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OFFICE OF HEALTH STRATEGY

HEALTH SYSTEMS PLANNING UNIT

HEARING TO CONTEST THE IMPOSITION OF A CIVIL PENALTY
DOCKET NUMBER 21-32486-CON

Petitioner: Office of Health Strategy
Respondent: Trinity Health of New England
D/B/A Johnson Memorial Hospital

HEARING DATE: November 16, 2022
HELD: Via Zoom Videoconferencing
Platform

HELD BEFORE: DANIEL CSUKA, HEARING OFFICER

FOR THE PETITIONER:

Lara Manzione, Esq., OHS
Steven Lazarus, Certificate of Need Program Supervisor

FOR THE RESPONDENT:

David DeBassio, Esq., Hinckley Allen
Stuart Rosenberg, President of Johnson Memorial Hospital

ALSO PRESENT:

Roy Wong, OHS, Associate Research Analyst

Reporter: Theresa Bergstrand, CSR #406

I N D E X

	PAGE
EXAMINATION	
STEVEN LAZARUS	
Direct Examination by Ms. Manzione	23
Voir Dire Examination by Mr.	25
DeBassio	
Voir Dire Cross-Examination by Ms.	27
Manzione	
Continued Direct Examination by Ms.	31
Manzione	
Cross-Examination by Mr. DeBassio	35
 STUART ROSENBERG	
No Direct Examination by Mr.	
DeBassio	
Cross-Examination by Ms. Manzione	45
Examination by the Hearing Officer	58

1 (The hearing commenced at 9:34 a.m.)
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HEARING OFFICER CSUKA: Good morning, everyone. We
had some discussions off the record before we began, but
we have started the recording, so we are going to begin
this hearing, now.

This hearing before the Connecticut Office of
Health Strategy is identified by Docket Number 21-32486,
pursuant to Connecticut General Statutes
Section 19(a)-653. The Petitioner in this matter, the
Connecticut Office of Health Strategy, issued a Notice
of Civil Penalty in the amount of \$394,000 to the
Respondent, Johnson Memorial Hospital, relating to its
alleged failure to seek Certificate of Need approval
under the Connecticut General Statute
Section 19(a)-638(a), for the termination of services,
specifically, inpatient obstetric services or labor and
delivery services. Thereafter the Respondent requested
a hearing to contest the imposition of the civil penalty
and OHS issued a Notice of Hearing for today's date.

Today is November 16, 2022. My name is Daniel
Csuka, Executive Director. Kimberly Martone designated
me to be the Hearing Officer, and I will be issuing the
proposed final decision in this matter. Also present on
behalf of the agency is Roy Wong, he is an Associate

1 Research Analyst. He will be available to assist me
2 today, if needed.

3 Public Act Number 21-2, as amended by Public Act
4 Number 22-3, authorizes an agency to hold a hearing by
5 means of electronic equipment. In accordance with the
6 Public Act, any person who participates orally in an
7 electronic meeting shall make a good faith effort to
8 state his or her name and title at the outset of each
9 occasion that such person participates orally during an
10 uninterrupted dialogue or series of questions and
11 answered.

12 I ask that all members of the public mute their
13 devices that they are using to access the hearing and
14 silence any additional devices that are around them.
15 This hearing is held pursuant to 19(a)-653 and will be
16 conducted under the provisions of Chapter 54 of the
17 General Statutes, that's the Uniform Administrative
18 Procedure Act.

19 The Certificate of Need process is a regulatory
20 process, and as such, the highest level of respect will
21 be accorded to the Petitioner, the Respondent and OHS
22 Staff. Our priority is the integrity and transparency
23 of the process. Accordingly, decorum must be maintained
24 by all present during these proceedings.

25 This hearing is being transcribed and recorded, and

1 the video will also be made available on the OHS website
2 and its YouTube account. All documents related to this
3 hearing that have been or will be submitted to the
4 Office of Health Strategy are available for your review
5 through the electronic Certificate of Need Portal, which
6 is accessible on OHS's CON web page.

7 As indicated in the agenda, although the hearing is
8 open to the public, only the Petitioner, Respondent, OHS
9 and their respective representatives will be permitted
10 to make comments. Accordingly, the chat feature in this
11 Zoom call has been disabled. As this hearing is being
12 held virtually, we ask that anyone speaking, to the
13 extent possible, enable the use of the video camera on
14 their laptops or other devices when speaking during the
15 proceedings. In addition, as I mentioned earlier,
16 anyone who is not speaking, should make their best
17 effort to mute their electronic devices.

18 And lastly, as Zoom notified you in the course of
19 entering this meeting, you are appearing on camera, and
20 so if you are not consenting to being filmed, you should
21 revoke your consent and drop off the call at this time.

22 The CON Portal contains the Table of Record in this
23 case. As of yesterday afternoon when I looked at it
24 around 6:00 p.m., it looked like exhibits had been
25 identified for, from A through Q. I am just going to

1 ask that Petitioner's counsel identify herself,
2 Petitioner being the Office of Health Strategy.

3 MS. MANZIONE: Yes. Good morning. Good morning,
4 all. My name is Lara Manzione, and I represent the
5 Office of Health Strategy.

6 HEARING OFFICER CSUKA: And Counsel for Respondent,
7 Johnson Memorial Hospital, can you please identify
8 yourself for the record, please.

9 MR. DEBASSIO: Morning, Your Honor. My name is
10 David DeBassio of Hinckley Allen on behalf of Johnson
11 Memorial Hospital, Inc.

12 HEARING OFFICER CSUKA: Thank you. So, looking at
13 the Exhibits A through Q, do either of you have any
14 objections to any of those? Again, those are the
15 documents that were uploaded to, or that were in the
16 Table of Record. Starting first with Ms. Manzione, do
17 you have any objections to any of those?

18 MS. MANZIONE: No, I don't have any objections to
19 them, per se. I did notice that at different points in
20 the timeline of this proceeding that they had been
21 inaccurately named, and when that came to my
22 attention, I tried to communicate with OHS staff that
23 that was the case. So I hope that they are all, now,
24 accurately titled. And I agree that, with Attorney
25 DeBassio that, yes, there is that one error in the end,

1 called Respondent, but -- it is called Petitioner, but
2 it should be Respondent. So that is one point.

3 The other point is, as my opposing counsel remarked
4 earlier, he and I have spent a bit of time coming up
5 with a list of agreed upon stipulated facts, and I don't
6 think either one of us had the ability to upload it last
7 night, but I think it is complete. And I think it would
8 serve everyone if we could be allowed to upload that to
9 the, to the portal and so it could become part of the
10 record at some point this morning.

11 HEARING OFFICER CSUKA: Okay. Yes, it doesn't need
12 to be during the hearing. It can be after. I am not
13 going to be able to read through it right now, anyway,
14 unless one of you wants to bring it up on the video.
15 And the exhibit that you were referencing as being
16 inaccurately labeled in the Table of Record was Exhibit
17 J, that's Respondent's prefiled, correct?

18 MS. MANZIONE: Yes.

19 MR. DEBASSIO: That's correct, Your Honor.

20 HEARING OFFICER CSUKA: Thank you. So we will
21 correct that in the final Table of Record after the
22 hearing has concluded.

23 And also, I am not sure if it is in the Table of
24 Record or in the agenda or both, but as Attorney
25 DeBassio indicated earlier when we were off the

1 record, the Petitioner in this case is Johnson Memorial
2 Hospital, Inc., correct?

3 MR. DEBASSIO: That is the Respondent, Your Honor.

4 HEARING OFFICER CSUKA: I am sorry -- Respondent.

5 MS. MANZIONE: OHS is the Petitioner.

6 HEARING OFFICER CSUKA: Yes, sorry.

7 MR. DEBASSIO: That's okay.

8 HEARING OFFICER CSUKA: Johnson Memorial Hospital,
9 Inc., is the Respondent, correct, not Trinity Health of
10 New England?

11 MR. DEBASSIO: That's correct, Your Honor.

12 HEARING OFFICER CSUKA: Okay. Thank you.

13 MR. DEBASSIO: And I believe Counsel would agree
14 with me, the penalty has been levied against Johnson
15 Memorial Hospital, Inc.

16 HEARING OFFICER CSUKA: Okay. Thank you.

17 MS. MANZIONE: That was the intention.

18 MR. DEBASSIO: The only other thing I would add,
19 Your Honor, is, I have no problems with Exhibits A
20 through P, but the Table of Record I got doesn't have an
21 Exhibit Q. And the one I saw on the portal when I
22 checked today, doesn't have an Exhibit Q. So I am
23 probably prepared to stipulate to Exhibit Q, but I,
24 until I actually know what it is, I can't go ahead --
25 and so I am prepared to stipulate to A through P.

1 HEARING OFFICER CSUKA: Let me --

2 MS. MANZIONE: I think Exhibit Q is the actual
3 Table of Record.

4 MR. DEBASSIO: Oh, to the extent Exhibit Q is the
5 Table of Record, I stipulate to that, as well.

6 MS. MANZIONE: And there is also an Exhibit R,
7 which is the OHS's exhibit list of two documents that I
8 showed to you before, Attorney DeBassio. It is Exhibit
9 Number 1, which we think is actually the same as
10 Johnson's Exhibit Letter I. And Exhibit Number 2, is
11 the only new document that hasn't been introduced before
12 today. And I know you have not had a chance to respond
13 to it, I don't know what your opinion is, if you are
14 going to accept it, but that is Exhibit Letter P -- no,
15 R, R, according to the Table of Record.

16 HEARING OFFICER CSUKA: All right. So that there
17 are no issues with A through Q, Q being the Table of
18 Record that does not have letter Q in it, as far as R
19 goes, that is, from what I can tell, as you just
20 indicated, Attorney Manzione, the filing that you made
21 last night with the, the two exhibits. Attorney
22 DeBassio, do you have any objection to either of those?

23 MR. DEBASSIO: I don't have an objection to
24 Exhibit 1. I would like to conduct a brief voir dire
25 about Exhibit 2, because I just wanted to confirm how

1 this information was circulated before I stipulate to
2 it. So I imagine we are going to get to that point, but
3 this is the first time I have seen it. It wasn't
4 available on OHS's website, so I would just like to do a
5 brief voir dire of Mr. Lazarus about how this document
6 was published and circulated.

7 HEARING OFFICER CSUKA: Okay. All right. We can
8 get to that later on. I am not going to do the voir
9 dire right now, but after, after Mr. Lazarus presents
10 his testimony and you're cross-examining him, you are
11 free to ask those questions.

12 MR. DEBASSIO: Absolutely understand. I just also
13 mention it because Attorney Manzione may be able, I
14 would guess, could also address it as soon as she
15 introduces Mr. Lazarus' testimony, and then I probably
16 wouldn't have any objection.

17 HEARING OFFICER CSUKA: Okay. If that, if that
18 works for you, Attorney Manzione, feel free to do that,
19 as well, I am okay with either one.

20 MS. MANZIONE: Sounds good.

21 HEARING OFFICER CSUKA: So, that's R. Are there
22 any other documents or exhibits that either Party wishes
23 to put into the record at this time, oh -- so I guess
24 the stipulated facts would be S, correct?

25 MS. MANZIONE: Yes.

1 MR. DEBASSIO: Yes. And that is a joint
2 stipulation, so we both consent to that -- I shouldn't
3 say, we both. I consent to that becoming part of the
4 record once it is filed.

5 MS. MANZIONE: As do I. I also consent and it is a
6 joint stipulation.

7 HEARING OFFICER CSUKA: Okay. All right. So, I
8 don't know why I would need to look at these particular
9 documents, but I am going to take administrative notice
10 of them anyway. It's the Statewide Healthcare
11 Facilities and Services Plan, the Facilities and
12 Services Inventory, OHS Acute Care Hospital Discharge
13 Database, Hospital Reporting System HRS Financial and
14 Utilization Data, and All Pair Claims Database Claims
15 Data. Also, I should have mentioned all of those
16 exhibits are entered as full exhibits, with the
17 exception being letter R, which we will get to, and then
18 that will likely, it sounds like it may also be a full
19 exhibit, as well.

20 MS. MANZIONE: And also OHS Number 2, until we, you
21 know, establish foundation for it, it should not be
22 entered as a full exhibit yet.

23 HEARING OFFICER CSUKA: Yes, that is part of, that
24 is part of our -- it is like confusing the way --

25 MS. MANZIONE: Sorry. I was -- you are right. It

1 is confusing.

2 HEARING OFFICER CSUKA: I am also going to be
3 taking administrative notice of some dockets that I am
4 aware of that I think may be relevant to the proceeding.
5 One of which is actually the remainder of this
6 docket, which is 21-32486, because there are, from what
7 I could tell, documents related to a determination, an
8 investigation of some kind a civil penalty and also the
9 Certificate of Need Application. I think a lot of
10 those, if not all, of those documents are already in the
11 exhibits that the two of you had stipulated to, but I
12 could be wrong.

13 MR. DEBASSIO: There are two that are in the portal
14 that are not part of the stipulated exhibits and
15 testimony. There is an anonymous letter that was sent
16 to OHS that is not part of our record or presentation
17 for this hearing at this time. And there was another
18 letter from ATF, I believe it was, asking for the
19 investigation itself, that Attorney Manzione and I have
20 not made an exhibit or part of the record.

21 HEARING OFFICER CSUKA: Okay. Thank you. I am
22 going to run through the rest of these dockets, now.
23 One of which is Docket Number 15-31998, that is Milford
24 Hospital's termination of OB services; Docket Number
25 15-32014, which is Sharon Hospital's Termination of

1 Sleep Center; Docket Number 04-30297, which is Lawrence
2 and Memorial's suspension of angioplasty; Docket Number
3 04-30272, which is John Dempsey Hospital suspension of
4 its Bone Marrow Transplant Program; Docket Number
5 03-23013, which is Yale New Haven Hospital's suspension
6 of its Liver Transplant Program. And then there are
7 four civil penalty dockets from between 2012 and 2014;
8 one is 12-31797, that's the civil penalty issued
9 regarding Greenwich Hospital's termination of its Dental
10 Clinic; Docket Number 14-31905, which is the civil
11 penalty issued regarding Yale New Haven Hospital's
12 acquisition of two pieces of imaging equipment; Docket
13 Number 14-31943 civil penalty issued regarding Assent
14 Healthcare of Connecticut, that is Sharon Hospital's
15 termination of its Intensive Outpatient Psychiatric
16 Program; and then finally, 14-31953 civil penalty issued
17 regarding Hartford Hospital's acquisition of a piece of
18 imaging technology.

19 I may also take administrative notice of other
20 dockets as we go through if they are presented by either
21 party, and I may also look at other decisions that may
22 come up as I am reviewing the matter.

23 MS. MANZIONE: Hearing Officer Csuka, I would ask
24 that the Tribunal take administrative notice of the two
25 currently pending civil penalty matters that are, I have

1 the docket numbers, I am not sure what the year is, but
2 the first one is 32516, which is Rockville General
3 Hospital, the termination of surgical services; and the
4 other one is 32517, which is Windham Hospital
5 termination of services labor and delivery.

6 HEARING OFFICER CSUKA: Okay. I will take notice
7 of those. Thank you.

8 So with that, we will proceed in the order
9 established by today's agenda. Are there any other
10 housekeeping matters or procedural issues that we need
11 to address before we start?

12 Hearing none, I will move on. Is there an opening
13 statement from OHS, Attorney Manzione?

14 MS. MANZIONE: Yes.

15 HEARING OFFICER CSUKA: Okay. So, you can, you can
16 proceed whenever you are ready.

17 MS. MANZIONE: Sure. I just like to clarify, so
18 will it be, will the process be opening statement,
19 opening statement of the Respondent, or will it be
20 opening statement and then I go to my witness? I don't
21 have a preference, I am just looking to plan.

22 HEARING OFFICER CSUKA: I had planned it, and the
23 agenda indicates, that it will be your opening statement
24 and then your evidence. And then it will be, you know,
25 cross-exam and redirect on your witness. And then we

1 will turn to the Respondent's opening statement, his,
2 and his client's evidence and cross-exam and redirect.
3 And then your closing argument, Ms. Manzione, and then
4 the Respondent's closing argument.

5 MS. MANZIONE: Okay.

6 HEARING OFFICER CSUKA: So, you can proceed
7 whenever you are ready. And then we will take some time
8 to introduce your witness and have him go under oath.

9 MS. MANZIONE: Okay. Sounds good. Thank you.

10 Good morning. Good morning. My name is Lara
11 Manzione. I am representing the Petitioner, the Office
12 of Health Strategy. Today we are here to determine
13 whether the Office of Health Strategy properly imposed a
14 civil penalty on Johnson Memorial Hospital.

15 Specifically the question is whether Johnson Memorial
16 Hospital willfully failed to seek a Certificate of Need,
17 or CON, before terminating its labor and delivery
18 services.

19 The parties to this hearing agree on most of the
20 facts in this case. There was a terrible pandemic of
21 COVID-19 that came to the United States in early 2020.
22 The Governor of Connecticut issued a series of Executive
23 Orders to try to stem the spread of this unknown virus.
24 The Governor also granted unusual authority to
25 healthcare regulators to assist in mobilizing resources

1 to fight the pandemic quickly and efficiently. The
2 evidence will show that one of these orders, Executive
3 Order 7(b), gave the Executive Director of the Office of
4 Health Strategy authority to waive Certificate of Need
5 requirements starting on March 14th, 2020.

6 The Office of Health Strategy started a
7 notification and waiver program that many hospitals and
8 other institutions took advantage of to bypass the
9 usually lengthy CON requirements in order to help in the
10 battle against COVID-19. Johnson Memorial Hospital
11 utilized this special waiver program to stop providing
12 labor and delivery services during the early part of the
13 pandemic. However, when OHS's Authority to operate the
14 waiver program ended, the hospital did not reinstitute
15 the labor and delivery services, nor did it seek a CON
16 to officially terminate the services. This is where the
17 parties to this matter disagree.

18 What happens if a hospital stops providing an
19 inpatient service without a Certificate of Need? The
20 evidence will show that typically if a hospital wants to
21 cease providing an inpatient service, it must file a CON
22 application with the Office of Health Strategy before
23 stopping that service so the regulator can evaluate
24 whether the hospital should be allowed to do so. If a
25 hospital terminates an inpatient service without a CON,

1 it is a violation of law and the hospital is subject to
2 a civil penalty. And that is why we are here today.

3 There are two related applicable laws at issue.

4 The first is Connecticut General Statute

5 Section 19(a)-638(a)(5). This law requires that a CON,
6 Certificate of Need, be granted in order to terminate
7 inpatient services offered by a hospital. The other law
8 is Connecticut General Statutes Section 19(a)-653. It
9 states that if a healthcare facility or institution that
10 is required to file a CON under Section 19(a)-638
11 willfully failed to seek CON approval for any of the
12 activities in 19(a)-638, they shall be subject to a
13 civil penalty of up to \$1,000 per day for each day such
14 healthcare facility or institution conducts any of the
15 described activities without Certificate of Need
16 approval as required by Section 19(a)-638.

17 The evidence presented today will show that Johnson
18 Memorial Hospital violated these laws. The Hospital
19 knew that they violated the laws and therefore acted
20 willfully. Today Johnson and Memorial Hospital will
21 offer three reasons why they are not in violation of the
22 law. First, the Hospital will say that because they
23 were in frequent communication with OHS staff and
24 repeatedly said that they were intending to only suspend
25 L&D services, that gave the Hospital approval to keep

1 the L&D services suspended. Second, Johnson Memorial
2 Hospital will say it had to suspend the L&D services,
3 because it could not find enough qualified providers to
4 offer 24/7 coverage for those services. The Hospital
5 will provide evidence that they did everything they
6 could to try to recruit and hire more staff, but failed.
7 And thirdly, Johnson and Memorial Hospital will say that
8 it had a good faith misunderstanding of either the facts
9 of the situation or the applicable law. In terms of the
10 facts, the Hospital will say that it believed that the
11 labor market would improve and that one day soon they
12 would be able to hire enough qualified people to lift
13 the suspension on providing labor and delivery services.
14 Alternatively, the Hospital will show that it had a good
15 faith misunderstanding that a CON was not required to
16 stop providing L&D services because it never intended to
17 terminate L&D services, but only ever intended to
18 suspend them temporarily. The Office of Health Strategy
19 will show, through documents and testimony, that none of
20 these reasons will protect Johnson Memorial Hospital
21 from receiving a civil penalty.

22 As I mentioned earlier, at the beginning of the
23 COVID-19 pandemic, special rules were enacted that
24 allowed hospitals, including Johnson Memorial Hospital,
25 to stop providing inpatient services without a CON.

1 Therefore JMH's suspension of labor and delivery
2 services in October of 2020, under the notification and
3 waiver program, was entirely appropriate and legal.
4 However, the notification and waiver program made clear
5 that once public health conditions returned to
6 normal and the Executive Orders were lifted, that CON's
7 would once again be required for activities that hadn't
8 needed them during the pandemic.

9 To reiterate, the evidence will show that Johnson
10 Memorial Hospital suspended its labor and delivery
11 services on October 14th, 2020, and that labor and
12 delivery services have not been restarted since that
13 date, since October 14th, 2020. The evidence will show
14 that the Governor caused certain authorization to expire
15 in the spring of 2021, pursuant to Executive Order
16 12(b). This Executive Order caused OHS's authority to
17 waive CON requirement to expire. The authority
18 officially expired at 11:59 p.m. on May 28th, 2021.
19 Therefore, as of May 29, 2021, all the organizations OHS
20 regulated were expected to return to business as usual.

21 The evidence will show that Johnson Memorial
22 Hospital did not resume labor and delivery services on
23 that date of May 29th, 2021, as it should have. Nor did
24 Johnson Memorial Hospital resume labor and delivery
25 services after OHS issued a guidance document on

1 October 22nd, 2021, clarifying that all hospitals that
2 had received a CON waiver should be back to pre-waiver
3 conditions. Continued suspension would constitute a
4 violation of CON statutes and regulations.

5 The evidence will further show that even though
6 Johnson Memorial Hospital knew that the Governor revoked
7 the Executive Orders granting OHS extraordinary
8 authority, and that they should be back to pre-waiver
9 conditions, that Johnson Memorial chose to willfully
10 ignore those announcements.

11 The evidence will show that there have been at
12 least two other cases in 2022 of other Connecticut
13 hospitals being fined for ceasing to provide inpatient
14 services without a CON, Windham Hospital and Rockville
15 Hospital. The testimony will show that it is hard to
16 fathom that Johnson Memorial Hospital did not know that
17 OHS expected them to file a CON once the waiver
18 authority expired in May of 2021, especially since the
19 Hospital will emphasize how up-to-date they were keeping
20 the OHS staff about their future plans for inpatient
21 services.

22 The record will also show that Johnson Memorial
23 Hospital was aware that during the 2022 legislative
24 session, a law was passed and signed on May 7, 2022,
25 that codified if an inpatient service is suspended for

1 180 days, it will be automatically deemed a termination.
2 It is disingenuous for the Hospital to claim it had a
3 good faith belief that a CON was not required, since it
4 intended to resume L&D services at some point when the
5 labor economy improved.

6 The evidence will show that Johnson Memorial
7 Hospital has not offered labor and delivery services
8 since October 14th, 2020, and that it should have
9 restarted offering them as of May 29, 2021. Therefore
10 May 29, 2021, is the date from which OHS should assess
11 the civil penalty of \$1,000 per day.

12 In conclusion, the Office of Health Strategy will
13 show that Johnson Memorial Hospital knowingly and
14 willfully failed to either seek a CON or resume offering
15 labor and delivery services once the temporary waiver
16 program expired. The hospital knew the law, willfully
17 broke the law and should be assessed \$1,000 per day as
18 is civil penalty. Thank you.

19 HEARING OFFICER CSUKA: Thank you, Attorney
20 Manzione. So, we are going to turn to your evidence and
21 witnesses, now. Can you please identify all individuals
22 who you plan to have testify today?

23 MS. MANZIONE: Yes. I am only planning on calling
24 one individual, and that is Mr. Steve Lazarus. Steve, I
25 think he is here, and I am sure he will spell his name

1 and do all those other things that he is supposed to do.
2

3 HEARING OFFICER CSUKA: Okay. Mr. Lazarus, can you
4 spell your last name -- actually, your first and last
5 name and also provide your title?

6 MR. LAZARUS: Good morning. My name is Steven
7 Lazarus, S-t-e-v-e-n L-a-z-a-r-u-s. And my current
8 title is Certificate of Need Program Supervisor.

9 HEARING OFFICER CSUKA: Thank you. Mr. Lazarus,
10 can you please raise your right hand?

11
12 (Whereupon Steven Lazarus was duly sworn in by
13 Hearing Officer Csuka.)

14
15 HEARING OFFICER CSUKA: Okay. And do you adopt the
16 testimony that was submitted on your behalf, I believe,
17 yesterday?

18 MR. LAZARUS: I do.

19 HEARING OFFICER CSUKA: Okay. So you can proceed
20 with whatever additional testimony you plan to provide
21 today whenever you are prepared to do so.

22 MS. MANZIONE: Maybe, perhaps, first we should just
23 address the foundation of the document labeled OHS
24 Exhibit Number 2.

25 HEARING OFFICER CSUKA: Okay.

1 MS. MANZIONE: I can ask a few questions about it,
2 but then I'll be happy to pass it over an Attorney
3 DeBassio for any questions he might have.

4

5 DIRECT EXAMINATION:

6

7 BY MS. MANZIONE:

8 Q So I am going to ask, Mr. Lazarus, I am not
9 sure if you have in front of you, or if you are able to
10 put in front of yourself an exhibit that was uploaded
11 last night. So it has been marked as letter R in the
12 record. Do you have access to the portal, right now?

13 A I do. I have it open in front of me.

14 Q Okay. Great. Do you have it open to the, I
15 -- okay, I am just pulling it up myself, too.

16 Okay. Can you explain what this document is, what
17 the title is and what the document is?

18 A Sure the title of the document is Guidance
19 Regarding the Expiration of the Temporary Waiver of CON
20 Requirements, Approval of Increased Beds, Capacity and
21 Temporary Suspension of Services at Connecticut
22 Hospitals and Outpatient Surgical Facilities during
23 COVID-19 Public Health Emergency. And it is dated
24 October 22nd, 2021.

25 Q Okay. And what can you tell us about this

1 document?

2 A This was a document that was put out by OHS on
3 that date. This basically refers, clarifies what is
4 OHS's position on the Executive Order 7(b) that was
5 issued and when it expired.

6 Q And how was this document distributed or made
7 public?

8 A So I was not directly involved with it, but
9 typically when a document that is put forth by OHS, a
10 similar document, they normally would be sent out via
11 e-mail to all hospital leadership. Traditionally the
12 CEO office e-mails, but I would have to check and
13 confirm in this particular case if that was done, but
14 typically that is where it is done.

15 Q I notice in the title it says Temporary
16 Suspension of Services at Connecticut Hospitals and
17 Outpatient Surgical Facilities. You mentioned that it
18 would be e-mailed to hospital leadership. Would it be
19 e-mailed to any other leadership?

20 A Outpatient surgical facilities, as well. And
21 it was, it would be e-mailed out.

22 Q And would it be posted in any other place
23 where members of the public, interested parties might be
24 able to see it?

25 A It probably was posted on a website, as well,

1 but I did not confirm it myself.

2 Q And are you the author of this document?

3 A I am not.

4 Q Do you know who is the author of this
5 document?

6 A I believe it was our, it was, it was the
7 Executive Director's Office, but it was worked on with
8 the, our general counsel at the time, which was Damian
9 Fontanella.

10 Q And do you know where Damian Fontanella is
11 today?

12 A Unfortunately he passed away about a year ago.

13 Q Okay. Thank you. I am sorry about that.

14 MS. MANZIONE: Okay. So I would say if Mr.
15 DeBassio has any questions, if he wants to conduct any
16 voir dire through you, Hearing Officer Csuka?

17 HEARING OFFICER CSUKA: I was waiting for him to
18 take himself off mute. Attorney DeBassio, if there is
19 any further follow-up on that, you can ask those
20 questions.

21
22 VOIR DIRE:

23
24 BY MR. DEBASSIO:

25 Q Thank you. Just briefly Mr. Lazarus. So I

1 believe you testified a moment ago that the normal means
2 of publishing this document to the affected hospitals
3 was via e-mail to those hospitals, correct?

4 A Yes.

5 Q And you are not sure if this was actually
6 posted on the OHS website, is that correct?

7 A I have not confirmed it, no.

8 Q So as you sit here today, you don't know if it
9 was made publicly available via any other means other
10 than e-mailing it to hospital administrators?

11 A I do not.

12 Q And you have no knowledge as you sit here
13 today, that this document was actually e-mailed to
14 anyone at Johnson Memorial Hospital?

15 A I was not part of this process, no.

16 Q Thank you.

17 MR. DEBASSIO: Based on that, Your Honor, I would
18 object that there is no, there is no evidence in the
19 record and the witness can't testify that Johnson
20 Memorial Hospital has ever seen or received that
21 document. And the witness has no actual knowledge that
22 it was ever published or made public to anybody through
23 the OHS website.

24 HEARING OFFICER CSUKA: Ms. Manzione, do you have
25 any response to that?

1
2 BY MS. MANZIONE:

3 Q Mr. Lazarus, is there anyone that is currently
4 available who might be a better source of information
5 about how this document was distributed or advertised,
6 publicized?

7 A Most likely would be the Executive, the
8 Executive Assistant who may have been involved in
9 distributing this document.

10 Q And who is that?

11 A I believe it was Mayda Capozzi at the time,
12 but I am not sure.

13 Q Okay.

14 MS. MANZIONE: Well, if it's important, we can
15 certainly see if we can get Ms. Capozzi to testify. I
16 know her and I know that she is working today. I am not
17 the sure if we can have her sworn in to answer some more
18 questions about this.

19 HEARING OFFICER CSUKA: So do you have further
20 follow-up or further questioning for Mr. Lazarus, or is
21 he planning to do further testimony right now?

22 MS. MANZIONE: Oh, I wanted to go, just, yes, I
23 wanted to just emphasize a few things from his testimony
24 before we, before I let go of, of, before I stop
25 presenting the case. So if you want me to continue with

1 Mr. Lazarus, I am happy to do that.

2 HEARING OFFICER CSUKA: I think maybe if you are
3 going be referring to this document, maybe we should
4 take, maybe, a 10-minute break to see if you can get
5 someone to verify the source of the document. So,
6 because I am, you know, I am, I don't want to exclude it
7 if you think you may be, you may have a way to get it
8 in.

9 MS. MANZIONE: Sure. Then yes, we would appreciate
10 a 10-minute break to check with Mayda Capozzi and see if
11 she has better knowledge and if she is available to be
12 sworn in and testify about this document.

13 MR. DEBASSIO: And Your Honor, just for the ease of
14 the proceedings, I am prepared to ask Mr. Rosenberg if
15 he has seen this document, as well. I didn't mean to
16 ambush Attorney Manzione. I got this last night and
17 haven't had a chance to talk about it with my client.
18 So, you know, to the extent Mr. Rosenberg received the
19 document and seen it and saw it prior to this
20 hearing, obviously we would have no objection, then.
21 But I, as I said, I didn't have a chance to
22 independently verify that before we started.

23 HEARING OFFICER CSUKA: Okay. So let's take 10
24 minutes and see Attorney Manzione and Attorney DeBassio,
25 if we can come to some sort of resolution as to whether

1 this document should be allowed in, and we will return
2 back at 10:25.

3

4 (Whereupon a short recess was taken.)

5

6 HEARING OFFICER CSUKA: All right. Thank you. We
7 are back. Attorney Manzione, do you have any, any way
8 of proving that this was published to the, to JMH?

9 MS. MANZIONE: So we checked with the witness, we
10 checked the staff person who we thought would have been
11 the person to do it. She could not find any evidence or
12 records in her system, so we are not able to prove that
13 through our, possible, it might have been sent by
14 somebody else, but the person who we thought was the
15 most likely to do it, doesn't have any record of it. So
16 unfortunately, we don't have the ability to prove that
17 right now.

18 HEARING OFFICER CSUKA: Okay.

19 MR. DEBASSIO: Your Honor, to the extent it may aid
20 in the presentation, Johnson Memorial Hospital is
21 prepared to stipulate that they have seen this document
22 before, but we are not prepared to stipulate that we saw
23 it on or about October 22nd, 2021. So to the extent OHS
24 wants to offer it for any other purpose, other than
25 notice to Johnson Memorial on that particular date, we

1 have no objection to it coming into evidence. But to
2 the extent OHS wants to offer it for the purpose of
3 establishing knowledge on behalf of Johnson Memorial
4 Hospital on that date, my witness has no specific
5 recollection of seeing it at that time, only that he has
6 seen it prior to this hearing.

7 HEARING OFFICER CSUKA: Okay. Attorney Manzione,
8 do you, what is, what is the way in which you intend --
9 well, I am going allow it in for right now, and if, if
10 it seems as though it meets that qualifier that just
11 mentioned Attorney DeBassio, I am going to exclude it.
12 Does that make sense to everyone?

13 MR. DEBASSIO: Yes.

14 HEARING OFFICER CSUKA: Okay. So that will be a
15 full exhibit for right now, but it may change at some
16 point in the future.

17 Attorney Manzione, you can proceed with your case.

18 MS. MANZIONE: Okay. So I would just like to pull
19 out a few things from Mr. Lazarus' written testimony.
20 So, if he can be called back to the stand. He is still
21 under oath. I would like to be able to see you, Steve,
22 I am not sure how I get to see you on the screen, but --
23 there you go. When you speak.

24 MR. LAZARUS: Okay.

1 CONTINUED DIRECT EXAMINATION:

2

3 BY MS. MANZIONE:

4 Q Okay. So, Mr. Lazarus, so can you remind us
5 again, what is your position at OHS, now?

6 A Sure. I am currently the CON Program
7 Supervisor.

8 Q And what do you do, now, what is your role at,
9 what is your job activities that you do?

10 A So I currently have a staff of about five,
11 which will hopefully grow to about seven by the end of
12 the year, we hope. They are various analysts and
13 various types of background titles. They are research
14 analysts, planning analysts, as well as healthcare
15 analysts and they review CON determinations, CON
16 applications, any, most of material related to the
17 Certificate of Need. I make sure that we make, we meet
18 all the legal deadlines, we get the completeness reviews
19 conducted and process the applications.

20 Q And were you involved with the CON process
21 during 2020 or 2021, and if so, in what capacity?

22 A I was not directly involved, but I was
23 involved in certain subject matter when they needed
24 assistance, mostly in the process piece when they needed
25 it.

1 Q And when you say, the process, what does the
2 process mean to you?

3 A More the legal process that is delineated
4 under 19-638 and 639. So we try to follow those
5 processes, as well as training of the staff.

6 Q Okay. And in terms of 19(a)-638, how familiar
7 are you with that statute?

8 A Well, I don't have a visual, perfect memory,
9 but I am rather comfortable with it. If I have it, I
10 can, I use it many times to, sort of, help guide CON
11 determinations and applications, whether they are
12 required or not.

13 Q Okay. And do you know what 19(a)-638(a)(5)
14 is?

15 A I believe that's the one for the termination
16 of the service by a hospital, acute care hospital.

17 Q And so the overall prescription of 19(a)-638,
18 the introductory words are, a Certificate of Need is
19 required for blah, blah, blah, so what does that entire
20 section 638(a)(5) mean?

21 MR. DEBASSIO: Objection, Your Honor. The Statute
22 speaks for itself. I mean, his interpretation of the
23 Statute really isn't at issue here.

24 MS. MANZIONE: Okay. I'll withdraw that.

1 BY MS. MANZIONE:

2 Q So Mr. Lazarus -- hold on one second. I
3 apologize.

4 Mr. Lazarus, in your knowledge, has OHS ever
5 imposed civil penalties on hospitals for failure to seek
6 a CON that is required?

7 A Yes. I think most recently I believe it was
8 Sharon Hospital, perhaps. So -- or, no -- they have
9 been done. Civil penalties have been assessed, probably
10 recently, but also probably about 10 years ago there
11 were a couple of cases.

12 Q And do you know, in your experience of the
13 civil penalties that are imposed, how much of a civil
14 penalty, like an amount, a dollar amount per day, has
15 been imposed?

16 MR. DEBASSIO: Objection, Your Honor. To the
17 extent she has asking what he has read, he is really
18 not -- it shouldn't be through his testimony. If she is
19 trying to qualify him as an expert in terms of assessing
20 the penalty and what sort of criteria OHS uses, there is
21 no foundation for that at this point to indicate that he
22 is qualified to do that.

23 HEARING OFFICER CSUKA: Attorney Manzione, do you
24 have a response?

25 MS. MANZIONE: Well, I don't, I don't really think

1 we are going to need to go through and qualify Mr.
2 Lazarus as an expert, even though I think he probably
3 would meet that criteria. Let me just see if there was
4 anything else I wanted to pull out of his written
5 testimony.

6 HEARING OFFICER CSUKA: So you are withdrawing that
7 question?

8 MS. MANZIONE: I am withdrawing that question. I
9 apologize. Yes, I am withdrawing that question.

10
11 BY MS. MANZIONE:

12 Q Okay. So, the final question for you, then,
13 Mr. Lazarus is, after the second Executive Order issued
14 by the Governor, Executive Order 12(b), which was the
15 Executive Order that ended the special authority given
16 to OHS to bypass the CON, do you know, did you get an
17 influx of CON requests through the portal, if you know?

18 MR. DEBASSIO: Objection, Your Honor. Relevance.

19 HEARING OFFICER CSUKA: I am going to allow it.
20 I'll give it due, whatever weight it's, the responses
21 due.

22
23 BY MS. MANZIONE:

24 Q So Mr. Lazarus, do you know if there was an
25 influx at that time when the Executive Order expired?

1 MR. DEBASSIO: Your Honor, I am also going to
2 object that the time frame isn't specific here. I mean,
3 from time the Executive Order expired to the time this
4 penalty was imposed, was over a year. So to the extent
5 we are talking about an influx within a certain period,
6 I think we should define what that period of time is.

7 MS. MANZIONE: Okay. Fair enough.

8

9 BY MS. MANZIONE:

10 Q I will say, do you know, Mr. Lazarus, if there
11 was an influx of CON filings in the time period for the
12 month after the Executive Order expired, so that would
13 have been from the last day of May in 2021 to the last
14 day of June in 2021? So for about the month of June, do
15 you happen to know? I am not asking you to look
16 anything up, do you happen to know, do you recall?

17 A I don't -- no, I don't know.

18 Q Okay. That is all I have for Mr. Lazarus.
19 Thank you.

20 HEARING OFFICER CSUKA: Okay. Attorney DeBassio,
21 you can do cross-examination of Mr. Lazarus.

22

23 CROSS-EXAMINATION:

24

25 BY MR. DEBASSIO:

1 Q Good morning, Mr. Lazarus. My name is David
2 DeBassio and I represent Johnson Memorial Health in the
3 proceedings today.

4 A Good morning.

5 Q Morning. I am not going to take up too much
6 of your time, I just had a couple of quick questions.

7 So do you have a copy of your written prefiled
8 testimony in front of you?

9 A I do.

10 Q If you would be so kind as to go to page,
11 page 3 of that testimony. And I am looking specifically
12 at paragraph 5 that reads, OHS even circulated guidance
13 in July of 2021, do you see where that paragraph starts?

14 A I do.

15 Q Is that guidance that you are referring to
16 there, the guidance at the top paragraph, Guidance
17 21-002?

18 A Yes.

19 Q So it wasn't circulated in July of 2021, it
20 was circulated in October of 2021, correct?

21 A Correct.

22 MR. DEBASSIO: Your Honor, to the extent that that
23 information is already covered in the first paragraph of
24 Mr. Lazarus' testimony, I would move to strike
25 paragraph 5 of his prefiled testimony, just because

1 it's, it's, if we are creating a record and you go back
2 to it, it gives the inaccurate impression that there was
3 a separate guidance issued in July of 2021, when I
4 believe that paragraph should read, based on Mr.
5 Lazarus' testimony here today, October of 2021. And I
6 don't believe it would prejudice OHS because that
7 information is contained, as I mentioned, in the first
8 paragraph on that page.

9 MS. MANZIONE: Before you rule, Hearing Officer
10 Csuka, I would like to ask Mr. Lazarus, do you know if
11 there was an additional separate guidance document
12 circulated in July of 2021?

13 MR. DEBASSIO: Your Honor, before you answer that,
14 object, because he just testified that that reference in
15 that paragraph was to the October guidance. So whether
16 there was or was not a separate guidance issued in July
17 of 2021 is irrelevant to what we are talking about with
18 regard to this particular piece of testimony.

19 MS. MANZIONE: I have to disagree with the
20 characterization of Attorney DeBassio's characterization
21 of what Mr. Lazarus said. I think he spoke quickly. I
22 would just like Mr. Lazarus to have time to consider
23 whether there was or not. I do not know the answer. I
24 am just trying to find out. Obviously the record is not
25 particularly clear and we could do a better job keeping

1 records.

2 So Mr. Lazarus, if possible, do you know if there
3 was another, quote unquote, guidance document issued in
4 July of 2021?

5 MR. LAZARUS: I don't have any knowledge of that.

6 MS. MANZIONE: Okay. So that's fine. We can
7 assume that was an error, that it should have been
8 October of '21.

9 HEARING OFFICER CSUKA: Yeah, I am not going to
10 strike it, but I am going to take notice of the fact
11 that that was an error.

12 MR. DEBASSIO: That is fine, Your Honor. And,
13 again, I am not trying to impune any improper motive on
14 anybody, but since this is, this is a heavily stipulated
15 to case, and we are submitting all of this in terms of a
16 record, I didn't want that particular milestone in that
17 testimony to be misconstrued, you know, when you are
18 writing your decision days or weeks from now, when I
19 believe it is clear that, and I am only basing it on
20 what Mr. Lazarus said, that his understanding was that
21 that was the October guidance.

22 HEARING OFFICER CSUKA: Understood.

23 MR. DEBASSIO: Thank you.

24
25 BY MR. DEBASSIO:

1 Q So Mr. Lazarus, you talked about how you are
2 familiar with the CON process, correct?

3 A Yes.

4 Q Are you involved, at all, in the, in the
5 penalty process, in terms of determining when to impose
6 a penalty and how severe a penalty to impose?

7 A I am not.

8 Q Do you know who in your office is involved in
9 that process?

10 A I am not directly involved in the process, so
11 I am not sure who all the parties are involved.

12 MS. MANZIONE: I am going to object to any further
13 answering on that question, because we have already
14 established that Mr. Lazarus is not an expert in this
15 area, unless you want to try and do that. I don't think
16 he has got the information that you are seeking.

17 MR. DEBASSIO: I wasn't asking him an expert
18 question, I was just asking if he knew who in the office
19 was involved in the penalty process.

20 MS. MANZIONE: And he said, no.

21 HEARING OFFICER CSUKA: I'll allow the question.
22 And Mr. Lazarus, can you just confirm that you don't
23 know.

24 MR. LAZARUS: I do not know.

25 HEARING OFFICER CSUKA: Okay.

1 MR. DEBASSIO: So I have nothing further.

2 HEARING OFFICER CSUKA: Okay. Ms. Manzione, did
3 you have any redirect for Mr. Lazarus?

4 MS. MANZIONE: No, just thank you for your
5 testimony.

6 MR. LAZARUS: Thank you.

7 HEARING OFFICER CSUKA: Okay. Mr. DeBassio, are
8 you prepared to move forward with your opening statement
9 or did you, would you prefer to take a five-minute break
10 just to regroup.

11 MR. DEBASSIO: I just want to make sure that
12 Attorney Manzione has concluded her presentation.

13 MS. MANZIONE: Yes, I don't have any other
14 witnesses and all of the documents have already been
15 submitted so I am, I have concluded my presentation.

16 MR. DEBASSIO: Thank you.

17 It's up to you, Your Honor, I don't know if you
18 want to take a break at 11:00, anyway, so we would be
19 taking it now. We just took a break 20 minute ago to
20 deal with that other issue. I don't expect, I don't
21 know if you want me to make my opening statement, deal
22 with Mr. Rosenberg's testimony and then we can take a
23 break and do closing arguments, or how you want to
24 proceed.

25 HEARING OFFICER CSUKA: Sure. Yes, no, we can do

1 that. Let's just move forward.

2 MR. DEBASSIO: Thank you, Your Honor. I am going
3 to be extremely brief with regard my opening statement,
4 because given the condensed nature of the hearing, you
5 are going to have my closing statement in about a half
6 an hour.

7 So, you know, suffice it to say I compliment
8 Attorney Manzione because she highlighted what Johnson
9 Memorial's defense here is going to be. That the facts
10 really aren't in dispute. I am not going to take a lot
11 of time marshaling the evidence, because it is before
12 you, other than to say; Johnson Memorial took tremendous
13 efforts during this very uncertain time to recruit and
14 staff labor and delivery services there at Johnson
15 Memorial. They did keep OHS updated on what was going
16 on. They were in constant communication with them.
17 They actually recruited nurses that were, that it was
18 with the intent for them to go and work at Johnson
19 Memorial Hospital. They were trained at Saint Francis
20 Hospital, and then when they completed their training,
21 they didn't, quite frankly, want to go work at Johnson
22 Memorial Hospital. So this wasn't a situation where
23 Johnson Memorial Hospital willfully terminated labor and
24 delivery services. They didn't have the intent to walk
25 away from those services. They had the intent to resume

1 those services. The pandemic effected that. Their
2 mistaken belief that they could actually achieve the
3 staffing levels they needed to provide those services,
4 affected that. The labor market affected that. And
5 their inability to actually achieve those staffing goals
6 affected that.

7 So there are, you, as the Hearing Officer, are
8 entitled to consider not just the fact that the services
9 were not provided. I mean, the Statutes specifically
10 provides that you can consider the facts and
11 circumstances surrounding that. You can even consider
12 the fact that Johnson Memorial eventually filed the CON
13 itself as a reason to reduce, revoke or rescind the
14 fine. And that is our submission here today, that if
15 you look at this in a vacuum and simply say, as of May
16 2021 the services were not provided, therefore we are
17 fining you \$1,000 a day, is completely inequitable in
18 the situation where Johnson Memorial did not terminate
19 the services. They were unable to provide the services.
20 They made tremendous efforts to provide those services
21 and those efforts just didn't bear fruit.

22 That is the conclusion of my opening statement.

23 HEARING OFFICER CSUKA: Okay. Thank you, Mr.
24 DeBassio. I believe you said you have one witness, is
25 that correct, Mr. Rosenberg?

1 MR. DEBASSIO: That's correct, Your Honor. That is
2 Mr. Rosenberg. And Mr. Rosenberg's testimony was filed
3 with OHS on November 2nd, 2022. I believe I indicated
4 in a cover letter to you that is part of the record,
5 that Mr. Rosenberg was unable to sign his testimony at
6 that point due to a family circumstance that rendered
7 him unavailable. Attorney Manzione didn't have any
8 objection to us filing the unsigned testimony at that
9 point, and Mr. Rosenberg, I do have a signed copy, if
10 you would like me to submit that as part of the record
11 to correct that exhibit, but I believe, you know, if you
12 canvas Mr. Rosenberg, he is prepared to adopt that
13 testimony this is submitted on November 2nd, 2022, as
14 unchanged.

15 HEARING OFFICER CSUKA: Okay. That should be fine.
16 I don't think there is need for you to file the signed
17 version. So I will move onto Mr. Rosenberg.

18 Please unmute your device, Sir. Okay. Thank you.
19 Can you please state and spell your name and provide
20 your title, as well.

21 MR. ROSENBERG: Absolutely. Stuart Rosenberg.
22 S-t-u-a-r-t Rosenberg, R-o-s-e-n-b-e-r-g. President of
23 Johnson Memorial Hospital.

24 HEARING OFFICER CSUKA: Okay. Thank you. Please
25 raise your right hand, sir.

(Whereupon Stuart Rosenberg was duly sworn in by
Hearing Officer Csuka.)

HEARING OFFICER CSUKA: And do you adopt your prefilled testimony -- thank you. You could put your right hand down.

Do you adopt your prefilled testimony?

MR. ROSENBERG: Yes, sir.

HEARING OFFICER CSUKA: Okay. Thank you. So Attorney DeBassio, you can either proceed with questioning, or Mr. Rosenberg if you planned to just make an opening statement, you could do that, whichever you prefer.

MR. DEBASSIO: Your Honor, with the admission of Mr. Rosenberg's testimony, that's the conclusion of our evidence. Assuming, and I believe we dealt with this at the beginning, we don't have to move our exhibits into evidence because they are already full exhibits.

HEARING OFFICER CSUKA: Correct.

MR. DEBASSIO: Then with the exhibits and Mr. Rosenberg's prefilled testimony, that is our, that is the Respondent's evidence for this hearing.

HEARING OFFICER CSUKA: Okay. Did you have any additional questions you wanted to ask? You will have

1 an opportunity to do redirect, but for right now is
2 there any direct examination?

3 MR. DEBASSIO: No, Your Honor.

4 HEARING OFFICER CSUKA: Okay. Thank you. Attorney
5 Manzione, did you have any cross-examination of Mr.
6 Rosenberg, based on the testimony that has been
7 submitted?

8 MS. MANZIONE: I do have just a few questions, and
9 I think they will be relatively painless.

10
11 **CROSS-EXAMINATION:**

12
13 **BY MS. MANZIONE:**

14 Q I want to, I am looking at the -- Mr.
15 Rosenberg, I am looking at your, a printed copy of your
16 direct testimony. I am not sure if you have access to a
17 copy of that, or if you can see it on your screen
18 somewhere. I am curious about the third sentence in the
19 first paragraph, the one that starts with JMH has been
20 fined. Do you see that, sir?

21 A Yes.

22 Q Okay. Can you just read that sentence for me?
23 I think I might be misunderstanding what the point of
24 that sentence is. Can you please read that sentence to
25 me?

1 A JMH has been fined for its alleged willful
2 termination of labor and delivery services with filing a
3 Certificate to Need. JMH --

4 Q No, that is enough. Do you mean to say, with
5 filing a Certificate of Need, or do you mean to say,
6 without filing a certificate of need?

7 A Would you repeat that last part of your
8 question?

9 Q Sure. I am curious if the word, with, is
10 supposed to be, without. Sometimes it is just a
11 typographical error.

12 A Without, I think is the issue here.

13 Q Exactly. And I wanted to make sure we were
14 clear it was what the issue -- so, would you reconsider
15 that sentence, and if you were going to state it again
16 directly, how would you state that sentence.

17 A Without adding any words?

18 Q Or just --

19 A I mean, JMH has been fined for its alleged,
20 willful termination, which I don't agree with, I mean,
21 the term willful, I -- we could talk about that --

22 Q Yes.

23 A -- labor and delivery without filing a
24 Certificate of Need.

25 Q Okay. All right. So yeah, I would like to,

1 that is what I thought it should be. I think that was
2 the typographical error. Very confusing sometimes when
3 there is double negatives. So. Okay.

4 Mr. Rosenberg, do you know when the last time a,
5 labor and delivery services were provided at Johnson
6 Memorial Hospital?

7 A I believe it was October of '21.

8 Q October of 2021?

9 A You are talking the last delivery, is that
10 what --

11 Q Yes. When was the last time that you had an
12 in-hospital -- October of 2021?

13 A On or about, yes.

14 Q And so that was about a year ago. Are they,
15 how long were those -- so that was the last time. So
16 have any births occurred at the hospital since then?

17 A No.

18 Q Okay. And would you say, Mr. Rosenberg, that
19 you are familiar with the role of OHS, the Office of
20 Health Strategy as a healthcare regulator?

21 A Yes.

22 Q Would you say that you are familiar with some
23 of the Certificate of Need statutes and regulations that
24 OHS is charged to enforce?

25 A Globally, but not with all the detail.

1 Q Okay. If you didn't know what a specific
2 requirement or regulation was, what would you do if you
3 needed to know the answer about, should I do something,
4 do I need to ask OHS for permission for approval, who
5 would you ask if you didn't know?

6 MR. DEBASSIO: I am going to object, just to the
7 extent that may call for information covered by the
8 attorney/client privilege. But to the extent, I just, I
9 want to be clear before Mr. Rosenberg answers. Just, to
10 the extent he is going to identify an individual, I am
11 not claiming the privilege with regard to that, but at,
12 he can identify an individual, but I will object to any
13 questions about the topics, the nature and the advice
14 and the substance of their discussions. And I am going
15 to instruct Mr. Rosenberg, based on that, if we can
16 limit the question to the individual, then that is fine.

17 HEARING OFFICER CSUKA: All right. I don't think
18 that's where Ms. Manzione is going with this. I could
19 be wrong, but yeah, I agree with you Attorney DeBassio,
20 Mr. Rosenberg, just be careful not to discuss any
21 conversations, the specifics of any conversations you
22 may or may not have had with legal counsel.

23 MR. DEBASSIO: And I agree Counsel's question
24 wasn't in that vein, but if I don't object before he
25 answers, the cat is out of the bag.

1 HEARING OFFICER CSUKA: Understood.

2

3 BY MS. MANZIONE:

4 Q All right. Let me rephrase this.

5 So Mr. Rosenberg, if you have a question about
6 CON's statutes and regulations, would you ask someone
7 about it, is there somebody who you might ask?

8 A Yes. And there is specific individuals that I
9 would ask within Trinity Health of New England who
10 supports our hospitals in this area.

11 Q I am sorry, you spoke quickly.

12 A I said, we have individuals within Trinity
13 Health of New England who I would contact for questions
14 with respect to this area.

15 Q And without violating any of the substance of
16 what you might ask them, who are those types of people,
17 if you know their names, what role do they have, are
18 they a strategic officer, are they a financial
19 position, are they an attorney, what type of person?

20 A I think it, I would call it a strategist and
21 legal counsel.

22 Q And you say that there are people who have
23 these titles who work for Trinity Health, which is the
24 parent company of Johnson Memorial Hospital?

25 A Trinity Health of New England is the owner of

Johnson Memorial Hospital.

Q Is the owner. Okay. And would you say that the Trinity Health of New England, the staff who work for them or the officers who work for them, give you good information when you ask questions about policy or strategy?

MR. DEBASSIO: Objection, Your Honor. To the extent that that's calling for him to discuss information he may or may not receive of legal counsel, I think it is inappropriate.

MS. MANZIONE: I am asking the witness if he believes that he has good information from the people he asks. He has said he speaks to a strategist and legal counsel, so if you are uncomfortable with me including legal counsel, I will ask about the strategist.

MR. DEBASSIO: I think is she wants to limit it to the strategist, that is appropriate, but if she is asking him what his feelings are about the advice he is getting from legal counsel, I think that's invading the attorney/client privilege.

HEARING OFFICER CSUKA: All right. I'm inclined to agree, so if you want to ask specifically about the strategist, that is fine.

BY MS. MANZIONE:

1 Q Mr. Rosenberg, have you asked the strategist
2 who works for Trinity Health information about the
3 Office of Health Strategy requirements, regulations,
4 statutes, have you asked the strategist who works for
5 Trinity Health?

6 A Yes.

7 Q And would you say you have received
8 information from the strategist that you feel is
9 reliable?

10 A Yes.

11 Q And would you say that you have asked the
12 strategist questions about OHS regulations, requirements
13 on more than one occasion?

14 A Multiple occasions, yes.

15 Q And would you say that that person or persons
16 are pretty knowledgeable about OHS rules?

17 A Yes.

18 Q Okay. My other question deals with -- okay, I
19 am sorry -- deals with the imposition of civil penalty.
20 Your attorney has suggested that the penalty imposed is
21 too high, and that it should either be rescinded or
22 minimized or mitigated. On what grounds should the
23 penalty be reduced or mitigated or rescinded?

24 MR. DEBASSIO: Objection, Your Honor. That is a
25 legal argument. I mean, the facts are, the facts are

1 submitted in this case, and now she is asking him to
2 make legal arguments on behalf of Johnson Memorial.

3 MS. MANZIONE: So, I am asking -- one second, I am
4 going to his testimony. Okay. I'll stop asking him
5 about that. I will withdraw that question.

6

7 BY MS. MANZIONE:

8 Q Let me ask you about some of the recruiting
9 that you did or that your, that the Hospital did. Can
10 you tell me about the recruiting efforts that the
11 Hospital did to try to staff the labor and delivery
12 services for the hospital?

13 A Sure. We, our talent acquisition team went
14 out to several websites, schools, to recruit nurses in
15 the specialty, and it is a specialty. And we offered
16 incentives for hiring, you know, like a lot of other
17 hospitals in the State are doing, sign-on bonuses,
18 referral bonuses. We put all our resources into this
19 initiative.

20 Q And what kind of, so you said you offered
21 incentives, sign-on bonuses, referral bonuses, do you
22 happen to know about how much those were?

23 MR. DEBASSIO: Objection, Your Honor. Relevance.

24 MS. MANZIONE: I am curious to find out how much
25 emphasis the Hospital placed on recruiting. One of the

1 arguments of the hospital is that it was unable to fill
2 these positions. I am wondering, you can say that the
3 Hospital offered an incentive of \$100, and that would
4 probably not be that much of an incentive, it, I am
5 curious if the Hospital offered an incentive of \$1,000,
6 \$10,000. It has been a very tough time to try to
7 recruit workers, we have heard this across the across
8 the industry from all sorts of representatives of
9 healthcare workers, especially in more rural parts of
10 the state. I am curious as to how much money the
11 Hospital thought would be enough to incent workers to
12 come and work at the hospital.

13 MR. DEBASSIO: Well, respect --

14 MS. MANZIONE: To the extent that he knows.

15 MR. DEBASSIO: With all due respect to Counsel,
16 Your Honor, curiosity aside. The OHS's position is that
17 our defense of this is meritless, so really going down
18 this road as to exactly in terms of dollars and cents
19 what they did, doesn't go to making OHS's case in chief.
20 And I think it's, it's a red herring and it is going
21 down a road where, you know, unless you can put it into
22 context as to what was going on at that particular time
23 or what other hospitals were offering, it's a number
24 that is going to be completely without context in this
25 scenario.

1 HEARING OFFICER CSUKA: I am going to allow the
2 question, because I think it may be relevant. But as
3 you as you indicated, Attorney DeBassio, I don't want to
4 go too far down this path. So Attorney Manzione, if you
5 want to ask the question again.

6 MS. MANZIONE: Certainly.

7
8 BY MS. MANZIONE:

9 Q Mr. Rosenberg, do you happen to know the
10 possible range of bonuses, either sign-on bonuses or
11 referral bonuses that were offered to potential
12 employees in 2020, 2021?

13 A Let me just, let me answer the question in the
14 sense, compensation and bonuses are pretty protected, as
15 we have to be careful how we promote that. You know,
16 you notice there is not a lot of that in the
17 advertisements that we do. So I am going to be cautious
18 with this, Counselor, if that is possible, Dave, because
19 we got to be mindful of certain historical aspects of
20 compensation and bonuses, but I will --

21 MR. DEBASSIO: With that, Your Honor, I mean if we
22 are going to pursue this, maybe, we didn't anticipate
23 going into Executive Session, but this may be
24 appropriate for Executive Session if it is going to put
25 Johnson Memorial Hospital at a competitive disadvantage

1 to its peers in the marketplace by talking about this in
2 an open forum such as this.

3 MS. MANZIONE: I don't think we need to go into
4 Executive Session. To the extent that this information
5 is private or confidential, I find that hard to believe
6 that you would not make it widely known that if you come
7 and work for us, we will give you a \$5,000 sign-on
8 bonus. That is something you want people to know, that
9 is something you want people to talk about, especially
10 in context of a referral. So I really find it hard to
11 believe that we wouldn't want to information to get out.

12 The reason I am asking this is because I am curious
13 how hard the hospital has tried to recruit for these
14 specialized positions. Yes, it does not go to my case
15 in chief, because I believe that your entire argument is
16 meritless, but to the extent that the Hearing Officer
17 might prove or might believe that, well, it was tough to
18 hire people, I want to try and chip away at the fact
19 that you did not do everything within your power, you
20 did not offer enough money to try to recruit people, you
21 did not go to the ends of the earth to try to find
22 workers here.

23 MR. DEBASSIO: But again, your --

24 MS. MANZIONE: So my question remains, what kind of
25 dollar amount was offered.

1 MR. DEBASSIO: But again, Your Honor, if we are not
2 talking about, and we don't have any evidence of what
3 other hospitals were doing recruiting those same
4 individuals at the same time period, it is a meaningless
5 benchmark for the purposes of this hearing.

6 MS. MANZIONE: I think the Hearing Officer can make
7 the determination about how much people have been
8 offered as recruitment bonuses or sign-on bonuses. This
9 is not a new topic of conversation. This has often come
10 up in other hearings on whether we are able to staff the
11 hospital. This is not the first time this problem has
12 come up.

13 MR. DEBASSIO: It may not be the first time this
14 problem has come up, but there is nothing the record, in
15 our record, in this particular hearing today, about what
16 a milestone or what a benchmark would be for those types
17 of things. And milestones and benchmarks that may have
18 existed prior to the pandemic, are not the milestones
19 and benchmarks we are talking about during or after the
20 pandemic. The entire labor market changed. So again,
21 to the extent that we are talking about this in a
22 vacuum, I don't think it is probative of the issues
23 before Your Honor.

24 HEARING OFFICER CSUKA: Okay. Let me just start by
25 asking, Mr. Rosenberg, do you even know the answer to

1 that question before we --

2 MR. ROSENBERG: Yes.

3 HEARING OFFICER CSUKA: Okay. I don't know, it
4 sounds, Attorney DeBassio like you're claiming Executive
5 Session may be appropriate because this will fit into
6 one of the exemptions under the FOI regarding, you know,
7 trade secrets and things of that nature. I don't know
8 if we can physically go into Executive Session, because
9 I have never had to do that before. So I am going to
10 have to take a five-minute break just to, actually,
11 let's say --

12 MS. MANZIONE: You know what, I will withdraw my
13 question. I don't want to prolong this. It's not
14 essential to my case, how much of a referral bonus. It
15 is fine if we don't get that information out. I think I
16 have made the point that there are always more, there is
17 always more that a recruiter or an employer could do to
18 try to find more workers. You could pay more money.
19 But I don't want to testify. I am just asking the
20 question. And you don't want to, you don't want to
21 answer it outside of Executive Session, so I will just
22 withdraw it.

23 HEARING OFFICER CSUKA: Okay. Thank you.

24 MS. MANZIONE: Okay. I don't have anymore
25 cross-examination.

1 HEARING OFFICER CSUKA: Okay.

2 MR. DEBASSIO: I have no redirect, Your Honor.

3 HEARING OFFICER CSUKA: All right. I actually did
4 have a couple of questions for Mr. Rosenberg. And
5 Attorney DeBassio, I'll let you do some follow-up if you
6 have any, just to clarify. But we were sort of getting
7 into the extent to which Mr. Rosenberg understood the
8 Executive Orders and things of that nature.

9
10 EXAMINATION BY THE HEARING OFFICER:

11
12 BY HEARING OFFICER CSUKA:

13 Q So I, Mr. Rosenberg, do you have any legal
14 training or education?

15 A Yes.

16 Q Can you just tell me a little bit about what
17 that is?

18 A Just, it is classwork and business legal
19 principles and healthcare administration.

20 Q Okay. But you don't have any, a law degree,
21 per se?

22 A No. No.

23 Q Okay. And can you, just to confirm, earlier
24 you testified that when it comes to your understanding
25 and analysis of the CON requirements, you defer to

1 either internal general counsel or outside counsel, is
2 that correct?

3 A Yes, Your Honor.

4 Q Okay. Can you just turn to page 7 of your
5 testimony, there is something I wanted to ask you in
6 there. Just let me know when you are ready.

7 MS. MANZIONE: Is that in a number, I am looking at
8 the testimony that is attached to the, to Attorney
9 DeBassio's brief. I think it's, I think it's part of
10 the same document. It is, Mr. Rosenberg's testimony
11 starts on page, Bates stamped marked number page 14, so
12 would that be page 20?

13 HEARING OFFICER CSUKA: Sorry, I am looking at
14 Exhibit J --

15 MS. MANZIONE: Okay. Exhibit J. Okay. I think
16 you were talking about --

17 HEARING OFFICER CSUKA: Yes, it is JMH000020.

18 MS. MANZIONE: Yes, thank you.

19 HEARING OFFICER CSUKA: Okay.

20 MR. ROSENBERG: I am ready, Your Honor.

22 BY HEARING OFFICER CSUKA:

23 Q So, the last sentence of the first full
24 paragraph, that says, ultimately the Board of Directors
25 of JMH's parent company made the difficult decision on

1 June 29, 2022, to seek approval from OHS, do you see
2 that?

3 A Yes, sir. Yes, Your Honor.

4 Q And then in the next paragraph it says, on
5 June 29th OHS filed, do you see that, as well? Just
6 read through that for a moment. And let me know when
7 you are ready.

8 A Yes, I am ready, Your Honor.

9 Q Do you know which of those occurred first, the
10 decision or the issuance of the civil penalty? If you
11 don't, that's fine. I am just --

12 A I am just thinking of the timing, Your Honor.
13 I believe the local community board made the decision,
14 because we had to go forward with the decision to
15 terminate services and file a CON, and then post that
16 came this. That is my, I have to go back and look at
17 more detail.

18 Q Okay. That is fine.

19 MS. MANZIONE: I am sorry. Hearing Officer Csuka,
20 I don't understand what Mr. Rosenberg said. Can you
21 just restate what happened first, and then what
22 happened?

23 MR. ROSENBERG: Well it says the Board of
24 Directors, yeah, we had to go through the process before
25 we can get to the, there were two things going, we had

1 the civil penalty, we had the determination, decision to
2 file a CON, and then we had to go, as it said here, to
3 the parent company board and then, and then OHS files
4 its civil penalty letter, that we did our work there.
5 So everything came, the board meeting went first, and
6 then the second, June 29th statement came second, and
7 then the third was the result of all of that on
8 September 29th. I think that is the time frame.

9

10 BY HEARING OFFICER CSUKA:

11 Q But you are not certain, it sounds like.

12 A No --

13 Q Based on your own independent recollection of
14 the events?

15 A I am certain that the board meeting went
16 first.

17 Q Okay.

18 A Then came the next, and then came the next.
19 That is kind of the sequence of events that occurs. But
20 without checking minutes of meetings and going and
21 looking at that myself, I mean, I can do that, but this
22 is what I recall.

23 Q Okay. And one other question for you. If you
24 can pull up Exhibit F of your prefilled testimony. I
25 guess that is Exhibit F to the, the brief for your

1 **profile.**

2 MR. DEBASSIO: Just for ease of the record, the
3 exhibits are, the identification is the same throughout
4 the affidavit and the brief.

5 HEARING OFFICER CSUKA: Okay. Thank you.

6

7 **BY HEARING OFFICER CSUKA:**

8 Q Do you have that, Mr. Rosenberg?

9 A David, is that F in the binder?

10 MR. DEBASSIO: Yes. Yes, Stuart, that is F in the
11 binder.

12 MR. ROSENBERG: Okay.

13 MR. DEBASSIO: Just for the record, so everybody
14 understands, for the ease of this hearing, I sent Mr.
15 Rosenberg a binder with a hard copy of all of the
16 exhibits that JMH has submitted as part of the record
17 here. So he is not referring to anything other than a
18 printout of the materials that have already been
19 provided to the Hearing Officer and OHS.

20 HEARING OFFICER CSUKA: Okay. Thank you.

21 MR. ROSENBERG: I have it here, Your Honor.

22

23 **BY HEARING OFFICER CSUKA:**

24 Q Okay. Thank you. Do you recall when you
25 first -- so it's dated November 2nd, 2021. Do you

1 recall receiving this?

2 A Yes.

3 Q And to the best of your recollection, was it
4 on or about November 2nd, 2021?

5 A On or about, because it came through, you
6 know, through the portal. So yeah, on or about that.
7 That is how we became knowledgeable.

8 Q So, if you could just look at the last full
9 paragraph. It is on JMH000199. The paragraph
10 beginning, given that the hospital.

11 A Okay. Yes, Your Honor.

12 Q If you could just read through that to refresh
13 your recollection as to the content of that paragraph
14 and let me know when you are ready, I would appreciate
15 it?

16 A Sure. Okay, Your Honor.

17 Q Now, do you recall reading that paragraph when
18 this letter came in?

19 A Yes.

20 Q And then if you look at Exhibit G, which is
21 the next, the next exhibit to your testimony, that's the
22 November 30th, 2021 response that you signed your name
23 to.

24 A Okay.

25 Q Can you just take a moment to look at that

1 document, as well?

2 A Okay, Your Honor.

3 Q In that letter, did you object to Ms.
4 Martone's statement that JMH was in violation of the CON
5 statutes?

6 A I don't know if I specifically objected. We
7 stated that we didn't plan to terminate because we
8 wanted to continue to recruit for nurses, so we can
9 provide a quality program here at Johnson for the
10 community.

11 Q As you are looking at that, though, you
12 wouldn't characterize your letter as stating that you
13 were disputing her statement that JMH was in violation
14 of the statutes?

15 A I think we continued on with our previous
16 statements to OHS about recruiting and we, you know, I
17 know there was a decision point about whether you want
18 to terminate or not terminate, but we felt that we
19 wanted, we were going to be able to recruit a critical
20 number of staff so we can offer that service, a quality
21 service, to our community.

22 Q Okay. Thank you, Mr. Rosenberg.

23 HEARING OFFICER CSUKA: Attorney DeBassio, did you
24 have any questions you wanted to ask of Mr. Rosenberg
25 given my questions?

1 MR. DEBASSIO: No, Your Honor.

2 HEARING OFFICER CSUKA: Okay. All right. I am
3 going to suggest that we take a 10-minute break and then
4 come back and do some closing arguments, and then wrap
5 up the hearing.

6 So let's come back at 11:30. And again, the, I
7 would encourage you all to mute your devices and turn
8 your video off until then.

9
10 (Whereupon a short recess was taken.)

11
12 HEARING OFFICER CSUKA: So before we get into
13 closing arguments, I did want to ask one question of you
14 both. Attorney DeBassio, I saw that you filed a legal
15 brief on, I believe it was November 2nd, did you, so
16 Attorney Manzione, did you want an opportunity to also
17 file a legal brief?

18 MS. MANZIONE: I would certainly like the
19 opportunity to file a brief. I don't want to put
20 opposing counsel at a disadvantage, I know that he
21 already filed one, but I wouldn't be opposed if he
22 wanted to file a post-hearing brief, as well.

23 HEARING OFFICER CSUKA: That was going to be my
24 second question. So it normally takes about one to
25 2 weeks for us to get the transcript back. Do either of

1 you, do you think that it would be reasonable to set,
2 maybe, a 30-day deadline following the receipt of the
3 transcript, does that seem reasonable?

4 MS. MANZIONE: I'm just cautious of the time of
5 year that it is. It is November 16th. There is
6 Thanksgiving coming up, there is Christmas, Hanukkah,
7 New Years, I just know it is a very busy time for many
8 people, and I am not sure how the 30-day deadline would
9 fall.

10 HEARING OFFICER CSUKA: Okay. Attorney DeBassio,
11 do you have any thoughts on that?

12 MR. DEBASSIO: Your Honor, I don't disagree with
13 Attorney Manzione, and I think if we could all agree
14 today that we will look at when the transcripts come in,
15 and if the 30 days is going to land somewhere around the
16 holidays, you know, we can agree that they will be due
17 January 15th, or something like that, you know. Or I
18 would be, you know, I would be prepared to, my hesitancy
19 is if this period, if we do not prevail and this period
20 is going be counted as part of the period in terms of
21 assessing the penalty, I don't really want to push this
22 off indefinitely. So, that is my position. I agree
23 with the holidays and everything, I want to be
24 accommodating, but one of my questions would be, if we
25 do not prevail in this hearing, if we are going to do

1 this, can we stipulate that this period of time is not
2 going to be counted if Your Honor decides that you are
3 going to impose a penalty.

4 MS. MANZIONE: I would have no objection to
5 stopping the clock, if that is what we are talking
6 about, of the penalty continuing.

7 HEARING OFFICER CSUKA: Okay. Correct me if I am
8 wrong, but I think the Statute says willful fail to file
9 an application for a CON, and your client already has
10 filed that application and you actually attached it as
11 an exhibit to your filing, right, Mr. DeBassio?

12 MR. DEBASSIO: Well, yes, Your Honor, I believe
13 there is an argument that all of it stops as of the date
14 of the CON application. But I recognize that the
15 Statute, I, the Statutes have changed and the approach,
16 the global landscape has changed since the pandemic, so
17 I, you know, without presuming that the, that the filing
18 of the CON on September 29th should stop any accrual of
19 the penalty, which I am not asking anybody to make a
20 ruling on today, I believe that is the case, though, I
21 would certainly not want any extension of these
22 proceedings to be tacked on, so to speak.

23 MS. MANZIONE: I agree with Attorney DeBassio's
24 characterization of how things can be interpreted. I
25 personally think that the civil penalty Statute, the

1 653, states that willfully fail to seek a certificate of
2 need approval, and obviously his client, the Hospital,
3 has sought that Certificate of Need approval. However
4 there is little bit of disconnect with the 638 requiring
5 the Certificate of Need to be granted before actually
6 doing the activities. So I think there is a little bit
7 of possibility for interpretation that's different. So
8 I would have no problem pausing, hitting a stop key so
9 no further time or penalty accrues during this waiting
10 time or writing period.

11 HEARING OFFICER CSUKA: Okay.

12 MR. DEBASSIO: And I don't think Attorney Manzione
13 and I were anticipating this was going to be the
14 Seminole case to clear up any ambiguity.

15 HEARING OFFICER CSUKA:

16 MR. DEBASSIO: So that's, again, the only reason.
17 And I am not trying to bind OHS and I am not looking at
18 her position as an admission, or anything, you know, but
19 that's my concern.

20 HEARING OFFICER CSUKA: Okay. If you are both
21 willing to stipulate to a pause, I think that will work.
22 So we will, I guess we will just treat today as, as the
23 first date of that pause, to the extent that it is
24 necessary, and we will figure out the briefing schedule
25 at a later date once we have received the transcript.

1 Does that sound reasonable to both of you?

2 MR. DEBASSIO: Yes, Your Honor. And again, that is
3 without waiving any right to claim that the pause isn't
4 necessary if we have to, because it should have stopped.
5 But, and I believe if Your Honor is comfortable with it,
6 when the transcripts come in, I don't think Attorney
7 Manzione and I are going to ask for six months. So that
8 we may be able to submit a joint submission that we
9 agree briefs should be submitted by January 13th or
10 whatever. And unless you disagree -- I am just trying
11 to spare you setting up a scheduling conference with us
12 if it is not necessary.

13 HEARING OFFICER CSUKA: Yes. I think it is
14 probably something we can do by e-mail.

15 MR. DEBASSIO: Perfect.

16 HEARING OFFICER CSUKA: Consistent with what I did
17 earlier this week, where I just, sort of, uploaded our
18 conversation about the need for additional time. So I
19 think the same sort of thing can be done for this.

20 So we are going to keep the hearing record
21 technically open. We need to have Exhibit S filed, as
22 well. So if we go get Exhibit S filed by the end of
23 this week, that would be good.

24 MS. MANZIONE: It would be my preference to have it
25 filed by the end of today, so.

1 HEARING OFFICER CSUKA: Okay.

2 MS. MANZIONE: We can beat the end of this week.

3 HEARING OFFICER CSUKA: Okay. So we are
4 technically going to keep the hearing record open until
5 both of the legal briefs are submitted. And with that,
6 I think we are ready to proceed with closing arguments.

7 So we are going to start first with Attorney
8 Manzione, since OHS has the burden.

9 MS. MANZIONE: Okay. Thank you, Hearing Officer
10 Csuka.

11 As I said in my opening statement, typically if a
12 hospital wants to cease providing an inpatient
13 service, it must file a CON application with the Office
14 of Health Strategy before stopping that service so the
15 regulator can evaluate whether the hospital should be
16 allowed to do so. And if a hospital terminates an
17 inpatient service without a CON, it is a violation of
18 law, and the hospital is subject to a penalty.

19 But this is not what JMH did. Johnson Memorial
20 Hospital acted like they should not have to follow the
21 law requiring a CON before terminating an inpatient
22 service as important as labor and delivery. Johnson
23 Memorial Hospital would have us believe that they did
24 not willfully fail to follow the law, but rather they
25 had a good faith misunderstanding of the law or a

1 misunderstanding of the labor market. They claim that
2 their misunderstanding was that because they never
3 intended to terminate, only suspend the labor and
4 delivery services, that they shouldn't need to file a
5 CON, but that is not what the law requires. The law is
6 clear, in order to terminate an inpatient service, a
7 hospital requires a CON.

8 We learned this morning from the President of
9 Johnson Memorial Hospital that there are individuals who
10 work for the parent company, Trinity Health of New
11 England, there are individuals whom he can call to ask
12 about questions about Certificate of Need process. We
13 also heard Johnson Memorial Hospital claim that because
14 they had a good faith misunderstanding that the labor
15 market would turn around and they would be able to hire
16 more staff for labor and delivery services, that they
17 should be absolved of facing the consequences of their
18 actions. But once again, this is not what the law
19 requires. The law is clear, in order to terminate an
20 inpatient service, the hospital requires a CON. The
21 hospital must keep providing the services until a CON is
22 approved.

23 We also learned that Johnson Memorial Hospital was
24 directly put on notice by letter dated November 2nd,
25 2021, that it was in violation of the CON statutes and

1 regulations after the Executive Order expired, which
2 allowed the hospital to cease services without a CON.
3 But not even that letter changed the Hospital's actions.
4 Just because Johnson Memorial Hospital repeatedly said
5 that it didn't intend to terminate L&D services doesn't
6 matter. After all, the evidence showed that the
7 Hospital did finally file a CON to terminate L&D
8 services on September 29, 2022, just a few months ago.

9 It would be inappropriate to allow Johnson Memorial
10 Hospital to evade paying a civil penalty, when other
11 similar situated hospitals have been assessed civil
12 penalties for similar activities. I respectfully urge
13 that the order imposing a civil penalty be upheld.

14 Thank you.

15 You are muted.

16 HEARING OFFICER CSUKA: Thank you, Attorney
17 Manzione. Attorney DeBassio?

18 MR. DEBASSIO: Thank you, Your Honor I would just
19 note, just to pick up on one thing that Attorney
20 Manzione said when she finished up, is if Johnson
21 Memorial's Hospital intent doesn't matter, then the
22 statute becomes a *per se* statute, and the issue of
23 willfulness is completely taken out of it. Because
24 willfulness means, at its very heart, that you're
25 electing to do something with knowledge of the statute

1 intentionally. So intent does matter. It is critical
2 to determining how this should be resolved.

3 Now, again, facts are not in dispute here, and I am
4 not going to needlessly waste everybody's time by
5 marshaling them here. I am just going to say, Johnson
6 Memorial Hospital undertook steps to resume labor and
7 delivery services once the Governor's Executive Order
8 expired. They actually took steps to resume those
9 services while the order was in place. The stipulated
10 facts and the prefiled testimony show that Johnson
11 Memorial was not terminating or abandoning these
12 services, they were doing their best to actually resume
13 providing these services.

14 Johnson Memorial Hospital trained several nurses
15 for labor and delivery services and ultimately this
16 training was so successful they took jobs at other
17 hospitals. So they didn't end up going to Johnson
18 Memorial to provide labor and delivery services. Any
19 patients that would have been going to Johnson Memorial
20 Hospital ended up -- excuse me -- for these labor and
21 delivery services, ended up at Saint Francis Hospital
22 receiving those services or receiving them through the
23 emergency room at Johnson Memorial Hospital.

24 During this time, Mr. Rosenberg has testified, no
25 doctor or nurse was laid off because of what was going

1 on with labor and delivery services at Johnson Memorial
2 Hospital. I would also like to point out that, as an
3 introduction to my closing, that the Office of Health
4 Systems could have imposed, under their theory, a civil
5 penalty on Johnson Memorial Hospital any time after May
6 of 2021. Johnson Memorial Hospital, regardless of what
7 OHS likes to characterize it as, was completely
8 transparent in notifying OHS of everything they were
9 doing. OHS didn't impose a civil penalty until June of
10 2022, over a year after this statute expired with the
11 waiver. So I think that also needs to be taken into
12 account here, that when you talk about Johnson Memorial
13 being in violation of the statute, OHS was well aware of
14 it. OHS could have imposed the penalty or could have
15 given the notice of the penalty at any time during that
16 13-month period, but they waited 13 months. And what
17 was going on during that 13 months, OHS was, or Johnson
18 Memorial, excuse me, was telling them, we are
19 recruiting, we are training, we are trying to get the
20 service open. They are sending letters to OHS, and OHS
21 is aware of everything that is going. So I think it is
22 a little disingenuous OHS's part to say that Johnson
23 Memorial was ignoring the law, when OHS was ignoring the
24 law and waiting until the absolute last minute to impose
25 this penalty, letting it accrue over 13 months.

1 Now we get back to the issue of willfulness. As I
2 mentioned before, if intent doesn't matter, then it is a
3 per se statute and willfulness doesn't matter, but that
4 is not the way it is written. Willfulness does matter.
5 We suffered an unprecedented global crisis. Mr. Lazarus
6 himself talked about it in his stipulated testimony,
7 that they had staffing issues. People left. They were
8 backlogged. They were looking to hire at OHS. Johnson
9 Memorial experienced the same thing. The Executive
10 Orders are proof of just how drastic this crisis was and
11 the challenges that everybody faced.

12 Now labor and delivery is a specific service, as
13 Mr. Rosenberg testified to. It is a 24/7 service that
14 has to be fully staffed and it is labor and skill
15 intensive. So finding people to staff that service is
16 difficult. It is not like being able to find remote
17 workers who are going to do data processing from home.
18 They have to be in the hospital and they have to be
19 available that entire time.

20 Now this proved to be a challenge, and it proved to
21 be an insurmountable challenge for Johnson Memorial
22 Hospital, but we get back to the intent with regard to
23 filing the CON. I would say contrary to what OHS
24 argues, the November 2021 letter is proof that Johnson
25 Memorial Hospital viewed this as a suspension and not a

1 termination. They received the, they received the
2 November 2021 letter from OHS and they immediately
3 responded back to OHS and said, our intend is to resume
4 these services as soon as we get the appropriate staff
5 and we can do it.

6 Now JMH has suspended labor and delivery services,
7 that is not in dispute. So as of November 2021 JMH
8 arguably could have filed a CON, or C-O-N. OHS arguably
9 could have filed a penalty at that point. As of January
10 2022 the parties were corresponding back and forth.
11 Johnson Memorial Hospital was telling them, we are still
12 having problems providing the service. OHS knew about
13 that. They could have filed a penalty, just as easily
14 as Johnson Memorial could have filed a CON, but they
15 didn't do that. And Johnson Memorial didn't, quite
16 candidly, want to terminate the service. We are talking
17 about penalizing a hospital that is seeking to employ
18 nurses and serve patients and do everything they
19 possibly could to make sure that happened, and that is
20 where we come to one of Johnson's next defenses,
21 inability or impossibility.

22 You can't find somebody acted willful if it was
23 impossible for them to fulfill those obligations, okay.
24 Now OHS can take this gilded tower view that says,
25 until you get a CON and until we allow you to terminate

1 these services, you have to provide those services.

2 Well Johnson Memorial, for lack of a better term,
3 triaged this. They transferred nurses and doctors to
4 Trinity -- to Saint Francis Hospital, they got them
5 trained, they got their patients there so that they were
6 cared for, all of these constituent populations were
7 taken care of, but Johnson Memorial was, it was
8 impossible for them to staff the services at the
9 hospital 24/7 with the skilled labor they needed to, to
10 adequately resume labor and delivery. So again, it is
11 not that they terminated, it is not that there were
12 layoffs, it is not that there was some sort of cost
13 cutting here, it was that they couldn't get the skilled
14 staff into Johnson Memorial.

15 That is where the defense of mistake does come in,
16 okay. Johnson memorial had a good faith belief, and Mr.
17 Lazarus references this in his testimony, as well, that
18 when the pandemic ended, the labor force and the labor
19 market would come back, and that people would return to
20 work and things would return to normal. So Johnson
21 Memorial had the mistaken belief that if they just kept
22 trying to recruit, if they just keep trying to staff the
23 service, they would eventually end up on the other side
24 of this wave and they would be able to fully staff and
25 provide the service. Well it turns out that the

1 declining usage of the service, the staffing challenges
2 and everything, were a burden that they ultimately
3 couldn't overcome, and they made a mistake thinking they
4 could. But that is not willfully ignoring their
5 obligations under the statute.

6 Now, we also come to the fine itself. You, as the
7 Hearing Officer, have the power to rescind, revoke or
8 reduce the fine. The statutes give all sorts of
9 discretion to you, and quite frankly they give
10 discretion to OHS on the front end. OHS didn't have to
11 impose \$1,000 a day fine. Going to the default of the
12 maximum fine in the situation, knowing everything OHS
13 knows about the situation here, is an abuse of
14 discretion. And to let that \$1,000 a day sit if you
15 don't rescind the fine altogether, would be inequitable
16 based on the situations and the circumstances Johnson
17 Memorial Hospital is facing. We would submit that it is
18 completely appropriate to revoke the fine completely,
19 given the facts and circumstances here. As a threshold
20 issue, the filing of the CON application itself, lack
21 letter of law, is enough for OHS to rescind or revoke
22 the fine. There is no question and the record is clear
23 that Johnson Memorial Hospital eventually filed a CON.

24 And again, the facts and circumstances giving rise
25 to why we are even having this dispute here, would call

1 for if the fine is not rescinded entirely, a drastically
2 reduced fine. As I mentioned before, for 13 months OHS
3 was aware of the situation going on at Johnson Memorial,
4 we don't know why, we don't have a witness who testified
5 why, OHS didn't file the penalty prior to June of 2022.
6 We can speculate that maybe they were giving Johnson
7 Memorial Hospital a chance to get their staffing up to
8 speed. But regardless, saying Johnson Memorial didn't
9 file it for 13 months and imposing the maximum penalty
10 on them, when OHS was aware of it and OHS could have
11 filed that penalty at any point in that 13-month period,
12 the record is clear, Johnson Memorial was transparent
13 with them that those services were suspended and Johnson
14 Memorial couldn't provide them. If OHS determined that
15 that was a termination, OHS could have imposed a penalty
16 at any point and we would not be talking about the
17 astronomical number that is in the June 29th, 2022
18 letter.

19 But I would also stress, given your inherent power
20 to revoke or reduce the fine, that these facts and
21 circumstances are completely appropriate for that. As I
22 mentioned Johnson Memorial had no layoffs. Johnson
23 Memorial's doctor was at Saint Francis Hospital.
24 Johnson Memorial hired nurses to staff the service,
25 those nurses were fully trained and then took other

1 opportunities that, unfortunately for Johnson Memorial,
2 they thought were better than the opportunities at
3 Johnson Memorial Hospital. Patient care didn't suffer.
4 And that is one of the, that is one of the primary
5 focuses of what Johnson Memorial was doing here, they
6 were trying to get the service up and running until they
7 realized it was absolutely impossible to do, and then
8 they filed the CON application in June of 2022.

9 And again, when we are looking at the timeline of
10 what OHS could have done with regard to the penalty, we
11 are not blaming OHS, just like we don't believe Johnson
12 Memorial Hospital should be blamed. We are just
13 pointing out that there were several milestones along
14 the way here where both parties had opportunities, and I
15 think it's inequitable to look at this and say, Johnson
16 Memorial should have done something, when OHS had the
17 exact opportunity to do something, as well, and they sat
18 on their hands and did nothing.

19 So in conclusion, I'd just like to say, that
20 Johnson Memorial Hospital here did everything in their
21 power to reserve, to resume labor and delivery services
22 during this unprecedented time in healthcare, and with
23 the global pandemic. They were focused on providing
24 fully staffed, safe and competent services. They took
25 every step they reasonably could to lift that

1 suspension. They ensured patient care was a top
2 priority. They ensured patients received the proper
3 care. There is no evidence that any patient suffered
4 for lack of services. Johnson Memorial recruited and
5 trained potential labor and delivery staff who achieved
6 those competencies, that then went to work for other
7 hospitals when those, when that training was complete.
8 Again, entirely beyond Johnson Memorial Hospital's
9 control. If they had stayed with Johnson Memorial, we
10 would be having a different discussion here today, than
11 the one we are having now.

12 Ultimately Johnson Memorial was faced with the
13 reality that they were not going to be able to resume
14 providing these services at the level they needed to in
15 order to be in compliance and to provide good patient
16 care, and they filed for the CON. Given the entirety of
17 facts and circumstances here, this is not, we submit to
18 Your Honor that this is not a situation where Johnson
19 Memorial Hospital should be punished or sanctioned. We
20 ask that you take this entire record into account and
21 you do not impose the fine against Johnson Memorial
22 Hospital in these circumstances.

23 I would like to thank Your Honor for your time
24 today, and I would also like to thank Attorney Manzione
25 for her professionalism and her courtesies in preparing

1 for this hearing. I would like to thank Mr. Lazarus for
2 his testimony and his patience with our questioning and
3 everything. And I would like to thank my witness,
4 Stuart Rosenberg for the same, his patience and putting
5 up with our questioning and making himself available
6 today. And with that, unless Your Honor has any other
7 open issues or any questions for me, that concludes my
8 presentation.

9 HEARING OFFICER CSUKA: Thank you. And thank you
10 all for attending today. I do not have anything else
11 that I need to address on the record. This has been
12 very informative, so this hearing is hereby adjourned.
13 But as I indicated earlier, the hearing record will
14 remain open until after those legal briefs are filed,
15 and that deadline will be determined at a later date,
16 depending upon when the transcript is received. And
17 also as indicated earlier, the parties have stipulated
18 to a pause of the potential period during which any
19 additional civil penalty can accrue. So we will, we
20 will just set a date for these briefs as it allows, as
21 much time as the parties feel is necessary.

22 So thank you very much, and this hearing is hereby
23 adjourned.

24 MS. MANZIONE: Thank you.

25 MR. DEBASSIO: Thank you, Your Honor.

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2 (Whereupon the hearing concluded at 11:57 a.m.)
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STATE OF CONNECTICUT

I, THERESA BERGSTRAND, a Licensed Professional Reporter/Commissioner within and for the State of Connecticut, do hereby certify that I took the hearing testimony, on NOVEMBER 16, 2022 via Zoom Videoconferencing Platform.

I further certify that the within testimony was taken by me stenographically and reduced to typewritten form under my direction by means of computer assisted transcription; and I further certify that said deposition is a true record of the testimony given by said witness.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

WITNESS my hand and seal the 7th day of December,
2022.

Theresa Bergstrand

Theresa Bergstrand, CSR.
My commission expires 3/31/2026