STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WINTER HAVEN HOSPITAL, Petitioner, vs. AGENCY FOR HEALTH CARE ADMINISTRATION, Respondent.	)	Case No. 04-1887MPI

RECOMMENDED ORDER OF DISMISSAL

Respondent is the agency of the state that administers the Florida Medicaid program, defined in Subsection 409.901(15), Florida Statutes (1996), in accordance with Title XIX of the Social Security Act, 42 USC Section 1396 et seq. Respondent initiated this administrative proceeding to recover alleged overpayments in the amount of $35,158.76 for Medicaid services that Petitioner provided from July 1, 1997, through March 31, 1999 (the audit period).

Petitioner disputed the proposed recovery of the alleged overpayments and requested an administrative hearing. Respondent referred the matter to the Division of Administrative Hearings (DOAH) to assign an administrative law judge (ALJ) to conduct the hearing, in place of the agency head, in accordance with the Administrative Procedure Act (APA), Chapter 120,

Florida Statutes (1996). DOAH assigned the matter to the undersigned, and the administrative hearing is currently scheduled for January 10 and 11, 2005.

Petitioner provided the Medicaid services at issue more than four years before Respondent issued either a Preliminary Audit Report or a Final Agency Audit Report. Petitioner filed a Motion to Dismiss on June 2, 2004, raising for the first time the defense that the proposed agency action is time barred by Subsection 95.11(3)(f), Florida Statutes (1996) (the statute of limitations), pertaining to an action founded on statutory liability.

A cursory order from the undersigned denied Petitioner's motion with leave to submit another motion citing legal authority for applying the statute of limitations in this administrative proceeding. Petitioner filed a subsequent Motion to Dismiss (Motion) on July 9, 2004. Respondent filed its Response to Second Motion to Dismiss on July 14, 2004 (Response).

The parties filed legal memoranda and a joint stipulation of facts in support of their respective positions, and the undersigned conducted a motion hearing on October 4, 2004. At the hearing, the ALJ requested the parties to submit supplemental legal memoranda addressing issues raised by the ALJ during the hearing. Petitioner filed a supplemental legal

memorandum concerning the issues of when an administrative cause of action accrues and when Respondent initiated its recovery action. Respondent did not file a supplemental memorandum.

During a telephone conference conducted on December 21, 2004, the undersigned entered an ore tenus order granting Petitioner's request to stay discovery pending the issuance of this Order. On December 22, 2004, the ALJ requested counsel for the parties to submit additional legal authority. The purpose of the request was to give respective counsel the opportunity to cite legal authority, if any, supporting or denying the authority of the state to enact a statute of limitations that shortens the federal statute of limitations barring a federal agency from initiating collection for overpayments of Medicaid payments after six years. In a written response filed on December 23, 2004, Respondent admits that the six-year federal statute of limitations does not apply to state administrative proceedings authority and, presumably, the federal statute of limitations does not preclude the state from enacting a shorter statute of limitations.

The statute of limitations, in relevant part, provides:

> A civil action or proceeding, called "action" in this chapter, including one brought by the state, a public officer, a political subdivision of the state, a municipality, a public corporation or body corporate, or any agency or officer of any of them, or any other governmental

> authority, shall be barred unless begun within the time prescribed in this chapter or, if a different time is prescribed elsewhere in these statutes, within the time prescribed elsewhere.

§ 95.011, Fla. Stat. (1996).

It is undisputed that a different time is not prescribed elsewhere in Chapter 409, Florida Statutes (1996), and that, if a state statute of limitations applies in this proceeding, the operative statute is Section 95.011, Florida Statutes (1996).

The threshold issue for determination is whether the statute of limitations applies to administrative proceedings such as this proceeding. For reasons stated hereinafter, the ALJ concludes that the statute of limitations applies to some administrative proceedings, including this proceeding, but not to other administrative proceedings.

In asserting the negative of the threshold issue, the Response argues, in substance rather than form, that the phrase "civil action or proceeding" should be construed grammatically to mean civil action or civil proceeding. The Response presumably does not suggest that a civil action and a civil proceeding are synonymous because principles of statutory construction assume the legislature does not intend to enact meaningless or redundant terms. Unruh v. State, 669 So. 2d 242, 245 (Fla. 1996).

The necessary implication from the Response is that a civil action and a civil proceeding are distinct judicial events. The Response cites no legal authority to support the distinction, but a recent appellate decision held that an administrative proceeding may be a distinct event from an administrative hearing. G.E.L. Corporation v. Department of Environmental Protection, 875 So. 2d 1257, 1261 (Fla. 5th DCA 2004) reh. denied (July 1, 2004).

The statutory construction proposed by Respondent is problematic for at least three reasons. First, the proposed construction ignores the fact that the legislature mandates a substantial proportion of state "action" to be initiated through an administrative proceeding pursuant to the APA and workers' compensation law. Second, the proposed construction is inconsistent with relevant case law. Third, the proposed construction may violate the non-delegation doctrine that is virtually unique to Florida.

The statutory construction proposed by Respondent ignores the practical reality that the legislature authorizes a substantial proportion of state "action" to be initiated in the form of an administrative "proceeding." See, e.g., §§ 120.569 and 120.57(1), Florida Statutes (1996) (authorizing an administrative hearing for any proposed agency action that affects a person's substantial interests). Similarly, the

statute of limitations is, by its terms, intended to apply to "actions or proceedings" initiated by every conceivable form of state or local government. For example, the legislature intends the statute of limitations to apply to "actions or proceedings" initiated by:

> . . . the state, a municipality, a public officer, a political subdivision of the state, a municipality, a public corporation or body corporate, or any agency or officer of any of them, or any other governmental authority. . . .

§ 95.011, Fla. Stat. (1996). Compare Heidt v. Caldwell, 41 So. 2d 303, 305 (Fla. 1949) (holding a different limitations statute did not apply to the state because the language of the statute did not make it applicable to the state).

It would strike the undersigned as counterintuitive, and perhaps the functional equivalent of a legislative nullity, if the legislature were to apply the statute of limitations to "actions or proceedings" initiated by such an inclusive definition of state government and, simultaneously, reduce the reach of the statute by excluding a significant body of action that the legislature authorizes the state to initiate in an administrative proceeding. The undersigned concludes that the statute of limitations applies to proceedings that are administrative substitutes for civil actions in the absence of either a specifically applicable statute of limitations or an

express statutory exclusion. See Associated Coca-Cola and Liberty Mutual Insurance v. Special Disability Trust Fund, 508 So. 2d 1305, 1306 n. 2 (Fla. 1st DCA 1987) (holding that a general statute of limitations applies to administrative proceedings in the absence of a specially applicable statute) (citations omitted).

A conclusion that the legislature intended the statute of limitations to apply to proceedings that are administrative substitutes for civil actions, in the absence of a specifically applicable statute or an express exclusion, construes the broad scope of state action described in the statute of limitations in a manner that is consistent with the broad legislative mandate for state action to be initiated pursuant to the APA. Compare §§ 57.111(2) (expressly distinguishing civil actions from administrative proceedings), 164.1041(1), and 164.1051, Fla. Stat. (2004) (expressly excluding administrative proceedings conducted pursuant to the APA from the operation of the Florida Governmental Conflict Resolution Act) with § 95.011, Fla. Stat. (2004) (not expressly limiting the term "proceedings" to administrative proceedings).

The statutory construction proposed by Respondent is inconsistent with cases in which courts have applied the statute of limitations in administrative proceedings conducted pursuant to workers' compensation law in Chapter 440. Associated Coca-

Cola, 508 So. 2d at 1305. Accord Special Disability Trust Fund v. Florida Crushed Stone Company, 689 So. 2d 430 (Fla. 1st DCA 1997); Special Disability Trust Fund v. Orange County Board of Commissioners, 687 So. 2d 1368 (Fla. 1st DCA 1997); Rebich v. Burdine's, 417 So. 2d 284 (Fla. 1st DCA 1982), review denied 424 So. 2d 762 (Fla. 1982). The cited cases did not apply the statute of limitations to APA proceedings. It is appropriate, therefore, to determine whether there is any practical or legal basis for treating administrative proceedings initiated pursuant to the workers' compensation law differently from administrative proceedings initiated pursuant to the APA.

In several cases, courts have refused to apply the statute of limitations to administrative proceedings initiated pursuant to the APA. In each case, however, the administrative proceeding involved disciplinary actions in which the state exercised a quasi-police power against a licensee (disciplinary actions). Ong v. Department of Professional Regulation, 565 So. 2d 1384, 1386 (Fla. 5th DCA 1990); Farzad v. Department of Professional Regulation, 443 So. 2d 373, 375 (Fla. 1st DCA 1983); Landes v. Department of Professional Regulation, 441 So. 2d 686 (Fla. 2d DCA 1983); Donaldson v. State Department of Health and Rehabilitative Services, 425 So. 2d 145 (Fla. 1st DCA 1983).

The parties agree that the statute of limitations does not apply to APA proceedings that are disciplinary actions. However, they also agree that this proceeding is not a disciplinary action.

Judicial decisions that exclude disciplinary actions from the statute of limitations do not a fortiori exclude other APA proceedings from the statute of limitations. APA proceedings that are not disciplinary actions do not comprise a subset of disciplinary actions. Rather, disciplinary actions comprise a subset of the universe of APA proceedings.

At least one case has applied a statute of limitations in an APA proceeding that was not a disciplinary action. Bishop v. State Division of Retirement, 413 So. 2d 776 (Fla. 1st DCA 1982). In Bishop, a hearing officer concluded in an administrative proceeding conducted pursuant to Subsection 120.57(1), Florida Statutes (1979), that the claims of retirees for debts owed by the state and payable in installments were untimely tort claims that were barred by a statute of limitations in Subsection 768.28(11), Florida Statutes (1979). Bishop v. Division of Retirement, DOAH Case No. 80-1297 (DOAH May 12, 1981) (adopted by Final Order June 3, 1981). On appeal, the court held that the statute of limitations applicable to contracts, rather than that applicable to torts, runs against each installment from the day the

installment is due. Bishop, 413 So. 2d at 778. However, the published decision of the court did not explicitly identify the statute of limitations that barred untimely contract claims in administrative proceedings.

In a subsequent case, the court identified "Chapter 95" as the statute of limitations at issue in Bishop and attempted to clarify the earlier decision in Bishop. Farzad, 443 So. 2d at 375. In relevant part, the court explained:

> Although Donaldson indicates that Chapter 95 is not applicable to this administrative proceeding in the absence of contrary legislative intent, appellant urges that our decision in Bishop (citation omitted) dictates a contrary result. . . . Bishop involved an action which was an administrative substitute for the common law remedy of a suit for breach of contract, rather than a disciplinary proceeding brought in the name of the sovereign, as here. We hold that this administrative disciplinary proceeding is not barred by Section 95.011(3)(p), Florida Statutes (1981).

Id.

The refusal to apply "Chapter 95" to administrative proceedings conducted pursuant to the APA is expressly limited in the foregoing judicial explanation to the subset of APA proceedings identified as disciplinary actions. The decision does not expressly reach other administrative proceedings within which this proceeding is properly characterized.

It is uncontested that this proceeding is an action based on statutory liability within the meaning of Subsection 95.11(3)(f), Florida Statutes (1996). However, this proceeding, like federal actions to recover Medicare overpayments, is an administrative substitute for a civil action. See United States v. Beck, 758 F.2d 1553, 1558 (11th Cir. 1985)(holding that federal actions for recoupment of overpayment of Medicare claims are contract actions).

Unlike this proceeding, disciplinary actions are penal proceedings that are more closely analogous to criminal actions than they are to civil actions. Courts may exclude disciplinary actions brought "in the name of the sovereign" from the reach of "Chapter 95" because disciplinary actions arguably constitute administrative substitutes for quasi-criminal actions rather than administrative substitutes for civil actions. Compare Farzad, 443 So. 2d at 375 and Bishop, 413 So. 2d at 778 (read together for the proposition that non-disciplinary actions are an administrative substitute for a civil action) with State ex rel. Vining v. Florida Real Estate Commission, 281 So. 2d 487, 489 and 491 (Fla. 1973) (holding that disciplinary actions are penal proceedings; superceding the rationale in Robins v. Florida Real Estate Commission, 162 So. 2d 535 (Fla. 3d DCA 1964) that refused to extend the right against self-

incrimination to a disciplinary action because disciplinary actions were administrative proceedings).

A separate procedural rule that exempts disciplinary actions from the statute of limitations is consistent with the literal terms of Chapter 95. The statute of limitations, by its terms, is limited to civil actions or proceedings.

A separate procedural rule that exempts disciplinary actions from the statute of limitations, but does not exempt other administrative proceedings, is consistent with other procedural rules that treat disciplinary actions differently from other types of APA proceedings. For example, the standard of proof in a disciplinary action is clear and convincing evidence while the standard of proof for other APA proceedings is a preponderance of evidence. Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996). In addition, courts require greater specificity for pleadings in disciplinary actions than courts require in other types of APA proceedings. Ghani v. Department of Health, 714 So. 2d 1113 (Fla. 1st DCA 1998); Cottrill v. Department of Insurance, 685 So. 2d 1371 (Fla. 1st DCA 1996).

Respondent's proposed statutory construction, if it were accepted, would violate the non-delegation doctrine in Florida. Art. 2, § 3, Fla. Const. While the undersigned has no jurisdiction to determine the constitutionality of a statute,

the undersigned is required, whenever possible, to interpret a statute in a manner that preserves the statute's constitutionality.

The non-delegation doctrine, in relevant part, prohibits the legislature from delegating to an administrative agency the power to exercise unrestrained discretion in the administration of an enactment. The non-delegation doctrine requires the legislature to make fundamental and primary policy decisions and to provide administrative agencies, including Respondent, with minimal standards and guidelines that are ascertainable by reference to the legislature's enactment. Bush v. Shiavo, 885 So. 2d 321 (Fla. 2004). See also B.H. v. State, 645 So. 2d 987, 992-994 (Fla. 1994); Askew v. Cross Key Waterways, 372 So. 2d 913, 925 (Fla. 1978).

If the statute of limitations were inapplicable to administrative substitutes for civil actions, the legislature would effectively empower Respondent to determine in each case the amount of time within which a state agency would enforce statutory liability without any guidelines ascertainable in the enactment. Application of Section 95.011, Florida Statutes (1996), to state action initiated by a state agency in an administrative substitute for a civil action precludes an inadvertent violation of the non-delegation doctrine.

The statutory interpretation proposed by Respondent either nullifies the four-year limitation period; or, in the alternative, enlarges the time limit to an indefinite and variable period to be determined by a state agency in each case with no minimal standards or guidelines that are ascertainable by reference to the legislative enactment that Respondent seeks to enforce. Neither Respondent nor DOAH can construe the collective provisions of the Medicaid law and the statute of limitations in a manner that enlarges, modifies, or contravenes the specific provision of either law. §§ 120.52(15) and 120.68(7)(d) and (e), Fla. Stat. (2004).

Application of the statute of limitations to APA proceedings other than disciplinary actions is consistent with judicial decisions applying the statute of limitations to administrative proceedings initiated pursuant to the workers' compensation law. Such APA proceedings, like workers' compensation proceedings, are administrative substitutes for civil actions; both are proceedings, within the meaning of Section 95.011, Florida Statutes (1996); and neither is a disciplinary action.

Having resolved the threshold issue by concluding that the statute of limitations applies to proceedings that are administrative substitutes for civil actions, the remaining issue is whether the statute of limitations bars the proposed

agency action in this administrative proceeding. Resolution of the remaining issue requires a determination of when Respondent's cause of action accrued and when Respondent initiated an administrative proceeding to enforce its cause of action.

Respondent seeks reimbursement of alleged Medicaid overpayments in this proceeding. Respondent's cause of action did not accrue on the date that Respondent made payments to Petitioner. See Associated Coca Cola, 508 So. 2d at 1307 (rejecting the contention that a cause of action for reimbursement of workers' compensation benefits accrues on the date of payment).

Respondent could not have known of the alleged overpayments at the time of the payments. See Stipulations for Hearing, paragraph 6 (October 1, 2004) (hereinafter "Stipulations"). A cause of action generally accrues on the date that a claimant, such as Respondent, has knowledge sufficient to reasonably believe that a right of action has accrued. Compare City of Miami v. Brooks, 70 So. 2d 306, 308-309 (Fla. 1954) and Urie v. Thompson, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949) (both holding that a right of action for a tort victim does not accrue until the victim reasonably should have known of the tort) with Harris v. District Board of Trustees of Polk Community College, 9 F. Supp. 2d 1319, 1328 (M.D. Fla. 1998)

(holding that cause of action under whistle blower statute accrues when claimant has knowledge of wrongful act).

Respondent's cause of action for recovery of alleged Medicaid overpayments accrued on the date when Respondent received a peer review report that Petitioner had over-utilized medical treatment. The date of the peer review report is the first date on which Respondent had reasonable knowledge of the alleged overpayments. Compare Beck, 758 F.2d at 1559 (holding that federal actions for recoupment of overpayment of Medicare claims accrue upon payment, but due to specific federal code provisions the federal six-year statute of limitations is tolled until receipt of the peer review report) with United States v. Diaz, 790 F.2d 866, 867 (11th Cir. 1986) and United States v. Kass, 740 F.2d 1493, 1497 (11th Cir. 1984) (both holding that government action for recoupment of overpayments of Medicare claims accrues upon receipt of peer review report).

Respondent may not have known all of the details of the alleged overpayments when Respondent received the peer review reports, and the peer review reports presumably were recommendations. Moreover, Petitioner provided additional information that Respondent considered before issuing a final agency audit letter. However, it is not necessary for Respondent to have all relevant and material information before the statute of limitations begins to run. Once the facts

comprising the "essence" of a right of action are reasonably knowable, the action accrues, and the statute of limitations begins to run. Kass, 740 F.2d at 1497 and 1498 n.5.

Respondent, through its agent, issued 17 separate "adverse determination letters" for the audit period, based on peer review reports, between March 22, 1999, and September 20, 1999. Stipulations, paragraph 4. Resolving unstipulated facts against Petitioner, as the moving party, it is assumed that Respondent's agent received each peer review report on the same date as the date of the respective adverse determination letter. Thus, Respondent had reasonable knowledge of the alleged overpayments no later than September 20, 1999.

A state agency generally initiates a cause of action when it takes action that creates a point of entry for a person whose interests are substantially affected by the proposed agency action. Friends of the Hatchineha, Inc. v. Department of Environmental Regulation, 580 So. 2d 267, 269 (Fla. 1st DCA 1991). Preliminary agency action does not affect a person's substantial interests. See Florida League of Hospitals v. Hospital Cost Containment Board, Department of Insurance, 492 So. 2d 431, 433 (Fla. 1st DCA 1986) (holding that voice vote of board was preliminary agency action that did not entitle regulated party to formal administrative hearing).

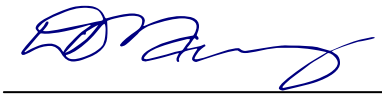
Respondent issued a preliminary audit letter on November 20, 2003, and a final agency audit letter on April 18, 2004. Stipulations, paragraphs 2 and 3. The final agency audit letter dated April 18, 2004, initiated agency action. The date of the final agency audit letter was the first date on which Respondent created a point of entry for Petitioner to request an administrative hearing to challenge the proposed recoupment of alleged overpayments. See §§ 409.913(20), 120.569(1), and 120.57(1), Fla. Stat. (1996).

Respondent initiated an administrative proceeding to recoup alleged overpayments on April 18, 2004, more than four years after Respondent's cause of action accrued on September 20, 1999. Respondent's claim for alleged overpayments based on statutory liability is barred by the statute of limitations.

Having considered the Motion and Response, it is

RECOMMENDED that Respondent enter a final order dismissing this proceeding as barred by the statute of limitations.

DONE AND ENTERED this 28th day of December, 2004, in Tallahassee, Leon County, Florida.



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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order of Dismissal. Any exceptions to this Recommended Order of Dismissal should be filed with the agency that will issue the Final Order in this case.