authority considered the evidence, which was the single most important evidence in the case, but refused to provide the evidence, or even a summary of it, to CAMC. CAMC cannot judge the veracity or appropriateness of evidence it cannot inspect.

Thomas' information was submitted to the Authority pursuant to an Agreed Protective Order negotiated by and between the Authority and Thomas. (DR 0092,94). CAMC was not made aware of the Agreed Protective Order, it did not participate in the negotiation of that Agreed Protective Order, it did not endorse that Agreed Protective Order, and it was not provided with the opportunity to inspect any information submitted to the Authority under Agreed Protective Order. The information was the sole evidence presented in this matter and provided the sole factual basis for the Order.

CAMC filed the initial complaint and it made and responded to filings in the matter. (DR 0002). By statute, CAMC was an interested person to this matter. W. Va. Code § 16-2D-2(1)(E). In the context of a determination before the Authority, however, there are positive rights that afford parties the right to information. Affected parties can engage in discovery of evidence as provided by the West Virginia Rules of Civil Procedure. Further, W. Va. CSR § 65-32-8.25 provides "Affected parties shall have **equal access to records, testimony and evidence before the board**

and shall have equal access to the expertise of the authority's staff." W. Va. Code § 16-29B-12(f) (emphasis added). Furthermore, the Authority is mandated to "make available for public inspection and examination all applications filed with the Authority and all other pertinent written materials filed with the Authority and essential to its review process." W. Va. CSR § 65-32-19. In a slightly different context, our Supreme Court reversed the entry of an order sealing a file, when the moving party was not advised of a hearing on the issue. *State ex rel. Brooks v. Zakaib*, 216 W. Va. 600, 602, 609 S.E.2d 861, 863 (2004).

Despite this, the Authority negotiated an Agreed Protective Order (DR 0092-0093) as well as an Amended and Restated Protective Order (DR 0094-95). CAMC is unaware of any motion filed by Thomas, nor does the designated record contain a motion setting forth its good cause for the Agreed Protective Order as required by this Court in *State ex rel. Johnson v. Tsapis*, 187 W. Va. 337, 419 S.E.2d 1 (1992). Further, as a result of this secretly negotiated Agreed Protective Order, CAMC was prohibited from inspecting the information presented by Thomas to the prejudice of CAMC. On this basis, CAMC contends that the Agreed Protective Order is actually a misnomer as the order entered is actually an order sealing the evidence.² CAMC could not respond to the information that was presented by Thomas without first being offered the opportunity to inspect it.

The Authority is a public body that has no power to prohibit parties from viewing evidence in a proceeding. While an agency can enter a protective order pursuant to W. Va. R.C.P. 26, it is

² CAMC contends that a Protective Order typically only governs discovery and this Agreed Protective Order issued by the Authority, at the request of Thomas, went further than a normal protective order. CAMC contends that it is actually an order sealing the evidence. The Court of Appeals for the Sixth Circuit discussed this issue in *Shane Grp., Inc. v. Blue Cross Blue Shield*, 825 F.3d 299, 305-06 (6th Cir. 2016) recognizing that the adjudication stage and the discovery stage are very different and the adjudication stage requires more openness and public accessibility. Here, there is no openness to CAMC or anyone else in the public as a result of the Authority's Agreed Protective Order sealing the evidence in this case.

clear that the first step in that process is a motion. *State ex rel. Johnson, supra*. Here, a review of the designated record clearly reflects that no motion for protective order was ever filed by Thomas.

Second, in that motion, it is incumbent for Thomas to show good cause for the protective order.

In the Syllabus Point from *State ex rel. Johnson, supra* this Court held:

The following six-factor test should be applied in determining whether there is "good cause" pursuant to Rule 26(c)(7) of the West Virginia Rules of Civil Procedure to issue a protective order:

1. The extent to which the information is known outside of the defendant's business;
2. The extent to which it is known by employees and others involved in the defendant's business;
3. The extent of the measures taken by the defendant to guard the secrecy of the information;
4. The value of the information to the defendant and competitors;
5. The amount of effort or money expended by the defendant in developing the information; and
6. The ease or difficulty with which the information could be properly acquired or duplicated by others.

No motion for protective order was ever filed in this case, and no finding was ever made by the Authority that Thomas had established good cause for the entry of a protective order.³ It was clear

³ It is noted that the Agreed Protective Order states in its first paragraph that Thomas' utilization data was "confidential, proprietary, and competitively sensitive." Since CAMC was not provided with a copy of this utilization data, it has no ability to know whether it is or is not information protected under Rule 26 and whether or not Thomas did or did not establish good cause. The Order on its face does not make a finding that good cause was established under a confidentiality standard under the factors in *State ex rel. Johnson, supra*. CAMC does note however, that utilization is often at issue before the Authority and it is often routinely produced in similar cases. Similar utilization data was submitted by Thomas to the Authority and CAMC when a previous dispute arose in 2021, discussed on page 6 of this Brief. Further, all hospitals in the State file yearly Uniform Financial Reports containing utilization data for the hospital, although not particular to a specific site, as well detailed financial data.

error for the Authority to issue the Agreed Protective Order without a motion or a finding of good cause.

In addition, protective orders should be narrowly drawn and only entered into when good cause has been shown. W.Va. R.C.P 26(c), *State ex rel. Johnson, supra*. As CAMC was not privy to any of the conversations between Thomas and the Authority it cannot argue whether the Agreed Protective Orders were narrowly drawn or whether good cause was shown. That is obviously the problem with the Authority's action in this matter. Could the Protective Order have been more narrowly drawn to allow CAMC to view some or all of the disclosed information? What was the good cause that Thomas showed the Authority? What were the dates of the services that were allegedly provided? Were they after the filing of the letter of complaint in August 2024? As the Authority's "investigation" lasted nearly a full year, the dates of the services are key. Since the Authority was not looking at the statutory requirements of offering services on a regular basis, how often were the services offered? Once in the previous year? Twice? Since CAMC was excluded from even the negotiations of the terms of the Agreed Protective Order, CAMC could not present arguments on the regularity of the services and these key questions cannot be answered.

Being excluded from the negotiations of the Protective Order, in and of itself constitutes error by the Authority. Did the information disclosed demonstrate that the services had been offered on a regular basis as required by W. Va. Code § 16-2D-8(a)(12)? Or, did it show that the facility had not ceased operations for more than twelve months conforming to the Authority's total misreading and misapplication of the statute? The difference is dispositive in this case, but CAMC cannot begin to answer these fundamental questions because it could not inspect the evidence. Further, CAMC could not challenge whether good cause existed for the Agreed Protective Order, nor could it challenge the evidence, present alternative evidence or address it any way. Entering

into the Agreed Protective Order and excluding key evidence from CAMC, a party to the proceeding, was in violation of constitutional and/or statutory provisions, in excess of the statutory authority or jurisdiction of the agency, made upon unlawful procedures, clearly wrong in view of the reliable, probative, and substantial evidence on the whole record, and arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

With regard to the first assignment of error, this Court should determine that the Authority erred as a matter of law in entering into an Agreed Protective Order (DR 92,94) without Thomas ever filing a Motion for Protective Order or even requesting one in writing. This Court should also determine that the Authority erred as a matter of law in entering into an Agreed Protective Order that was unknown to the moving party, CAMC, as it is undisputed that CAMC's counsel did not endorse the Agreed Protective Order. This Court should determine that the Authority erred as a matter of law in entering into an Agreed Protective Order that is styled as a Protective Order, when it was actually an Order Sealing the evidence, as no evidence was ever provided to counsel for CAMC for inspection or refutation. This Court should determine that the Authority erred as a matter of law in considering evidence, which was the sole evidence in the case, but refused to provide the evidence, or even a summary of it, to CAMC.

2. The Health Care Authority Potential Violation Order improperly applied the provisions of W. Va. Code § 16-2D-8(a)(12).

With regard to the second error, CAMC contends that the Authority did not properly apply W. Va. Code § 16-2D-8(a)(12) in reaching its conclusion that no violation existed in this matter because Thomas' Teays Valley Location had not "ceased operations for twelve (12) months." (DR 0100). W. Va. Code § 16-2D-8(a)(12) provides that a CON is required for "[t]he addition of health services offered by or on behalf of a health care facility which were not offered on a regular basis by or on behalf of the health care facility within the 12-month period prior to the time the services

would be offered.” CAMC’s complaint, expressed in its August 15, 2024, letter filed in this matter, (DR 0002) was that W.Va. Code § 16-2D-8(a)(12) applies because no services were offered at the location for many years, much less the last twelve months. As a result, the Teays Valley Location was not an existing facility and, when it began to offer services there at the time of the letter, that constituted the development of a new site and a new health care facility which required a CON. (DR 0002-0003). After a year of allegedly investigating this matter, the Authority issued an Order that found that Thomas “has presented information, as required by the Board, which shows that at no time has the Teays Valley Location ceased all operations for twelve (12) months.” (DR 0100).

W. Va. Code § 16-2D-8(a)(12) does not mention that ceasing operations for twelve months is the issue. It clearly provides that a provider must offer services on a “regular basis” for the preceding twelve months or a new CON is required to institute services. The non-statutory burden the Authority sets forth in its Order materially and significantly changes the statute and makes the burden of proof placed upon Thomas significantly easier to establish. In 2021, Thomas tried to open the same health care facility at the same location, arguing again that it offered services at the location of a regular basis in the preceding twelve months. (DR 0005). When asked to provide evidence, Thomas could only provide evidence that it provided a simple radiology procedure on a single day. (DR 0019). That is not a service offered on a regular basis. There are no recurring, or fixed, uniform, or normal intervals. There is no schedule at all. However, that sole day means the facility had not ceased operations. It is certainly easier to prove that operations had not ceased at the location for a twelve-month period than it is to prove that services were not offered on a regular basis in that same period. Providing one service on one day in the twelve-month period means the facility did not cease operations, but it doesn’t mean that the services were offered on a regular basis.

In a lawyer disciplinary matter where the interpretation of ‘regularly engaged in the practice of law’ was an issue, the Supreme Court wrote that “[w]e also observe that Webster’s Third New International Dictionary of the English Language Unabridged 1913 (1970), defines “regularly” as a “regular, orderly, lawful, or methodical way.” “Regular” is defined as “steady or uniform in course, practice, or occurrence, not subject to unexplained or irrational variation: steadily pursued; orderly, methodical.” *Lawyer Disciplinary Bd. v. Allen*, 198 W. Va. 18, 35, 479 S.E.2d 317, 335 (1996). It was also reviewed by the Supreme Court, in a case involving the same statutory language in W. Va. Code § 16-2D-8(a)(12). Justice Cleckley wrote that “‘Regular’ commonly means conforming to a consistent plan.” *West Virginia Health Care Cost Review Auth. v. Boone Mem. Hosp.*, 196 W. Va. 326, 337, 472 S.E.2d 411, 422 (1996).

Merriam-Webster defines ‘ceased’ as “to cause to come to an end especially gradually : no longer continue.” The words are clearly not synonyms. In fact, they are almost opposite. One means to stop; one means to perform on an orderly schedule. By misapplying the plain language of the statute from “on a regular basis” to not “ceasing operations” the Authority changed the statute and the burden on Thomas in the matter and allowed them to offer evidence, that CAMC couldn’t see, that met a new burden not in the statute, when Thomas may not have been able to meet the statutory burden.

The plain language of the statute is clear. The issue is whether health services were offered on a “regular basis” in the last twelve-month period, not whether the facility was completely closed and the services ceased being offered. Because the plain language of the statute is clear, “the language must prevail and further inquiry is foreclosed.” *Appalachian Power*, 195 W. Va. 573at 587, 466 S.E.2d at 438; *Monongahela Power Co. v. Buzminsky*, 243 W. Va. 686, 691, 850 S.E.2d 685, 690 (2020). “If the language of an enactment is clear and

within the constitutional authority of the law-making body which passed it, courts must read the relevant law according to its unvarnished meaning, without any judicial embroidery.”

Syl. Pt. 3, in part, *W. Va. Health Care Cost Rev. Auth. v. Boone Mem’l Hosp.*, *supra*. In 2007, the Supreme Court ruled in *Phillips v Larry’s Pharmacy*, 220 W.Va. 484, 491, 647 S.E.2d 920, 927 (2007):

“However, ‘[i]t is not for this Court arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted.’ *Banker v. Banker*, 196 W. Va. 535, 546-7, 474 S.E.2d 465, 476-77 (1996)(citing *Bullman v. D R Lumber Company*, 195 W. Va. 129, 464 S.E.2d 771 (1995); *Donley v. Bracken*, 192 W. Va. 383, 452 S.E.2d 699 (1994)). See also, *State ex rel. Frazier v. Meadows*, 193 W. Va. 20, 24, 454 S.E.2d 65, 69 (1994) (“Courts are not free to read into the language what is not there, but rather should apply the statute as written.”). Moreover, “[a] statute, or an administrative rule, may not, under the guise of ‘interpretation,’ be modified, revised, amended or rewritten.” Syllabus Point 1, *Consumer Advocate Division v. Public Service Commission*, 182 W. Va. 152, 386 S.E.2d 650 (1989).

Here, as in *Appalachian Power*, *Phillips*, and *Boone Memorial*, the statutory provision at issue is unambiguous on this issue and does not contain any language corresponding to the cessation of services applied by the Authority. There is nothing in W. Va. Code § 16-2D-8(a)(12) that includes the cessation of operations. This Court must not allow the Authority to read into W. Va. Code § 16-2D-8(a)(12) that which it does not say.

“A statute is enacted as a whole with a general purpose and intent, and each part should be considered in connection with every other part to produce a harmonious whole. Words and clauses should be given a meaning which harmonizes with the subject matter and the general purpose of the statute. The general intention is the key to the whole and the interpretation of the whole controls the interpretation of its parts.” *State ex rel. Appleby v. Recht*, 213 W. Va. 503, 510, 583 S.E.2d

800, 807 (2002) (quoting Syl. Pt. 1, *State ex rel. Holbert v. Robinson*, 134 W.Va. 524, 531, 59 S.E.2d 884, 889 (1950)). The Legislature’s intention was to provide that the provision of services on a “regular basis” was the difference between a health care facility that was active and allowed to continue offering those services and a facility that was not active and needed a CON to institute services again. If the issue was the cessation of operations, the legislative could have and would have said so. They did not.

As noted above, the statute clearly requires that a service must be offered on a “regular basis,” not that the operations were not ceased for twelve-months. The Authority’s material alteration of the plain statutory requirements set forth in W. Va. Code § 16-2D-8(a)(12) was highly prejudicial to CAMC’s interests in this matter, was in violation of constitutional or statutory provisions, in excess of the statutory authority or jurisdiction of the agency, made upon unlawful procedures, clearly wrong in view of the reliable, probative, and substantial evidence on the whole record, and arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

With regard to the second error, this Court should conclude that the Authority did not properly apply W.Va. Code § 16-2D-8(a)(12) in reaching its conclusion that no violation existed in this matter because Thomas’ Teays Valley Location had not “ceased operations for twelve (12) months.” (DR 0100). The operative provisions of W.Va. Code § 16-2D-8(a)(12) indicate that a CON is required for “[t]he addition of health services offered by or on behalf of a health care facility which were not offered on a regular basis by or on behalf of the health care facility within the 12-month period prior to the time the services would be offered.” Here Thomas did not meet its burden of proof, and this Court should reverse the Authority’s Order. (DR 0100).

3. The Health Care Authority erroneously backdated the Potential Violation Order causing CAMC statutory appeal period to be cut in half.

With regard to the third assignment of error, CAMC contends that this Court should conclude as a matter of law that the Authority erred when it decided that Thomas had not committed a violation at its regularly scheduled Board Meeting on August 13, 2025, but it did not issue a written Order outlining the reasons for the decision until on or about August 28, 2025. (DR 0100). At that time, the Order was backdated to August 13, 2025. The Authority's decision to backdate its written Order cut CAMC's time to appeal this matter to this Court in half, prejudicing CAMC's ability to properly analyze the law and facts in this matter.

W. Va. Code § 16-2D-16(a) provides that “[a]n applicant or an affected person may appeal the authority’s final decision in a CON review to the Office of Judges. The request shall be received within thirty days after the date of the authority’s decision.” The West Virginia Administrative Procedures Act (“APA”) specifies that the appeals period begins “the date upon which such party received notice of the final order or decision of the agency.” W. Va. Code § 29A-5-4. The issue in this matter revolves around when, exactly, is the date of the agency’s decision and when does a party receive notice of that decision. This is an important issue because the Supreme Court has long held that the thirty-day time period under W. Va. Code § 29A-5-4 and other statutes is mandatory and jurisdictional. *See e.g. State ex rel. Comm'r v. Swope*, 230 W. Va. 750, 742 S.E.2d 438 (2013) and *State ex rel. W. Va. Consol. Pub. Ret. Bd. v. Nibert*, 235 W. Va. 203, 772 S.E.2d 609 (2015) (Finding the thirty-day language in W. Va. Code § 29A-5-4 is jurisdictional and mandatory). *See also, Deyerle v. W. Va. Dep't of Health & Human Res.*, 2019 W. Va. LEXIS 51, *5-6, 2019 WL 856254 (2019) (Holding that the thirty-day grievance appeal period in W. Va. Code § 6C-2-5(c) was mandatory); and, *Tax Assessment Against Purple Turtle, LLC v. Gooden*, 223 W.Va. 755, 679 S.E.2d 587 (2009) (Tax appeal not properly perfected within thirty-days under

W. Va. Code § 11-3-25 was dismissed).

The Authority made the decision that Thomas was not acting in violation of the statute at its regularly scheduled board meeting on August 13, 2025. The Board meeting was a public meeting attended by representatives of CAMC, including the undersigned. Although the decision was announced, no specific findings were made by the Authority. There were no reasons given for the decision, just that no violation had occurred. The actual reasons for the decision, such as they were, were not given until the written Order was released on or about August 28, 2025, about two weeks after the decision was publicly made by the Authority and about two weeks CAMC received notice of the decision. It is undisputed that the written Order was backdated to August 13, 2025, approximately fifteen (15) days from the date the Order was made publicly available to counsel for CAMC. In backdating its decision by fifteen (15) days, the Authority reduced CAMC's period to appeal this Order from the statutory 30 days to 15 days.⁴ The Order is dated August 13, 2025, but CAMC had no access to it and did not receive it until August 28, 2025. Pursuant to the statute and the State Regulation, the time to appeal begins when a party has notice of the decision. CAMC had notice of the decision on August 13, but it had no notice of the reasons for the decision, which would provide the grounds for an appeal, until August 28.

Instead of dating the written Order on the date of its release, August 28, the Authority backdated the Order to August 13. The Authority, at best, confused the issue. At worst, it cut CAMC's statutory thirty-day appeal period in half. Such action by the Authority is in error and is prejudicial to CAMC. Backdating an Order is now a common practice by the Authority, as this is at least the second time that it has happened to CAMC and it is in violation of constitutional or statutory provisions, in excess of the statutory authority or jurisdiction of the agency, made upon

⁴ The Order also misstates the date upon which CAMC filed the original letter of compliant as April 22, 2025. The original letter was filed August 15, 2024. (See DR 0002 and DR 0100).

unlawful procedures, clearly wrong in view of the reliable, probative, and substantial evidence on the whole record, and arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

With regard to the third assignment of error, this Court should conclude as a matter of law that the Authority erred when it decided that Thomas had not committed a violation at its regularly scheduled Board Meeting on August 13, 2024, but it did not issue a written Order outlining the reasons for the decision until on or about August 28, 2025. (DR 0100). At that time, the Order was backdated to August 13, 2025. The Authority's decision to backdate its written Order cut CAMC's time to appeal this matter to this Court in half, prejudicing CAMC's ability to properly analyze the law and facts in this matter. This Court should conclude as a matter of law that it is not proper for an administrative agency to backdate its written decisions.

IX. CONCLUSION

For the reasons set forth above, Charleston Area Medical Center, Inc. respectfully requests that the Court reverse and vacate the Authority's August 28, 2025, Potential Violation Order and remand the case to the Authority with directions to either enter a decision ordering that Thomas Memorial Hospital's creation of an ambulatory care facility is subject to CON review or, in the alternative, ordering the Authority to hold a hearing on the matter pursuant to the provisions of W. Va. Code § 16-29B-12(a) allowing all parties to review all evidence and present witnesses, evidence and arguments and to provide such further relief as this Court deems proper and just.

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Charleston Area Medical Center, Inc.,

Petitioner Below, Petitioner,

v.

Thomas Memorial Hospital Association, d/b/a Thomas Memorial Hospital,

Applicant Below, Respondent,

and

West Virginia Health Care Authority,

Respondent.

CERTIFICATE OF SERVICE

I, Thomas G. Casto, do hereby certify that I have served the foregoing *Brief of Petitioner Charleston Area Medical Center, Inc.* on this 13th day of November, 2025, via the Court's electronic filing system, which caused a true and exact copy of the same to be served upon counsel of record:

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