

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0367**

In the Matter of the Surveillance and Integrity Review Appeal by
Smart Choice Health Care Corporation and Farah Jama Mohamed,
Relators,

vs.

Minnesota Department of Human Services,
Respondent.

**Filed September 19, 2022
Affirmed in part and reversed in part
Slieter, Judge**

Department of Human Services
File No. 37138

Anna M. Koch, V. John Ella, Trepanier MacGillis Battina, P.A., Minneapolis, Minnesota;
and

David J. Holt, Holt Law, LLC, St. Paul, Minnesota (for relators)

Keith Ellison, Attorney General, R.J. Detrick, Assistant Attorney General, St. Paul,
Minnesota (for respondent)

Considered and decided by Bjorkman, Presiding Judge; Slieter, Judge; and Bryan,
Judge.

NONPRECEDENTIAL OPINION

SLIETER, Judge

In this administrative appeal, relators challenge the commissioner of human services' final decision ordering recovery from relators of a \$424,564.20 "overpayment"

and suspending relators from participating as personal care assistance providers for one year. Relators argue that (1) the commissioner legally erred and acted arbitrarily and capriciously by concluding that relators committed “abuse” and, consequently, seeking a monetary recovery from corporate relator, and (2) the commissioner erred in suspending relators from participating as personal care assistance providers for one year.

Agency rules define “abuse” to include incomplete or missing documentation and obligate the commissioner to seek a monetary recovery of “overpayment” when a vendor commits “abuse.” And Minnesota law permits suspension of the corporate relator but, as the commissioner concedes, because the department failed to provide notice to the individual relator prior to its suspension sanction, his suspension from participating in personal care assistance was based on unlawful procedure. Therefore, we affirm in part and reverse in part.

FACTS

Individual-relator Farah Jama Mohamed is the sole shareholder of corporate-relator Smart Choice Healthcare Corporation (Smart Choice). Smart Choice employs personal care assistants (PCAs), is licensed by respondent Minnesota Department of Human Services (DHS), and participates in Minnesota Health Care Programs (MHCP) to provide personal care services to its clients through the PCAs that it employs. Smart Choice is defined as a “vendor” and is subject to DHS rules. *See* Minn. R. 9505.2165, subp. 16a (stating that a “vendor” includes a personal care provider).

First Investigation

As the result of an investigation by DHS's surveillance and integrity review section (SIRS), which found Smart Choice had some inaccurate billing and timesheet practices, SIRS required Smart Choice to enter into a stipulated provider agreement (SPA). SIRS required Smart Choice to comply with 20 terms as conditions for continued participation in MHCP, including, for purposes of our review, developing internal controls (term 10), maintaining care plans (term 15), submitting proper billings (term 17), and completing employee training (term 18).

Second Investigation

On February 27, 2020, SIRS commenced a second investigation of Smart Choice. SIRS investigated PCA services provided by Smart Choice from February 1, 2017, through February 29, 2020, and discovered that the care plans for six care recipients¹ were missing required information.

Based on its investigation, DHS determined that these six care plans did not comply with term 15. Smart Choice also acknowledged that it submitted inaccurate time sheets for one recipient's care in which Smart Choice claimed that it provided 21.75 hours of care while the recipient was actually hospitalized, which violated term 17. DHS also determined that Smart Choice violated term 10 by failing to develop internal controls to ensure that PCA time records submitted for clients reflect the actual care provided by the

¹ Smart Choice serves approximately 163 clients.

PCAs. Lastly, DHS determined that Smart Choice personnel did not attend required in-person training, which violated term 18.

Sanctions

As the result of its investigation, DHS sought monetary recovery from Smart Choice in the amount of \$424,564.20, which represented the total payments DHS made to Smart Choice for care provided to the six recipients from 2018 to 2020.² On June 30, 2020, DHS mailed a notice of “overpayment” and suspension to Smart Choice. The notice required Smart Choice to repay the \$424,564.20 overpayment. The notice also provided that Smart Choice and Mohamed were suspended from providing PCA services for two years.

Administrative Law Judge (ALJ) Determination

Smart Choice and Mohamed administratively appealed DHS’s decision. During the evidentiary hearing before the ALJ, Mohamed testified that information was missing from the care plans but that he took immediate remedial action when DHS notified him of the deficiencies. He explained, however, that the information missing from the care plans was, nonetheless, readily available in other documents such as the recipients’ initial intake application forms, emergency contact sheets, and other documents which included phone numbers for a nurse, social worker, and Mohamed.

The ALJ concluded that Smart Choice’s “care plans in this matter did not meet the standards required by Minn. Stat. § 256B.0659, subd. 7, and term 15 of the SPA,” and DHS “established it has the authority, but is not required, to recover an overpayment of

² The total also included the amount billed for the recipient who Smart Choice claimed to provide care for while the recipient was actually hospitalized.

\$424,564.20 in connection with amounts paid to [Smart Choice] for personal care assistance services.”

With respect to the suspensions, the ALJ concluded that DHS “failed to establish that the nature, severity and chronicity of [Smart Choice]’s conduct supports a two-year suspension.” The ALJ noted that although Smart Choice’s “conduct in this matter was of a serious nature, and chronic, [it was] not severe, because it had no impact on the health and safety of any recipients, and only a very minor impact on a Medicaid payment, which [Smart Choice] has not disputed.” Lastly, the ALJ concluded that DHS “failed to establish a legal or factual basis to suspend [Mohamed] . . . for a two-year period.”

The ALJ recommended that the commissioner rescind the overpayment and both suspension orders and recommended that the commissioner impose an \$84,912.84 fine pursuant to Minn. Stat. § 256B.064, subd. 2(f) (2020).³

In February 2022, the commissioner rejected the ALJ’s recommendations, affirmed the earlier determination that Smart Choice is responsible for the \$424,564.20 “overpayment,” and reduced Smart Choice’s and Mohamed’s individual suspensions to one year each. This certiorari appeal follows.

DECISION

When reviewing an agency decision in a contested case, we may affirm, remand, reverse, or modify the agency’s decision. Minn. Stat. § 14.69 (2020). We may reverse or modify the decision

³ The ALJ also recommended that the commissioner order Smart Choice to repay the overpayment for services to the one recipient who was hospitalized.

if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:

- (a) in violation of constitutional provisions; or
- (b) in excess of the statutory authority or jurisdiction of the agency; or
- (c) made upon unlawful procedure; or
- (d) affected by other error of law; or
- (e) unsupported by substantial evidence in view of the entire record as submitted; or
- (f) arbitrary or capricious.

Id. Relators have the burden of proof when challenging an agency decision. *In re Excelsior Energy, Inc.*, 782 N.W.2d 282, 289 (Minn. App. 2010).

I. The commissioner did not legally err in determining that Smart Choice must repay \$424,564.20.

We first note that the phrase “overpayment” in this context is the product of statutory definition. *See* Minn. Stat. § 256B.064, subd. 1a (2020). It is undisputed that, with the one exception never contested by the relators (overpayment due to inaccurate billing), all services billed by Smart Choice were provided to the recipients. The commissioner’s “overpayment” decision was based on the determination that Smart Choice’s failure to include all required information in the recipients’ care plans constituted “abuse” as defined by DHS rules. And that DHS rules require the commissioner to obtain monetary recovery when the overpayment is the result of abuse. Minn. R. 9505.2215, subp. 1(A) (2021).

The crux of Smart Choice’s argument is that the commissioner erred in determining that Smart Choice’s conduct constituted “abuse.”

This issue we are asked to resolve involves the interplay of Minnesota statutes and DHS rules. The interpretation of statutes and administrative rules are questions of law,

which we review *de novo*. *J.D. Donovan, Inc. v. Minn. Dep't of Transp.*, 878 N.W.2d 1, 4-5 (Minn. 2016). Although we generally defer to an agency's interpretation of its own rules when the language is ambiguous, we need not give any deference when the language is unambiguous. *St. Otto's Home v. Minn. Dep't of Hum. Servs.*, 437 N.W.2d 35, 40 (Minn. 1989). We “read and construe a statute as a whole and must interpret each section in light of the surrounding sections to avoid conflicting interpretations.” *See Am. Fam. Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000). Neither party argues that the applicable statutes or rules are ambiguous. We agree that the statutes and rules are unambiguous, and thus, we review them without deference to agency interpretation.

Minnesota Statutes section 256B.064, subdivision 1c(a) (2020), provides that “[t]he commissioner may obtain monetary recovery from a vendor who has been improperly paid . . . as a result of [abuse].” A DHS rule provides that “[t]he commissioner *shall* seek monetary recovery [] from a vendor, if payment for a recipient's health service under a program was the result of fraud, theft, *abuse*, or error on the part of the vendor.” Minn. R. 9505.2215, subp. 1 (2021) (emphasis added). “Abuse” is not defined by statute, but is defined by DHS rule in Minn. R. 9505.2165, subp. 2(A) (2021).

The rule first defines “abuse” to mean

in the case of a vendor, a pattern of practices that are inconsistent with sound fiscal, business, or health service practices, and that result in unnecessary costs to the programs or in reimbursements for services that are not medically necessary or that fail to meet professionally recognized standards for health service.

Minn. R. 9505.2165, subp. 2(A). The second part of the rule identifies 22 practices that “are *deemed* to be abuse by a vendor.” *Id.*, subp. 2(A)(1)-(22) (emphasis added). Therefore, if one of these 22 practices exists, it constitutes abuse, irrespective whether the first definition is met. *See First Nat’l Bank of Mankato v. Wilson*, 47 N.W.2d 764, 767 (Minn. 1951) (discussing that “in our statutes the word ‘deemed’ appears to be treated as creating a conclusive presumption”); *see also Black’s Law Dictionary* 523 (11th ed. 2019) (defining “deem” as “[t]o treat (something) as if (1) it were really something else, or (2) it had the qualities that it does not have”).

One such “deemed” practice is “failing to develop and maintain health service records as required under part 9505.2175.” Minn. R. 9505.2165, subp. 2(A)(7). And the record shows that Smart Choice undisputedly failed to properly maintain care plans for six recipients. These care plans were missing birthdates, addresses, telephone numbers, emergency telephone numbers, procedures and descriptions of measures to identify and address safety issues, backup staffing plans, signatures and dates by the recipients or their responsible persons, and signatures and dates by a qualified professional. Therefore, the record supports that Smart Choice’s conduct meets the definition of “abuse” as set forth in Minn. R. 9505.2165, subp. 2(A)(7). *Id.*; *see also* Minn. Stat. § 256B.0659, subd. 7 (2020) (listing information required to be in care plans).

Smart Choice argues that, even if a practice is “deemed abuse,” the commissioner must also determine that the practice “result[ed] in unnecessary costs to the programs or in reimbursements for services that are not medically necessary or that fail to meet professionally recognized standards for health service.” Minn. R. 9505.2165, subp. 2(A).

Failing to do so, Smart Choice contends, was a legal error. For the reasons we have already explained, we are not persuaded.

Because the rule unambiguously identifies 22 practices which “are deemed to be abuse by a vendor,” and one of these identified practices is the basis for the commissioner’s conclusion, she did not err. And, consequently, the commissioner is not required to undertake an analysis pursuant to the first definition of abuse because an instance of abuse has been conclusively shown to have occurred pursuant to the second part of the rule.

Smart Choice also argues that, even if abuse occurred, the commissioner was prohibited from obtaining a monetary recovery because Minnesota law explicitly authorizes the commissioner to impose a fine pursuant to Minn. Stat. § 256B.064, subd. 2(f) (2020) for “failure to fully document services according to standards in this chapter and Minnesota Rules, chapter 9505.” Additionally, Smart Choice argues, that the commissioner’s decision to obtain monetary recovery is arbitrary and capricious. Neither argument is persuasive.

The applicable statute provides that “[t]he commissioner *may impose* sanctions against a vendor of medical care for any of the following: (1) fraud, theft, or *abuse* in connection with the provision of medical care to recipients of public assistance.” Minn. Stat. § 256B.064, subd. 1a(a)(1) (emphasis added). One such sanction is that “[t]he commissioner *may order* a vendor to forfeit a fine for failure to fully document services according to standards in this chapter and Minnesota Rules, chapter 9505.” Minn. Stat. § 256B.064, subd. 2(f) (emphasis added). And, as we previously noted, “[t]he commissioner *may obtain* monetary recovery from a vendor who has been improperly

paid . . . as a result of [abuse].” Minn. Stat. § 256B.064, subd. 1c(a) (emphasis added). But nothing in this statute prohibits the commissioner from obtaining monetary recovery from a vendor in addition to seeking a fine.

We acknowledge this result seems harsh given the undisputed fact, as we previously noted, that Smart Choice provided all the services to its clients for which it was paid. However, because the definition of “overpayment” is a product of statutory and agency rule definitions, it is beyond our authority to rule otherwise.⁴ *Lake George Park, L.L.C. v. IBM Mid-Am. Emps. Fed. Credit Union*, 576 N.W.2d 463, 466 (Minn. App. 1998) (“This court, as an error correcting court, is without authority to change the law.”), *rev. denied* (Minn. June 17, 1998).

Therefore, it is neither arbitrary nor capricious for the commissioner to obtain monetary recovery, the commissioner did not legally err in determining that Smart Choice must repay \$424,564.20, and we affirm the commissioner’s decision.

II. The commissioner did not err by suspending Smart Choice from providing PCA services for one year but did err with respect to Mohamed’s suspension.

Minnesota law provides that “[t]he commissioner may impose sanctions against a vendor of medical care for . . . abuse in connection with the provision of medical care to

⁴ We note that relators did not argue that Minn. R. 9505.2215, subp. 1(A), which includes the mandatory term “shall,” exceeds the scope of DHS’s authority pursuant to Minn. Stat. § 256B.064, subd. 1c(a), which includes the permissive term “may.” *See generally* Minn. Stat. § 14.45 (2020) (“[T]he court shall declare the rule invalid if it finds that it . . . exceeds the statutory authority of the agency”); *see also Vang v. Comm’r of Pub. Safety*, 432 N.W.2d 203, 206 (Minn. App. 1988) (“An administrative regulation is valid only to the extent it is consistent with the statutory authority pursuant to which it is promulgated.”), *rev. denied* (Minn. Dec. 30, 1988).

recipients of public assistance.” Minn. Stat. § 256B.064, subd. 1a(a). “The commissioner may impose . . . sanctions for the conduct described in subdivision 1a . . . [including] suspending or terminating participation in the program, or imposition of a fine under subdivision 2, paragraph (f). *Id.*, subd. 1b (2020).

A. Suspension of Smart Choice

“When imposing sanctions under this section, the commissioner shall consider the nature, chronicity, or severity of the conduct and the effect of the conduct on the health and safety of persons served by the vendor.” *Id.*; *see also* Minn. R. 9505.2205 (2021) (requiring the commissioner to consider the nature and history of the abuse).

Smart Choice argues that the commissioner legally erred in determining that Smart Choice’s conduct supported a one-year suspension.

The commissioner, in support of its suspension decision, adopted the ALJ’s findings:

In deciding to impose the suspension, the NSC⁵ panel considered the nature, severity, and chronicity of the SPA and care plan violations. The nature of the violations raised concerns because most of the documentation problems involved care plans and this type of violation presents risks to the patient. The care plan violations were considered severe because inadequate care plans present the possibility that a patient is not receiving needed cares, that cares are not being updated as the patient’s needs change, that it is not clear to the PCA, the [qualified professional], and the patient or the [responsible person] just what cares are needed. When care providers are unaware what cares are needed, that can present a risk to the patient’s health and safety. Further, the group deemed the violations to be particularly severe because Appellant had been allowed to enter into an SPA and to correct

⁵ Nature, severity, and chronicity.

previous violations, but then violated the SPA. Finally, the group considered that the violations were chronic because of the eleven patient files examined, ten had incomplete care plans over a two-year period.⁶

Smart Choice argues that a suspension is not warranted because the services provided to the six recipients were necessary and their “missing” care information, though not in their care plans, was readily available in other documents at their places of residence. We agree that the record does not show that actual harm occurred to the recipients. But, as previously noted, the statute and rules plainly grant authority to the commissioner to suspend a vendor upon a finding of abuse. And the commissioner relied upon evidence that explained the nature, chronicity, and severity of Smart Choice’s failure to have six completed case plans, which also violated the SPA. Minn. Stat. § 256B.064, subd. 1b; *see also* Minn. R. 9505.2205. We affirm the commissioner’s suspension of Smart Choice.

B. Suspension of Mohamed

Mohamed argues, and the commissioner concedes, that his suspension was improper and must be reversed. Except in situations not applicable here, “neither a monetary recovery nor a sanction will be imposed by the commissioner without prior notice and an opportunity for a hearing.” Minn. Stat. § 256B.064, subd. 2(a) (2020). Minnesota law further provides that “[t]he notice required under subdivision 2 shall be served by certified mail at the address submitted to the department by the vendor.” *Id.*, subd. 4(a) (2020). Contested-case rules also require notice of the hearing, and an order for hearing,

⁶ The commissioner subsequently relied solely on six care plans as being incomplete.

including “[a] statement of the allegations or issues” sent to all parties. Minn. R. 1400.5600, subp. 2D (2021).

The commissioner concedes that this did not occur with respect to Mohamed, and the record supports this concession. Accordingly, the suspension of Mohamed is reversed because the decision was “made upon unlawful procedure.” Minn. Stat. § 14.69(c).

Affirmed in part and reversed in part.