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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2013-CA-000683-MR

CONTINUING CARE HOSPITAL
AT SAINT JOSEPH EAST — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 09-CI-00088

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY
SERVICES, DEPARTMENT FOR MEDICAID
SERVICES — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; TAYLOR AND VANMETER, JUDGES.

TAYLOR, JUDGE: Continuing Care Hospital at Saint Joseph East (CCH) brings this appeal from a March 19, 2013, Opinion and Order of the Franklin Circuit Court affirming a Final Order of the Secretary of the Commonwealth of Kentucky, Cabinet for Health and Family Services, Department for Medicaid Services,

denying CCH's administrative appeal of its per diem Medicaid payment rate. We affirm.

CCH was established in 2002 as a long-term acute care hospital operated by Saint Joseph East in Lexington, Kentucky. CCH was licensed in Kentucky and was a participating provider in the Kentucky Medicaid program. The state agency charged with administering the Medicaid program is the Commonwealth of Kentucky, Cabinet for Health and Family Services, Department for Medicaid Services (Cabinet). Kentucky Revised Statutes (KRS) 194A.030.

In Kentucky, Medicaid reimbursements for long-term acute care hospitals are calculated upon a "cost-based" system. Premised upon CCH's projected costs, the Cabinet initially determined a temporary per diem reimbursement rate of $1,015 per patient. CCH filed its first full-year cost report for the fiscal year ending August 31, 2003, pursuant to regulatory procedure, the report was subsequently audited.

On August 25, 2006, the Cabinet sent written notice to CCH that based upon the 2003 audit, its per diem rate had been decreased from $1,015 per patient to $910.15. The decrease was retroactive to February 27, 2002. The notice from the Cabinet decreasing CCH's per diem rate also informed CCH it could appeal the rate determination. CCH received the written notice from the Cabinet on August 29, 2006, and subsequently requested a dispute resolution meeting pursuant to 907 Kentucky Administrative Regulations (KAR) 1:671, Section 8. A

dispute resolution meeting was conducted, and the decreased per diem rate was upheld.

As a result, CCH requested an administrative hearing to challenge the reduction in the per diem rate. On November 24, 2008, the Administrative Law Judge (ALJ) issued a Recommended Order denying relief to CCH. Therein, the ALJ determined:

> An administrative appeal is available for calculation of errors in the establishment of the per diem rate. Pursuant to Section 20 of the manual [*Medicaid Reimbursement Manual for Hospital Inpatient Services, November 2003 Edition*, Section 20, p. 20.1] any such appeal takes place under 907 KAR 1:671. *Id.* at 20.1.
>
> 907 KAR 1:671 affords providers an appeal right for certain issues. In particular, 907 KAR 1:671 Section 9(4) affords an administrative appeal in the following situations:
>
> > (a) If a provider is a nursing facility as defined in 42 U.S.C. 1396r(a), or is an intermediate care facility for the mentally retarded as defined in 42 U.S.C. 1396d(d), and participation is terminated regardless of reason;
> >
> > (b) A provider alleges discrimination by the department as prohibited by 42 U.S.C. 2000d;
> >
> > (c) The department imposes a sanction;
> >
> > (d) The department requires repayment of a noncourt-established overpayment or noncourt-ordered restitution; or

(e) A provider's payments are being withheld in accordance with Section 4 of this administrative regulation.

An administrative agency only has the jurisdiction to reasonably and effectively carry out the express powers granted to it. Therefore, it follows that the undersigned only has the jurisdiction to hear appeals of matters that are specifically enumerated in the regulations. In this instance, the undersigned does not have jurisdiction to hear the Appellant's appeal. (Citations omitted.)

The Appellant has challenged the methodology under which the reimbursement rate was calculated. Such appeals are specifically prohibited under the *Medicaid Reimbursement Manual for Hospital Inpatient Services, November 2003 Edition*, Section 20, p. 20.1 and 907 KAR 1:617 does not provide for such appeals. Therefore, this matter must be dismissed as not appealable.

Appellant's other arguments need not be addressed. However, it should be noted that 907 KAR 1:671 Section 8(1) states in order for someone to request a DRM [dispute resolution meeting] the request . . ., "**shall be in writing and mailed to and received by the branch manager that initiated the department-written determination within thirty (30) calendar days of the date the notice was received by the provider**." The Appellant argues that by submitting the DRM request by fax on the 30th properly perfects the appeal and therefore, the appeal can move forward. Under the plain meaning of 907 KAR 1:671 Section 8(1), an appeal must be submitted in writing and that writing received by the branch manager on the 30th day. The plain meaning of the regulation does not allow for the appeal to be perfected by fax. (Emphasis added.)

CCH sought review of the ALJ's Recommended Order with the Secretary of the Cabinet. By Final Order dated December 19, 2008, the Secretary affirmed the ALJ's Recommended Order and denied CCH relief.

CCH subsequently filed an appeal to the Franklin Circuit Court. Therein, CCH challenged the methodology utilized to calculate the per diem rate and argued that such challenges are allowed pursuant to KRS Chapter 205 and 907 KAR 1:671. CCH also argued that 907 KAR 1:013 was unconstitutional. By Opinion and Order entered March 19, 2013, the circuit court affirmed the Cabinet's Final Order, including the constitutionality of 907 KAR 1:013. The circuit court also agreed with the Cabinet that CCH failed to timely request a dispute resolution meeting under 907 KAR 1:671, Section 8(1). This appeal follows.

CCH contends that the circuit court erred by affirming the Cabinet's Final Order of March 19, 2013. CCH specifically asserts that the circuit court erred by determining CCH did not timely request a dispute resolution meeting pursuant to 907 KAR 1:671, Section 8. We disagree.

907 KAR 1:671, Section 8 provides, in relevant part:

> Resolution of Provider Disputes Prior to Administrative Hearing. (1) If a provider disagrees with a Medicaid determination with regard to an appealable issue as provided for in Section 9 of this administrative regulation, the provider may request a dispute resolution meeting. **The request shall be in writing and mailed to and received by the branch manager that initiated the department-written determination within thirty (30) calendar days of the date the notice was received by**

> **the provider.** The department shall not accept or honor a request for administrative appeals process, or a part thereof, that is filed by a provider prior to receipt of the department-written determination that creates an administrative appeal right under this administrative regulation. (Emphasis added.)

It is well-established that administrative regulations directed toward controlling procedural aspects of a case (e.g., those controlling the "flow of cases" and those concerned with maintaining "an orderly appellate process") require strict compliance. *See Jenny Wiley Health Care Center v. Com.*, 828 S.W.2d 657, 661 (Ky. 1992). The terms of 907 KAR 1:671, Section 8(1) are clear – the request for a dispute resolution meeting "shall be in writing and mailed and received by" the department within thirty calendar days of notice being received. Thus, it is mandatory to both mail the request and that the mailed request be received within thirty days.

In this case, it is undisputed that CCH received the Cabinet's notice on August 29, 2006. CCH then mailed its request for a dispute resolution meeting to the Cabinet on day thirty, September 28, 2006. However, the mailed request was not received by the Cabinet until September 29, 2006, one day late. CCH also faxed a copy of the request to the Cabinet on September 28, 2006. But, a faxed copy of the request does not strictly comply with the procedural mandate of 907 KAR 1:671, Section 8. As set forth above, 907 KAR 1:671, Section 8(1) requires CCH to mail the request and requires that the mailed request be received by the Cabinet within thirty days. It is undisputed that the Cabinet did not receive CCH's

mailed request within thirty days. Accordingly, we believe the Cabinet and the circuit court properly concluded that CCH failed to timely request a dispute resolution meeting and, thus, is not entitled to relief.

CCH also contends that the circuit court erred by determining that 907 KAR 1:013 was constitutional. Specifically, CCH asserts that 907 KAR 1:013 is unconstitutional for vagueness, arbitrariness, and internal inconsistencies. We disagree and adopt the circuit court's thorough analysis and erudite decision upholding the constitutionality of 907 KAR 1:013:

> [T]his Court finds the regulation has a clear purpose, to help determine the per diem rate for Medicaid reimbursement, with specific standards and procedures to be followed in determining that rate. Here the Court finds the agency gave consideration and valid reasoning for this regulation, and the regulation is consistent with interpretation of the agency's governing statute. That statute gives the agency authority to govern Medicaid reimbursements. This Court gives the agency deference in interpreting its organic statute and accordingly affirms the constitutionality of [907 KAR 1:013]. Medicaid reimbursement is based on the statute and regulations, and there is no property right to a preordained reimbursement rate. Under the statute and regulations, the Cabinet has a right to audit the actual costs incurred and to adjust the reimbursement rates accordingly. While there may be grounds for reasonable dispute as to whether the Cabinet's adjustment of the reimbursement rates is correct, there is no basis to argue that the statute and regulation are unconstitutional.
>
> Because the final administrative ruling of the Secretary here, holding that reimbursement methodology cannot be administratively appealed has been AFFIRMED, the Plaintiff cannot prevail unless it demonstrates that the Cabinet's actions violate constitutional standards. CCH is unable to carry that

> heavy burden. While reasonable persons may disagree about the Cabinet's reimbursement methodology in this case, there has been no showing that the methodology is vague or its application so arbitrary that it violates constitutional standards. The Court finds that the Cabinet's actions reflect a reasonable attempt to fix actual costs based on the available data, and CCH's claims of unconstitutional action cannot be sustained.

We agree with the circuit court that CCH failed to demonstrate that 907 KAR 1:013 is unconstitutional.

We view CCH's remaining contentions of error as moot or without merit.

In sum, we hold that the circuit court properly affirmed the Final Order of the Secretary.

For the foregoing reasons, the Opinion and Order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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