

STATE OF CONNECTICUT
OFFICE OF HEALTH STRATEGY

DOCKET NUMBER 21-32486-CON

ORAL ARGUMENT IN RE:
HEARING TO CONTEST THE IMPOSITION OF A
CIVIL PENALTY

Oral Argument on the Proposed Final Decision held
via Zoom before the Office of Health Strategy
on Wednesday, May 29, 2024, beginning at 10 a.m.

H e l d B e f o r e :

DEIDRE SPELLISCY GIFFORD, MD, MPH,
Executive Director, Office of Health Strategy,
Senior Advisor to the Governor for Health and
Human Services

W. BOYD JACKSON, ESQ., Director of Legislation
and Regulation

Representing Johnson Memorial Hospital:

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Also present: Dr. Robert Roose, Johnson Memorial
Hospital, and Claudio Capone, Trinity Health of
New England

Reporter: Lisa L. Warner, CSR #061

1 (Commenced at 10 a.m.)

2 EXECUTIVE DIRECTOR GIFFORD: Good
3 morning. This hearing is being convened for the
4 limited purpose of an oral argument in Docket
5 Number 21-32486-CON. The petitioner in this
6 matter, Johnson Memorial Hospital, Inc., stopped
7 providing inpatient obstetric services and seeks
8 permission under a separate Docket Number
9 22-32612-CON to terminate those services.

10 On June 29, 2022, the Office of Health
11 Strategy issued a Notice of Civil Penalty to
12 Johnson Memorial Hospital pursuant to Connecticut
13 General Statute, Section 19a-653 and regulations
14 of the Connecticut Statute Agencies, Section
15 19a-653-1. OHS alleged in that notice that JMH
16 willfully failed to seek Certificate of Need
17 approval prior to terminating labor and delivery
18 services in violation of Connecticut General
19 Statute, Section 19a-638(a)(5).

20 After a hearing on November 6, 2022,
21 Hearing Officer Dan Csuka issued a proposed final
22 decision recommending that the \$394,000 civil
23 penalty issued against Johnson Memorial be reduced
24 to \$153,500.

25 On March 6, 2024, the petitioner filed

1 a request to submit a brief in opposition and
2 written exceptions to the proposed final decision
3 and requested an opportunity to present oral
4 argument.

5 On March 22, 2024, the Office of Health
6 Strategy issued a Notice of Oral Argument for
7 today.

8 On May 22, 2024, Johnson Memorial
9 Hospital filed its brief in opposition and written
10 exceptions to the proposed final decision.

11 This hearing before the Office of
12 Health Strategy is being held on May 29, 2024. My
13 name is Deidre Gifford, and I'm the commissioner
14 of OHS, and I will be issuing the final decision
15 in this matter. Also present on behalf of the
16 agency is OHS director of legislation and
17 regulation, W. Boyd Jackson.

18 OHS is holding this public hearing
19 remotely by means of electronic equipment. Any
20 person who participates orally in an electronic
21 meeting shall make a good faith effort to state
22 his or her name and title at the outset of each
23 occasion that such person participates orally
24 during an uninterrupted dialogue or series of
25 questions and answers. We ask that all members of

1 the public mute the device that they're using to
2 access the hearing and silence any additional
3 devices that are around them.

4 This hearing concerns only the
5 petitioner's oral argument regarding its brief and
6 exceptions to the proposed final decision, and it
7 will be conducted under the provisions of Chapter
8 54 of the Connecticut General Statutes.

9 The Certificate of Need process is a
10 regulatory process, and as such, the highest level
11 of respect will be afforded to the petitioner and
12 our staff. Our priority is the integrity and
13 transparency of this process. Accordingly,
14 decorum must be maintained by all present during
15 these proceedings.

16 This hearing is being transcribed and
17 recorded, and the video will also be made
18 available on the OHS website and its YouTube
19 account. All documents related to this hearing
20 that have been or will be submitted to OHS are
21 available for review through our Certificate of
22 Need portal which is accessible on the OHS CON
23 webpage.

24 Although this hearing is open to the
25 public, only the petitioner and its

1 representatives and OHS and its representatives
2 will be allowed to make comments. Accordingly,
3 the chat feature in this Zoom has been disabled.

4 As this hearing is being held
5 virtually, we ask that anyone speaking, to the
6 extent possible, enable the use of video cameras
7 when speaking during the proceedings. In
8 addition, anyone who is not speaking shall mute
9 their electronic devices, including telephones,
10 televisions, other devices not being used to
11 access the hearing.

12 Lastly, as Zoom notified you while
13 entering this meeting, I wish to point out that by
14 appearing on camera in this virtual hearing you
15 are consenting to being filmed. If you wish to
16 revoke your consent, please do so at this time.

17 We will now proceed. Counselor for the
18 petitioner, can you identify yourself for the
19 record.

20 MR. DEBASSIO: Thank you, Madam
21 Commissioner. My name is David DeBassio. I'm an
22 attorney at Hinckley Allen, and I'm here on behalf
23 of Johnson Memorial Hospital.

24 EXECUTIVE DIRECTOR GIFFORD: Thank you.
25 Are there any other housekeeping matters or

1 procedural issues we need to address before we
2 start, Mr. DeBassio?

3 MR. DEBASSIO: Not that I'm aware of,
4 Commissioner.

5 EXECUTIVE DIRECTOR GIFFORD: Thank you.
6 You may begin whenever you're ready.

7 MR. DEBASSIO: Thank you, Commissioner.
8 First off, I would like to thank Hearing Officer
9 Csuka and the OHS staff for the professionalism
10 and the courtesy they extended us throughout this
11 entire process. It's been a real pleasure to work
12 with them. And I want to thank the hearing
13 officer, Hearing Officer Csuka, for his decision.
14 Though we disagree with certain parts of it, we
15 think he gave a very thoughtful and reasoned
16 approach to it and took his time and listened to
17 everything that was presented by both parties.

18 It's our position that the proposed
19 decision correctly finds that there are mitigating
20 circumstances that need to be taken into account
21 in reaching the final decision in this matter,
22 namely Johnson Memorial Hospital's significant
23 efforts to resume labor and delivery services, the
24 considerable expense incurred in recruiting and
25 retention efforts, the continued employment of the

1 L&D staff even when they were not being utilized
2 in labor and delivery services, and the
3 significant expenditures in their marketing and
4 advertising campaigns. The hearing officer
5 rightly notes that all of these efforts were
6 undertaken during the COVID-19 pandemic.

7 The hearing officer also notes that
8 there has been very little in the way of direct
9 precedent out of OHS or its predecessor agencies
10 that would have provided guidance to Johnson
11 Memorial or its legal counsel at the time of these
12 events as to what would be an appropriate term for
13 a suspension and when a suspension would be viewed
14 as a termination.

15 The hearing officer correctly
16 determined that the time frame at issue here was
17 from November 2, 2021 through the date of the CON
18 application on September 29, 2022.

19 The hearing officer correctly exercised
20 its discretion reducing the proposed fine to
21 \$153,500.

22 However, where Johnson Memorial objects
23 to the final decision is where the hearing officer
24 finds that Johnson Memorial Hospital willfully
25 failed to file the CON for the termination of L&D

1 services.

2 To start with, OHS, as the party
3 seeking to assess the civil penalty, has the
4 burden of proving the respondent's actions were
5 willful. And under Connecticut law, to find that
6 Johnson Memorial had acted willfully, OHS must
7 find that Johnson Memorial was aware of its
8 obligations under the law and intentionally
9 violated or disregarded those obligations. The
10 mere violation of a rule does not always
11 constitute willful misconduct. To have that
12 effect, the disobedience must have been
13 deliberate. Johnson Memorial respectfully submits
14 that its inability to resume labor and delivery
15 services despite its best efforts is a valid
16 defense to the claim of willfulness.

17 The proposed Finding of Fact Number 24
18 itself acknowledged OHS viewed the status of labor
19 and delivery at Johnson Memorial as suspended
20 through the time period we're talking about in
21 November of 2021. Mr. Rosenberg testified that
22 there was no intent or -- Mr. Rosenberg, excuse
23 me, on behalf of Johnson Memorial. Given the
24 compressed time frame, I am relying a lot on the
25 information that we submitted in our brief. And

1 unless, Commissioner, you need me to sort of
2 circle back and give certain references to these
3 facts, I'm going to assume that the record will
4 speak for itself with regard to this. But
5 Mr. Rosenberg did testify, and it was unrebutted,
6 that there was no intent or willful attempt to
7 circumvent the statute and the services were
8 suspended and not terminated.

9 As the proposed decision correctly
10 acknowledges, House Bill 5506, which was passed as
11 amended during the 2022 legislative session and
12 was signed into law by Governor Lamont on May 7,
13 2022, defines the termination of services as the
14 cessation of any services for a period greater
15 than 180 days. The hearing officer correctly
16 notes that previously, however, termination was
17 not defined either in statute or by regulation.

18 The proposed final decision attempts to
19 work around this by arguing that precedent should
20 have put Johnson Memorial on notice that the
21 suspension would be viewed as a termination.
22 Respectfully, Commissioner, all of the precedent
23 cited in the proposed final decision was issued
24 after the case at bar had commenced and can in no
25 way serve as guides for what constitutes a

1 termination.

2 Further, those decisions actually
3 support Johnson Memorial's position as they both
4 discuss the fact that it was unclear what
5 constitutes a suspension versus a termination and
6 under similar fact patterns found that those fines
7 should be waived and/or rescinded.

8 The hearing officer also acknowledged
9 there has been very little in the way of direct
10 precedent out of OHS or its predecessor agencies
11 that were providing guidance to Johnson Memorial
12 or its legal counsel at the time of the events.
13 Again, acknowledging that these decisions he
14 relies on in his decision, in his proposed final
15 decision as precedent were issued after all of the
16 events, and I believe even after we had the
17 hearing on the penalty itself.

18 Throughout this entire period, Johnson
19 Memorial, and it is unrebutted that Johnson
20 Memorial attempted to recruit and hire labor and
21 delivery staff. Johnson Memorial consulted with a
22 strategist and legal counsel about how to proceed.
23 Johnson Memorial kept OHS abreast of these
24 efforts. It is indisputable that Johnson Memorial
25 sought to resume the services. It was not

1 abandoning or terminating the services.

2 Johnson Memorial's position that the
3 labor and delivery were suspended and not
4 terminated despite the duration of the suspension,
5 therefore, is either a good faith misunderstanding
6 or a mistake as opposed to a willful violation of
7 the law. Conduct is not willful if it was due to
8 negligence, inadvertence or mistake or was the
9 result of a good faith misunderstanding. There
10 was no deliberate attempt by Johnson Memorial to
11 circumvent the CON application process or avoid
12 resuming labor and delivery services. There was
13 no attempt to suspend these services indefinitely
14 to avoid its statutory obligations.

15 Further, there was certainly no attempt
16 to hide the suspension of services as found by the
17 Hearing Officer. There is nothing in the record
18 to indicate that there was any attempt at
19 subterfuge or to hide the status of labor and
20 delivery at Johnson Memorial. Any time the
21 service was discussed between Johnson Memorial and
22 OHS, Mr. Rosenberg testified and Mr. Capone wrote
23 letters that are all part of the record that
24 Johnson Memorial was incredibly transparent with
25 OHS about what attempts they were making to resume

1 labor and delivery and what struggles they were
2 having to resume labor and delivery and were
3 consistent up until the point the board of
4 directors of Trinity Health in June of 2022
5 realized that labor and delivery was not going to
6 be resumed and voted to submit a CON application.

7 It's also important when you look at
8 the decision that the hearing officer issued when
9 he found that Johnson Memorial hid the fact that
10 labor and delivery was not resumed and that is
11 evidence of willfulness, that during discussions
12 between JMH and OHS in late 2021 and early 2022
13 happening in real time while the situation was
14 taking place, OHS itself never accused Johnson
15 Memorial of hiding the fact that L&D, labor and
16 delivery, was not operating.

17 In its November 2, 2021 letter, OHS did
18 not claim any nefarious motive or attempt to hide
19 the status of labor and delivery, and they
20 themselves referred to the status as a suspension
21 of services. During this time through and until
22 Johnson Memorial filed the CON, the undisputed
23 record is that there was back and forth
24 communications between Johnson Memorial and OHS
25 discussing the efforts to resume the suspended

1 services.

2 In conclusion, while Johnson Memorial
3 agrees with the proposed decision that OHS in
4 exercising its discretion should not impose the
5 maximum statutory fine, it respectfully submits
6 that the imposition of any fine in these
7 circumstances is excessive and unduly punitive.
8 It goes without saying that a hospital cannot
9 offer services to patients without having the
10 proper staff to provide those services.

11 The hearing officer correctly exercises
12 his discretion in finding mitigating circumstances
13 in significantly reducing the fine in the proposed
14 decision. It is respectfully submitted that OHS
15 should exercise that discretion further and waive
16 or rescind the proposed fine. The challenges
17 Johnson Memorial faced, the transparency reporting
18 these challenges to OHS, and ultimately the
19 hearing officer's acknowledgment that there was
20 little to no precedent Johnson Memorial could
21 point to during these unprecedented events weigh
22 heavily in favor of recission or waiver when
23 determining the appropriate resolution.

24 And lastly, we would respectfully
25 submit that to the extent that there is going to

1 be any funds charged against Johnson Memorial in
2 this particular instance for its inability to
3 resume labor and delivery that Johnson Memorial
4 should be reinvesting those funds in pre and
5 postnatal delivery services in its primary service
6 area.

7 Thank you, Madam Director. And I'm
8 available to answer any questions you may have.

9 EXECUTIVE DIRECTOR GIFFORD: Thank you
10 very much, Mr. DeBassio, for your clear
11 presentation. I do not have any questions. So
12 with that, I want to thank you and your team from
13 Johnson Memorial Hospital for attending today, and
14 I will issue a final decision in this matter in
15 accordance with Chapter 54 of the General
16 Statutes. Thank you very much.

17 MR. DEBASSIO: Thank you.

18 EXECUTIVE DIRECTOR GIFFORD: Have a
19 good day.

20 MR. DEBASSIO: You as well.

21 (Whereupon, the above proceedings
22 concluded at 10:15 a.m.)
23
24
25

1 CERTIFICATE

2
3 I hereby certify that the foregoing 14 pages
4 are a complete and accurate computer-aided
5 transcription of my original stenotype notes taken
6 of the Oral Argument on the Proposed Final
7 Decision held via Zoom before the Office of Health
8 Strategy in Re: DOCKET NUMBER 21-32486-CON,
9 HEARING TO CONTEST THE IMPOSITION OF A CIVIL
10 PENALTY, which was held remotely via Zoom before
11 DEIDRE S. GIFFORD, MD, MPH, Executive Director, on
12 May 29, 2024.
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17

Lisa Warner

18 -----
19 Lisa L. Warner, CSR 061
20 Notary Public
21 My commission expires:
22 May 31, 2028
23
24
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