THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

S. Philip Lenski, Administrative Law Judge

Case No. 2018-00895

Jeanette's Loving In-Home Care Agency, Appellant,

v.

South Carolina Department of, Health and Human Services Respondent.

APPELLANT'S BRIEF

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STATEMENT OF THE CASE

On June 24, 2016 South Carolina Department of Health and Human Services (SCDHHS) and Jeanette's Loving In-Home Care Agency (Loving Care) entered into a contract whereby Loving Care Agency agreed to provide Personal Care I Services, Personal Care II Attendant Care Services, HASCI Respite Services, Companion Services, and MCC Respite Services to participants in Medicare.

On January 3, 2017 SCDHHS sent a compliance reviewer to Loving Care for the purpose of conducting a survey. However, the reviewer was unable to locate Loving Care's place of business in order to conduct the survey.

On February 3, 2017 a compliance reviewer again attempted to conduct a review of Loving Care. This time the reviewer was able to locate LC's place of business, but found no one there.

Subsequently, via letter dated February 8, 2017, SCDHHS notified Loving Care that they were suspending new participant referrals for ninety (90) days effective February 8, 2017 "based on non-compliance to the terms of your contract and the surveyor's inability to complete the review" (attached hereto as Exhibit "A").

On February 20, 2017 the reviewer, made a third visit to Loving Care's place of business and was able to conduct a review. Pursuant to the review, on February 23, 2017 SCDHHS sent Loving Care a list of deficiencies that needed to be corrected and requested that Loving Care send a corrective action plan by March 9, 2017 (attached hereto as Exhibit "B"). Loving Care complied with this request in a timely manner.

On April 5, 2017 SCDHHS sent Loving Care a letter (attached hereto as Exhibit "C"). terminating her contract "due to insufficiency of the corrective action plan." On April 6, 2017 SCDHHS sent Loving Care a letter advising that termination of her contract would be effective in seven (7) business days (attached hereto as Exhibit "D").

On May 9, 2017 Loving Care appealed the decision to terminate her contract to SCDHHS's Division of Appeals and Hearings. On June 8th and July 24th SCDHHS held hearings with regard to Loving Care's appeal. On August 16, 2017 Loving Care received a Final Administration Decision upholding termination of her contract. On September 13, 2017 Loving Care appealed that decision to the S.C. Administrative Law Court. By order, On April 17, 2018 the Administrative Law Court affirmed the Final Administration Decision. On May 9, 2018, Loving care appealed that decision to this court.

STANDARD OF REVIEW

South Carolina's Administrative Procedures Act (Act), S.C. Code Ann. § 1-23-310 et. seq. governs this appeal. § 1-23-380(5) of the Act sets forth the standard of review herein and provides in part:

> "The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

ARGUMENTS

The record in the instant case shows that the respondent terminated its contract with appellant on the ground that appellant breached the terms of their contract. Specifically, the contract was terminated because (1) respondent was unable to conduct a compliance survey at appellant's place of business and (2) appellant's review score exceeded four hundred (400).

I. IRREGULARITIES IN AGENCY HEARING PROCEDURE.

1. The Hearing Officer Erred in Denying Appellant's Motion to Terminate the Case Adversely to Respondent.

A.

At the initial hearing, appellant move to have the appeal terminated in her favor due to the absence of the reviewer for questioning as requested, the hearing officer denied the motion, stating that the burden was on appellant to request a continuance where the reviewer would not be available (R050:8-23). Appellant disagrees.

Whereas the reviewer was under the control of respondent, it was the responsibility of the respondent, not the appellant, to request a continuance if the reviewer would not be available and, thus, appellant's motion should have been granted.

Therefore, where respondent did not request a continuance on that basis, the hearing officer erred in not granting appellant's motion.

Further, any later testimony by the reviewer should be stricken from the record and deemed unavailable for review by this court, and any finding or conclusions based on her testimony should be regarded as unsupported by substantial evidence.

B.

As one of the grounds for terminating appellant's contract, respondent alleged that on two (2) occasions a reviewer attempted to conduct a survey at appellant's office and no one was there.

At the initial hearing appellant disputed that no one was at appellant's office the first time a survey was attempted. Appellant argued that she was there at that date and that the reviewer did not appear a Loving Care's place of business on that date because she could not locate it.

Appellant attempted to establish this as fact during the initial hearing but, the reviewer, Carolyn Lockhard, was not present at the initial hearing for questioning, despite appellant's request that she be there available for questioning.

Additionally, during the second hearing, when Ms. Lockhard was available for questioning, appellant was not able to establish that she was at her office the first time a survey was attempted because the hearing officer, at the first hearing, stated that he lacked jurisdiction to consider the issue where appellant did not appeal the ninety (90) days suspension imposed as a result of respondent's claim that no one was present the first two times reviews were attempted (R015:footnote 1). Therefore, appellant abandoned questions concerning the issue.

The hearing officer's decision to bi-furcate or suspend the initial June 8, 2017 hearing, after some witnesses had testified, and continue on July 24, 2017— resulting in two (2) hearings — was irregular, arbitrary and capricious, and prejudicial to appellant

where in the interim respondents and its witnesses had time to collude and tailor any new testimony based on previous questions and responses.

2. The Administrative Law Court Erred in Denying Appellant's Motion to Enter Default and Default Judgment.

In ruling on appellant's motion to enter default and default judgment, this court concluded that it was appellant's responsibility to find a qualified court reporter to produce a transcript of the hearing. Although appellant disagrees with the ruling, she respects and gives deference to the court's interpretation of its own rules.

However, appellant submits that, what makes sense is having the respondent arrange to have a court reporter present at its hearings — respondent bearing that cost. That way, (1) the appellant would be relieved of the burden of finding a court reporter, thereby preventing unnecessary delays in the appeal process, and (2) the appeal process would benefit, where both appellant and respondent would have transcripts prepared by the same court reporter, avoiding discrepancies therein.

II. SCDHHS LACKED SUFFICIENT GROUND(S) TO TERMINATE THE CONTRACT WITH LOVING CARE.

1.

As one of the grounds for terminating appellant's contract, respondent alleged that on two occasions a reviewer attempted to conduct a survey at appellant's office and no one was there. The progressive penalties for this type of violation is clear and unambiguous. Respondent's *Community Long Term Care Medicaid Provider Manual*

(CLTC) Section G. Compliance Review Process (R346:3-9) provides in part:

> "Onsite visits are un-announced. ... If the reviewer ... arrives at the provider's office to conduct a survey and no one is there, the following sanctions will be imposed:
> - First time – thirty (30) day suspension of new referrals
> - Second time – ninety (90) day suspension of new referrals
> - Third time – contract termination

Thus, where respondent, in the instant case, terminated appellant's contract after only the second occasion in which they were unable to conduct a survey due to no one being present at appellant's office, respondent, not appellant, breached the agreement.

2.

As the other ground for terminating appellant's contract, respondent alleges that appellant's review score exceeded four hundred (400). However, the progressive penalties for this type of violation is also clear and unambiguous:

CLTC Section G. Compliance Review Process (R344:31-36) provides:

> "Providers who have two (2) consecutive reviews that result in suspension of new referrals, will be terminated if the third consecutive review has a final score that would result in a suspension of new referrals (100 and above)."

Thus, where, respondent terminated appellant's contract after only *one* (1) failed review, which, in accordance with their agreement, should have resulted in suspension of new referrals, again, respondent, not appellant, breached their contractual agreement.

The administrative law judge concluded that the SCDHHS was justified in terminating their agreement with appellant where "substantial evidence in the record supports the Hearing Officer's decision to uphold the Department's decision to terminate the appellant's contract..." However, nothing in the record supports this conclusion.

The CLTC delineates the contractual agreement between appellant and respondent. While the contract allows the respondent to terminate the contract for a material breach or for failing to comply with their obligations under the contract, clearly and unambiguously the plain language of the agreement supports termination of appellant's contract only where there has been *either* three (3) occasions in which respondent was unable to conduct a survey *or* three (3) consecutive review scores that would result in suspension of new referrals.

No reasonable person of average intelligence would interpret the agreement as reading that violation of either on *two* occasions and violation of the other on *one* occasion in combination may result in termination of the contractual agreement, as did the administrative law judge in upholding the agency decision. As described in the CLTC, these are separate infractions, each with its own prescribed progressive penalties — termination being the ultimate penalty for each.

Therefore, where respondent wrongfully terminated appellant's contract after only two (2) occasions in which they were unable to conduct a survey and one (1) failed review, the administrative law judge's decision upholding the contract termination is irrational, arbitrary and capricious, and not supported by substantial evidence.

3.

S.C. Code Ann. Regs.126-400 thru 126-403 is entitled **ADMINISTRATIVE SANCTIONS AGAINST MEDICAID PROVIDERS.** Pursuant to section 126-403(F), a provider may be sanctioned for "Breach of the terms of the Medicaid provider agreement. This is the general ground cited for terminating appellant's contract.

However, S.C. Code Ann. Regs. 126-401 (A) & (B) provides that termination, as a sanction, may only be invoked in the event of a determination of abuse or fraud, respectively, with respect to the Medicaid Program.

Thus, where there has been no finding of abuse or fraud on the part of appellant, respondent lacked reason or authority to invoke any sanction(s) against appellant.

Furthermore, S.C. Code Ann. Regs. 126-402 provides factors to be considered in determining sanctions. Section 126-402 provides:

> "The factors to be considered in determining sanctions shall include, but not be limited to, the following:
> A. Seriousness of the offense(s);
> B. Extent of violation(s);
> C. History of prior violation(s);
> D. Prior imposition of sanction(s);
> E. Provider failure to obey program rules and policies as specified in the appropriate Provider Manual or other official notices.

In the instant case, respondent never considered these or any other factor(s) prior to terminating appellant's contract. Thus, the hearing officer's decision is not supported by substantial evidence.

4.

Notwithstanding the above arguments, in his Findings of Fact the hearing officer stated that, where the appellant and respondent disagreed as to whether the previous version of the training module or the present version should be used in deciding issues raised by appellant, "I gave this document little weight in arriving at my decision" (R015:9-11).

Appellant finds this statement to be preposterous where the training module reflects the CLTC, which provides and explains the requirements of participation in Medicare as a provider of services. Whether appellant or petitioner complied with these requirements is at issue in this case. On this statement alone, the hearing officer's decision in this case should be reversed as arbitrary and capricious. A decision is arbitrary or capricious when it is made at one's pleasure without adequate determining principles, or is governed by no fixed rules or principles. *Deese v. S.C. State Bd. of Dentistry,* 332 S.E.2d 539; 1985 S.C. App. LEXIS 403.

Where the hearing officer chose to review appellant's complaint in light of the current version of the training manual and not the previous version, pursuant to which appellant was trained, any finding of facts or conclusions adverse to appellant, based on the current manual, should be reversed.

5.

In both his findings of fact and conclusions of law the hearing officer found and concluded that on two occasions respondent attempted to make surveys at petitioner's place of business and both times were unable to gain entry as no one was present (R015:3). The hearing officer arrived at this finding and conclusion despite petitioner's statement that she was present at her place of business in January and her suggestion that perhaps the surveyor was unable to locate her place of business.

This finding and conclusion is without evidentiary support, especially in light of appellant's arguments in Irregularities in Agency Hearing Procedure, I. (1)(B), supra.

In addition, in support of this finding, the hearing officer noted that appellant did not appeal respondent's decision to impose a ninety (90) day suspension of new client referrals and, thus, he lacked jurisdiction to consider it. Appellant disagrees.

The fact that appellant did not appeal the suspension is insufficient reason for the hearing officer to conclude that he lacked jurisdiction to consider whether appellant was absent from her place of business in January, where respondent later used the same allegation to terminate appellant's contract.

Further, where respondent had already penalized appellant via ninety (90) days suspension for her alleged absence, it is unjust for them to use the same facts later to terminate appellant's contract. Nothing in CLTC permits them to do this. Therefore, the hearing officer's decision is not supported by substantial evidence.

Finally, where the hearing officer made this finding and conclusion without allowing appellant to question the reviewer concerning this issue, he unfairly deprived appellant of the opportunity to disprove her allegation.

6.

Concerning the survey at issue in this case, appellant first takes issue with the terminology used by the hearing officer in describing respondent's grading process.

When conducting a survey, a certain number of points are assessed against a provider for findings of "deficiencies" not "noncompliance". Regardless, the review was not properly conducted, leading the hearing officer to arrive at an incorrect decision.

In properly conducting a compliance review, the reviewer brings a list of computer-generated files available for review. Upon arriving at the provider's office, the

reviewer asks the provider for those files she has selected for review. The reviewer then scrutinizes the files for compliance with respondent agency's guideline, regulations, and rules and inputs each finding of deficiency into the agency's scoring software that generates a numerical score (R015:18-22).

At the conclusion of the review, the reviewer gives the provider a copy of the review for her signature, as proof that a review was conducted. The proper compliance review process was not followed in the instant case.

In conducting the first and only unannounced compliance survey of appellant, the reviewer brought with her twenty (21) files for review. She first asked for six (6) client files. Of those six client files, two were terminated by the respondents, one chose not to continue with Loving Care, and the other three were deceased. She then asked for the files of six employees (subcontractors). Of those six, three (3) were terminated by appellant and the other three were put on "inactive" status by appellant.

The reviewer declined to review any of the other thirty (30) remaining files (R164:15 - R165:4), thereby not conducting a fair review, resulting in unfair prejudice to appellant whereby incorrect findings of deficiencies were inputted, resulting in an incorrect numerical score being generated, and, therefore, appellant's contract being terminated.

As described, supra, the respondents' way of showing that a review was conducted is by having appellant sign the summary report. In the instant case, respondent's summary report is not signed by appellant because the reviewer did not review any files in order to input any deficiencies whereby a summary report could be

generated. It defies logic how this review could generate a final score of 906 where the reviewer did not review any of the available files!

The hearing officer's decision is arbitrary and capricious, where he made factual findings or conclusions related to the above-described irregular and unfair manner in which this survey was conducted. The appellant raised this issue at the hearing. (R162:20 – R163:20).

CONCLUSION

Therefore, based on the above discussion, the administrative law judge's decision should be reversed and appellant's contract with respondent reinstated. Appellant should be awarded the costs of appealing termination of her contract and cost associated with loss of client participation for the term of her contract termination.

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