

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Petitioner,

vs.

Case No. 18-5986F

COVENANT HOSPICE, INC.,

Respondent.

_____ /

RECOMMENDED ORDER

This case is before Administrative Law Judge Yolonda Y. Green of the Division of Administrative Hearings ("Division") pursuant to the parties' Joint Motion to Cancel Hearing and Set Date to File Briefs. The case was submitted for decision based upon a stipulated record.

APPEARANCES

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For Respondent: Bryan K. Nowicki, Esquire
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STATEMENT OF THE ISSUE

The issue to be determined in this matter is whether the Agency for Health Care Administration ("AHCA") is entitled to recover its attorney's fees and costs, pursuant to section 409.913(23), Florida Statutes, incurred prosecuting a matter pursuant to section 409.913.

PRELIMINARY STATEMENT

On October 17, 2018, AHCA issued a Final Order in Agency for Health Care Administration v. Covenant Hospice, Inc., Case No. 17-4641MPI (Fla. DOAH Aug. 15, 2018), rejected in part, Case No. 18-0701 (Fla. AHCA Oct. 17, 2018) ("Overpayment Case"), finding AHCA is entitled to recover \$637,973.10 in Medicaid overpayments and to impose a fine of \$127,594.62. The Final Order concluded, "[a]dditionally, since the Agency has prevailed in this matter, it is entitled to recover its investigative, legal, and expert witness costs it incurred in this matter. § 409.913(23), Fla. Stat." The Final Order provided that if the parties are unable to reach an agreement as to costs, either party may file a request with the Division within 30 days of the date of the rendition of the Final Order.

On November 15, 2018, AHCA timely filed its Petition for Administrative Hearing for Recovery of Fees and Costs ("Petition"). The Petition was assigned to the undersigned for disposition. On November 26, 2018, the undersigned conducted a

telephonic hearing with the parties, at which time they requested that the case be placed in abeyance to allow additional time to resolve the matter without a hearing. On December 28, 2018, the parties submitted their Joint Status Report requesting additional time, until February 7, 2019, to discuss settlement negotiations. On February 7, 2019, AHCA filed its Amended Petition for Recovery of Petitioner's Fees and Costs, which is the Petition at issue in this matter. Covenant Hospice, Inc. ("Covenant"), disputes that AHCA is entitled to legal fees and costs. On February 8, 2019, the parties filed their Joint Status Report providing dates to schedule the final hearing. The final hearing in this matter was then scheduled for April 3, 2019.

On March 15, 2019, the undersigned held a case management conference, pursuant to the parties' request. The parties advised the undersigned of their desire to forego an evidentiary hearing and to limit the instant case to the legal question of whether AHCA is entitled to attorney's fees and costs under section 409.913(23). The parties were instructed to file their Joint Stipulated Preliminary Facts ("Joint Stipulation") and briefs, which contained facts that have been incorporated into the Findings of Fact below, to the extent relevant.

On April 5, 2019, Respondent filed its Motion to Strike two exhibits attached to AHCA's Memorandum of Law in Support of

Petitioner's Amended Petition for Legal Fees. The undersigned denied the Motion to Strike and took official recognition of the two exhibits. Thus, Petitioner's Exhibits 1 and 2 have been admitted. Respondent's Exhibit 1 has been admitted. All exhibits and the Joint Stipulation were considered in preparation of this Recommended Order.^{1/}

FINDINGS OF FACT

1. AHCA is the state agency responsible for administering the Florida Medicaid Program. Medicaid is a joint federal/state program to provide health care and related services to qualified individuals, including hospice services.

2. Covenant is a provider of hospice and end-of-life services and at all times relevant to this matter, the program was an authorized provider of Medicaid services pursuant to a valid Medicaid provider agreement with AHCA.

3. AHCA is authorized to recover Medicaid overpayments, as deemed appropriate, pursuant to section 409.913.

4. The U.S. Department of Health & Human Services, Centers for Medicare and Medicaid Services ("CMS"), contracted with Health Integrity, a private vendor, to perform an audit of Covenant. Health Integrity retained a company called Advanced Medical Reviews ("AMR") to provide peer physician reviews of claims to determine whether an overpayment occurred.

5. Based on the audit findings in the Overpayment Case, AHCA prosecuted claims against Covenant for Medicaid overpayment.

6. On August 9, 2016, AHCA provided a Final Audit Report ("FAR") to Covenant seeking \$715,518.14 in overpayments, \$142,903.63 in fines, and \$131.38 in costs.

7. On August 29, 2016, Covenant timely filed a Petition for Formal Administrative Hearing.

8. The undersigned conducted a final hearing on March 19 through 23, 2018, on Covenant's Petition filed in the Overpayment Case. At the time of the final hearing, AHCA sought a modified overpayment of \$677,023.44, and a fine of \$135,404.68.

9. On August 15, 2018, the undersigned issued a Recommended Order in the Overpayment Case finding AHCA is entitled to collect an overpayment of \$637,632.15, and a fine of \$127,526.43. The Recommended Order noted that AHCA reserved its right to amend its cost worksheet in this matter and, pursuant to section 409.913(23), file a request with the undersigned to recover all investigative and legal costs, if it prevailed.

10. On October 17, 2018, AHCA issued a Final Order in the Overpayment Case finding AHCA is entitled to recover \$637,973.10 in overpayments and to impose a fine of \$127,594.62. The Final Order concluded, "[a]dditionally, since the Agency has prevailed

in this matter, it is entitled to recover its investigative, legal, and expert witness costs it incurred in this matter. § 409.913(23), Fla. Stat.” Further, it provided that if the parties are unable to reach an agreement as to costs, either party may file a request with the Division requesting a final hearing within 30 days of the date of the rendition of the Final Order.

11. On November 15, 2018, AHCA timely filed its Petition for Recovery of AHCA’s Legal Fees and Costs. On February 7, 2018, AHCA amended its Petition. Covenant opposed AHCA’s Petition and disputed whether AHCA is entitled to legal fees.

12. Covenant has appealed the Final Order in the Overpayment Case, and the appeal is pending before the First District Court of Appeal in Covenant v. AHCA, Case No. 1D18-4797.

13. The final hearing was held on a stipulated record, Petitioner’s Memorandum of Law in Support of Petitioner’s Amended Petition for Legal Fees, and Covenant’s Brief in Opposition to AHCA’s Petition for Recovery of Costs and Fees (with exhibits). Legal issues were framed by the Joint Stipulation. There was no testimony of any witnesses offered by either party.

14. The exhibits constituting the record were exhibits to Respondent’s Brief and Petitioner’s Memorandum of Law.

15. The parties have stipulated to the reasonableness of AHCA's claimed attorney's fees, in accordance with the parties' agreement stated in the Joint Motion for Case Management Conference dated March 11, 2019. The issue that remains is whether AHCA is entitled to recovery of \$330,186.14 in attorney's fees under section 409.913(23). For the reasons explained below, the undersigned finds that Florida law does not support a finding that AHCA is entitled to the attorney's fees in dispute.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with sections 120.569 and 120.57(1), Florida Statutes (2018).

17. Pursuant to section 409.913, AHCA is the sole agency authorized to investigate and prosecute claims for possible Medicaid fraud, abuse, or overpayments.

18. Section 409.913(23) provides:

(a) In an audit or investigation of a violation committed by a provider which is conducted pursuant to this section, the agency is entitled to recover all investigative, legal, and expert witness costs if the agency's findings were not contested by the provider or, if contested, the agency ultimately prevailed.

(b) The agency has the burden of documenting the costs, which include

salaries and employee benefits and out-of-pocket expenses. The amount of costs that may be recovered must be reasonable in relation to the seriousness of the violation and must be set taking into consideration the financial resources, earning ability, and needs of the provider, who has the burden of demonstrating such factors.

(c) The provider may pay the costs over a period to be determined by the agency if the agency determines that an extreme hardship would result to the provider from immediate full payment. Any default in payment of costs may be collected by any means authorized by law.

19. The standard of proof is a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

20. The Final Order entered in the Overpayment Case has determined that Petitioner "ultimately prevailed," as required by section 409.913(23). Based on the stipulation of the parties, the sole question here is whether AHCA is entitled to attorney's fees for prevailing in the Overpayment Case.

Plain Meaning of Statute

21. AHCA's entitlement to attorney's fees under section 409.913(23) ultimately will turn on the meaning of the term "legal costs."

22. Each party asserts that the "plain meaning" of the statute supports their respective positions. AHCA asserts that section 409.913(23)(a) authorizes it to recover all of the investigative, legal, and expert witness costs it incurred to

prosecute the Overpayment Case, including attorney's fees from outside counsel. AHCA further argues that a provider's costs may be reduced based on factors outlined in section 409.913(23) (b) .

23. By contrast, Covenant asserts a different reading of the statute based on the plain meaning of section 409.913(23). Covenant takes the position that section 409.913(23) only provides that AHCA is entitled to its "legal costs" without any reference to "legal fees." Covenant also asserts that Florida law does not support the expansion of the term "legal costs" to include attorney's fees.

24. Despite the parties' assertion that the "plain meaning" of section 409.913(23) controls in this matter, they differ in their interpretation of the statute. Covenant argues the statute must be strictly construed because the statute is in derogation of common law. On the other hand, AHCA argues that section 409.913(23) is remedial and, thus, it must be liberally construed. Under either analysis, there is not sufficient support to interpret "legal costs" as including attorney's fees.

Strict Construction

25. Under Florida law, statutes awarding attorney's fees to a prevailing party are in derogation of the common law "American Rule," the well-established law in Florida that each party pays its own fees, and, therefore, must be strictly

construed. See Johnson v. Dep't of Corr., 191 So. 3d 965, 968 (Fla. 1st DCA 2016). A strict construction of the plain language of section 409.913(23) requires that the term "costs" be given its exact and technical meaning in Florida, which does not include attorney's fees.

26. In Florida, legal costs and attorney's fees do not have the same meaning. Johnson v. Jarvis, 107 So. 3d 428 (Fla. 1st DCA 2012). "Costs" are generally not considered attorney's fees. Price v. Tyler, 890 So. 2d 246, 252 (Fla. 2004). See also Wiggins v. Wiggins, 446 So. 2d 1078 (Fla. 1984).

27. In Price, the statutory provision provided that "[t]he party recovering judgment shall recover all of his or her legal costs." Id. The Supreme Court ruled that "[i]n this action, the trial court should not have included attorney's fees as 'costs' because Section 57.041 does not include attorney's fees in the definition of litigation costs." Id. at 253.

28. It is worth noting that, *expressio unius est exclusio alterius* applies here in that the mention of one thing implies the exclusion of another. "[W]here a statute enumerates the things on which it is to operate, or forbids certain things, it is ordinarily to be construed as excluding from its operation all those not expressly mentioned." See Thayer v. State, 335 So. 2d 815, 817 (Fla. 1976).

29. Here, section 409.913(23) lists the costs to be considered, including investigative, expert, and legal costs. It does not mention attorney's fees.

Liberal Construction

30. AHCA argues that section 409.913 should be interpreted based on liberal construction of the statute because it is a remedial statute, instead of strict construction.

31. In Florida, "[w]hen a statute is both in derogation of the common law and remedial in nature, the rule of strict construction should not be applied so as to frustrate the legislative intent." Irven v. Dep't of Health & Rehab. Servs., 790 So. 2d 403, 406 (Fla. 2001). Instead, the opposite is true: "The statute should be construed liberally in order to give effect to the legislation." Id.

32. In Irven, a former child protective investigator sued the Department of Health and Rehabilitative Services, her employer, under the Florida Whistleblower Act. After a jury verdict in her favor, the Department appealed to the Second District Court of Appeal ("DCA"), arguing that the Whistleblower Act did not waive sovereign immunity for the type of claim the investigator asserted. On appeal, the Second DCA addressed the "determinative issue" of whether the acts and communications by the investigator were "whistle-blower" acts, as defined and protected by the Whistleblower Act. Irven v. Dep't of Health

and Rehab. Servs., 790 So. 2d at 403 (quoting Irven v. Dep't of Heath & Rehab. Servs., 724 So. 2d 689, 699 (Fla. 2d DCA 1999)).

33. In Irven, the Court relied upon the "strict construction" canon, stating:

"It is clear to us that the 'Whistle-Blower's Act,' . . . clearly and unequivocally waives sovereign immunity for the purposes of the 'Remedies' and 'Relief' afforded by subsections 112.3187(8) and (9). It is equally clear to us, however, that because any waiver of sovereign immunity must be clear and unequivocal . . . , the waiver must be limited to the acts or conduct clearly and unequivocally prohibited or protected against. Therefore, the waiver must be strictly construed and applied. A protection against acts not clearly delineated as prohibited or protected must not be implied." Id.

34. While the parties assert that the plain meaning of the statute clearly supports their respective positions, the undersigned concludes that section 409.913(23) is not clear under strict or liberal construction regarding whether "legal costs" include attorney's fees.

35. The parties both address whether AHCA should be entitled to deference regarding the interpretation of "legal costs." However, in this matter the definition of "legal costs" is outside AHCA's substantive jurisdiction. See G. E. L. Corp. v. Dep't of Env'tl. Prot., 875 So. 2d 1257, 1263-64 (Fla. 5th DCA 2004). But the obvious resemblances between statutes to recover costs and attorney's fees casts doubt on how a court may

resolve the question of whether the construction of § 409.913(23) is within the substantial jurisdiction of Petitioner. Thus, deference would not be a factor here.

Bill Analysis

36. The parties have each cited to the Final Bill Analyses and Economic Impact Statement for CS/HB 133 ("1996 House Bill Analysis"), as providing evidence of the intent of the Legislature when it amended the statute regarding Medicaid recovery.

37. The issue in this matter is specific to the meaning of "legal costs." However, the 1996 House Bill Analysis does not directly address attorney's fees or the meaning of "legal costs." It directly addresses AHCA's authority to "conduct federally program integrity, or Medicaid abuse investigatory and sanctioning activities." Likewise, in Senate Staff Analysis and Economic Impact Statement for CS/SB 118 ("1996 Senate Bill Analysis"), there is little to offer regarding whether the Legislature intended "legal costs" to include attorney's fees.

Joint Report

38. There is additional information provided in the joint AHCA and Medicaid Fraud Control Unit Report ("Joint Report"), which requires AHCA to provide the amount of costs incurred each year for discovery and prosecution of Medicaid overpayment

annually. This report is submitted as required by section 409.913(1).

39. AHCA asserts that since it is required to document costs associated with discovering and prosecution of providers for Medicaid overpayment, the statute contemplates that AHCA would recover its attorney's fees. However, even in the introductory paragraph and the Joint Report, if the Legislature intended "costs" to include attorney's fees, it would have been addressed in the statute. Thus, the Joint Report does not provide persuasive guidance on whether the legislature intended "legal costs" to include attorney's fees.

Definition of Costs

40. Section 409.913 contains no definition for the term "legal costs." Other provisions of the Medicaid statute under AHCA's jurisdiction specifically reference "attorney's fees" when such a recovery is intended. See, e.g., § 409.907(3)(h), Fla. Stat. It is established in Florida that the Legislature clearly knows how to declare its intention to authorize AHCA to recover attorney's fees when that is its desire. "[T]he Legislature must be assumed to know the meaning of words and to have expressed its intent by the use of the words found in the statute." See Thayer v. State, 335 So. 2d at 817.

Other Statutes

41. Other statutes that address recovery of attorney's fees for prosecution of allegations of non-compliance by providers or professionals may provide guidance regarding the definition of "legal costs."

42. Looking to licensee enforcement actions taken by the Florida Department of Health ("DOH"), section 456.072(4), Florida Statutes, authorizes DOH to recover costs related to the time spent by the attorney and other personnel working on the case and other expenses as the prevailing party in licensee disciplinary proceedings.

43. Section 456.072(4), in pertinent part, provides:

(4) In addition to any other discipline imposed through final order, . . . the board, or the department when there is no board, shall assess costs related to the investigation and prosecution of the case. The costs related to the investigation and prosecution include, but are not limited to, salaries and benefits of personnel, costs related to the time spent by the attorney and other personnel working on the case, and any other expenses incurred by the department for the case. The board, or the department when there is no board, shall determine the amount of costs to be assessed after its consideration of an affidavit of itemized costs and any written objections thereto.

44. Although the word "fees" does not appear in section 456.072(4), that statute explicitly defines "costs" to include

"time spent by the attorney." Section 409.913, by contrast, does not go as far as extending such a meaning to "legal costs."

45. In comparison, section 455.227, Florida Statutes, the Department of Business Professional Regulation's counter-part to the Health Care Practitioner Regulation statute, provides a vast difference in that it does not allow attorney's fees.

46. Section 455.227 provides, in pertinent part, as follows:

(3) (a) In addition to any other discipline imposed pursuant to this section or discipline imposed for a violation of any practice act, the board, or the department when there is no board, may assess costs related to the investigation and prosecution of the case excluding costs associated with an attorney's time.

47. Most important to this case is that section 455.227 clearly provides for costs related to investigation and prosecution of the case, but excludes attorney's fees. Unlike section 409.913(23), section 455.227 takes the extra step in defining the term "legal costs."

48. Based on similar statutes, Petitioner's position is unsupported under Florida law.

Costs Statutes

49. It is worthwhile to look to the statutes that specifically award attorney's fees as they may shed light on the issue of whether "legal costs" includes attorney's fees.

50. Under section 57.105(5), Florida Statutes, in administrative proceedings under chapter 120, an administrative law judge shall award a reasonable attorney's fee and damages, if it is determined that the losing party raised unsupported claims or defenses.

51. Under section 57.111, an award of attorney's fees and costs shall be made to a prevailing small business party initiated by a state agency, unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust. The purpose of section 57.111 is to deter agencies from bringing actions against persons without having substantial justification for the action.

52. Section 57.111(4)(b)1. outlines in detail the process for an attorney's fees and costs award, most important here, by requiring an affidavit that shows the nature and extent of the services rendered by the attorney, as well as the costs incurred in preparations, motions, hearings, and appeals in the proceeding.

53. Under chapter 120, section 120.595(1)(e), which awards reasonable costs and attorney's fees to the prevailing party if the losing party acted for an improper purpose, defines costs as follows: "'Costs' has the same meaning as the costs allowed in civil actions in this state as provided in chapter 57."

54. When recovering from a losing party, section 57.041(1) provides that the prevailing party shall recover all his or her "legal costs" and charges, which shall be included in the judgment.

55. When defining the costs that are allowed, section 57.071 provides as follows:

(1) If costs are awarded to any party, the following shall also be allowed:

(a) The reasonable premiums or expenses paid on all bonds or other security furnished by such party.

(b) The expense of the court reporter for per diem, transcribing proceedings and depositions, including opening statements and arguments by counsel.

(c) Any sales or use tax due on legal services provided to such party, notwithstanding any other provision of law to the contrary.

(2) Expert witness fees may not be awarded as taxable costs unless the party retaining the expert witness furnishes each opposing party with a written report signed by the expert witness which summarizes the expert witness's opinions and the factual basis of the opinions, including documentary evidence and the authorities relied upon in reaching the opinions. Such report shall be filed at least 5 days prior to the deposition of the expert or at least 20 days prior to discovery cutoff, whichever is sooner, or as otherwise determined by the court. This subsection does not apply to any action proceeding under the Florida Family Law Rules of Procedure.

56. Although section 409.913 is specifically related to recovery of Medicaid payments, even under the general cost statute, the term "legal fees" does not include attorney's fees.

Legal Costs are Not Limited to Those Incurred by Agency Staff Attorneys

57. Covenant asserts additional theories to advance its position that AHCA is not entitled to attorney's fees in this matter.

58. First, Respondent asserts that any entitlement to fees would be reserved for only state agency attorneys and not outside counsel. That argument, though it seems plausible, fails to acknowledge that section 409.913(23) clearly states that the agency is entitled to recover "all legal costs" without any distinction between those incurred by agency attorneys or outside counsel.

Entitlement to Attorney's Fees under the Statute, Given It is a Federal Audit and Not a State Audit

59. Next, Covenant takes the position, which is contrary to their position at hearing, that AHCA is not entitled to costs as the audit was under state law instead of federal law. AHCA seeks costs under section 409.913(23) "[f]or audits or investigations of a violation committed by a provider which is conducted pursuant to [section 409.913]. Covenant argues that section 409.913 does not contemplate audits directed by CMS, a federal agency, and conducted by Health Integrity, a federal

contractor and, thus, AHCA is not entitled to costs under section 409.913(23).

60. This interpretation fails to accept that AHCA is the state agency responsible for administering the Florida Medicaid program and required to recover Medicaid overpayments.

§ 409.913(2), Fla. Stat. When an overpayment is identified, AHCA is required to recover the overpayment and impose sanctions, as appropriate. § 409.913, Fla. Stat.

Conclusion


61. Section 409.913(23) provides AHCA the pathway to recover "legal costs." Section 409.913(23), by its terms, however, does not authorize AHCA to recover its attorney's fees.

62. It is not within the province of this administrative law judge to write in language, e.g., authorizing attorney's fees, into section 409.913(23). While AHCA's position is well-taken, the undersigned is not at liberty to rewrite section 409.913(23) in order to reach a desired result.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Agency for Health Care Administration enter a final order that section 409.913(23) (a) does not authorize the Agency for Health Care Administration to recover its attorney's fees under the guise of "legal costs" for the audit related to this matter.

DONE AND ENTERED this 12th day of June, 2019, in
Tallahassee, Leon County, Florida.



YOLONDA Y. GREEN
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of June, 2019.

ENDNOTE

^{1/} Although Administrative Law Judges (ALJs) maintain final order authority in attorney's fees statutes under chapter 120 and other statutes, section 409.913(23), Florida Statutes, does not extend final order authority to ALJs. See Ag. for Health Care Admin. v. Hal M. Tobias, Case No. 13-3818MPI (Fla. DOAH Feb. 24, 2014; Fla. AHCA Mar. 27, 2014).

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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. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.