No. 25-ICA-369

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.

REPLY 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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III. INTRODUCTION

This matter involves an appeal from an Order of the West Virginia Health Care Authority ("the Authority") filed pursuant to the provisions of W. Va. Code § 16-2D-16 and W. Va. Code § § 16a. The underlying matter began when Charleston Area Medical Center, Inc. ("CAMC") filed a complaint with the Authority against Thomas Memorial Hospital ("Thomas") in this matter on August 15, 2024. (DR 0002). By statute, CAMC was an "affected person" in this matter pursuant to the provisions of W. Va. Code § 16-2D-2(1)(E) and it was legally entitled to participate fully in the resolution of its complaint before the Authority.

The complaint violation involved Thomas' 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 Certificate of Need ("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." Over the next year the parties exchanged letters arguing about the issues before the Authority. The Authority issued a Potential Violation Order on August 28, 2025, ruling against CAMC's complaint, finding that Thomas did not need a CON to institute the services at the location. (DR 0100).

IV. REPLY ARGUMENT

1. The Appeal is Proper Pursuant to the Provisions of W.Va. Code § 16-2D-16 and § 16A.

W. Va. Code § 16-2D-16 (a) provides that "an [a]pplicant or an affected person may appeal

the authority's final decision in a certificate of need review to the Office of Judges." In 2022, the Office of Judges was replaced as the appellate body by this Court. W. Va. Code § 16-2D-16a. Similar to the language in W. Va. Code § 16-2D-16, W. Va. Code § 16a(a)(2) provides that "[a]n appeal of a final decision in a certificate of need review, issued by the authority after June 30, 2022, shall be made to the West Virginia Intermediate Court of Appeals, pursuant to the provisions governing the judicial review of contested administrative cases in §29A-5-1 *et seq*. of this code." Although the statute references 'the provisions governing the judicial review of contested administrative cases', the language of what is appealable states, 'a final decision in a certificate of need review' did not change. Reference to the provisions of the APA regarding appeals does not change what may be appealed from the Authority to this Court, it just provides the process and the general statutory grounds for the appeal.

Further, neither W. Va. Code § 16-2D-16 nor § 16a restricts what an affected person may appeal. Neither provides that the appeal is limited to the Authority's final decision in the review of a CON application after a hearing is held. Neither states that an affected person may appeal the Authority's final decision only after a CON review under W. Va. Code § 16-2D-13, the section that outlines the process for a contested CON review. The language in both is plain and clear. If the Authority issues a decision or order in a matter where CON issues are the subject of the review, it is an appealable order or decision.

In its Decision issued in *St. Joseph's Hospital of Buckhannon v. Stonewall Jackson Memorial Hospital Co. and West Virginia Health Care Authority*, No 23-ICA-265, *rev'd on other grnds*, 2025 W. Va. LEXIS 440 (Nov. 13, 2025). ("St. Joe's case"), this Court found that this section, and the ability of an affected person to appeal a final order or decision of the Authority in a matter where there was no hearing, applies to Requests for Determinations of Reviewability

("DOR) filed pursuant to the provisions of W. Va. Code § 16-2D-7. In that case, Stonewall Jackson Memorial Hospital ("Stonewall") filed a DOR before the Authority arguing that a proposed project was not subject to CON review. St. Joseph's Hospital of Buckhannon ("St. Joe's") requested affected person status and submitted letters of opposition to Stonewall's request. The Authority never specifically granted such status to St. Joe's. The Authority issued a decision approving the DOR and the decision was appealed by St. Joe's to this Court. Stonewall filed a Motion to Dismiss the appeal arguing essentially the same issues as are argued here. St. Joe's case, Transaction No. 70280076. The Motion to Dismiss was summarily denied by this Court. St. Joe's case, Transaction No. 70806863.

Later, when this Court issued its decision in St. Joe's case, it fully addressed whether it had jurisdiction to consider St. Joe's appeal from an Authority matter that did not involve a CON application and a hearing. In footnote 4, this Court stated:

> The Court acknowledges that our colleague has filed a dissent to our decision in this case. The dissent contends that we lack jurisdiction here because the Authority's Amended Decision is not a final decision in a certificate of need review, which we have jurisdiction over pursuant to West Virginia Code § 16-2D-16a(a)(2) (2021). The dissent's view is that the Authority's determinations of a proposed project's reviewability under West Virginia Code § 16-2D-7 (2016) are separate and distinct from certificate of need review decisions, and thus fall outside of our limited appellate jurisdiction. However, we find that there is ample statutory support for this Court's jurisdiction over a determination of reviewability by the Authority. **This Court has jurisdiction over "[f]inal judgments, orders, or decisions of an agency** or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to § 29A-5-4 or any other provision of this code." W. Va. Code § 51-11-4(b)(4) (2022). Therefore, if a determination of reviewability by the Authority is reviewable under West Virginia Code § 29A-5-4 (2021), this Court has appellate jurisdiction. In addition, declaratory rulings by an agency are "subject to review before the court and in the manner hereinafter provided for the review of orders or decisions in contested cases," which is § 29A-5-4. West Virginia Code § 29A-4-1 (2024). Also,

> West Virginia Code § 16-29B-13 (2024) states that a "final decision" of the Authority is reviewable under § 29A-5-4, without any reference or limitation of review to a "certificate of need review." Moreover, West Virginia Code § 16-2D-2 (2024) does not provide a specific definition for a final decision nor certificate of need review such that a § 16-2D-7 determination of reviewability would be excluded from our jurisdiction over final decisions in a certificate of need review under § 16-2D-16. Thus, we find that one or more of the aforementioned statutes confer this Court with jurisdiction over this case.
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> St. Joe's case, No. 23-ICA-265, 2024 W.Va. App. LEXIS 135, Footnote 4, *rev'd on other grnds*, 2025 W. Va. LEXIS 440 (Nov. 13, 2025). Emphasis added.

Neither DORs, like the St. Joe's case, nor potential violation complaints, like this case specifically provides that affected persons may intervene in the process. However, such intervention is not specifically prohibited and the Authority has allowed such interventions since its inception. Also, neither DOR proceedings nor investigations provide for a hearing process. Both begin with the filing of a letter stating why the actions of a party are or are not subject to CON review. In both processes, affected persons may submit letters arguing why the request or the complaint is incorrect. Evidence may be submitted with the letters, but it is not required. Neither process involves an application, discovery or a hearing. Both end with the issuance of a formal, written order or decision, signed by the Chairman of the Authority Board and formally transmitted to all parties as well as the Insurance Commissioner as the consumer advocate and the Secretary of State. DR 0102. There is no material difference between the two processes or the two cases as it pertains to Thomas' Motion to Dismiss in this case as well as the arguments in Thomas' and the Authority's Briefs. The opinion of this Court in the St. Joe's case was that the appeal in that case was proper. The decision should be the same in this matter. This appeal is proper under the provisions of W. Va. Code § 16-2D-16 and W. Va. Code § 16a.

In addition to being wrong on the law, counsel for the Authority betrays a misunderstanding

of the workings of his client. Counsel argues that CAMC is not an affected person in the matter because the Authority never granted such status. First and foremost, it should be recognized that CAMC was the moving party in this matter. It filed the complaint with the Authority and it filed letters with arguments over the next year. It is absurd to suggest that it is not a proper party to this proceeding. Further, as discussed, the Authority never affirmatively grants a party affected person status. Potential affected persons request such status and the process then proceeds without a response from the Authority. There is no order or other document evidencing the Authority's recognition of a party as an affected person. In St. Joe's case, St. Joe's was never granted affected person status. A person or entity simply is an affected person or is not. The Authority does not designate parties as such, the statute does. Under the provisions of W. Va. Code § 16-2D-2(1)(E), St. Joe's was an affected person in the St. Joe's case and CAMC is undeniably an affected person in this matter.

In the St. Joe's case, St. Joe's clearly summarized the argument against Stonewall's Motion to Dismiss. "In sum, Stonewall's argument that a final decision of the Authority is only appealable if it is issued on a certificate of need application is clearly wrong. At least three statutes (W. Va. Code § 29A-4-1, W. Va. Code § 16-2D-16a(a)(2), & W. Va. Code § 16-29B-13) establish that the Authority's decisions are subject to judicial review under the West Virginia Administrative Procedure Act's standard of review for contested cases, W. Va. Code § 29A-5-4, and none of those statutes impose such a limitation." St. Joseph's Hospital of Buckhannon, Inc.'s Sur-Reply in Opposition to Stonewall Jackson Memorial Hospital Company's Reply in Support if its Motion to Dismiss, Transaction ID 70457583, page 7. There was no such limitation as it pertained to a DOR proceeding in the St. Joe's case and there is no such limitation as it pertains to the final order in this case. Both involved a statutory process where the Authority issued a final, written order or

decision ruling that CON review was not required. This Court agreed with St. Joe's in the St. Joe's case, denying Stonewall's Motion to Dismiss the appeal. It should do so in this case.

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

The Authority, in its Brief, does not address CAMC's first issue raised in its appeal. The Authority's sole argument is that the Potential Violation Order is not an order that is appealable under the provisions of W. Va. Code § 16-2D-16. As discussed above, that argument is without merit. This Court should conclude that the Authority has conceded on this issue.

Thomas' arguments on the first issue raised in the appeal are also without merit. Thomas' arguments are that: (1) the matter was not a contested case, so CAMC had no due process rights that included a duty to allow it to inspect evidence;[1] and, (2) the CON law does not grant third parties the right to discovery in a potential violation matter. Thomas argues, without citation, that "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." Thomas Brief, p. 11.

There are a number of problems with Thomas' argument. First, Thomas refers to CAMC as a third-party complainant. CAMC filed the complaint with its letter of August 15, 2024, that led to the whole proceeding in this matter. DR 0003-0004. CAMC was an affected person in this

[1] It should be noted that Thomas never responds to CAMC's arguments under *State ex rel. Johnson v. Tsapis*, 187 W. Va. 337, 419 S.E.2d 1 (1992) that the Agreed Protective Order, (DR 92,94), should never have been entered in this matter because it failed to file a motion or establish good cause for the entry of this order.

matter, as that term is defined by statute. CAMC started this entire process and, it is not some uninterested party seeking to intervene as Thomas argues. Second, Thomas conflates investigative information in the investigating agency's files with the specific information used by that agency to make a decision. CAMC never made a request to inspect the entire Authority file. However, for Thomas to argue that CAMC is not entitled to view the specific evidence that the Authority used to make the decision memorialized in the Order amounts to Thomas arguing that the Authority is a kangaroo court and that it is perfectly acceptable for that Court to make decisions in secret and maintain that secrecy after the order is issued. The result of that would be that CAMC, an affected person in the case, is allowed to simply read the Order that states that there is evidence that supports the decision made in the Order that it cannot see. CAMC must just trust Thomas and the Authority. That is not a system of justice that this Court, or any court should sanction.

Further, Thomas argues that the practice of excluding information that is the sole basis of an agency decision "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." Allowing CAMC to view the evidence that that was the sole basis for the Authority's decision is not a threat to the integrity of that evidence. CAMC certainly has no intention of interfering or tampering with such evidence. Thomas' assertions otherwise are spurious. Finally, Thomas' assertion that allowing CAMC to simply view a few pieces of paper is somehow a threat to the proper functioning of the Authority is a ridiculous statement. CAMC was the complaining party, and it should have been entitled to review Thomas' evidence and respond to it. That is the normal process before the Authority and this Court should not sanction this ill-advised process.

Thomas' next argument is just as meritless, and it is also not supported by the facts in this matter. Thomas argues that CAMC was not entitled to discovery in this matter as it was not a contested hearing under the provisions of W. Va. Code § 16-2D-13. CAMC does not disagree that this matter was not a contested case held under the provisions of W.Va. Code § 16-2D-13. However, Thomas' argument that '[s]imply put, CAMC's attempt to demand discovery as a part of a PV investigation rests on a categorical mismatch of laws, regulations, and procedures, and must be rejected." Thomas Brief, p. 14. Thomas seems to be exercised over the fact that CAMC demanded discovery in this case, except that CAMC did not demand discovery. CAMC filed no motions for discovery, no interrogatories, no requests for production of documents. All CAMC requested was the opportunity to review the evidence that Thomas submitted and that was subsequently the sole basis for the Authority's Order in this case. That request was denied. As a result, CAMC must appeal a decision to this Court without knowing what information the decision was based upon. That also is not a system of justice that this Court, or any court should sanction.

Thomas also incorrectly argues that the Authority's ability to investigate violations of CON law is based on the provisions of W. Va. Code § 16-2D-19. That is incorrect. W. Va. Code § 16-2D-19 provides the Authority with the ability to obtain injunctions in Circuit Court and assess fines. The ability to investigate is inherent in the legislature's grant of powers and duties in W. Va. Code § 16-2D-3(a)(1), where the Authority is granted the power to "[a]dminister the certificate of need program. The statute is not limited to granting CON's and holding hearings on CON applications. The certificate of need program clearly involves granting certificates of need and holding hearings on applications. It also involves deciding whether a proposed project requires a CON under W. Va. Code § 16-2D-7, whether a project qualifies for an exemption under the applicable statutes or whether an action or project already undertaken required a CON. W. Va.

Code § 16-2D-19 does not directly apply to any of those powers and duties. It merely allows a method enforcement when such enforcement is needed. On this basis, this Court should reject Thomas' arguments that the Potential Violation Order entered on August 28, 2025, is not an appealable order.

CAMC raised arguments regarding the impropriety of the Agreed Protective Order in its Brief. Those do not need to be repeated here. Thomas raised nothing in its Response Brief on this first appeal issue worthy of reply. 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 and without CAMC even knowing of its existence. 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 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, while refusing to provide the evidence, or even a summary of it, to CAMC.

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

As with the first appeal issue, the Authority has chosen not to respond to CAMC's second appeal issue or even try to justify applying incorrect language in its Order. Again, this Court should conclude that the Authority has conceded on this issue.

Thomas' justification on this second appeal issue is to argue that there is information in the record to justify the Order even if the Authority did use a completely incorrect standard. That

argument is more of the same from Thomas. It is essentially arguing that they don't care if the Order uses the wrong standard, one that is totally incompatible with the actual statute. They offered evidence to prove the right standard, CAMC just can't see it.

Neither the Authority, which punts on this issue, nor Thomas actually try to explain how the Authority can rewrite a statute and then apply that rewritten statute to a case. The reason for this total silence on the real issue raised here is that neither can intelligently respond. The fact of the matter is that the Authority rewrote the statute, changing the key phrase in the statute from services "were not offered on a regular basis" (W. Va. Code § 16-2D-8(a)(12)) to the facility "being completely closed." DR 0100. That changes the burden of proof, changes the intent of the statute and is simply improper and cannot be justified. If the Authority believed that the language in W. Va. Code § 16-2D-8(a)(12) required an entity to be completely closed before it was required to apply for a CON, it is not applying the statute as written. As has been noted by CAMC, Thomas could have opened the facility for 30 minutes, once a year and the facility would not have been completely closed during that 12-month period. However, opening the facility for 30 minutes once a year does not constitute offering services on a regular basis. The Authority's Decision changes the statutory language and it totally changes the requirement set forth in W. Va. Code § 16-2D-8(a)(12). This Court should hold that the Authority's Decision should be reversed on this issue alone.

"The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. Pt. 5, *St. Joseph's Hospital of Buckhannon v. Stonewall Jackson Memorial Hospital Co. and West Virginia Health Care Authority*, 2025 W. Va. LEXIS 440, 2025 WL 3171420 (2025), citing Syl. Pt. 1, *Smith v. State Workmen's Comp. Com'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). "A statutory provision which is clear and unambiguous and plainly expresses

the legislative intent will not be interpreted by the courts but will be given full force and effect." *Id.* at Syl. Pt. 6, citing Syl. Pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951).

Again, the provisions of W. Va. Code § 16-2D-8(a)(12) are clear. The statute does not mention that ceasing operations for twelve months is the issue. The primary objective is clear: a provider must offer services on a "regular basis" for the preceding twelve months or a new CON is required to institute services. The primary objective is not to allow a facility to open for 30 minutes, once a year. A facility that is operating on a regular basis is open and does not need a CON to continue being open. One that is not operating on a regular basis is closed and requires a CON to reopen.

As noted in CAMC's previously filed Brief, 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 opposite, one meaning to stop; one meaning to perform on an orderly schedule. Substituting one for the other is not giving effect to the primary object or the intent of the Legislature. It is, again, the opposite. It gives full effect to the exact opposite of what the statute is intended to convey.

The language of the statute is plain and clear. "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*. "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 clear intent was to make sure that the provision of services on a "regular basis" at a health care facility was the basis for that facility to remain in compliance with CON law. If services were not offered regularly, that facility was not active and needs a CON to start offering services again. If the issue was the total cessation of operations, the legislative could have and would have said so. They did not.

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.

4. 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. This Court should conclude as a matter of law that it is not proper for an administrative agency to backdate its written decisions.

V. 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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CERTIFICATE OF SERVICE

I, Thomas G. Casto, do hereby certify that I have served the foregoing ***Reply Brief of Petitioner Charleston Area Medical Center, Inc.*** on this 29th day of December, 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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