OAH 71-1800-38078

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the SIRS Appeal by US Care PCA Agency	**ORDER DENYING LEAVE TO AMEND AND PERMITTING SUPPLEMENTAL BRIEFING**

This matter is before Administrative Law Judge Jessica A. Palmer-Denig upon a Request to Amend Notice and Order for Hearing filed by the Minnesota Department of Human Services (Department) on October 17, 2023. US Care PCA Agency (Appellant) filed its objection to the request on October 24, 2023, and the record related to the request closed on that date.

Mara Sybesma, Assistant Attorney General, appears on behalf of the Department. Katherine J. Claffey, Groshek Law, P.A., appears on behalf of Appellant.

Based upon the record, pursuant to Minn. R. 1400.5500(D)-(E), (J), (Q), .5600, subp. 5 (2023), and for the reasons expressed in the accompanying Memorandum, the Administrative Law Judge issues the following:

ORDER

1. The Department's request for leave to amend the Notice and Order for Prehearing Conference and Hearing (Hearing Notice) is **DENIED**.

2. The parties shall file supplemental briefs addressing the Minnesota Court of Appeals' decision in *In re the SIRS Appeal by Best Care, LLC.*,[1] and its application to the record established during the evidentiary hearing. The briefs should include argument as to any monetary recovery or sanction the Administrative Law Judge should recommend that the Commissioner of the Department (Commissioner) impose in this matter. The parties' supplemental briefs shall be filed and served by **4:30 p.m.** on **December 22, 2023**.

3. Upon the filing of the parties' supplemental briefs, the record shall close, and this matter will be taken under advisement for issuance of a recommendation to the Commissioner.

Dated: November 17, 2023

JESSICA A. PALMER-DENIG
Administrative Law Judge

[1] 994 N.W.2d 333 (Minn. Ct. App. 2023).

MEMORANDUM

I. Introduction

Following an investigation into Appellant's billing and documentation practices for personal care assistance services, the Department determined that Appellant had been overpaid $56,924.40 by the Minnesota Health Care Programs (MHCP).[2] The Department issued a Notice of Overpayment requiring Appellant to repay that amount to the Department, and it also required that Appellant sign a Stipulated Provider Agreement (SPA) to continue participating as a provider in the MHCP.[3] The Department identified practices constituting "abuse" under Minn. R. 9505.2165 (2023), to support its decision.[4] Appellant appealed and the Department filed its Hearing Notice identifying two issues: (1) whether the Department properly sought to recover the alleged overpayment; and (2) whether the Department properly required Appellant to sign an SPA.[5]

This matter came before the undersigned for an evidentiary hearing on June 12, 2023. The record closed on that date and the Administrative Law Judge took the matter under advisement. While the case was under consideration, however, the Minnesota Court of Appeals issued its opinion in *Best Care*,[6] a precedential decision directly related to the issues presented here. In *Best Care*, the court held that the Department may not recover funds paid by the MHCP under Minn. Stat. § 256B.064, subd. 1c (2022), based solely on evidence of abuse, but must also show that the vendor was "improperly paid."[7] In contrast, the court held that sanctions may be imposed under Minn. Stat. § 256B.064, subds. 1b, 2(f) (2022), for conduct meeting the definition of abuse without a showing that the vendor was improperly paid.[8] Such sanctions may include suspension or withholding of payments to the vendor, suspension or termination of the vendor's participation in the MHCP, or imposition of a fine.[9]

The Administrative Law Judge determined that the record should be reopened to allow the parties to address the impact of *Best Care* on this case, and to discuss whether the parties should be permitted to offer additional evidence or supplemental briefs.[10] The Administrative Law Judge held a telephone conference on September 11,

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[2] Hearing Notice at 2 (Jan. 14, 2022).
[3] Notice of Overpayment and Stipulated Provider Agreement (Sept. 8, 2021).
[4] Abuse is defined by Minn. R. 9505.2165, subp. 2, as 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," and the rule further deems that certain specific conduct constitutes abuse.
[5] Hearing Notice at 3.
[6] 994 N.W.2d 333.
[7] *Id.* at 342.
[8] *Id.* at 341-42.
[9] Minn. Stat. § 256B.064, subds. 1b, 2(f).
[10] Order Reopening Record (July 25, 2023).

2023.[11] At that time, the parties requested that post-hearing proceedings be continued to allow them to engage in settlement discussions.[12] The matter reconvened on October 10, 2023, for a status conference. The parties had been unable to reach a resolution and, instead, the Department advised the Administrative Law Judge that it wished to amend its Hearing Notice to impose a fine, rather than monetary recovery.[13] The Administrative Law Judge requested that the Department submit its request in writing and set a schedule for the filing of the Department's proposal and a response from Appellant.

II. The Parties' Positions

The Department requests leave to amend the Hearing Notice to substitute a fine for its claim for monetary recovery. The Department's proposal contemplates that it will conduct an internal reconsideration of the nature, severity, and chronicity of the alleged conduct in order to determine the fine to be imposed,[14] and will supplement the record with an affidavit supporting its determination. The Department does not believe that an additional evidentiary hearing would be necessary, though it would not object to further proceedings if requested by Appellant.

Appellant opposes the Department's request. Appellant argues that the holding in *Best Care* forecloses monetary recovery on this record. Appellant maintains that the Department considered whether to impose a fine at the outset of this matter, but it determined that a fine was not the appropriate remedy. Appellant contends that the Department should not be allowed to have a second chance at this case after it presented all of its evidence and rested, simply because it now faces adverse precedent.

III. Analysis

A. Legal Standards

Under Minn. R. 1400.5600, subp. 1 (2023), an agency commences a contested case by serving a notice of and order for hearing. Among other things, the notice and order must identify the allegations or issues to be determined, include citations to the relevant statutes or rules the agency alleges were violated, and state the basis for the agency's statutory authority to take the action it has proposed.[15] At any time before the evidentiary hearing begins, the agency may amend the notice and order, and the parties

[11] Order for Telephone Conference (Aug. 10, 2023); Prehearing Conference Digital Recording (Sept. 11, 2023 (on file with the Minn. Office Admin. Hearings).
[12] Order for Status Conference (Sept. 12, 2023); Prehearing Conference Digital Recording (Sept. 11, 2023 (on file with the Minn. Office Admin. Hearings).
[13] Prehearing Conference Digital Recording (Oct. 10, 2023) (on file with the Minn. Office Admin. Hearings).
[14] *See* Minn. Stat. § 256B.064, subd. 1b (directing that, when imposing sanctions, the Commissioner must 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.").
[15] Minn. R. 1400.5600, subp. 2(C)-(D) (2023).

must be granted a reasonable time to prepare to meet any new issues or allegations, if requested.[16] Amendments sought after the hearing begins must be approved by the administrative law judge.[17]

The contested case rules do not provide any criteria for determining whether amendment of the hearing notice should be approved. Under Minn. R. 1400.6600 (2023), administrative law judges are to apply the Minnesota Rules of Civil Procedure in ruling on motions where the contested case rules are silent.[18] Minn. R. Civ. P. 15 governs the amendment of pleadings, and the Administrative Law Judge determines that a notice and order for hearing is sufficiently similar to a complaint in a civil action to make an analysis of this rule useful.[19]

Rule 15.01 provides a general rule addressing amendments to pleadings in a civil case. The rule states that a party may amend a pleading once as a matter of course at any time before service of a responsive pleading, or if the pleading is one for which no responsive pleading is permitted and the matter has not been placed on the court's trial calendar, a party may amend within 21 days after the pleading is served. Otherwise, a pleading may only be amended if the other party consents or by leave of court, and leave is to be freely granted when justice so requires.

Rule 15.02 governs amendments to conform pleadings to the evidence after a trial has been held. The rule states that when issues not raised in the pleadings have been tried by the parties' express or implied consent, such issues are treated in all respects as if they had been raised in the pleadings. A motion to amend a pleading to conform to the evidence may be made at any time, including after judgment.

Finally, under Rule 15.04 a party may be allowed to serve a supplemental pleading setting forth transactions, occurrences, or events that happened after the date of the pleading. The court may order supplementation upon motion of a party with reasonable notice and on terms that are just.

B. Amending the Hearing Notice

When leave of the court is required for a party to amend a pleading, amendments are to be freely granted except when doing so would result in prejudice to the other party.[20] The trial court has wide discretion to grant or deny an amendment, and its decision will not be reversed absent a clear abuse of discretion.[21] The Administrative Law Judge determines leave to amend must be denied.

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[16] *Id*., subp. 5 (2023).
[17] *Id.*
[18] Though the Department's filing is titled as a "request," it is an application for issuance of an order and so is properly considered to be a motion under Minn. R. 1400.6600.
[19] *See* Minn. R. Civ. P. 7.01, 8.01.
[20] *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).
[21] *Id.*

The Department proposes amendment of its Hearing Notice not just after the evidentiary hearing started, but after its end. The Department offered all of its evidence and rested, putting the facts of this case before the Administrative Law Judge for consideration. The Department's proposal also goes beyond amendment of the Hearing Notice. It proposes to reconsider this matter and amend the underlying notice of agency action to impose a different remedy from the one it originally selected, and then amend its Hearing Notice to reflect its reconsideration of the case. This is not an amendment to conform a pleading to the evidence. Rather, the Department would create new evidence that did not exist at the time it rested its case against Appellant. A party may be allowed to serve a supplemental pleading addressing events that occur after the date a pleading is first filed and served, but the Department is not proposing simply to recount more recent events. Rather, the Department proposes to affirmatively create such an event to support an amended notice.

The Administrative Law Judge determines that the Department's proposal falls outside the bounds contemplated by Minn. R. Civ. P. 15. Allowing the Department to reconsider its case internally in order to support an amended Hearing Notice would be prejudicial to Appellant, particularly given that Appellant challenged the Department's evidence on the essentially the same theory as that adopted by the Court of Appeals in *Best Care*.

The Administrative Law Judge also concludes that the Department is not prejudiced by denial of leave to amend. First, the Department does not concede that *Best Care* forecloses monetary recovery on the record produced at the hearing. The Department retains the ability to argue that monetary recovery is appropriate here.

Second, the Department's reconsideration of the record internally is not necessary for the Administrative Law Judge to analyze the record and recommend a different remedy. The Administrative Law Judge is not bound by the Department's decision as to the remedy to be imposed. Rather, a contested case proceeding "is a de novo review, and not a mere appeal from the agency's decision."[22] If the Department believes that a fine is now an appropriate remedy in light of the reasoning in *Best Care*, it may offer argument regarding the sanction to be imposed based upon the record produced at the hearing, and the Administrative Law Judge may consider its arguments in determining the remedy to recommend.

The Administrative Law Judge will not allow supplementation of the factual record or amendment of the Hearing Notice at this late stage. She determines, however, that the parties must be given an opportunity to address the application of *Best Care*'s reasoning to the evidence offered at the hearing. Therefore, the Administrative Law

[22] *In re the Rate Appeal of Sleepy Eye Care Ctr. v. Comm'r of Human Servs.*, 572 N.W.2d 766, 770 (Minn. Ct. App. 1998). Appellant argues that one of the Department's witnesses testified that the Department did not believe a fine was an appropriate remedy in this case. It should be noted that, because this matter is a de novo review, the Administrative Law Judge is not bound by that determination either.

Judge will permit the parties to file supplemental briefs articulating their positions as to the remedy the Administrative Law Judge should recommend to the Commissioner.

IV. Conclusion

The Administrative Law Judge concludes that the Department should not be granted leave to amend its Hearing Notice in this case. The Administrative Law Judge will permit the parties to file supplemental briefs addressing the impact of *Best Care* on consideration of the existing evidentiary record. The Administrative Law Judge also notes that the parties have engaged in good faith efforts to resolve this matter on several occasions, and the Administrative Law Judge encourages the parties to continue those discussions if the parties believe their interests might be better served by a settlement.

J. P. D.