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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1624**

In the Matter of the Nursing Rate Appeal by Stewartville Care Center.

**Filed July 20, 2020
Affirmed
Worke, Judge**

Minnesota Department of Human Services
File No. 35426

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Considered and decided by Worke, Presiding Judge; Frisch, Judge; and Schellhas,
Judge.*

UNPUBLISHED OPINION

WORKE, Judge

Relator challenges a final rate-setting order, arguing that respondent engaged in unpromulgated rulemaking, and its decision to disallow certain costs in the rate-setting formula was arbitrary and capricious. We affirm.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

FACTS

Relator Stewartville Care Center (Stewartville) is a nursing home located in Olmsted County that receives medical-assistance reimbursement. In 2015 and 2016, Stewartville procured temporary nursing-pool services through annLeo Inc. (annLeo). annLeo is a vendor management organization that provides software and services to assist healthcare facilities to obtain supplemental healthcare personnel from a supplemental nursing services agency (SNSA). annLeo charged Stewartville a \$55 fee per shift (shift fees) worked by a healthcare worker placed at its facility from participating SNSAs. Stewartville reported all shift fees charged by annLeo to respondent Minnesota Department of Human Services (DHS) in its 2015 and 2016 cost reports and classified them as services from an SNSA.

In January 2017, DHS notified Stewartville that the agency's rate calculations effective January 1, 2017, reflected adjustments to Stewartville's 2015 cost report. DHS disallowed approximately \$115,610 in costs constituting annLeo's shift fees because it determined that the charges by annLeo—which was at that time considered to be an unregistered SNSA by the Minnesota Department of Health (MDH)—exceeded the statutory maximum in its geographic region and were therefore not reasonable. Stewartville appealed the adjustments to its 2015 cost report.

In May 2017, MDH notified annLeo that it did not meet the statutory definition to be considered an SNSA. MDH stated that while it had originally considered annLeo to be an unregistered SNSA, further inquiry led to the conclusion that annLeo was not an SNSA and that it did not need to register as one.

In March 2018, DHS published Stewartville's rate notices for rates effective January 1, 2018, which reflected adjustments to Stewartville's 2016 cost report. DHS disallowed approximately \$169,312 in costs constituting annLeo's shift fees. Stewartville appealed these adjustments to its 2016 cost report.

Following desk audits of DHS's decisions to disallow the shift fees in Stewartville's 2015 and 2016 cost reports, a human-services judge affirmed DHS's decision to disallow the shift fees in the 2015 cost report and affirmed in part DHS's decision to disallow the shift fees in the 2016 cost report. Stewartville then requested a consolidated contested-case hearing.

In March 2019, the parties filed cross-motions for summary disposition. In May 2019, an administrative-law judge (ALJ) recommended that DHS's summary-disposition motion be granted after determining that DHS properly disallowed the costs because annLeo was not an SNSA and therefore its shift fees could not be claimed as direct-care costs constituting services from an SNSA.

In June 2019, Stewartville filed exceptions to the ALJ's recommendation. Stewartville contended that: (1) the rate reductions would be unfair, unreasonable, and contravene caselaw; (2) DHS's rate adjustments violated the purpose of the requirements and regulations governing SNSAs codified at Minn. Stat. §§ 144A.70-.74 (2018) (SNSA Act); and (3) DHS cannot do indirectly what it cannot do directly.

In September 2019, the commissioner of human services (commissioner) granted DHS's summary-disposition motion. The commissioner determined that the rate reductions did not contravene caselaw, the disallowance did not contravene the purpose of

chapter 144A because annLeo was not an SNSA, and Stewartville failed to establish that the shift fees fell within the direct-care-costs definition under Minn. Stat. § 256R.02, subd. 17 (2018). This certiorari appeal followed.

D E C I S I O N

Judicial review of the commissioner’s order is authorized pursuant to Minn. Stat. § 256.045, subd. 7 (2018). This court may reverse, remand, or modify the commissioner’s decision if it prejudiced Stewartville’s substantial rights and was: “(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.” See Minn. Stat. § 14.69 (2018).

“Summary disposition is the administrative equivalent of summary judgment.” *Pietsch v. Minn. Bd. of Chiropractic Exam’rs*, 683 N.W.2d 303, 306 (Minn. 2004). Review of a grant of summary disposition requires this court to determine whether there are any genuine issues of material fact and whether there was an error in applying the law to the facts. *In re Assessment Issued to Leisure Hills Health Care Ctr.*, 518 N.W.2d 71, 75 (Minn. App. 1994), review denied (Minn. Sept. 16, 1994). Although an appellate court exercises judicial restraint when reviewing agency decisions, questions of law are reviewed de novo. *Fish v. Comm’r of Minn. Dep’t of Human Servs.*, 748 N.W.2d 360, 363 (Minn. App. 2008). For challenges involving a claim that an agency’s decision was arbitrary and capricious, we will not disturb the decision “so long as a rational connection between the facts found and the choice made has been articulated.” *Id.* (quotation omitted).

Rates paid to nursing facilities receiving medical assistance are established by chapter 256R and are subject to a rate-setting procedure overseen by DHS. Minn. Stat. § 256R.01, subds. 1, 2 (2018). When setting a prospective payment rate, DHS reviews a nursing facility's past cost report and calculates the costs incurred that fall within the statutorily reimbursable categories. Minn. Stat. §§ 256R.21-.26 (2018) (listing reimbursable categories). DHS determines an appropriate payment rate for the upcoming year based on a facility's previous allowable costs. Minn. Stat. § 256R.21, subd.1. Allowed costs are those which are "reported by the facility which are necessary for the operation of the facility and the care of residents and which are reviewed by [DHS] for accuracy." Minn. Stat. § 256R.02, subd. 5 (2018). In addition, DHS can use only allowable costs claimed by a nursing facility to compute the total payment rate. *See* Minn. Stat. § 256R.10, subd. 1 (2018) (listing five criteria required for a cost to constitute an allowable cost for rate-setting purposes).

While DHS considers three broad rate categories when calculating a facility's total payment rate, the only category subject to this appeal is Stewartville's operating payment rate. *See* Minn. Stat. § 256R.21, subds. 3, 4 (2018). A facility's operating payment rate is based on its "other operating payment rate" and "total care-related payment rate." *Id.*, subd. 3. On appeal, Stewartville's total care-related payment rate is at issue.

A facility's total care-related payment rate is the sum of its direct-care payment rate and other care-related payment rate. Minn. Stat. § 256R.23, subd. 9 (2018). A facility's direct-care payment rate equals "the lesser of (1) the facility's direct care costs per standardized day, or (2) the facility's direct care costs per standardized day divided by its

cost to limit ratio.”¹ *Id.*, subd. 7. “Direct care costs” include “services from a[n SNSA].” Minn. Stat. § 256R.02, subd. 17.

An SNSA is defined as “a person, firm, corporation, partnership, or association engaged for hire in the business of providing or procuring temporary employment in health care facilities for nurses, nursing assistants, nurse aides, and orderlies.” Minn. Stat. § 144A.70, subd. 6. Under the medical assistance program, an SNSA can be compensated up to a certain maximum statutory rate. Minn. Stat. § 144A.74.

Unpromulgated rulemaking

Stewartville first argues that DHS’s disallowance of annLeo’s shift fees constituted unpromulgated rulemaking.² Stewartville contends that: (1) DHS adopted the role of “unofficial enforcer” of the SNSA Act’s maximum charges; (2) DHS added an unauthorized cost-disallowance component to the SNSA Act’s maximum-charge mandate, which constituted a new and unauthorized rate-setting mechanism not contemplated by the legislature; and (3) no provision of chapter 144A allows or authorizes DHS to disallow temporary pool costs paid by a nursing home.

¹ Stewartville’s direct-care costs per standardized day were used to determine the direct-care payment rate.

² Unpromulgated rulemaking occurs when an agency announces a new rule of general application without complying with statutory rulemaking requirements. *See generally In re Minn. Living Assistance, Inc.*, 934 N.W.2d 300, 309 (Minn. 2019) (explaining that rules not adopted in compliance with statutory requirements are invalid), *reh’g denied* (Nov. 4, 2019). An agency does not engage in unpromulgated rulemaking when it applies existing statutes or rules according to their plain language. *See Cable Commc’ns Bd. v. Nor-W. Cable Commc’ns P’ship*, 356 N.W.2d 658, 667 (Minn. 1984).

But DHS did not engage in unpromulgated rulemaking. In this case, after reviewing the 2015 and 2016 cost reports, DHS determined that Stewartville's reported costs from annLeo's shift fees were inaccurately categorized as being services from an SNSA because MDH did not consider annLeo an SNSA. Notably, on appeal, Stewartville does not challenge MDH's determination that annLeo is not an SNSA. And because MDH did not categorize annLeo as an SNSA, the reported costs did not constitute direct-care costs under Minn. Stat. § 256R.02, subd. 17. Further, while annLeo's fees may have satisfied the criteria to be considered allowable costs as outlined by Minn. Stat. § 256R.10, subd. 1, the reported costs still had to qualify as direct-care costs under Minn. Stat. § 256R.02, subd. 17. Therefore, DHS did not engage in unpromulgated rulemaking by disallowing Stewartville's reported costs relating to annLeo's fees.

While Stewartville's argument that DHS's disallowances constituted a new and distinct rate-setting mechanism not allowed under chapter 144A may have had merit at the time of the disallowances—when DHS capped the *amount* of Stewartville's payments based on maximum allowable charges in the SNSA Act—this appeal is from the commissioner's final order in which DHS disallowed the charges because annLeo is not an SNSA. Stewartville requested a consolidated contested-case hearing, and the ALJ engaged in a de novo review of the hearing record that the commissioner then reviewed. *See In re Rate Appeal of Benedictine Health Ctr.*, No. A05-873, 2006 WL 224289, *5 (Minn. App. Jan. 31, 2006) (noting that when party requests contested-case hearing, ALJ engages in de novo review and commissioner then makes decision based on hearing record), *rev'd on other grounds*, 728 N.W.2d 497 (Minn. 2007). As such, MDH's 2017 determination that

annLeo was not an SNSA was part of the hearing record and, therefore, DHS did not adopt a new rate-setting mechanism.

In support of its argument that DHS relied on an unpromulgated legal interpretation of the SNSA Act, Stewartville relies on *In re Contested Cases of St. Otto's Home v. Minn. Dept. of Human Services*, 437 N.W.2d 35 (Minn. 1989); *White Bear Lake Care Ctr., Inc. v. Minn. Dep't of Pub. Welfare*, 319 N.W.2d 7 (Minn. 1982); and *In re Contested Case of Ebenezer Soc'y v. Minn. Dep't of Human Servs.*, 433 N.W.2d 436 (Minn. App. 1988). In those cases, however, the agencies either added an adjustment or formula when calculating a payment rate or based a disallowance on an erroneous interpretation of a statute or rule. *See St. Otto's Home*, 437 N.W.2d at 42 (holding adjustment unreasonable following review of agency's interpretation of ambiguous language in newly adopted administrative rule in light of past interpretation of predecessor rule); *White Bear Lake Care Ctr.*, 319 N.W.2d at 9 (holding addition of per-diem formula to rate calculation constituted unpromulgated rulemaking when rule was unambiguous); *In re Contested Case of Ebenezer Soc'y*, 433 N.W.2d at 441 (holding reclassification of costs constituted invalid rulemaking because language of rule was not ambiguous).

This case does not involve the interpretation of a newly adopted administrative rule. Nor was there an unpromulgated legal interpretation of the SNSA Act, because Minn. Stat. § 256R.02, subd. 5, authorizes DHS to review cost reports for accuracy, and annLeo's shift fees were inaccurately categorized as reimbursable direct-care costs. Therefore, DHS did not rely on an unpromulgated legal interpretation of the SNSA Act.

Disallowed costs

Stewartville also argues that DHS acted arbitrarily and capriciously by disallowing annLeo's fees. Stewartville contends that DHS: (1) failed to consider the allowed-costs provision of Minn. Stat. § 256R.10, subd. 1; (2) relied on factors not intended by the legislature for the purpose of the SNSA Act and cannot do indirectly what it cannot do directly; (3) failed to consider how rural facilities such as Stewartville are to procure skilled nursing care during a workforce crisis; and (4) cannot retroactively change an interpretation that facilities had relied on without first promulgating a rule.

While certain costs are allowed if they meet the criteria of Minn. Stat. § 256R.10, subd. 1, in this case Stewartville categorized annLeo's fees as direct-care costs from the services of an SNSA. And as discussed above, annLeo's costs had to be considered direct-care costs to be included in Stewartville's total operating costs. Because annLeo's fees did not constitute direct-care costs under Minn. Stat. § 256R.02, subd. 17, they are not allowable under that category and it is irrelevant whether they satisfy the criteria of Minn. Stat. § 256R.10, subd. 1. Therefore, DHS's grant of summary disposition was not arbitrary and capricious.

In addition, DHS did not rely on factors not intended by the legislature relating to the purpose of the SNSA Act. Because MDH did not recognize annLeo as an SNSA, DHS was not enforcing or relying on the purpose or intention of the SNSA Act. However, even assuming that Stewartville accurately characterized the purpose of the SNSA Act as being the prevention of SNSAs from "gouging" skilled nursing facilities with unchecked costs, it appears that using a vendor management service to source staff from SNSAs is an attempt

to create a loophole in the purpose of the SNSA Act. Finally, Stewartville’s argument that DHS cannot do indirectly what it cannot do directly is misplaced, given that Minn. Stat. § 256R.02, subd. 5, allows DHS to review cost reports for accuracy.

As a final matter, Stewartville’s argument that DHS failed to consider the ability of rural nursing facilities to procure skilled nursing care is a policy argument and not properly before this court.³ See *LaChapelle v. Mitten*, 607 N.W.2d 151, 159 (Minn. App. 2000) (“Because this court is limited in its function to correcting errors it cannot create public policy.”), *review denied* (Minn. May 16, 2000).

Affirmed.

³ While we recognize that rural facilities might have difficulties procuring supplemental nursing services, this argument appears to be more appropriately directed toward the legislature.