COURT OF APPEALS
DECISION
DATED AND FILED

June 19, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2461

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

CATHOLIC CHARITIES BUREAU, INC.,

PETITIONER-RESPONDENT,

v.

DEPARTMENT OF HEALTH AND FAMILY SERVICES,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Douglas County: JOSEPH A. MC DONALD, Judge. *Reversed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. The Wisconsin Department of Health and Family Services appeals an order directing it to adjust St. Francis Home in the Park's[1]

[1] Catholic Charities was St. Francis' parent organization until January 21, 1999.

Medicaid reimbursement rates for the 1997-98 and 1998-99 rate years. Because St. Francis failed to timely appeal the established rates for 1997-98 and 1998-99, we conclude that St. Francis waived its right to challenge the rates. Therefore, the order is reversed.

BACKGROUND

¶2 St. Francis is a nonprofit nursing home that receives Medicaid reimbursement from the department. St. Francis disputed the Medicaid reimbursement rates established by the department for the rate years 1994-95 and 1995-96. St. Francis appealed the rates within the department pursuant to § 1.700 of the Methods of Implementation for Title XIX Nursing Home Payment Rates.

¶3 On April 17, 1997, the department rejected St. Francis' request for an adjustment to the rate established for 1994-95 and 1995-96. St. Francis appealed to the circuit court. The circuit court reversed and remanded to the department to recalculate the established rates. The department then appealed to this court.

¶4 In ***St. Francis Home in the Park v. DH&FS***, No. 98-0986, unpublished slip op. (Wis. Ct. App. March 23, 1999) (per curiam), we reversed in part the circuit court's order and remanded to the department to calculate new reimbursement rates for the rate years 1994-95 and 1995-96. On remand, the department reached an agreement with St. Francis and adjusted the rates for 1994-95, 1995-96, and 1996-97.[2] The agreement did not actually specify the new rates

[2] The inclusion of 1996-97 was based on the fact that the rates for that period were derived directly from the rate for the previous rate year, 1995-96.

to be established, but simply set the total amount to be paid. The agreement also included a clause that stated the agreement was not precedent for future rates.

¶5 St. Francis subsequently requested the department to readjust the 1997-98 and 1998-99 rates to conform to our previous decision. The department sent a letter, dated January 6, 2000, stating that it refused to adjust St. Francis' rates for the rate years 1997-98 and 1998-99. The letter stated that it declined to adjust the rates because St. Francis failed to request an administrative hearing challenging those rates at the time the rate letters were issued in April and November 1998, as required by § 1.700 of the applicable Methods of Implementation. *See* WIS. STAT. § 49.45(6m)(ag).[3] Further, the department declined to adjust the rates because our prior decision limited the rate setting methodology to the rate years 1994-95 and 1995-96.

¶6 St. Francis filed a petition for review in the circuit court. The department moved to dismiss the petition and argued that St. Francis' challenge to the 1997-98 and 1998-99 rate letters was untimely and the January 6, 2000, letter was not a reviewable decision under WIS. STAT. ch. 227.

¶7 The circuit court remanded to the department and ordered it to apply our previous decision to the rate years 1997-98 and 1998-99. This appeal followed.

STANDARD OF REVIEW

[3] All references to the Wisconsin Statutes are to the 1997-1998 version unless otherwise noted.

¶8 We review the department's decision independently where there is no evidence that the agency used any special knowledge or expertise, or where the issue is clearly one of first impression. ***Brauneis v. LIRC***, 2000 WI 69, ¶18, 236 Wis. 2d 27, 612 N.W.2d 635. The interpretation of the methods of implementation, and the effect of judicial decisions on the interpretation and applicability of future methods involves no special knowledge or expertise on the department's part. Further, the question whether the department must interpret and apply future rates to a method provision interpreted by a judicial decision is one of first impression. Therefore, we review the department's decision independently.

DISCUSSION

¶9 The department argues that: (1) St. Francis waived its right to challenge the 1997-98 and 1998-99 reimbursement rates by failing to appeal under § 1.700 of the Methods from the April 10, 1998, and November, 3, 1998, final rate setting letters; and (2) the January 6, 2000, letter was not an appealable decision under WIS. STAT. ch. 227.

¶10 WISCONSIN STAT. § 49.45(6m)(ag) provides that medical assistance payments to facilities such as nursing homes are to be determined "according to a prospective payment system updated annually by the department." WISCONSIN STAT. § 49.45(6m)(ag)3m. (1997-98), provides that 1997-98 payment rates be "based on information from cost reports for the 1996 fiscal year of the facility," and further provides that 1998-99 payment rates be "based on information from cost reports for the 1997 fiscal year of the facility."

¶11 WISCONSIN STAT. § 49.45(6m)(e) requires the department to "establish an appeals mechanism within the department to review petitions from

facilities providing skilled, intermediate, limited, personal or residential care or providing care for the mentally retarded for modifications to any payment under this subsection." The department's general internal appeals mechanism is found in WIS. ADMIN. CODE § HFS 106.12. WISCONSIN ADMIN. CODE § HFS 106.12(3) requires the department to provide written notice to the medical assistance service provider of the department's intended action.

¶12 The more specific statement of the written notice requirement in medical assistance reimbursement rate determinations is contained in § 1.700 of the Methods of Implementation for Title XIX Nursing Home Payments. The 1994-95, 1995-96, 1997-98, and 1998-99 Methods contain virtually identical language for the written notice requirement. The most recent states:

> The rate approval letter issued to the facility by the Department is the formal written Notice of Action required by the state administrative code (Reference: HSS 106.12, Wis. Adm. Code). **The request for hearing must be served within 15 days of receipt of a Notice of Action.** It must contain a brief and plain statement identifying every matter or issues contested.(emphasis added)

¶13 WISCONSIN STAT. § 49.45(6m)(e) describes the relief that can be granted by the department if an internal department appeal is timely sought by a nursing home: "The department may, upon the presentation of facts, modify a payment if demonstrated substantial inequities exist for the period appealed." Section 1.133 of the Methods states that the reimbursement rates established will apply only to the corresponding reimbursement period.

I. SECTION 1.700

¶14 The department argues that the plain meaning of the statutes and rules requires St. Francis to file an appeal from each year's reimbursement rate if it disagreed with the rate established in the rate approval letter for that year. "[A]n administrative agency's interpretation of its own rules or regulations is controlling unless plainly erroneous or inconsistent with the language of the rule or regulation." ***Hillhaven Corp. v. DHFS***, 2000 WI App. 20, ¶12, 232 Wis. 2d 400, 606 N.W.2d 572.

¶15 St. Francis argues that: (1) § 1.140 of the Methods, as it appears for the rate years 1997-98 and 1998-99, requires that a judicial order or interpretation of a provision remain in effect for all future years unless and until "vacated, reversed or otherwise modified;" (2) our previous decision controls the methodology for reimbursement for the 1997-98 and 1998-99 rate years; and (3) the doctrine of issue preclusion applies.

¶16 The exclusivity of § 1.700 is underscored by ***Hermann v. Town of Delavan***, 215 Wis. 2d 370, 572 N.W.2d 855 (1998). Where there is a specified method for bringing an administrative action to judicial review, that method is exclusive. ***Id.*** at 383. "[W]here administrative action has taken place, and a statute sets forth a specific procedure for review of that action and court review of the administrative decision, the statutory remedy is exclusive and the parties cannot seek judicial review of the agency action through other means." ***Id.*** "Where a party does not seek administrative redress of a grievance which might have been correctable by the administrative agency, the party may not seek judicial relief." ***Id.*** at 385.

¶17 If St. Francis desired to challenge the 1997-98 and 1998-99 rates, it was obligated to do so within the time limits established by § 1.700. Each year's

rate is a separate transaction for which a separate challenge must be filed in order to preserve objections to that year's rates. In ***Pabst Brewing Co. v. Milwaukee***, 125 Wis. 2d 437, 373 N.W.2d 680 (Ct. App. 1985), Pabst sought a declaratory judgment asserting that certain structures were exempt from taxation. The parties had stipulated that the circuit court's judgment would apply to all tax years between 1974 and 1980. The court declared that Pabst did not owe the tax. However, the judgment extended the scope of the declaration to 1981, 1982, and 1983, contrary to the stipulation.

¶18 We held that the circuit court erred by applying the declaration to a time not covered by the parties' stipulation. We further held that the tax exemption at issue had to be determined on a year-by-year basis. ***Id.*** at 460-61. We conclude that this holding is consistent with the department's argument that each year's rate is a separate transaction for which a separate challenge must be filed in order to preserve objections to that year's rates.

¶19 St. Francis has not convinced us that the department has authority to modify established reimbursement rates if the requirements of § 1.700 are not met. There is nothing in the statutes or the rules allowing the department to reconsider the reimbursement rates once the rates are established and the time for a departmental appeal has expired.

¶20 Here, the department issued a letter on April 10, 1998, establishing St. Francis' rates for the year beginning July 1, 1997. The letter advised St. Francis of its right to appeal within fifteen days of the receipt of the letter. St. Francis did not file a written appeal. Similarly, the department issued a letter on November 3, 1998, establishing St. Francis' rates for the year beginning July 1, 1998. The letter also advised St. Francis of its right to appeal, but St. Francis did

not file any appeal. Therefore, we conclude that St. Francis waived its right to challenge the established rates for the 1997-98 and 1998-99 rate years. The department's construction of § 1.700 to require a separate timely appeal for each rate year the nursing home wants to contest is consistent with the language of § 1.700.

¶21 St. Francis argues that § 1.140 of the Methods applies to this case. It contends that a judicial order of a provision of the Methods remains in effect for all future rate years unless and until vacated, reversed or otherwise modified by a court. We disagree.

¶22 Section 1.140 of the Methods for 1997-98 provides in relevant part:

> Litigation. The State has been or may be involved in litigation concerning the validity or application of provisions contained in this Methods or provisions of previous Methods. Medical Assistance or Medicaid payments resulting from entry of any court order may be rescinded or recouped, in whole or in part, by the Department if that court order is subsequently vacated, reversed or otherwise modified, or if the Department ultimately prevails in litigation. When recoupment occurs, recoupment will be made from all facilities affected by the issuance of the court order, whether or not such facilities were parties to the litigation. If any provision of this Methods is properly and legally modified or overturned, the remaining portions of this Methods are still valid.

¶23 Contrary to St. Francis' arguments, § 1.140 does not apply. Section 1.140 allows the department to rescind or recoup payments it made to the party to the prior litigation and to all other facilities affected by the court's order. The section would apply if: (1) the department had made payments to St. Francis as a result of the circuit court's order; (2) that order had later been vacated, reversed or otherwise modified; or (3) if the department had ultimately prevailed.

¶24 Section 1.140 of the Methods gives nursing homes no procedural route outside § 1.700 to initiate challenges to rate setting letters. The first sentence of § 1.140 states only the historical fact that, in any given year, the state is or may be involved in litigation concerning the application of current-year or prior-year provisions of the Methods. The second sentence defines circumstances under which the department has the right to recover money from providers. The language does not define any circumstances under which a provider may seek or obtain additional payments from the department.

¶25 Section 1.140 does not envision the circumstances argued by St. Francis. The section refers only to the department's authority to recover or rescind payments made to nursing homes as a result of court decisions that are later overturned. The section says nothing at all about a nursing home's ability to challenge a final rate setting letter after the fifteen days allowed by § 1.700. Section 1.140 does not allow a nursing home to demand greater payment from the department; it only permits the department to reduce the payments it made as a result of a court order later overturned.

¶26 St. Francis further argues that no sound judicial principle is served by interpreting § 1.700 as being the only opportunity for a nursing home to challenge each year's rate setting letter. We disagree. Without an end point to the right to administratively challenge a rate setting letter, finality would be impaired. Also, administration of the medical assistance program would be made more difficult if providers could challenge rates two or three years after they were established.

¶27 Next, St. Francis argues that our previous decision controls the methodology for reimbursement for the 1997-98 and 1998-99 rate years.

St. Francis argues that it did not appeal the 1997-98 and 1998-99 rates because it believed the methodology used to calculate the rates for the disputed years would be decided by this court and applied to future rate determinations. We disagree.

¶28 The prior case was determined by the circuit court on February 17, 1998. That order was entered more than a month before the 1997-98 rates were established. As a result, the 1997-98 rates were not an issue in the circuit court or the subsequent appeal filed by department. The same rationale applies to the 1998-99 rates.

¶29 By the time the 1997-98 rate letter was sent, the department had already argued its position in court and had filed a notice of appeal. St. Francis had no reasonable basis for thinking that the department would re-adjust its 1997-98 rates in the absence of an appeal pursuant to § 1.700. Additionally, St. Francis entered into an agreement with the department for adjusting the rates for 1994-95, 1995-96, and 1996-97. That agreement included a clause which stated that the agreement was not a precedent for future rates.

¶30 St. Francis recognized the need to timely preserve its objections to the rates set by the department after it appealed the 1994-95 rates but before appealing the 1995-96 rates. When the 1995-96 rate letter was received, St. Francis appealed and stated that "as we do not have a ruling on our previous appeal yet, we are filing this hearing request to protect our interests."

¶31 Direct review of the April 10 and November 3, 1998, rate setting letters was no longer available at the time our previous decision was released, by reason of the time limits in § 1.700 of the Methods. It would be contrary to public policy to allow review of the department's decision after months or years of

inaction by St. Francis. Therefore, we conclude that St. Francis relinquished its right to timely challenge the rates established.

¶32 Last, St. Francis argues that issue preclusion bars the department from relitigating its interpretation of the Methods at issue in our previous decision. Issue preclusion prevents relitigation of an issue of fact or law previously determined by a valid final judgment in an action between the same parties. ***Heggy v. Grutzner***, 156 Wis. 2d 186, 192, 456 N.W.2d 845 (Ct. App. 1990).

¶33 However, the issue whether the department can adjust the established rates even though St. Francis failed to timely appeal pursuant to § 1.700 from the April 10 and November 3, 1998, rate setting letters was never previously litigated. The department is not arguing that the rates should remain untouched because of the methodology used to arrive at those rates. The department argues that St. Francis failed to timely appeal from the rate setting letters. Therefore, the doctrine of issue preclusion does not apply.

II. January 6, 2000, Letter

¶34 The department argues that the January 6, 2000, letter, on which the circuit court based its jurisdiction, was not an appealable decision under WIS. STAT. § 227.53. The only administrative decision reviewable under WIS. STAT. § 227.53 is one "which adversely affects the substantial interests of any person." Here, the petition for review claims that the January 6 letter was the department's written notice that it would not recalculate the rates for 1997-98 and 1998-99 pursuant to our decision in ***St. Francis Home in the Park***, No. 98-0986, unpublished slip op.

¶35 We conclude that the January 6 letter was not a reviewable decision. To be reviewable under WIS. STAT. ch. 227, an agency action must be a decision that is supported by a record, based on findings of fact and conclusions of law, and determining the further legal rights of the party aggrieved. ***YMCA v. DOR***, 141 Wis. 2d 907, 912, 417 N.W.2d 39 (Ct. App. 1987).

¶36 Here, the letter does not adversely affect St. Francis' interests. The decisions, which adversely affected St. Francis' interests, were the April 10 and November 3, 1998, rate letters. The January 6 letter does not become a reviewable decision simply because it reminded St. Francis that the rate letters were the department's final action.

¶37 The January 6, 2000, letter is similar to the letter of the Wisconsin Employee Relations Commission in ***Universal Org. of Mun. Foremen, Supervisors & Admin. Pers. v. WERC***, 42 Wis. 2d 315, 166 N.W.2d 239 (1969). There, our supreme court held that a letter by the commission denying the processing of a petition was not a reviewable decision. ***Id.*** at 318. The letter was not based on a record, did not contain findings of fact and conclusions of law, was not in the form of a decision, and was merely a statement of the commission's chairperson. ***Id.*** at 321-22.

¶38 The January 6, 2000, letter fit none of the requirements for a decision. The letter does not contain findings of fact or conclusions of law. It is not based on any record. The letter merely reiterates the department's prior ruling that the rate approval letters were the formal written notice of action. In fact, the letter rejects St. Francis' attempt to classify it as a reviewable decision. The January 6, 2000, letter was not an appealable order.

By the Court.—Order reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.