

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FFVA MUTUAL,)	
)	
Petitioner,)	
)	
vs.)	Case No. 08-0398RX
)	
DEPARTMENT OF FINANCIAL)	
SERVICES,)	
)	
Respondent,)	
)	
and)	
)	
HOLMES REGIONAL MEDICAL)	
CENTER, INC.,)	
)	
Intervenor.)	
)	
_____)	
TECHNOLOGY INSURANCE COMPANY,)	
)	
Petitioner,)	
)	
vs.)	Case No. 08-0711RX
)	
DEPARTMENT OF FINANCIAL)	
SERVICES,)	
)	
Respondent.)	
_____)	

FINAL ORDER

These cases are before the undersigned based upon the parties' responses to the Orders to Show Cause issued on January 30, 2008, and February 15, 2008. No hearing is necessary.

APPEARANCES

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For Respondent: Jill Bennett, Esquire
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For Intervenor: Jerome W. Hoffman, Esquire
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ISSUE

The issue is whether Section 11B(3) of the Florida Workers' Compensation Reimbursement Manual for Hospitals, 2004 Second Edition, is an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

On or about November 15, 2007, FFVA Mutual (FFVA) filed a Petition for Formal Administrative Hearing with the Agency for Health Care Administration (AHCA). The petition requests a hearing under Sections 120.569 and 120.57(1), Florida Statutes,^{1/} on AHCA's determination that FFVA is required to reimburse Holmes Regional Medical Center, Inc. (HRMC), more than \$55,000 for in-patient services that HRMC provided to Patient E.C. The petition also seeks a determination under Section 120.56,

Florida Statutes, that Section 11B(3) of the Florida Workers' Compensation Reimbursement Manual for Hospitals, 2004 Second Edition ("the 2004 Manual"), is an invalid exercise of delegated legislative authority. The petition alleges that the 2004 Manual is incorporated by reference into Florida Administrative Code Rule 69L-7.501.

On November 28, 2007, AHCA referred the petition to the Division of Administrative Hearings (DOAH). The petition was designated DOAH Case No. 07-5414 and assigned to Administrative Law Judge Bram D.E. Canter.

On January 16, 2008, the Department of Financial Services (Department) filed a motion in DOAH Case No. 07-5414 requesting that it be added to the case style, because it was the agency that promulgated the rule incorporating the manual challenged by FFVA. The Department's motion also requested that DOAH Case No. 07-5414 be consolidated with two other cases--DOAH Case Nos. 07-5489 and 07-5661--in which the same provision of the 2004 Manual was being challenged.^{2/}

Judge Canter denied the motion to consolidate in an Order entered in DOAH Case No. 07-5414 on January 24, 2008. The Order also stated that DOAH had "opened Case No. 08-0398RX, based on the rule challenge included in the petition for hearing filed by FFVA Mutual in the companion case of 07-5414."

On January 28, 2008, HRMC filed a petition to intervene in DOAH Case No. 08-0398RX. The petition was granted in an Order entered on January 30, 2008.

Judge Canter held a telephonic status conference in DOAH Case No. 08-0398RX on January 29, 2008, at which "the parties appeared to be in agreement that the rule being challenged in this case, a manual adopted by reference in Florida Administrative Code Rule 69L-7.501, is no longer adopted by reference." Because the challenged rule did not appear to be a proposed rule or an existing rule and because DOAH only has jurisdiction to consider challenges to proposed rules and existing rules, Judge Canter issued an Order to Show Cause on January 30, 2008, directing FFVA to "show cause in writing . . . why this rule challenge should not be dismissed." Thereafter, on February 6, 2008, this case and the related DOAH Case No. 07-5414 were transferred to the undersigned.

FFVA filed a response to the Order to Show Cause on February 6, 2008. The Department and HRMC filed replies to FFVA's response on February 12, 2008.

On February 11, 2008, DOAH established Case No. 08-0711RX based upon the Petition for Formal Hearing filed by Technology Insurance Company (TIC) with AHCA and referred to DOAH. The petition filed by TIC, like FFVA's petition, requests a hearing under Sections 120.569 and 120.57(1), Florida Statutes, on the

determination issued by AHCA in the reimbursement dispute between TIC and a health care provider,^{3/} and also seeks a determination under Section 120.56, Florida Statutes, that Section 11B(3) of the 2004 Manual is an invalid exercise of delegated legislative authority.

On February 15, 2008, the undersigned issued an Order to Show Cause in DOAH Case No. 08-0711RX. The Order directed the parties to show cause as to why DOAH Case Nos. 08-0398RX and 08-0711RX should not be consolidated and also directed TIC to show cause "as to why this case should not be dismissed for the reasons identified in the Order to Show Cause issued in DOAH Case No. 08-0398RX on January 30, 2008."

The Department filed a response to the Order to Show Cause on February 24, 2008, and TIC filed a response on February 25, 2008. An Order consolidating DOAH Case Nos. 08-0398RX and 08-0711RX was entered on February 26, 2008.

Due consideration has been given to the parties' filings. No hearing is necessary to rule on the jurisdictional issue framed by the Orders to Show Cause and the parties' responses to the Orders.

FINDINGS OF FACT

1. The petitions filed by FFVA and TIC challenge the validity of Section 11B(3) of the 2004 Manual,^{4/} which prior to

October 1, 2007, was adopted by reference as part of Florida Administrative Code Rule 69L-7.501(1).

2. Florida Administrative Code Rule 69L-7.501(1) was amended effective October 1, 2007, to adopt by reference the Florida Workers' Compensation Reimbursement Manual for Hospitals, 2006 Edition ("the 2006 Manual").

3. Florida Administrative Code Rule 69L-7.501(1), as it existed when the petitions were filed and as it currently exists, adopts by reference the 2006 Manual, not the 2004 Manual.

4. The 2004 Manual is no longer adopted by reference as part of Florida Administrative Code Rule 69L-7.501, or any other rule.

5. AHCA applied the 2004 Manual in the reimbursement dispute initiated by HRMC against FFVA under Section 440.13, Florida Statutes, as reflected in the determination letter issued by AHCA on October 24, 2007, which was attached to FFVA's petition. The reimbursement dispute is the subject of the pending DOAH Case No. 07-5414.

6. AHCA applied the 2004 Manual in a reimbursement dispute involving TIC under Section 440.13, Florida Statutes, as reflected in the determination letter issued by AHCA on January 9, 2008, which was attached to TIC's petition. The

reimbursement dispute is the subject of the pending DOAH Case No. 08-0703.

CONCLUSIONS OF LAW

7. DOAH has jurisdiction to consider rule challenges pursuant to Section 120.56, Florida Statutes.

8. DOAH's jurisdiction is limited to considering challenges to proposed rules, existing rules, agency statements that meet the definition of a rule but that have not been formally adopted as rules, and emergency rules. See § 120.56(2)-(5), Fla. Stat.

9. DOAH does not have jurisdiction to consider challenges to rules that have been repealed or that are otherwise "no longer in existence." See Dept. of Revenue v. Sheraton Bal Harbour Ass'n, Ltd., 864 So. 2d 454 (Fla. 1st DCA 2003); Fla. Retail Federation v. Agency for Health Care Admin., Case No. 04-1828RX, 2004 Fla. Div. Adm. Hear. LEXIS 2018, at ¶ 22 (DOAH July 19, 2004) (concluding that "the general principle announced in Sheraton--that rules no longer in existence cannot be challenged--extends beyond Section 120.56 proceedings involving rules that have been formally repealed"), per curiam aff'd, 903 So. 2d 939 (Fla. 1st DCA 2005) (table); § 120.56(3)(a), Fla. Stat. ("A substantially affected person may seek an administrative determination of the invalidity of an

existing rule at any time during the existence of the rule." (emphasis supplied)).

10. Sheraton is materially indistinguishable from this case. In that case, a taxpayer filed a petition under Section 120.56, Florida Statutes, challenging a rule that had been repealed by operation of law, but that was still being applied to determine the taxpayer's substantial interests in a pending tax refund case. The agency moved to dismiss the rule challenge on the ground that DOAH lacked jurisdiction to consider a challenge to a rule that had been repealed. The Administrative Law Judge denied the motion, and the agency petitioned for a writ of prohibition from the appellate court. The court granted the petition in a per curiam opinion, agreeing with the agency's argument that "section 120.56, Florida Statutes does not authorize a rule challenge to a rule that is no longer in existence." Sheraton, 864 So. 2d at 454.

11. Petitioners argue in their responses to the Orders to Show Cause that Sheraton is distinguishable because the rule at issue in that case had been repealed, whereas the 2004 Manual "remains in full force and effect for hospital admissions occurring prior to October 1, 2007." The fact that AHCA may still be applying the 2004 Manual in disputes involving services rendered prior to October 1, 2007, does not change the fact that the rule adopting the 2004 Manual is no longer in existence.

12. Petitioners also argue that it would be "an unreasonable result" and "a clear violation of [their] due process rights" if they were precluded from challenging the validity of the 2004 Manual because AHCA is still using the manual to determine their substantial interests. The undersigned is not unsympathetic to Petitioners' argument, but this result is mandated by Sheraton and Section 120.56, Florida Statutes.

13. In sum, DOAH does not have jurisdiction to consider Petitioners' rule challenge to Section 11B(3) of the 2004 Manual, because the manual is no longer adopted as part of Florida Administrative Code Rule 69L-7.501 or any other rule and, therefore, is no longer in existence for purposes of challenge under Section 120.56, Florida Statutes.

14. Finally, to the extent that Petitioners are challenging AHCA's interpretation of the 2004 Manual or its application of the manual in the reimbursement disputes, those issues are beyond the scope of a rule challenge proceeding. See Fairfield Communities v. Fla. Land & Water Adj. Comm'n, 522 So. 2d 1012, 1014 (Fla. 1st DCA 1988) (explaining that the purpose of a rule challenge is "to determine the facial validity of [the challenged rules], not to determine their validity as applied to specific facts, or whether the agency has placed an erroneous construction on them").

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is

ORDERED that:

1. The portions of the petitions filed by FFVA and TIC challenging the validity of Section 11B(3) of the 2004 Manual under Section 120.56, Florida Statutes, are dismissed.
2. The other aspects of the petitions remain pending in DOAH Case Nos. 07-5414 and 08-0703.
3. The files in DOAH Case Nos. 08-0398RX and 08-0711RX are closed.

DONE AND ORDERED this 4th day of March, 2008, in Tallahassee, Leon County, Florida.



T. KENT WETHERELL, II
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of March, 2008.

ENDNOTES

1/ All statutory references are to the 2007 version of the Florida Statutes.

2/ DOAH Case No. 07-5489 was voluntarily dismissed on February 1, 2008. DOAH Case No. 07-5661 was bifurcated, and the rule challenge included in the petition in that case was designated DOAH Case No. 07-5676RX. DOAH Case Nos. 07-5661 and 07-5676RX were voluntarily dismissed on February 28, 2008.

3/ This portion of the petition is pending as DOAH Case No. 08-0703, which is assigned to Administrative Law Judge P. Michael Ruff.

4/ According to the petitions, Section 11B(3) of the 2004 Manual states: "When charges for inpatient services at either an acute care hospital or a trauma center exceed \$50,000.00, the stop-loss method for reimbursement shall be used to reimburse the hospital instead of the established per diem. Reimbursement shall be at 75 percent of charges."

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of appeal with the Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.