In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-21-00015-CV

IMAGE API, LLC, APPELLANT,

V.

DR. COURTNEY PHILLIPS, EXECUTIVE COMMISSIONER OF THE TEXAS HEALTH AND HUMAN SERVICES COMMISSION, APPELLEE

On Appeal from the 459th District Court
Travis County, Texas
Trial Court No. D-1-GN-18-005950, Honorable Amy Clark Meachum, Presiding

March 11, 2022

MEMORANDUM OPINION

Before QUINN, CJ., and PIRTLE and DOSS, JJ.

This appeal concerns whether the Texas Health and Human Services Commission has an unlimited time within which to audit the funds paid entities which provide it Medicaid administrative services. Image API, Inc. purports to be one such entity. That is, it contracted with the Commission to provide document processing, i.e., mailroom and scanning services. That contract was renewed over the years. Eventually, the Commission decided to audit the compensation paid Image. The audit resulted in it

demanding from Image the repayment of over $400,000. Image objected and sued its executive commissioner, Dr. Courtney Phillips, in her official capacity, for engaging in ultra vires conduct.[1] The conduct involved the Commission's attempt, through the commissioner, to conduct what Image characterized as belated or unlawful audits. Allegedly, they were so because they were not conducted within the time prescribed by statute. The Commission moved, via a plea to the jurisdiction, to have the proceeding dismissed under the doctrine of sovereign immunity. So too did it move for summary judgment on similar grounds. Image responded with its own motion for partial summary judgment. The trial court denied both the plea to the jurisdiction and Image's summary judgment motion. It granted the Commission's summary judgment motion, though. Both parties appealed. Image avers that the trial court erred in granting the Commission's summary judgment, while the Commission believes it erred in denying its plea to the jurisdiction. We reverse in part.[2]

Framing the Dispute

At the risk of oversimplification, the dispute involves two questions. The first is whether the services provided by Image come within § 32.0705(a) of the Texas Human Health and Service Code. The latter states as follows: "In this section, 'Medicaid contractor' means an entity that . . . is not a health and human services agency as defined by Section 531.001, Government Code; and . . . under a contract with the commission or otherwise on behalf of the commission, performs one or more administrative services in

[1] We recognize that the suit was against the commissioner in her official capacity but, nonetheless, reference the Commission as the defendant in this opinion.

[2] Because this appeal was transferred from the Third Court of Appeals, we are obligated to apply its precedent when available in the event of a conflict between the precedents of that court and this Court. *See* TEX. R. APP. P. 41.3.

relation to the commission's operation of Medicaid, such as claims processing, utilization review, client enrollment, provider enrollment, quality monitoring, or payment of claims." TEX. HUM. RES. CODE ANN. § 32.0705(a). If the party is a Medicaid contractor, then a different subsection provides that the Commission is obligated "to perform annual independent external financial and performance audits of any Medicaid contractor used in the commission's operation of Medicaid." *Id.* § 32.0705(b). Image contends that it and its services meet the description of a Medicaid contractor; the Commission disputes that.

The second question entails the time period within which that audit must occur if Image is such a contractor. Pertinent statute says that (1) the Commission "shall . . . ensure that . . . to the extent possible, audits under this section are completed ***in a timely manner***," *id.* § 32.0705(b)(3) (emphasis added); and (2) "[a]n audit required by this section must be completed ***before the end of the fiscal year immediately following the fiscal year for which the audit is performed***." *Id.* § 32.0705(d) (emphasis added). The parties dispute whether the "timely manner" period controls or the "before the end of the fiscal year" period does. So too do they argue about whether the latter period is actually mandatory or merely directory.

Answering the First Question

Is Image a "Medicaid contractor"? The standard of review we apply is discussed in *Alamo Heights Indep. School Dist. v. Clark*, 544 S.W.3d 755, 770–71 (Tex. 2018). Upon applying it, we conclude that Image is correct.

Again, the Commission contracted with Image to perform document processing. That entailed the collection of mail sent to the Commission, scanning items susceptible to scanning into a digital format, and monitoring or managing the way in which both were

done. Once digitized, though, another entity would forward the items to appropriate departments within the Commission. One such department operated the Medicaid program for Texas. Other departments receiving the fruits of Image's work administered programs unrelated to Medicaid. That was and is undisputed.

Whether the receipt and digitization of the mail coupled with the supervision of the means by which that was done fall within the penumbra of "administrative services in relation to the commission's operation of Medicaid" is determinative. Needless to say, our legislature did not expressly define the quoted passage. Thus, we are left to derive what the legislature intended through assigning the words their ordinary meaning. *See* TEX. GOV'T CODE ANN. § 312.002(a) (stating that "words shall be given their ordinary meaning" when construing statutes). Our effort begins with "administrative services."

Common parlance ascribes to the noun "services" such meanings as "the occupation or function of serving" and "the work performed by one that serves." *See, e.g.*, *Services*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003). In turn, the word "administrative," when used as an adjective modifying a noun, has been ascribed definitions such as "having to do with overseeing the 'office-y' things," such as "paper-work," *Vocabulary.com*; "carrying out duties and responsibilities" like "a secretary" or "doing filing," *Yourdictionary.com*; "organizing and supervising an organization or institution, *CollinsDictionary.com*; or "relating to administration or an administration," *Administrative*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY. To that we add this Court's earlier interpretation of the word. We likened it to the performance of "ministerial" functions. *Mauritz v. Schwind*, 101 S.W.2d 1085, 1090 (Tex. Civ. App.—Amarillo 1937, writ dism'd w.o.j.) (quoting 2 C.J.S. p. 56 and stating "[a]dministrative is defined as follows:

[c]ommonly the word has been defined as ministerial; pertaining to administration, particularly, having the character of executive or ministerial action; and, when particularly applied to official duties connected with government, executive, a ministerial duty; one in which nothing is left to discretion"). Combining the two words and ordinary meanings assigned them leaves us interpreting the "administrative services" as encompassing "office-y" type work of a ministerial nature such as that done by a secretary. Deriving and implementing a procedure for gathering mail and digitizing it for viewing by others while assuring the efficaciousness of that process describes such "office-y" type of work. Simply put, Image provided "administrative services" to the Commission.

Next, we note that "office-y" work in question has to be "in relation to the commission's operation of Medicaid." No doubt, the passage "in relation to" carries with it a rather broad meaning in common usage. Such was shown true when courts dealt with it in other settings. For instance, in *Western Marketing v. AEG Petroleum, LLC*, 616 S.W.3d 903 (Tex. App.—Amarillo 2021, pet. denied), debate arose regarding the phrase "relates to" as used in an earlier version of the Texas Citizen's Participation Act. TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a) (permitting a defendant to seek dismissal of a legal action based on, relating to, or responding to a party's exercise of the right of free speech, right to petition, or right of association).[3] We stated that the requisite nexus contemplated by the phrase need not be strong; a tenuous or remote link sufficed. *W. Mktg.*, 616 S.W.3d at 913. In other words, "some sort of connection, reference, or relationship" was all that was needed. *Id.* Our conclusion happened to track that of the Austin Court of Appeals. It too observed that the phrase envisioned little more than some sort of

[3] The legislature redacted the phrase from the current version of the statute.

connection, reference, or relationship. *Cavin v. Abbott,* 545 S.W.3d 47, 69 (Tex. App.—Austin 2017, pet. denied). Affording a similar definition to the phrase at bar and comparing it to the evidence of record leads to the conclusion that Image's administrative services were in relation to the Commission's operation of Medicaid. It obtained and digitally processed documents pertaining to Medicaid and benefits thereunder sent to the Commission by Medicaid applicants, Medicaid subscribers or clients, and others. So, there existed some sort of connection, reference, or relationship between the services and the Commission's operation of the Medicaid program. Yet, our job is not over, for another passage necessitates consideration.

The passage is "such as claims processing, utilization review, client enrollment, provider enrollment, quality monitoring, or payment of claims." This phrase follows the comma after "administrative services in relation to the commission's operation of Medicaid." The Commission considers "claims processing, utilization review," and the other descriptive terms to be a non-exclusive sampling of the type of administrative services the legislature intended the purported contractor to provide. Moreover, that sampling allegedly described services specific to the operation of the Medicaid program, as opposed to all the programs operated by the Commission. As for the latter contention, the passage contains no such words of limitation. In other words, the statute does not say that the entity providing administrative services must be providing those services only in relation to the operation of the Medicaid program. The legislature having omitted such a restriction from the statute, it is not our place to rewrite the provision to include it.

As for whether the services in question here likened to claims processing, utilization review, client enrollment, provider enrollment, etc., we note that itemizing

examples of activity is a way for the legislature to reveal its intent. Indeed, our Supreme Court deemed that mode of revelation as a rule of construction called *ejusdem generis*. Per the latter, "when words of a general nature are used in connection with the designation of particular objects or classes of persons or things, the meaning of the general words will be restricted to the particular designation." *Hilco Elec. Coop. v. Midlothian Butane Gas Co*., 111 S.W.3d 75, 81 (Tex. 2003). Issue arises, though, concerning whether the phrase "such as claims processing, utilization review . . . client enrollment," etc. refers to the Commission's "operation of Medicaid" or to "administrative services." Accepting *arguendo* the Commission's belief that the phrase alludes to the type of "administrative services" contemplated, those provided by Image would be of the exemplified type, as we now explain.

The Commission issued a request for proposal (RFP) describing the nature of services sought. Within the request, it specified that "[t]he procurement of document processing services supports the mission objectives described in this section." Those "mission objectives" encompassed (1) "obtain[ing] program and operational optimization ***of eligibility determination for health and human services programs***" and (2) "the ***determination of client eligibility*** for Children's Health Insurance (CHIP), ***Medicaid***, Food Stamps Temporary Assistance to Needy Families (TANF), and ***Medicaid*** for the Elderly and Persons with Disabilities (MEPD)." (Emphasis added). We cannot reasonably deny that "determining client eligibility" for Medicaid is part of "client enrollment." Logically, only those found to be eligible could be enrolled into the program. So, like links in a chain, "document processing services" are tied to "eligibility determination[s]" which are tied to "client enrollment" into Medicaid. And, Image

performed those "document processing services." This means that its "administrative services" facilitate and are part of client enrollment, at the very least. Being such, they are akin to the non-exclusive examples of services found in § 32.0705(a)(2).

In sum, the "office-y" tasks performed by Image were and are "one or more administrative services in relation to the commission's operation of Medicaid, such as claims processing, utilization review, client enrollment, provider enrollment, quality monitoring, or payment of claims." Moreover, the entity was and is not a health and human services agency" as defined in § 531.001 of the Government Code. *See* TEX. GOV'T CODE ANN. § 531.001(4) (defining "health and human services agencies" as including the Department of Aging and Disability Services, the Department of State Health Services, and the Department of Assistive and Rehabilitative Services). Thus, we hold it to be a "Medicaid contractor" for purposes of § 32.0705 of the Human Resources Code. That said, we turn to the second question posed earlier.

Answering the Second Question

Again, § 32.0705 mentions two time parameters. The first says the Commission "shall . . . ensure that . . . to the extent possible, audits under this section are completed in a timely manner." TEX. HUM. RES. CODE ANN. § 32.0705(b)(3). According to the second, "[a]n audit required by this section must be completed before the end of the fiscal year immediately following the fiscal year for which the audit is performed." *Id*. § 32.0705(d). The initial debate concerns which one controls. Must the Commission complete the audits simply in an amorphous "timely manner" or within a specific period defined as the end of the fiscal year immediately following the fiscal year for which the audit was performed? As just mentioned, the latter sets a specific deadline. The former

does not. In deciding the question, we turn to a rule of statutory construction. It states that "the more specific statute controls over the more general." *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 901 (Tex. 2000); *Hartford Ins. Co. v. Crain*, 246 S.W.3d 374, 377–78 (Tex. App.—Austin 2008, pet. denied). Section 32.0705(d) is the more specific of the two time periods. It controls. This seems particularly appropriate since § 32.0705(b)(1) appears in a part of the statute that reads more like guidelines.

That is, in directing the Commission to engage an independent auditor to "perform annual independent external and financial audits of any Medicaid contractor," the legislature told the agency of the need to "review the Medicaid contracts and ensure" various measures. Those measures touch upon the nature of the audits. For instance, their frequency and extensiveness were to be influenced by "the amount of risk to the state involved in the administrative services being performed by the contractor." TEX. HUM. RES. CODE ANN. § 32.0705(b)(1). Their procedures were to be "used consistently," *id.* § 32.0705(b)(2), while their disposition should occur "in a timely manner." *Id.* § 32.0705(b)(3). Yet, when it came to expressly addressing the time within which the audits "must be" finished, the legislature said "before the end of the fiscal year immediately following the fiscal year for which the audit [was] performed." So, in effect, we have general guidelines describing the manner in which audits were to proceed in § 32.0705(b)(1) but an edict in § 32.0705(d) pointedly naming by when they "must be completed." That leads us to conclude that the latter, being more specific, controls over the former.

Of course, the Commission reads the time period in § 32.0705(d) as less pointed than Image does. To it, the period is a mere a suggestion, and it came upon that view by

construing "must" as directory as opposed to mandatory. We find that interpretation accurate, though not one mandating dismissal or disposition favorable to the Commission.[4]

There have been instances when statutory words which a common man would read as being mandatory were held less so by the courts. They include interpretation of the word "must." Indeed, that was the word with which the court dealt in *AC Interests, L.P. v. Texas Commission on Environmental Quality*, 543 S.W.3d 703 (Tex. 2018). In dealing with that term, the court initially observed that "[t]he words 'shall' and 'must' in a statute are generally understood as mandatory terms that create a duty or condition." *Id.* at 709. Then, it cautioned that all is not what it seems, for labels, absent context, can mislead. *Id.* The guiding principle "'is not whether 'shall' [or 'must'] is mandatory, but what consequences follow a failure to comply.'" *Id.* (quoting *State v. $435,000*, 842 S.W.2d 642 (Tex. 1992) (per curiam)). No accompanying consequence, or "noncompliance penalty," to a timing provision containing facially mandatory words like "shall" or "must" results in the word being interpreted as directory, according to the court. *Id.*; *accord In re Phillips*, 691 S.W.2d 714, 715 (Tex. App.—Amarillo 1985, no writ) (quoting, *Lewis v. Jacksonville Bldg. & Loan Ass'n*, 540 S.W.2d 307 (Tex. 1976) (observing that "provisions which do not go to the essence of the act to be performed, but which are for the purpose of promoting the proper, orderly, and prompt conduct of business, are not ordinarily regarded as mandatory. If the provision directed doing of a

[4] The Commission suggests that Image waived this topic by failing to attack it as a ground for summary judgment in its appellant's brief. Assuming this to be so, Image nevertheless extensively addressed it when replying to the cross-appellant's brief filed by the Commission. Given the interrelationships between the plea to the jurisdiction and motions for summary judgment (that is, all involve the same topics), the advent of cross-appeals, the Commission expressly interjecting the topic through its cross-appellant's brief, Image expressly addressing it in a cross-appellee's brief, and the admonishment about not allowing form to overcome substance, we conclude that it is legitimately before us.

thing in a certain time without any negative words restraining it afterwards, the provision as to time is usually directory."). Indeed, it later characterized this as a "presumption." *AC Ints., L.P.,* 543 S.W.3d at 714 (stating that "when a statutory provision has mandatory language, but is not jurisdictional, and does not have an explicit or logically necessary consequence, we presume the provision was intended as a direction rather than a mandate").

Here, § 32.0705(d) mentions no consequence for the Commission failing to complete the annual audit within the prescribed time. This circumstance creates the presumption that "must be completed" is directory, as opposed to mandatory. This is also buttressed by other considerations. One concerns the object sought to be attained through § 32.0705, that object being the conduct of financial and performance audits upon Medicaid contractors. *See* TEX. GOV'T CODE ANN. § 311.023(1) (stating that in construing a statute, the court may consider the "object sought to be attained," among other things). Construing "must be completed" as authorizing only a year to begin and finish the annual audit could well hamper that objective, given the plethora of other business conducted by the Commission. Unless one forgets, we are dealing with a bureaucracy engaged in many activities and serving many functions. Assigning a time period within which to act but omitting a consequence merely likens to a legislative intent urging orderliness and promptness. So, in the end, these factors lead us to forgo the common man's interpretation of "must" and adopt that called for by judicial precedent, legislative guidance, and circumstantial reality. "[M]ust be completed" is directory, as opposed to mandatory.

Section 32.0705(d) being directory has two effects. First, no ministerial duty is imposed upon the commissioner to act within period mentioned. Second, the failure to act within that period is not tantamount to the commissioner exceeding the bounds of granted authority or acting in conflict with the law. It cannot be otherwise if the statute falls short of ***mandating*** a period within which to act. And, because plaintiffs "in ultra vires suits must 'allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act,'" *City of Houston v. Houston Mun. Emps. Pension Sys*., 549 S.W.3d 566, 576 (Tex. 2018) (quoting *City of El Paso v. Heinrich*, 284 S.W.3d 366 (Tex. 2009)), the ultra vires exception to sovereign immunity is inapplicable. Thus, we (1) conclude that the trial court erred in denying the Commission's plea to the jurisdiction, (2) reverse the order denying that plea, and (3) order that the lawsuit of Image be dismissed for want of jurisdiction. The Commission's pending motion for appellate review of order suspending enforcement of judgment is denied.

Brian Quinn
Chief Justice