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Department of Health

KATHY HOCHUL
Governor

JAMES V. McDONALD, M.D., M.P.H.
Commissioner

JOHANNE E. MORNE, M.S.
Executive Deputy Commissioner

July 3, 2024

CERTIFIED MAIL/RETURN RECEIPT

Kendra Vergason, Esq.
c/o Janine Daniels-Rivera
Office of the Medicaid Inspector General
800 North Pearl Street
Albany, New York 12204

Rochelle Leigh Rosenberg, Esq.
Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004

RE: In the Matter of the Appeal of Jewish Home and Infirmary of Rochester, Inc.

Dear Parties:

Enclosed please find the Decision After Hearing in the above referenced matter.

If the appellant did not win this hearing, the appellant may appeal to the courts pursuant to the provisions of Article 78 of the Civil Practice Law and Rules. If the appellant wishes to appeal this decision, the appellant may wish to seek advice from the legal resources available (e.g. the appellant's attorney, the County Bar Association, Legal Aid, OEO groups, etc.). Such an appeal must be commenced within four (4) months after the determination to be reviewed becomes final and binding.

Sincerely,

Natalie J. Bordeaux
Chief Administrative Law Judge
Bureau of Adjudication

NJB: cmg
Enclosure

STATE OF NEW YORK
DEPARTMENT OF HEALTH

In the Matter of the Appeal of
Jewish Home and Infirmary of Rochester, Inc.
Medicaid ID # 02998263 Audit #17-6290
from a determination by the New York State Office of the
Medicaid Inspector General to recover Medicaid Program overpayments.

COPY
DECISION

Before: Kimberly A. O'Brien
Administrative Law Judge

Held at: New York State Department of Health
Via Webex Video Conference

Parties: New York State Office of the Medicaid Inspector General
800 North Pearl Street
Albany, New York 12204
By: Kendra Vergason, Esq.

Jewish Home and Infirmary of Rochester, Inc.
2021 Winton Road South
Rochester, New York 14618
By: Rochelle Leigh Rosenberg, Esq.
Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004

The Department of Health (Department) acts as the single state agency to supervise the administration of the Medicaid Program in New York State. 42 United States Code (USC) 1396a, New York Public Health Law (PHL)201(1)(v), New York Social Services Law (SSL) 363-a. The Office of the Medicaid Inspector General (the OMIG), is an independent office within the Department. The OMIG is responsible for conducting audits of Medicaid providers and pursuing recovery of improperly claimed Medicaid funds. [PHL 30, 31, 32.]

The OMIG determined to seek restitution of payments made under the Medicaid Program to Jewish Home and Infirmary of Rochester, Inc. (Appellant). Appellant requested a hearing pursuant to SSL 145-a and 18 New York Codes Rules & Regulations (NYCRR) 519.4 to review the determination. At hearing the OMIG is required to present the audit file and summarize the case. [18 NYCRR 519.17(a).] Appellant has the burden of proving by substantial evidence that the OMIG determination was incorrect and that all claims submitted and denied were due and payable under the Medicaid Program. [18 NYCRR 519.18(d)&(h), New York State Administrative Procedure Act (SAPA) 306(1).]

The OMIG offered one witness Sujata Stratton, OMIG Rate Audit Supervisor. The OMIG exhibits 1-22 were admitted into the record. Appellant offered two witnesses Michael King, Appellant's Chief Executive Officer (CEO), and Debra McIlveen, Appellant's Chief Financial Officer (CFO). Appellant exhibits B, C, F, M, N, X were admitted into the record. The hearing was held November 3, 2021, May 18, 2022, June 3, 2022, and July 20, 2022. A transcript of the hearing was made, pages 1-566. The parties agreed on a briefing schedule and the record closed November 14, 2022.

APPLICABLE LAW

Nursing homes enrolled as Medicaid providers are reimbursed by means of a per diem rate set by the Department on the basis of both operating and capital costs, reported by the facility in a cost report. [PHL 2808; 10 NYCRR 86-2.10.] Each provider's rate is determined based on a provider's reported allowable costs. [10 NYCRR 86-2.10 (b)(1)(ii) and (h); 10 NYCRR 86-2.7.] A facility's rate is provisional, and all information reported in the cost report is subject to audit (rate audit). [PHL 2808; 10 NYCRR 86-2.10; 18 NYCRR 517.3.]

Pursuant to 10 NYCRR 86-2.7 "All fiscal and statistical records and reports shall be subject to audit. All underlying books, records and documentation which formed the basis for the fiscal and statistical reports, filed by the residential health care facility with the department, shall be kept and maintained by the facility for a period of time not less than six years from the date of filing, or the date upon which the fiscal and statistical records were to be filed, whichever is the later date. In this respect, any rate of payment certified by the State Commissioner of Health based on the initial submission of base year data and reports will be construed to represent a provisional rate until such audit is performed and completed, at which time such rate or adjusted rate will be construed to represent the audited rate."

If an audit identifies an overpayment the Department can retroactively adjust the rate. [SSL 368-c; 10 NYCRR 86-2.7; 18 NYCRR 517.3.] Overpayment includes "any amount not authorized to be paid under the Medicaid Program, whether paid as the result of inaccurate or improper cost reporting, improper claiming, unacceptable practices, fraud, abuse or mistake. includes "any amount not authorized to be paid under the Medicaid Program, whether paid as the result of inaccurate or improper cost reporting, improper claiming, unacceptable practices, fraud, abuse or

mistake.” [18 NYCRR 518.1(c).] When the Department determines that an overpayment has been made it may then require the repayment of any amounts not authorized to be paid under the Medicaid Program. [18 NYCRR 518.1.]

Pursuant to 10 NYCRR 86-2.10(a)(9) “Capital costs shall mean costs reported in the depreciation, leases and rentals, interest on capital debt and/or major movable equipment depreciation cost centers, as well as costs reported in any other cost center under the major natural classification of depreciation, leases and rentals on the facilities annual cost report (RHCF-4).” The capital cost component of the rate is made on a prospective basis and is recalculated annually using a two-year lag. [10 NYCRR 86-2.10(g).]

Pursuant to General Construction Law 66 a public corporation includes a public benefit corporation. A “public benefit corporation is a corporation organized to construct or operate a public improvement wholly or partly within the state, the profits from which inure to the benefit of this or other states, or to the people thereof.” [General Construction Law (GCN) 66 [4].] The Office of the New York State Comptroller provides that public benefit corporations are public authorities “created by the Legislature to further public interests. Public authorities have various levels of autonomy from the State based on the powers, as well as the constraints, built into their legislative mandate. Some public authorities are completely self-supporting and operate entirely outside the budget process, while others rely on State appropriations to fund operations. In addition, most authorities are authorized to issue bonds—without voter approval—to develop and maintain infrastructure, such as roads and schools, or to fund projects for third parties, including hospitals and nursing homes.” [Office of the New York State Comptroller at osc.ny.gov.-“*What is a Public Authority?*”; See GCN §§65[a], 66[4].]

A municipal housing authority is a "public authority" and a "public benefit corporation." [Opinion 88-64 Office of the New York State Comptroller; *See* New York General Construction Law, §§65[a], 66[4].] "The village of East Rochester municipal housing authority (VERHA)" was "created and established for the village of East Rochester, in the county of Monroe, for the accomplishment of any or all of the purposes specified in article eighteen of the constitution of the state of New York. [New York Public Housing Law 516.] The Medical Care Facilities Finance Agency (MCFFA), succeeded by The Dormitory Authority of the State of New York (DASNY), is "a corporate governmental agency constituting a public benefit corporation (MCFFA/DASNY)." [New York Unconsolidated Laws 7414.]

Pursuant to 10 NYCRR 86-2.20(f) "Where a public finance authority has established a mortgage rate of interest such that sufficient cash flows exist to retire the mortgage prior to the stated maturity, the amount of the mortgage to be forgiven, at the time of such forgiveness, shall be capitalized as a deferred asset and amortized over the remaining mortgage life, as a reduction to the facility's capital expense."

FINDINGS OF FACT

1. Appellant operates a voluntary not-for-profit residential health care facility in Rochester, New York (nursing home or facility.) It is licensed under PHL Article 28 and enrolled as a provider in the Medicaid Program. [Exhibit (Ex.) 1.]

2. In 1983, Appellant secured a mortgage with bonds issued by MCFFA/DASNY and in 2002 refinanced the mortgage with bonds issued by VERHA. The mortgage note was due on June 1, 2024 (maturity date). Both MCFFA/DASNY and VERHA are public authorities/public benefit corporations. [Ex. 4, 5, 6; GCN 66, New York Unconsolidated Laws 7414, New York Public Housing Law 516; *See* Opinion 88-64 Office of the New York State Comptroller.]

3. The structure of the financing allowed the mortgage to be retired/forgiven in August 2015, nearly 10 years prior to the maturity date, resulting in a gain on extinguishment of debt. [Ex. 4, 5, 6; Transcript (T.) 89-98, 169-178; GCN 66, New York Unconsolidated Laws 7414, New York Public Housing Law 516]

4. The Department's Bureau of Long Term Care Reimbursement (BLTCR) sets the Medicaid per diem rate of payment for providers which is a prospective rate based on the cost report submitted by a provider. Appellant was provided reimbursement for capital costs in its rate. The rate is subject to audit by the OMIG. Once an audit is performed and completed the "rate or adjusted rate will be construed to represent the final audited rate." [10 NYCRR 86-2.7; Ex. 4, 5, 6; T. 34-37, 87-90, 207-210.]

5. On November 21, 2017, OMIG initiated a field audit to review Appellant's records/cost reports that "are the basis for the capital portion of the Provider's January 1, 2013 through December 31, 2016 Medicaid rates." Also subject to the audit were the Appellant's subsequent capital costs and per diem adjustments to these rates. [10 NYCRR 86-2.7; Ex. 1, 2, 3, 10, 11; T. 34-49.]

6. On November 6, 2019, the OMIG issued a Draft Audit Report (DAR) with four audit findings. The Appellant contests only Audit Finding 4 - Gain on Extinguishment of Debt: "The Appellant's mortgage note, which was due on June 1, 2024 was supported by NYS Public Authority Mortgage Revenue Bonds issued by the Village of East Rochester Housing Authority (VERHA). The mortgage interest rate established in the financing arrangement between the Provider and VERHA was greater than the interest payable on the underlying bonds, resulting in sufficient cash flows to pay the VERHA bonds in August 2015. The remaining principal of the mortgage was forgiven, resulting in a gain on extinguishment of debt totaling \$10, 233,871. The

amount of the mortgage forgiveness must be allocated over the remaining life of the mortgage and each annual allocation used to reduce otherwise allowable capital costs. Regulation: 10 NYCRR Section 86-2.20(f).” [Ex. 4 at page 24, Ex. 14; T. 87-98, 170-178.]

7. Appellant submitted a response to the DAR on December 23, 2019. Appellant contends that 10 NYCRR §86-2.20(c) and not (f), applies to the treatment of Appellant’s gain on the mortgage forgiveness. [Ex. 5.]

8. The OMIG issued a final audit report (FAR) on February 26, 2020. Appellant’s response to the DAR did not change the OMIG determination regarding Audit Finding 4 and the overpayment amount, \$994,285. [Ex. 6; T. 77-98, 207-208.]

9. Appellant requested a hearing to contest Audit Finding 4 and a prehearing conference was held. [Ex. 7, 8, 9; T. 84-86.]

ISSUES

Was the OMIG’s Audit Finding 4 “Gain on Extinguishment of Debt” and determination to recover overpayments, correct?

DISCUSSION

OMIG Audit Supervisor Stratton presented the audit file and summarized the case. She explained that in 1983 Appellant originated a mortgage with bonds issued by MCFFA/DASNY, and in 2003 the mortgage was refinanced with bonds issued by VERHA. The “structure of the bond financing arrangement” allowed Appellant to “pay off the bond early and to retire the mortgage,” in 2015, nearly “10 years earlier than the scheduled maturity.” [T. 87-88.] The OMIG concluded that “the mortgage was forgiven and based on that we made a disallowance pertaining to the liability that no longer existed.” [T. 77-78, 87.]

Prior to August 2015 when the mortgage was retired/forgiven Appellant was “reimbursed their mortgage interest rate” and approved historical capital costs including “depreciation” (approved costs). [T. 95-98.] When the mortgage was retired/forgiven “\$10 million in debt went away” and Appellant continued to “get reimbursed on the entire cost that was approved upfront.” [T. 97.] The approved costs were “funded through the mortgage” and “there is no mechanism in place to take away depreciation.” [T. 97-98.] The treatment of Medicaid overpayments for Appellant’s gain on extinguishment of debt is specifically provided for at 10 NYCRR 86-2.20 (f) which states that “the amount of the mortgage to be forgiven, at the time of such forgiveness, shall be capitalized as a deferred asset and amortized over the remaining mortgage life, as a reduction to the facility’s capital expense.” [T. 89-90.] Stratton reviewed Appellant’s response to the DAR and the OMIG’s overpayment determination regarding Audit Finding 4 remained unchanged in the FAR. [T. 97-98.]

Appellant argues that subsection (c), not subsection (f), applies to the treatment of Appellant’s gain on the mortgage forgiveness. Subsection (c) provides “Interest expense shall be reduced by investment income with the exception of income from funded depreciation, qualified pension funds, trustee malpractice insurance funds, or in instances where income from gifts or grants is restricted by donors. Interest on funds borrowed from a donor-restricted fund or funded depreciation is an allowable expense. Investment income shall be defined as the aggregate net amount realized from dividends, interest, rental income, interest earned on temporary investment of withholding taxes, as well as all gains and losses. If the aggregate net amount realized is a loss, the loss is not allowable.” Appellant argues that the gain should be recognized in only one year, either 2015 or 2017, and not amortized over the remaining life of the loan as per subsection (f).

Appellant does not dispute that MCFFA/DASNY is a public authority, and that subsection (f) would apply to the gain if the mortgage was retired/forgiven by MCFFA/DASNY. Appellant contends that VERHA is not a public authority because unlike MCFFA/DASNY it is not governed by the Public Authorities Law to provide financing to nursing homes and it is not listed by the OSC as a public authority. Appellant also contends that because the mortgage was retired/forgiven by VERHA rather than MCFFA/DASNY subsection (c) applies to the treatment of Appellant's gain on the mortgage forgiveness. Appellant further contends that in a June 3, 2015 meeting with the BLTCR¹, Appellant received verbal confirmation that subsection (c) applies.

Appellant CEO Michael King testified that in June 2015 Appellant was in the design phase of a project that would "transform the nursing home" from an environmental, structural and care standpoint (Greenhouse Project). [T. 334-337.] Appellant planned to build small cottages on the facility campus to house small groups of residents and transform existing space to feel less like the "medical model" of a skilled nursing facility, and "hoped to break ground in about a year or so." [T. 336-338.]

On June 3, 2015, King attended a meeting with the BLTCR to determine how it was going to "handle this mortgage forgiveness issue" because it would impact the scale and financing of the Greenhouse Project. [T. 334-335.] King testified that if the Department "was not going to agree with us" that subsection (c) applied to the mortgage forgiveness he is "pretty sure that we would not have proceeded with the 80 million dollar project." [T.354- 355.] "We came away from the meeting believing that subsection C applied" and the Department agreed with "our interpretation of the mortgage (understanding)." [T. 354-356.] King testified that after the meeting Appellant's counsel sent a June 10, 2015 letter (letter) to the Department confirming its understanding. [T.

¹ Appellant uses BLTCR, Department, the Department of Health and the OMIG interchangeably.

356.] King concedes that the Department did not confirm Appellant's understanding in writing. [T. 370-371.] Appellant obtained financing and Certificate of Need (CON) approval for the Greenhouse Project based on its understanding and was able to break ground in 2016.

Appellant CFO Debra McIlveen also attended the June 3, 2015 meeting with BLTCR (meeting.) McIlveen testified that in the 35 years she worked at the facility this was one of only a few times Appellant met with the Department, and it was the "most important one of them all." [T. 449.] Appellant's mortgage was scheduled to be retired/forgiven in August 2015 and the gain was approximately "10 million" dollars (gain). [T. 386.] McIlveen testified that the Department's treatment of the gain would have a significant impact on its revenue and ability to finance the Greenhouse Project.

In 1982 Appellant took out the mortgage which was financed with bonds issued by MCFFA/ DASNY. According to McIlveen, at that time "there wasn't much of a difference between the mortgage interest rate that we would pay, and the rate of interest that the bondholders would get if we default." [T. 384-385.] In order to "entice" investors to buy bonds a "mortgage forgiveness" agreement was established so that "there was a difference between when the bonds would be paid off and the mortgage schedule." [T. 385.] This type of mortgage agreement was "pretty standard for any nursing homes that were built at that time." [T. 411.]

While the Appellant does not receive "cash from the mortgage forgiveness" the treatment of the gain would have a significant impact on its Medicaid reimbursement and ability to finance the Greenhouse Project. [T. 383-386.] The impact of the Department's treatment of the gain was a Medicaid rate reimbursement reduction of "460,000" dollars "versus six million" dollars. [T. 449.] If subsection (c) applies to the treatment of the gain it would result in its Medicaid rate being reduced by a "portion" of the gain and would be "reflected in one year 2015" and the capital

expense would be reversed by "460,000" dollars. [T. 395-398, 436-438, 444-445.] In the following years there would be no capital expense reimbursement because the mortgage was retired. [T. 446-447.] If subsection (f) applies to the treatment of the gain it would result in the Department withholding from its reimbursement rate roughly "six million" dollars over the remaining life of the loan. [T. 386 – 394, 442.]

In 2002 Appellant refinanced the mortgage with bonds issued by VERHA which reduced its "capital expenses" and saved the Medicaid Program millions of dollars. [T. 418-423.] McIlveen testified that Appellant was advised by its counsel that because the mortgage was refinanced with VERHA, not MCFFA/ DASNY, subsection (c) applies to the treatment of the gain. [T. 419-425.] "We wanted to make sure that we had a really good understanding and that we were on the same page as the Department of Health" and that the gain would be "treated under subsection C." [T. 395.] McIlveen reviewed and agreed with the letter Appellant sent to the BLTCR confirming its understanding that subsection (c) applied to the gain. McIlveen said that Appellant was comfortable proceeding with financing for the Greenhouse Project without written confirmation from BLTCR based on Appellant's understanding that at the meeting BLTCR agreed subsection (c) applied. [T. 460-461.]

On cross examination Stratton testified that the BLTCR sets a prospective rate based on a provider's cost report "in order to make sure the facility is getting paid it does not audit the reported costs before issuing the rate." [T. 207-208.] The BLTCR sets the rate with the "understanding that OMIG has the right to go in and audit those rates after the fact." [T. 205.] The Greenhouse Project and its financing is outside the scope of the audit. [Tr. 229.] Stratton reiterated that in August 2015 the mortgage was retired/forgiven because the interest exceeded the amount of the bond and subsection (f) specifically provides for the treatment of the gain on mortgage forgiveness.

CONCLUSIONS

Appellant has failed to show that the OMIG's determination is incorrect. Its claim that VERHA is not a public finance authority within the meaning of 10 NYCRR 86-20(f) is not supported by persuasive authority and is rejected.

While it is undisputed that Appellant may have believed that the BLTCR verbally confirmed that subsection (c) applied to the gain, it is also undisputed that Appellant sent a letter to the BLTCR attempting to confirm its understanding that subsection (c) applied, and the BLTCR did not confirm in writing that subsection (c) did apply. It is further undisputed that Appellant submitted cost reports and obtained financing and CON approval for the Greenhouse Project based on its understanding subsection (c) applied to the gain. Assuming arguendo that BLTCR told Appellant at the meeting that subsection (c) applied, it has little relevance to the issues at hearing. The BLTCR sets prospective rates which are provisional and subject to audit by the OMIG. The OMIG conducted an audit and issued the final rate.

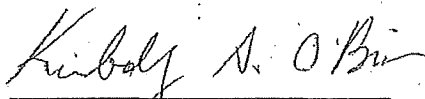
The record reflects that the audit does not concern the Greenhouse Project. Both MCFFA/DASNY and VERHA are public authorities/ public benefit corporations that issued bonds to finance Appellant's mortgage and the structure of the mortgage did not change when Appellant refinanced the mortgage with VERHA. The Medicaid Program reimbursed Appellant in its Medicaid rate for its approved costs including interest and depreciation. The OMIG based its determination regarding the disallowance on the structure of the mortgage financing that resulted in Appellant's mortgage being retired/forgiven prior to the mortgage maturity date. Subsection (f) specifically provides that "the amount of the mortgage to be forgiven, at the time of such forgiveness, shall be capitalized as a deferred asset and amortized over the remaining mortgage life, as a reduction to the facility's capital expense."

DECISION

The OMIG's determination regarding Audit Finding 4 "Gain on Extinguishment of Debt" is affirmed.

This decision is made by Kimberly A. O'Brien, Bureau of Adjudication, who has been designated to make such decisions.

DATED: Albany, New York
July 2, 2024



Kimberly A. O'Brien
Administrative Law Judge