
IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Charleston Area Medical Center, Inc.,
Petitioner

vs.) No. 25-ICA-369

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

and

West Virginia Health Care Authority,
Respondent

BRIEF OF RESPONDENT THOMAS MEMORIAL HOSPITAL

From The West Virginia Health Care Authority
CON File #24-3-13064-PV

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STATEMENT OF THE CASE

This matter was initiated by Charleston Area Medical Center, Inc.’s (“CAMC’s”) August 15, 2024, letter to the West Virginia Health Care Authority (the “Authority”), in which CAMC asked the Authority to investigate an alleged potential violation of the certificate of need (“CON”) law by Herbert J. Thomas Memorial Hospital Association d/b/a Thomas Memorial Hospital (“TMH”).² CAMC claimed in its letter that TMH was offering services at its Teays Valley Oncology Center located at 4004 State Route 34, Hurricane, West Virginia 25526 (hereinafter its “Teays Valley Location”) “without the benefit of a certificate of need,” and therefore, TMH was acting in contravention of W. Va. Code § 16-2D-8(a)(12).³ CAMC alleged that TMH’s Teays Valley Location had not been operated recently, and therefore TMH’s supposedly “new” health care facility required a new CON before it could operate.⁴

Thereafter, CAMC and TMH submitted various letters to the Authority regarding this matter.⁵ Notably, on May 19, 2025, TMH filed a letter with the Authority in which TMH stated that it had, in fact, “provided health services on a regular basis within the past twelve (12) months at its Teays Valley [Location].”⁶ To support this, TMH provided a declaration from TMH’s President and Chief Executive Officer, J. Gregory Rosencrance, M.D.⁷ TMH sent two subsequent letters emphasizing that TMH has valid CON approval to operate its Teays Valley Location and that this approval has never been revoked by the Authority.⁸

² See D.R. 0002-0003.

³ See *id.*

⁴ See *id.*

⁵ See, e.g., D.R. 0135-0137, 0151-0153, 0154-0161.

⁶ See D.R. 0035-0036.

⁷ See *id.*

⁸ See D.R.0042-0045, D.R. 0085-0088.

On July 16, 2025, the Authority issued an Agreed Protective Order with regard to utilization data produced by TMH at the Authority’s request.⁹ The Agreed Protective Order was necessary, as the utilization data requested by the Authority “encompasse[d] confidential, proprietary, and competitively sensitive information . . .”¹⁰ This utilization data simply corroborated Dr. Rosencrance’s declaration that TMH’s Teays Valley Location was, at all relevant times, an active ambulatory health care facility.¹¹

On August 13, 2025, the Authority issued an order (the “Order”) concerning CAMC’s August 15, 2024 letter alleging a potential violation by TMH. The Order stated that TMH presented information to the Authority demonstrating that “at no time has [TMH’s] Teays Valley Location ceased all operations for twelve (12) months.”¹² The Order further stated that TMH “ha[d] not performed any health care service which [TMH is] not currently authorized to offer.”¹³ Therefore, the Authority concluded that TMH’s Teays Valley Location was not in violation of the CON law.¹⁴ This appeal followed.

Finally, it is necessary to correct several inaccurate statements and inferences contained in CAMC’s statement of the case. The Teays Valley Location opened in 2002.¹⁵ To the extent that

⁹ See D.R. 0092-0093.

¹⁰ See *id.*

¹¹ See D.R. 0154-0156.

¹² See D.R. 0100-0101.

¹³ See *id.*

¹⁴ See *id.*

¹⁵ As background, on February 16, 2001, the Authority determined that TMH’s complete relocation of an existing TMH cancer center to the Teays Valley Location was not subject to CON review, and TMH subsequently opened the relocated Teays Valley Location around or about November of 2002. *See In re: Thomas Memorial Hospital*, CON File No. 01-3-7133-X (Decision on Request for Ruling on Reviewability) (hereinafter the “2001 DOR Decision,” attached hereto as Ex. A); *see also* D.R. 0097. As noted in the 2001 DOR Decision, Thomas has owned and operated this relocated cancer center as a department of the hospital since 1994. For more information about the background of the Teays Valley Location, including relevant CON decisions, please see D.R. 0042-43.

CAMC's statement of the case infers that the Teays Valley Location opened in 2024, it is incorrect.¹⁶

Furthermore, CAMC references a 2021 Request for Determination of Reviewability filed by TMH, which as further detailed *infra*, is entirely irrelevant to this current matter.¹⁷ In describing the 2021 matter, CAMC alleges that "[TMH] attempted to open [the Teays Valley Location] as a free-standing Emergency Room."¹⁸ To the extent that CAMC infers that the filing of the 2021 Request for Determination of Reviewability reflects that the Teays Valley Location was closed at that time, it is incorrect. TMH voluntarily withdrew its request because it no longer wished to proceed with the proposed project, and its filing of the request reflected nothing more than TMH's desire to obtain the Authority's position on whether the proposed project would be subject to CON review.

SUMMARY OF ARGUMENT

CAMC's appeal is fundamentally flawed because it is premised on the mistaken belief that it was entitled to rights in a proceeding that never became a contested case. It is undisputed that no agency hearing ever occurred in this matter: CAMC submitted a written complaint to the Authority, CAMC and TMH exchanged additional correspondence with the Authority, and the Authority conducted an initial investigation before determining that TMH was not in violation of the law. As the Authority never scheduled nor held an agency hearing, the Order was not issued as part of a contested case. And because the matter never became a contested case, the Authority's Order is not appealable, and this Court lacks jurisdiction.

¹⁶ See CAMC Br. at p. 2.

¹⁷ See CAMC Br. at p. 2-3.

¹⁸ CAMC Br. at p. 2.

Further, under West Virginia law, due process rights—including the right to inspect evidence—attach only when an agency matter advances beyond the investigatory phase and becomes a contested case through the scheduling of an agency hearing. Here, the Authority conducted only an initial investigation into a potential violation (“PV”), found no evidence of a violation, and never scheduled a hearing. As a result, CAMC, as a third-party complainant, had no due process rights in this matter, and the Authority was under no obligation to provide CAMC with access to evidence during its investigatory process.

CAMC’s arguments also conflate the distinct legal frameworks governing CON application reviews and PV investigations. The rights and procedures that CAMC seeks to invoke simply do not apply to PV investigations. For example, in claiming that it had discovery rights below, CAMC improperly attempts to import the West Virginia Rules of Civil Procedure to PV investigations, without any legal basis. The CON regulations make clear that discovery rights are features of the CON application review process, not PV investigations. Likewise, this Court has held that the West Virginia Rules of Civil Procedure only apply during the discovery phase of CON application review proceedings, and do not apply to other types of Authority proceedings. In investigatory PV matters like the one below, third parties like CAMC have no statutory or regulatory right to discovery, or to otherwise inspect evidence.

CAMC’s challenge to the Agreed Protective Order is equally misplaced. Its arguments are premised on the applicability of the West Virginia Rules of Civil Procedure, but again, these rules do not govern PV investigations. CAMC has no right to negotiate or review protective orders entered between the Authority and the subject of an investigation. To the contrary, the Authority acted well within its discretion to protect sensitive information and to structure its own investigatory procedures.

Even if this Court were to reach the merits, the Authority's determination that TMH did not violate the law is supported by substantial evidence. TMH provided a sworn declaration demonstrating that the Teays Valley Location regularly offered oncology services during the preceding twelve months. TMH also provided utilization data to the Authority, which corroborated the information contained in the declaration. The statutory definition of "offer" requires only that a health care facility hold itself out as capable of providing services; it does not impose any minimum threshold for patient volume. CAMC's attempt to re-weigh this factual evidence on appeal is unavailing and contrary to the deference owed to the Authority's factual findings.

Additionally, CAMC's assertion that the Authority improperly backdated its order is without merit. The record demonstrates that the Authority's Order clearly states the date on which the Authority's board voted and the date the Order was issued. The period for appeal did not begin until CAMC received notice of the final order, and to the extent the Order is appealable, CAMC timely filed its appeal. Thus, there is no basis for CAMC's claim that the order was backdated or that its appeal rights were prejudiced as a result.

Finally, CAMC's requested relief is neither legally permissible nor appropriate. The Order is not appealable, and even if it was, the only conceivable relief would be a remand directing the Authority to provide CAMC with a copy of the utilization data submitted by TMH. However, such a remand would serve no practical purpose and would not alter the outcome, as the Authority's factual determinations are supported by substantial evidence and CAMC has advanced no argument warranting a different result.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This is an appeal which should be dismissed by this Court pursuant to Rules 31(a)(4) and (5) of the West Virginia Rules of Appellate Procedure because the Order is not appealable, and as

such, this Court lacks jurisdiction.¹⁹ Further, TMH submits that “the dispositive issue or issues have been authoritatively decided” and that the “facts and legal arguments are adequately presented in the briefs and record on appeal[.]”²⁰ Accordingly, “the decisional process would not be significantly aided by oral argument.”²¹

ARGUMENT

I. STANDARD OF REVIEW.

The standard of review for an appellate court in determining whether an administrative agency’s decision is appealable is *de novo*.²² As fully identified by TMH’s Motion to Dismiss, which is incorporated herein by reference, and as further discussed *infra*, the Order is not appealable. Pursuant to the WVAPA and our Supreme Court of Appeals, only decisions arising from “contested cases” are subject to judicial review.²³ Because no agency hearing was scheduled or held in this matter, the Order was not issued as part of a “contested case” and is therefore not subject to judicial review.²⁴

To the extent that agency decisions are issued as part of “contested cases”—and are otherwise subject to judicial review—the standard of review for an administrative appeal taken under the CON program is set forth at W. Va. Code § 29A-5-4, and a court reviews questions of law presented *de novo*.²⁵ W. Va. Code § 29A-5-4 provides in relevant part the following:

(g) The court may affirm the order or decision of the

¹⁹ TMH has contemporaneously filed a Motion to Dismiss CAMC’s appeal with this brief.

²⁰ W. Va. R. App. P. 18(3)-(4).

²¹ *Id.*

²² *See Dye v. W. Va. Bd. of Architects*, No. 23-ICA-273, 2024 W. Va. App. LEXIS 98, *7 (W. Va. App. Ct. 2024) (memorandum decision).

²³ W. Va. Code § 29A-1-2(b); *see, e.g., State ex rel. Miller v. Reed*, 203 W. Va. 673, 683, 510 S.E.2d 507, 517 (1998).

²⁴ *See id.*

²⁵ *See* W. Va. Code § 16-2D-16(b); *St. Mary’s Hospital v. SHPDA*, 178 W. Va. 792, 364 S.E.2d 805 (1987). *Fairmont Gen. Hosp. v. W. Va. Health Care Auth.*, 218 W. Va. 360, 364, 624 S.E.2d 797, 801 (2005) (quoting Syl. pt. 1, *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996)).

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;
- or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon lawful procedures; or
- (4) Affected by other error of law; or
- (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.²⁶

With respect to the appellate review of a fact-finding body's factual determinations, our Supreme Court of Appeals has stated in relevant part that:

. . . [a reviewing court] must uphold any [of a fact-finding body's] factual findings that are supported by substantial evidence, and [the reviewing court] owe[s] substantial deference to inferences drawn from these facts.²⁷

Findings of fact by an administrative body are accorded deference unless the reviewing court believes the findings to be clearly wrong.²⁸ The “clearly wrong” standard of review is a deferential one which presumes an administrative agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis.²⁹

II. THIS APPEAL IS IMPROPER BECAUSE THE UNDERLYING MATTER WAS NOT A CONTESTED CASE.

²⁶ W. Va. Code § 29A-5-4(g).

²⁷ *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 304, 465 S.E.2d 399, 406 (1995); *see also Cahill v. Mercer County Bd. of Educ.*, 208 W. Va. 177, 180, 539 S.E.2d 437, 440 (2000) (stating that “a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge . . .”).

²⁸ *See Fairmont Gen. Hosp.*, 218 W. Va. at 364, 624 S.E.2d at 801 (quoting Syl. pt. 1, *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996)).

²⁹ *Lemley v. Markwest Liberty Midstream & Res., LLC*, No. 24-ICA-438, 2025 W. Va. App. LEXIS 326, *9 (W. Va. Ct. App. Sept. 3, 2025) (quoting Syl. Pt. 2, *Antero Res. Corp. v. Steager*, 244 W. Va. 81, 851 S.E.2d 527 (2020)).

As detailed by TMH’s Motion to Dismiss, it is undisputed that no agency hearing ever occurred in this matter. Both the WVAPA and the Supreme Court of Appeals of West Virginia require an agency hearing as a necessary condition for the creation of a “contested case.”³⁰ And pursuant to the WVAPA and our Supreme Court of Appeals, only decisions arising from such “contested cases” are subject to judicial review.³¹ Because no agency hearing was scheduled or held here, this matter does not constitute a “contested case,” and the Authority’s determination that TMH was not in violation of the law is not appealable.

For these reasons, and for the other reasons set forth in TMH’s Motion to Dismiss, the Order is not subject to judicial review. Because the Order is not appealable, this Court lacks jurisdiction, and should dismiss the appeal in accordance with the WVAPA , binding precedent, and sound policy.³²

III. THE AUTHORITY DID NOT IMPROPERLY WITHOLD INFORMATION FROM CAMC, AND CAMC WAS NOT ENTITLED TO SUCH INFORMATION.

A. Because the underlying matter was not a “contested case,” CAMC did not have any due process rights, including any right to inspect evidence.

CAMC’s first assignment of error—that it was improperly denied access to evidence submitted by TMH during the Authority’s PV investigation—is entirely without merit. CAMC’s argument rests on the assertion that the Authority improperly entered into an Agreed Protective Order with TMH, thereby prejudicing CAMC by denying it access to evidence.³³ However,

³⁰ W. Va. Code § 29A-1-2(b); *State ex rel. Miller*, 203 W. Va. at 683, 510 S.E.2d at 517 (1998).

³¹ W. Va. Code § 29A-5-4(a); *State ex rel. Frazier v. Thompson*, 243 W. Va. 46, 54, 842 S.E.2d 250, 258 (2020). As identified in TMH’s Motion to Dismiss, the only exception to this requirement is the judicial review of declaratory rulings, which exists by virtue of W. Va. Code § 29A-4-1. As further detailed by TMH’s Motion to Dismiss, the potential violation Order is not a declaratory ruling issued under W. Va. Code § 29A-4-1.

³² W. Va. R. App. P. 31(a)(4)-(5). *See* Syl. Pt. 5, *Holley v. Feagley*, 242 W. Va. 240, 834 S.E.2d 536 (2019); *State ex rel. Frazier*, 243 W. Va. at 55, 842 S.E.2d at 259.

³³ *See, e.g.*, CAMC Br. at p. 8.

because the underlying potential violation investigation never became a “contested case,” CAMC had no due process rights, including any right to inspect evidence. Its first assignment of error is therefore baseless.

As further discussed below, the Authority’s procedures for investigating and adjudicating PV matters are separate and distinct from its processes for other matters, such as the review of CON applications.³⁴ Under Section 16-2D-19—the specific section of the CON law addressing PV matters—the Authority is empowered to investigate alleged violations.³⁵ If the Authority determines “that there is probable cause to believe that a person is in violation of the provisions of this article, or any lawful rule promulgated thereunder,” it must provide “the person with written notice which states the nature of the alleged violation and the time and place at which an administrative hearing shall take place.”³⁶

Pursuant to W. Va. Code § 16-2D-19, the process for potential violation matters can be generally summarized as follows: (1) a complaint is made to the Authority; (2) the Authority conducts an initial investigation to determine whether probable cause exists to support the complaint; and (3) if probable cause is found, the Authority is required to schedule an administrative hearing, to provide the person alleged to be in non-compliance with notice and the opportunity to be heard.³⁷ If, however, the Authority determines there is no probable cause to support the complaint, the matter never proceeds to an agency hearing. In these situations, the Authority exercises its discretion to dismiss unsubstantiated complaints as part of its initial investigatory process, without proceeding to an agency hearing under W. Va. Code § 16-2D-19(c).

Here, after receiving CAMC’s letter alleging a violation, the Authority conducted an initial

³⁴ Compare, W. Va. Code § 16-2D-13(g), with W. Va. Code § 16-2D-19.

³⁵ W. Va. Code § 16-2D-19 *et seq.*

³⁶ *Id.*

³⁷ W. Va. Code § 16-2D-19 *et seq.*

investigation and found that no violation had occurred. By declining to schedule a hearing, the Authority exercised its discretion to end the matter at the investigatory phase. As further detailed in TMH's Motion to Dismiss, this means that the matter never became a "contested case."³⁸

Our Supreme Court of Appeals has made clear that the investigatory phase of agency action falls outside the scope of a "contested case."³⁹ An investigation of a potential violation is not an adjudicative process. As the Court has explained, "[w]hen governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used."⁴⁰ In *State ex rel. Hoover v. Smith*, the Court identified that the West Virginia Board of Medicine's investigation and prosecution of a complaint against a physician consisted of both an initial investigatory stage and a subsequent "'contested case' stage."⁴¹ "[T]he investigatory stage," the Court explained, "is merely a means for the Board of Medicine to ascertain the validity of the complaint brought against the physician" and, if the Board determines that the complaint has merit, then "the proceeding moves into the 'contested case' stage[.]"⁴²

Only at the contested case stage must due process rights attach, such as the right to inspect evidence.⁴³ As the Court expressly held: "[t]here is no requirement that the person being investigated be given notice of charges, the names of informants, a hearing, or the right to confront and cross-examine complainants, even though the investigation may affect reputations or result in

³⁸ W. Va. Code § 29A-1-2(b); *State ex rel. Miller*, 203 W. Va. at 683, 510 S.E.2d at 517; W. Va. Code § 29A-5-4(a); *State ex rel. Frazier*, 243 W. Va. at 54, 842 S.E.2d at 258.

³⁹ *State ex rel. Hoover v. Smith*, 198 W. Va. 507, 515 n.12, 482 S.E.2d 124, 132 (1997) ("The 'contested case' is the case that has moved from the investigatory stage to the adjudicatory stage."); cf. Alfred S. Neely, IV Administrative Law in West Virginia § 2.03 at 44 (1982) ("The beginning of the 'contested case' is when due process considerations arise").

⁴⁰ *Hoover*, 198 W. Va. at 514, 482 S.E.2d at 131.

⁴¹ *Id.* at 516, 482 S.E.2d at 133.

⁴² *Id.*

⁴³ *See id.*

the commencement of other proceedings.”⁴⁴

Just as in *Hoover*, the matter below was resolved at the Authority’s initial investigatory phase without any hearing, and the matter never became a “contested case.”⁴⁵ As it was not a “contested case,” due process rights did not attach, such as the right to inspect evidence.⁴⁶ *Hoover* makes clear that, even the person under investigation—who has the most at stake—has no right to inspect materials reviewed by an agency during its investigatory phase of a potential enforcement proceeding.⁴⁷ CAMC, as a third party not under investigation, is even further removed and plainly had no due process rights during the Authority’s investigation, including any right to inspect evidence.⁴⁸

Indeed, aside from its assertion that such rights should exist in the PV investigation context, CAMC fails to identify any other type of enforcement proceeding where third parties are entitled to review evidence during an investigatory phase. The reason for this is apparent: it is well-established across a wide range of administrative and legal contexts that information gleaned as part of investigative proceedings is generally not disclosed to the parties under investigation—let alone to third-party complainants like CAMC. This practice protects the integrity of investigations, prevents interference or tampering, and safeguards sensitive information. Limiting access to investigative materials is therefore not only routine, but essential to the proper functioning of administrative bodies.

⁴⁴ *Id.* Similarly, in *State ex rel. Ten S. Mgmt. Co. LLC v. Wilson*, the Court held that the West Virginia Human Rights Commission’s probable cause determinations serve a gatekeeping function, and that a petitioner is not entitled to the “records reviewed by the hearing officer in [the] administrative review [of the Commission’s no probable cause determination].” *See State ex rel. Ten S. Mgmt. Co. LLC v. Wilson*, 231 W. Va. 372, 378, 745 S.E.2d 263, 269 (2013).

⁴⁵ *See Hoover*, at 515 n.12, 482 S.E.2d at 132.

⁴⁶ *See id.* at 516, 482 S.E.2d at 133.

⁴⁷ *Hoover*, 198 W. Va. at 516, 482 S.E.2d at 133; *Wilson*, 231 W. Va. at 745 S.E.2d at 269.

⁴⁸ *See id.*; cf. Alfred S. Neely, IV, *Administrative Law in West Virginia*, sec. 2.03 at 44 (1982).

In sum, because the Authority determined there was no violation as part of its initial investigatory efforts, and chose to not initiate a hearing, the matter never became a “contested case.” As a result, CAMC had no due process rights during the PV investigation, including any right to inspect evidence submitted by TMH to the Authority.

B. The CON law does not afford third parties like CAMC the right to discovery or to otherwise inspect evidence in a PV matter.

CAMC’s first assignment of error suffers from another fundamental and dispositive flaw: it conflates the legal standards governing the review of CON applications with the entirely separate standards that apply to PV proceedings.⁴⁹ This is not a minor oversight—it is a critical error that undermines CAMC’s entire argument. Before addressing the consequences of this misapprehension, it is necessary to delineate two distinct types of matters handled by the Authority.

Perhaps the most well-known of the Authority’s functions is its review of CON applications. When a project is subject to CON review, an applicant submits an application to the Authority, who then reviews and ultimately approves or denies it. The CON law permits certain “affected persons” to oppose an application under review by the Authority.⁵⁰ Within the context of the review of a CON application, “affected persons” are afforded the right to request an administrative hearing, the right to present evidence, and the “right to conduct reasonable questioning of persons who make factual allegations relevant to [a] certificate of need application.”⁵¹ The CON regulations further provide that, as part of the CON application review

⁴⁹ See, e.g., CAMC Br., p. 7.

⁵⁰ See W. Va. Code § 16-2D-13(g) (entitled “Procedures for certificate of need reviews”); see also W. Va. Code R. § 65-32-8 (entitled “Application Review Procedure”). The CON law provides an explicit definition of an “affected person,” and identifies the various types of individuals and entities who may potentially qualify for that status. See W. Va. Code § 16-2D-2(1).

⁵¹ See W. Va. Code § 16-2D-13(g).

process, affected persons may engage in discovery as provided by the West Virginia Rules of Civil Procedure.⁵²

Separate from its CON application review responsibilities, the Authority is also authorized to investigate alleged violations. As identified above, the CON law contains a distinct section, Section 16-2D-19, which governs PV matters.⁵³ Because this appeal arises solely from the Authority’s investigation of a PV matter—and not from a CON application review—it is the PV section of the CON law that applies.⁵⁴

With these critical distinctions in mind, the flaw in CAMC’s position is manifest. CAMC asserts that it is entitled to certain rights and procedures which apply to CON application review proceedings, and seeks to import those rights into this PV matter. But there is no CON application under review here; the matter before the Authority solely concerns an alleged violation. The process for PV matters is wholly separate from the CON application review process, and is accordingly governed by a distinct section of the CON law.⁵⁵ Critically, this section does not confer upon third parties such as CAMC any right to discovery—or to otherwise inspect evidence—during the Authority’s initial investigatory efforts.

CAMC’s own brief exposes the depth of its misunderstanding, repeatedly conflating distinct statutory frameworks and underscoring this fundamental error. For example, CAMC claims that “[i]n the context of a determination before the Authority . . . there are positive rights that afford parties the right to information,” and that “[a]ffected parties can engage in discovery of

⁵² W. Va. Code R. § 65-32-8.25.

⁵³ W. Va. Code § 16-2D-19.

⁵⁴ PV investigations are assigned the unique designation “-PV” in a designated CON file number. As this matter’s CON file number (24-3-13064-PV) reflects, the Authority designated this matter as a PV investigation.

⁵⁵ *Compare*, W. Va. Code § 16-2D-13(g), *with* W. Va. Code § 16-2D-19.

evidence as provided by the West Virginia Rules of Civil Procedure.”⁵⁶ But those propositions apply to CON application reviews—not to the investigatory phase of a PV proceeding. The CON law governing PV investigations affords no discovery procedures to any party whatsoever.⁵⁷ Discovery procedures are referenced by the CON regulations solely in the context of CON application reviews, a separate and inapposite process.⁵⁸

As confirmed by this Court, the West Virginia Rules of Civil Procedure have not been incorporated into all types of Authority proceedings, and their application is expressly limited to discovery procedures:

Panhandle suggested that the Rules of Civil Procedure have been incorporated in all Authority proceedings and, accordingly, a motion for summary judgment was an appropriate action contemplated under those Rules. However, a review of the applicable rules and regulations reveals that the West Virginia Rules of Civil Procedure were only adopted with respect to discovery procedures. . . Thus, we find no merit in Panhandle's argument in this regard.⁵⁹

Because no discovery procedures are involved in investigatory PV proceedings, the West Virginia Rules of Civil Procedure did not apply to the proceeding below. Simply put, CAMC’s attempt to demand discovery as part of a PV investigation rests on a categorical mismatch of laws, regulations, and procedures, and must be rejected.

CAMC also points to W. Va. Code 16-29B-12(f), which provides that “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.”⁶⁰ But W. Va. Code § 16-29B-12 *et seq.* pertains

⁵⁶ CAMC Br. at p. 7.

⁵⁷ See W. Va. Code § 16-2D-19 *et seq.*

⁵⁸ W. Va. Code R. § 65-32-8.25.

⁵⁹ *Putnam Cnty. Aging Program, Inc. v. Panhandle Support Servs.*, 2025 W. Va. App. LEXIS 164, *27, 919 S.E.2d 454, 466 (Ct. App. 2025) (internal citations omitted).

⁶⁰ CAMC also cites W. Va. Code R. § 65-32-8.25 in conjunction with this quote, but such citation is erroneous, as the referenced quote appears in W. Va. Code 16-29B-12(f).

to “Certificate of need **hearings**”— a context not present here, as no agency hearing took place.⁶¹ Therefore, W. Va. Code § 16-29B-12 does not apply to investigatory PV matters that do not involve an agency hearing, such as the matter at issue below.

Finally, CAMC references W. Va. Code R. § 65-32-19 , which requires the Authority 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.”⁶² However, this regulation does not address materials related to PV investigations. By its plain language, the regulation expressly concerns the public inspection and examination of CON applications and “all other pertinent written materials filed with the Authority and essential to its review process.”⁶³ The phrase “all other pertinent written materials . . . essential to its review process” immediately follows the reference to CON applications, indicating that it is intended to encompass materials that are part of, or directly related to, the CON application review process.⁶⁴ This interpretation is reinforced by nearly identical language in W. Va. Code § 16-2D-13(l)⁶⁵, a statute dedicated exclusively to the procedures for the review of CON applications. Materials submitted in the course of investigating PV matters are not part of the CON application review process and, therefore, are not subject to the public access requirements set forth in W. Va. Code R. § 65-32-19.

Ultimately, CAMC’s assertion that it “cannot judge the veracity or appropriateness of evidence it cannot inspect” is irrelevant and inconsequential.⁶⁶ TMH has incurred significant

⁶¹ W. Va. Code § 16-29B-12 (emphasis added).

⁶² CAMC Br. at p. 8.

⁶³ W. Va. Code R. § 65-32-19.

⁶⁴ *See id.*

⁶⁵ The nearly identical provision states: “[t]he authority shall provide for access by the public to all applications reviewed by the authority and to all other pertinent written materials essential to agency review.” W. Va. Code § 16-2D-13(l)

⁶⁶ *See, e.g.,* CAMC Br. at p. 4.

expense and effort to provide the Authority with evidence demonstrating its compliance with the CON law. Granting CAMC the absolute right to inspect or judge the evidence not only undermines the Authority's exclusive investigatory function, but also risks transforming the process into a tool for unduly burdensome and vexatious complaints by competitors, rather than serving the public interest. At this stage, it is the Authority alone that is charged with reviewing and assessing the evidence to determine whether probable cause exists to schedule an agency hearing. The statutory and regulatory framework does not require third-party inspection of evidence at this stage, and imposing such a requirement would place an unnecessary and unfair burden on entities like TMH.

In sum, none of the legal authorities cited by CAMC grant it any right to inspect or evaluate evidence in a PV investigation like the one below. The responsibility for evaluating the veracity and appropriateness of evidence in investigatory PV matters rests exclusively with the Authority, not a third party competitor like CAMC. Without any statutory or regulatory right, CAMC had no entitlement to inspect the information provided by TMH, and the Authority's decision to withhold such information from CAMC was entirely proper and lawful.

C. The Authority properly exercised its discretion in entering the Agreed Protective Order with TMH.

Finally, CAMC advances a series of baseless arguments regarding the Agreed Protective Order. In doing so, CAMC once again erroneously relies on the West Virginia Rules of Civil Procedure—which have no application to PV matters—and disregards fundamental principles of administrative law.

CAMC's arguments are premised on the applicability of Rule 26 of the West Virginia Rules of Civil Procedure. For example, CAMC contends that TMH was required to file a motion for a protective order under Rule 26,⁶⁷ and further claims that the Agreed Protective Order is

⁶⁷ CAMC Br. at p. 8-9.

deficient because it was not supported by “good cause,” citing a case interpreting Rule 26(c)(7).⁶⁸ CAMC also asserts that the West Virginia Rules of Civil Procedure require protective orders to be narrowly drawn and complains that it cannot assess the narrowness of the Agreed Protective Order.⁶⁹

However, these arguments are entirely misplaced. As detailed *supra*, the West Virginia Rules of Civil Procedure apply only in the context of the discovery phase of CON application reviews—not as part of investigatory PV proceedings.⁷⁰ Again, there is no right to discovery by any party during the investigatory phase of a PV proceeding, so the West Virginia Rules of Civil Procedure do not apply.⁷¹ CAMC’s repeated attempts to transplant these procedural requirements into the PV context are unsupported by any law or regulation, and must fail.

CAMC also asserts that it should have been given the opportunity to negotiate or endorse the Agreed Protective Order.⁷² But CAMC has failed to identify a single law or regulation which entitles it to inspect evidence in a PV matter —let alone one that grants it the right to negotiate or endorse an agreed protective order between the Authority and the person under investigation.

CAMC’s arguments further overlook the well-established principle that administrative agencies are afforded broad discretion to manage their own procedures and affairs.⁷³ As the United States Supreme Court has held, “[t]he agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities . . .”⁷⁴ Moreover, the Court has

⁶⁸ CAMC Br. at p. 9.

⁶⁹ CAMC Br. at p. 10.

⁷⁰ See W. Va. Code R. § 65-32-8.25; see *Panhandle Support Servs.*, 2025 W. Va. App. LEXIS at *27, 919 S.E.2d at 466.

⁷¹ See *Hoover*, 198 W. Va. at 518, 482 S.E.2d at 131; see also W. Va. Code § 16-2D-19 *et seq.*

⁷² CAMC Br. at p. 7.

⁷³ *Mobil Oil Exploration & Producing Southeast v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991) (“An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities.”) (citations omitted)

⁷⁴ *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985).

made clear that courts may not impose procedural requirements on agencies that are not grounded in statute or regulation.⁷⁵

Here, both the CON law and the WVAPA are silent regarding the use of protective orders in PV investigations, and the West Virginia Rules of Civil Procedure do not apply to such proceedings. The Authority acted well within its discretion in determining that the Agreed Protective Order was necessary to protect competitively sensitive information from disclosure to third-party competitors like CAMC. CAMC's arguments to the contrary are without merit and must be rejected.

IV. THE AUTHORITY PROPERLY APPLIED THE PROVISIONS OF W. VA. CODE § 16-2D-8(a)(12), AND ITS FACTUAL DETERMINATIONS REGARDING THE TEAYS VALLEY LOCATION ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

CAMC's second assignment of error contends that the Authority misapplied W. Va. Code § 16-2D-8(a)(12) in determining that no probable cause existed for a violation.⁷⁶ CAMC specifically takes issue with the Authority's finding that: "TMH has presented information, as required by the Board, which shows that at no time has the Teays Valley Location ceased all operations for twelve months."⁷⁷ CAMC speculates that, even if the Teays Valley Location did not completely cease operations, it may have not regularly offered services during the past 12 months.⁷⁸

This Court need not delve down this rabbit hole involving the merits of the Authority's Order, since the Order is not appealable. However, CAMC's argument amounts to a distinction

⁷⁵ *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 102 (2015) ("Beyond the APA's minimum requirements, courts lack authority 'to impose upon [an] agency its own notions of which procedures are 'best' or most likely to further some vague, undefined public good.'").

⁷⁶ *See, e.g.*, CAMC Br. at p. 11.

⁷⁷ *See* Order at p. 1.

⁷⁸ *See* CAMC Br. at p. 12.

without difference and, in any event, is entirely dispatched by the evidence provided by TMH to the Authority. TMH submitted a sworn declaration of TMH’s President and Chief Executive Officer, J. Gregory Rosencrance, M.D., which confirmed that “[TMH] has continued to operate oncology services at the Teays Valley Location within the last 12 months,” that “[o]ncology services are rendered to patients at the Teays Valley Location on a regular basis according to the needs of the patient,” and that “[t]he Teays Valley Location is available for appointments based on patient need during any weekday between the hours of 8:30 a.m. to 4:00 p.m.”⁷⁹ This evidence was more than sufficient to demonstrate that the Teays Valley Location is—and at all relevant times, has been—an active ambulatory health care facility consistent with W. Va. Code § 16-2D-8(a)(12). At no point did CAMC present any evidence contradicting Dr. Rosencrance’s statements about the oncology services provided at the Teays Valley Location during the past twelve months. The utilization data submitted by TMH to the Authority as part of the Agreed Protective Order merely corroborates Dr. Rosencrance’s declaration.

In addition, CAMC’s argument is flawed because it misinterprets the statutory language. W. Va. Code § 16-2D-8(a)(12) requires only that a health care facility has regularly “offered” a relevant health service within the past twelve months. W. Va. Code § 16-2D-2(29) defines “offer” as occurring when “the health care facility holds itself out as capable of providing, or as having the means to provide, specified health services.” W. Va. Code § 16-2D-8(a)(12) does not require a health care facility to show that it has treated any particular number of patients in the past twelve months.

⁷⁹ D.R. 90.

Since TMH submitted evidence showing that it provided oncology services at the Teays Valley Location for the past three years⁸⁰, it has exceeded what is required to show that the Teays Valley Location “offer[ed]” such services within the last twelve months.⁸¹ That is because the CON law’s definition of “offer” only requires a showing that a health care facility is capable of providing services.⁸² Not only does the evidence submitted by TMH show that the Teays Valley Location is capable of providing oncology services, it further demonstrates that such services have actually been provided there. As such, TMH supplied adequate information to demonstrate that the Teays Valley Location regularly “offered” oncology services within the past twelve months, and indeed, for the past three years.

While CAMC references a 2021 Determination of Reviewability filed by TMH—where TMH requested the Authority to determine whether the development of a free-standing emergency department at the Teays Valley Location was subject to CON review—this is an entirely irrelevant inquiry. TMH voluntarily withdrew its request because it no longer wished to proceed with the project, not because it could not come up with patient utilization data (as CAMC infers). Further, W.Va. Code § 16-2D-20 provides a statute of limitations in which “[t]he authority has a period of three years to correct violations of the provisions of this article.” This makes CAMC’s attempts to look back to the 2021 Determination of Reviewability wholly irrelevant.

By raising baseless questions about the frequency of services at the Teays Valley Location, CAMC is essentially asking this Court to re-weigh factual evidence that has already been thoroughly presented to, and considered by, the Authority. Such a *de novo* re-weighing of factual

⁸⁰ As identified below, W.Va. Code § 16-2D-20 provides a statute of limitations in which “[t]he authority has a period of three years to correct violations of the provisions of this article.” Although the relevant period referenced by W. Va. Code § 16-2D-8(a)(12) is twelve months, to be reasonably thorough, TMH provided information spanning the previous three years, in accord with the statute of limitations.

⁸¹ See W.Va. Code § 16-2D-2(29).

⁸² See *id.*

evidence is not the proper standard of review. Instead, the Authority’s factual findings, as well as the Authority’s inferences drawn from its factual findings, are entitled to “substantial deference” if such findings and inferences are based upon substantial evidence.⁸³ Here, the record reflects that there was substantial evidence to support the Authority’s determination that the Teays Valley Location regularly “offered” oncology services within the past 12 months, in compliance with W. Va. Code § 16-2D-8(a)(12).

V. THE AUTHORITY DID NOT BACKDATE THE ORDER.

While TMH contends that this Order is not appealable, to the extent that it is, the Authority did not backdate the Order. The Order provides that “[t]he Health Care Authority board of review voted during a scheduled board meeting on August 13, 2025, and the final decision in this Potential Violation [matter] was issued by the Health Care Authority on August 28, 2025.”⁸⁴ As CAMC recognizes in its brief, the thirty-day time-period for filing an appeal begins on “the date upon which such party received notice of the final order or decision of the agency.”⁸⁵ The Order clearly could not be received by CAMC prior to it being issued by the Authority. Thus, CAMC’s claim that its period for appeal commenced on August 13, 2025, is simply without any merit. TMH received the Order on Tuesday, September 2, 2025. Given that the Order appears to have been mailed out on Thursday, August 28, 2025—and given that Monday, September 1, 2025 was Labor Day—it appears reasonable that CAMC would have also received the decision on September 2, 2025. Since CAMC appealed the decision on September 12, 2025, CAMC’s appeal, to the extent

⁸³ *Martin*, 195 W. Va. at 304, 465 S.E.2d at 406; *see also Cahill*, 208 W. Va. at 180, 539 S.E.2d at 440.

⁸⁴ D.R. 0100-0101.

⁸⁵ *See* W. Va. Code 29A-5-4(b); *see also State ex. Rel. Comm’r v. Swope*, 230 W.Va. 750, 755, 742 S.E.2d 438, 443 (2013) (“After careful consideration, this Court cannot conclude that W. Va. Code 29A-5-4(b) [1988], means less than what it plainly states. A party adversely affected by an administrative order or decision in a contested case must file the petition for appeal... ‘within thirty days after the date upon which such party received notice of the final order or decision of the agency.’”); *see also* CAMC Br. at p. 16.

the order is appealable, is timely under W. Va. Code 29A-5-4(b).⁸⁶

VI. THE RELIEF CAMC SEEKS IS IMPROPER.

In its brief, CAMC requests, *inter alia*, this Court to reverse and vacate the Order and remand to the Authority to enter a decision that TMH is in violation of the CON law. However, this remedy is neither legally permissible nor appropriate. At most, the only relief CAMC could properly seek would be a remand directing the Authority to provide CAMC with a copy of the utilization data submitted by TMH. CAMC has not advanced any argument in its brief that would warrant this Court to disturb the Authority's factual determinations or to find a violation of the CON law. Further, even if this case were remanded solely for the Authority to provide CAMC with the utilization data submitted as part of the Agreed Protective Order, such a remand would serve no practical purpose and would unnecessarily expend agency resources, as the outcome would remain unchanged.

CONCLUSION

For the reasons set forth above, as well as for the reasons set forth in TMH's Motion to Dismiss, TMH respectfully requests that this Court dismiss this pending appeal, and remove Case No. 25-ICA-369 from the docket. Alternatively, TMH respectfully requests that this Court affirm the Order.

**HERBERT J. THOMAS MEMORIAL HOSPITAL
ASSOCIATION
d/b/a THOMAS MEMORIAL HOSPITAL**

By Counsel

⁸⁶ Moreover, this Court does not have the authority to order the Authority to adopt a different procedure in issuing its orders. *See* Syl. Pt. 4, *State ex rel. Cicchirillo v. Alsop*, 218 W. Va. 674, 679, 629 S.E.2d 733, 738 (2006) ("In a circuit court's final disposition of an administrative appeal pursuant to W. Va. Code § 29-5-4 (1998) of the Administrative Procedures Act, the circuit court is not authorized to order a State administrative agency to cease the use of certain procedures and to direct the State agency to draft and implement new procedures...").

/s/ Alaina N. Crislip

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NEIL C. BROWN (WVSB #13170)

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Charleston Area Medical Center, Inc.,
Petitioner

vs.) No. 25-ICA-369

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

and

West Virginia Health Care Authority,
Respondent

CERTIFICATE OF SERVICE

I, Alaina N. Crislip, do hereby certify that I have served the foregoing ***Brief of Respondent Thomas Memorial Hospital*** on this 15th day of December, 2025, via the Court's electronic filing system, which will send notification of such filing to the following counsel of record:

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/s/ Alaina N. Crislip
ALAINA N. CRISLIP

EXHIBIT A

WEST VIRGINIA
HEALTH CARE AUTHORITY

FILED

FEB 21 10 57 AM '01

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

In re: **Thomas Memorial Hospital,**
Petitioner.

CON File #01-3-7133-X

DECISION ON REQUEST FOR RULING ON REVIEWABILITY

By letter received January 10, 2001, Thomas Memorial Hospital (TMH) requested a determination of reviewability for the complete relocation of the Charleston Cancer Center (CCC) located on Smith Street in Charleston. The capital expenditure associated with the proposal is less than \$2,000,000.

TMH submits that it has owned and operated the CCC as a department of the hospital since 1994. TMH owns property on Teays Valley Road just off the Winfield exit to which it plans to relocate the service. There will be no services remaining at the current Smith Street location and no new services are proposed.

The Authority has previously determined that the complete relocation of an existing service does not constitute a new institutional health service as defined in W. Va. Code §16-2D-3.

Accordingly, it is **ORDERED** that the proposal by Thomas Memorial Hospital for the complete relocation of the Charleston Cancer Center from Smith Street to Teays Valley Road **IS NOT SUBJECT** to certificate of need review.

DISTRIBUTION

Robert J. Gray, Vice President (Certified Copy)
Thomas Memorial Hospital

The Honorable Joe Manchin, III
Secretary of State

John M. Wilkinson, Director
Office of Health Facility Licensure & Certification

Cathy J. Ayersman, Director, Consumer Advocacy Division
West Virginia Insurance Commission

Sam G. Kapourales, Chairman
Health Care Authority

Marianne Stonestreet, General Counsel
Health Care Authority

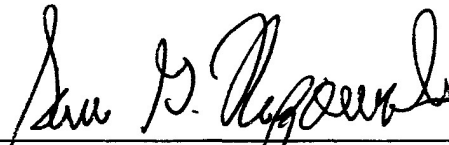
Dayle D. Stepp, Director, Certificate of Need
Health Care Authority

CON Analyst

KHP/DDS/mv

CON Case File #01-3-7133-X

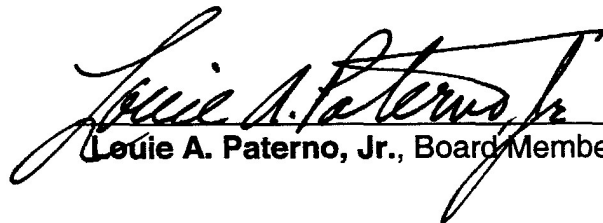
Done this 16th day of February, 2001.



Sam G. Kapourales, Chairman



D. Parker Haddix, Board Member



Louie A. Paterno, Jr., Board Member

THOMAS

January 10, 2001

#01-3-7133-X

RECEIVED
2001 JAN 10 P 3:35
HEALTH CARE
AUTHORITY

Dayle Stepp, Director
Certificate of Need Program
Health Care Authority
100 Dee Drive
Charleston, WV 25311

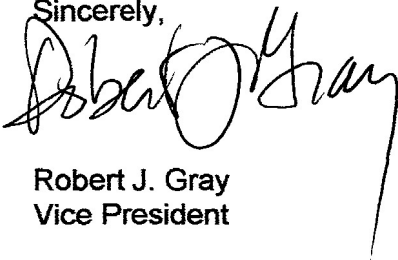
Dear Mr. Stepp:

Thomas Memorial has owned and operated the Charleston Cancer Center on Smith Street in Charleston since 1994. We received a Certificate of Need (Case File No. 94-3-4877-C) when we purchased it from Dr. Bobby Baker and have operated it as a department of the Hospital since we acquired it. We are respectfully requesting a determination of non-reviewability to completely relocate the service within our primary service area.

Thomas owns a property on Teays Valley Road just off the Winfield exit, to which we propose to completely relocate the service. There will be no service remaining at Smith Street and no new services are proposed in this relocation. The cost of the move will trigger no threshold as it will be far less than \$2 million. No new equipment will be purchased. This relocation is within our primary service area and analogous to other facility relocations that the Authority has determined in the past to be non-reviewable (See Bio-Medical Applications of WV, CON File No. 00-7-7092-X and Prestera Center for Mental Health Services, Inc., CON File No. 00-2-7063-X).

If you need further clarification on any of this information, I can be reached at 766-3525. Thank you in advance for your attention to this request.

Sincerely,



Robert J. Gray
Vice President

RJG/dka

Thomas Memorial Hospital

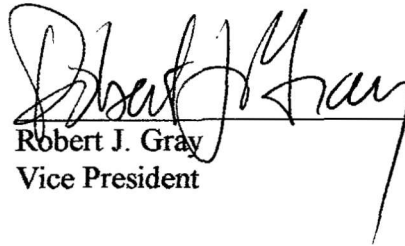
4605 MacCorkle Avenue, SW ■ South Charleston, WV 25309 ■ 304-766-3600

11

THOMAS

VERIFICATION NOTICE

I, Robert J. Gray, Vice President of Business Development, do hereby verify that the information contained in the foregoing letter is true and accurate to the best of my knowledge, information and belief.

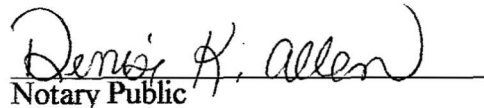

Robert J. Gray
Vice President

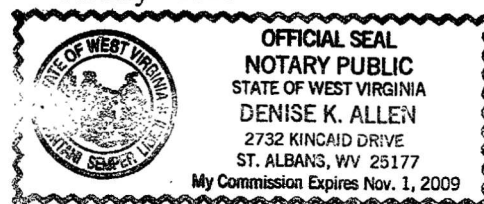
STATE: West Virginia

COUNTY: Kanawha

The foregoing instrument was subscribed and acknowledged before me this 10 day of January, 2001 by Robert J. Gray, Vice President of Thomas Memorial Hospital.

My commission expires November 1, 2009.


Notary Public



Thomas Memorial Hospital

4605 MacCorkle Avenue, SW ■ South Charleston, WV 25309 ■ 304-766-3600