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STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF AGING SERVICES

HUDSON MANOR, **Petitioner**	:	
	:	**ADMINISTRATIVE ACTION**
v.	:	
	:	**FINAL AGENCY DECISION**
DIVISION OF AGING SERVICES, **Respondent.**	:	**OAL DKT NO. DAS 7517-13**

The Director of the Division of Aging Services ("Division")[1] has reviewed the record in this matter consisting of the Initial Decision of the Honorable Jeff S. Masin, ALJ t/a, and the documents in evidence presented to the Office of Administrative Law. The Director also has reviewed the Exceptions submitted by Andrew Bayer, attorney for Petitioner, and by Deputy Attorney General T. Nicole Williams-Parks, attorney for Respondent, and the Reply to Exceptions submitted by each party.

STATEMENT OF CASE AND PROCEDURAL HISTORY

This matter involves the Medicaid per diem rates for reimbursement set for the Petitioner, Hudson Manor Health Care Center, by the Respondent, Division of Aging

[1] Effective July 1, 2012, functions related to nursing facility rate setting were reorganized from the former Department of Health and Senior Services into the new Division of Aging Services in the Department of Human Services. References to the "Department" have been changed to "Division" to avoid confusion.

Services. Petitioner disputes a determination by Respondent whereby Respondent reclassified Petitioner from a Class II governmental facility to a Class I private facility and recalculated Petitioner's Medicaid per diem reimbursement rate for Fiscal Year 2013. Petitioner contends that Respondent violated provisions of the Appropriations Act for Fiscal Years 2012 and 2013 in reducing the reimbursement rate to $194.38 and, therefore, the rate should be set at $207.45.

The Appropriations Act for Fiscal Year 2012 (P.L. 2011, c. 85, approved June 30, 2011) provides that a nursing facility's Medicaid per diem reimbursement rate shall not vary more than $10.00 from the per diem reimbursement rate received by that facility during Fiscal Year 2010. Petitioner's reimbursement rate for Fiscal Year 2012 was set at $207.45. The Appropriations Act for Fiscal Year 2013 (P.L. 2012, c. 18, approved June 29, 2012) provides that the Medicaid per diem reimbursement rate for a nursing facility shall not be less than the per diem rate last received by the facility for Fiscal Year 2012.

Petitioner is a long-term care facility located in Hudson County, New Jersey. The facility was owned previously by Hudson County and was classified as a Class II facility (a governmental facility) for the purposes of determining the Medicaid per diem rate of reimbursement. The Class II status resulted in a higher rate of reimbursement for Petitioner.

The current owner purchased Petitioner from Hudson County in 2002. After Hudson County sold the facility to the current owner, Respondent continued to treat Petitioner as a Class II facility when calculating the Medicaid per diem rate of reimbursement. However, on July 18, 2012, Respondent sent a letter to Petitioner

advising that the Centers for Medicare and Medicaid Services (CMS), which supplies one-half of the Medicaid funding, made a specific inquiry into Petitioner's ownership and operation. Respondent also advised Petitioner that its classification as a Class II facility would change with the rates effective July 1, 2012, unless Petitioner supplied proof of its Class II status.

On December 6, 2012, Respondent sent a letter to Petitioner advising that it was being reclassified from a Class II facility to a Class I facility (privately owned) and the Medicaid reimbursement rate was being adjusted to reflect the reclassification effective June 30, 2012. Although the reclassification and corresponding adjustment of the reimbursement rate became effective on June 30, 2012, Respondent did not implement the adjusted rate until July 1, 2012. Respondent determined the Fiscal Year 2012 rate to be $194.38, instead of $207.45, and set Petitioner's reimbursement rate for Fiscal Year 2013 at $194.38.

Petitioner filed a Level I appeal with Respondent. On February 25, 2013, Respondent upheld the rate calculations. On March 13, 2013, Petitioner filed a Level II appeal, and the matter was transmitted to the Office of Administrative Law.

A prehearing conference was held on August 29, 2013. The matter was placed on the inactive list to allow for settlement negotiations. On or about October 9, 2015, Petitioner filed a motion for summary decision. On or about November 30, 2015, Respondent filed opposition to the motion and a cross-motion for summary decision. On or about December 18, 2015, Petitioner filed a response to Respondent's opposition to Petitioner's motion and to Respondent's cross-motion. On or about July 13, 2016, Respondent filed a supplemental brief in reply to Petitioner's response. The Honorable

Kelly Kirk, ALJ, heard oral argument on July 19, 2016. On or about July 20, 2016, Petitioner filed a letter brief in response to Respondent's supplemental brief. The matter then was transferred to the Honorable Jeff S. Masin, ALJ t/a, for resolution of the motion and cross-motion. Judge Masin issued his Initial Decision on April 26, 2017.

On or about May 9, 2017, Deputy Attorney General T. Nicole Williams-Parks requested, on behalf of both parties, an extension of time to file Exceptions. The Division consented to an extension of time for both parties to file Exceptions. On May 22, 2017, both parties filed Exceptions. On or about May 25, 2017, Deputy Attorney General T. Nicole Williams-Parks requested, on behalf of both parties, an extension of time to file a Reply to the Exceptions. In response thereto and consistent with the administrative rules, the Division requested from the Office of Administrative Law a 45-day extension of time to issue the final decision. The Division then consented to an extension of time for both parties to file a Reply to the Exceptions. On or about June 8, 2017, Deputy Attorney General T. Nicole Williams-Parks filed a Reply to Exceptions on behalf of Respondent. On or about June 9, 2017, Andrew Bayer, Esq., filed a Reply to Exceptions on behalf of Petitioner.

STATEMENT OF FACTS

The Honorable Jeff S. Masin, ALJ t/a, ("ALJ") recited the following findings of facts in the Initial Decision:

1. Hudson County sold its interest in the facility.
2. At the time of purchase in 2002, the facility was transformed from a government entity into a privately owned nursing facility.

3. At the time of purchase in 2002, Petitioner was a privately owned facility that should have been reclassified as a Class I facility.
4. From the time of negotiating the purchase, Petitioner understood that it was seeking treatment in a classification in which it did not fit and which the Contract for Sale recognized was not guaranteed.
5. Respondent was aware of the sale and the desire for the facility to maintain its Class II status despite the sale.
6. The Contract for Sale specifically stated that Class II status was not guaranteed.
7. There was no formal agreement between the Respondent and Petitioner to continue treating the facility as a Class II facility.
8. For ten years, Respondent continued to treat Petitioner as a Class II facility for calculating Medicaid per diem rates of reimbursement.
9. Petitioner's reimbursement rate for Fiscal Year 2010 was $217.45.
10. Petitioner's reimbursement rate for Fiscal Year 2012 was $207.45.
11. Initially, Petitioner's reimbursement rate for Fiscal Year 2013 was $207.45 as a Class II facility.
12. Respondent reclassified Petitioner as a Class I facility and reduced Petitioner's reimbursement rate for Fiscal Year 2013 to $194.38.
13. Petitioner was accorded Class II status that was not authorized by statute or regulation.
14. It is uncertain exactly why Respondent allowed Petitioner to be treated as a Class II facility.

15. When CMS inquired about Petitioner's status as a Class II facility, Respondent quickly notified Petitioner, by way of correspondence dated July 18, 2012, and requested evidence that would support the Class II classification.
16. With the July 18, 2012, letter from Respondent, Petitioner was aware that its Class II status was in doubt.
17. Petitioner could not provide evidence to support its classification as a Class II facility.
18. By way of correspondence dated December 6, 2012, Respondent notified Petitioner that it would be reclassified as a Class I facility as of June 30, 2012, that its rate would be adjusted to reflect the Class I status as of June 30, 2012, and that the adjusted rate would become effective July 1, 2012.
19. Respondent did not seek to collect the monies it paid to Petitioner under the erroneous Class II classification.
20. Petitioner does not argue that it is a Class II facility.
21. The continuing classification as a Class II facility was not in accord with the governing statute or regulation and was a "mistake."

SUMMARY OF FILED EXCEPTIONS AND REPLIES

In the Exceptions filed on behalf of Petitioner, Mr. Bayer makes several arguments. First, Mr. Bayer argues that the ALJ erred in finding Respondent made a "mistake" in treating Petitioner as a Class II facility for ten years because the record does not support such conclusion.

Second, Mr. Bayer asserts that the ALJ erred in concluding the classification was a "mistake" because the ALJ relied on the false assumption that Petitioner could not point to any statute or regulation authorizing the classification of a privately owned facility as a Class II facility. Mr. Bayer contends that Respondent has the authority to exercise discretion, pursuant to N.J.A.C. 8:85-3.1, and deviate from the rules when presented with a unique factual situation and, therefore, Respondent had the discretion to classify Petitioner as a Class II facility based upon the circumstances. Mr. Bayer states that the ALJ "found, as a matter of fact," that Respondent considered the unique factual situation and decided to classify Petitioner as a Class II facility.

Next, Mr. Bayer contends that the ALJ erred in determining that Respondent was not bound by the Appropriations Act for Fiscal Year 2013 when it corrected a mistake and reclassified Petitioner as a Class I facility. He argues that Petitioner's Medicaid reimbursement rate was not calculated in accordance with the law.

Finally, Mr. Bayer argues that the ALJ erred by granting summary disposition in favor of Respondent and refusing a hearing on the Medicaid reimbursement rate. He states that Petitioner should have been afforded the opportunity to challenge the appropriateness of the rate reduction from $207.45 to $194.38. Mr. Bayer states that the Appropriations Act for Fiscal Year 2013 applies to the rate calculations upon the reclassification of Petitioner so that the minimum legal Medicaid reimbursement rate for Petitioner should be $207.45. Mr. Bayer contends that Petitioner's reimbursement rate was calculated contrary to the law and contrary to Respondent's practices.

In the Exceptions filed on behalf of Respondent, Ms. Williams-Parks argues that the Certification of Andrew Aronson, a former employee of Respondent, contains

confidential information protected by attorney-client privilege and should have been struck from the record. In his Certification, Mr. Aronson states that the decision to treat Petitioner as a Class II facility was based in part on advice from Respondent's counsel, the Office of the Attorney General, Division of Law. Ms. Williams-Parks contends that the ALJ erred in concluding that the Certification did not include confidential information or violate attorney-client privilege because there is nothing in the record to indicate that the communication was not made in confidence and because Mr. Aronson did not have the authority to waive the privilege.

In Petitioner's Reply to Exceptions, Mr. Bayer asserts that the ALJ correctly denied Respondent's application to strike Mr. Aronson's Certification because the Certification supported the fact that Respondent knowingly treated Petitioner as a Class II facility.

In Respondent's Reply to Exceptions, Ms. Williams-Parks asserts that the reason for the incorrect classification of Petitioner is inconsequential and that the ALJ was correct in concluding that Respondent acted properly in reclassifying Petitioner and in determining that the doctrine of estoppel does not apply. Also, Ms. Williams-Parks asserts there is no basis to hold a hearing on the Medicaid reimbursement rate because whether Respondent correctly calculated Petitioner's rate is a matter of law.

DECISION AND ANALYSIS

The issue presented here is the rate and the retroactive application of the rate. Petitioner asserts that the rate should be $207.45, not $194.38 as set by Respondent. Petitioner argues that the language of the Appropriations Act for Fiscal Years 2012 and

2013 prohibits Respondent from decreasing the rate to $194.38 and that Respondent cannot rely upon Petitioner's reclassification as a Class I facility to retroactively reduce the rate below the amount permitted by the Appropriations Act. Petitioner additionally argues that Respondent is equitably estopped from retroactively adjusting the rate.

First, it is necessary to address the Certification of Andrew Aronson and whether it contains information protected by attorney-client privilege. I disagree with the ALJ. The existence of an attorney-client relationship between the Division of Law and state agencies is well settled. Paff v. Div. of Law, 412 N.J. Super. 140, 151 (App. Div. 2010). Advice or opinions from the Division of Law provided to Respondent during the course of the attorney-client relationship is protected by the attorney-client privilege. Any statements pertaining to the advice or opinion from the Division of Law should be struck from the record. This conclusion, however, does not affect the remaining assertions contained in the Certification, specifically, those assertions regarding the treatment of Petitioner by Respondent, or the factual findings of the ALJ.

As noted by the ALJ, Petitioner does not argue that it is a Class II facility. Even if, for the sake of argument, Petitioner was a Class II facility after the sale of the facility and Respondent treated Petitioner as such, Petitioner never presented any evidence that it remained a Class II facility (governmental operation). There is no evidence to show that Petitioner was a Class II facility for the time period at issue. The record is devoid of evidence of Hudson County's alleged involvement in oversight or operations.

Furthermore, it is important to note that the ALJ did not find "as a matter of fact" that Respondent considered Petitioner's unique factual situation and decided to classify Petitioner as a Class II facility. To the contrary, the ALJ found that Petitioner was a

Class I facility at the time of sale, that Petitioner should have been treated as a Class I facility after the sale and that it is uncertain as to why Respondent treated Petitioner as a Class II facility for ten years.

Petitioner also argues that Respondent may exercise discretion in the classification of a nursing facility. N.J.A.C. 8:85-3.1 permits Respondent to review the application of the rules on the grounds of inequity. According to Petitioner, Respondent can exercise its discretion and classify Petitioner as a Class II facility.

The ALJ did not find any unique factual situation that would affect the reclassification of Petitioner or the adjustment of Petitioner's reimbursement rate for Fiscal Year 2013. There is nothing in the record to support a unique factual situation or an exercise of discretion. Even if Respondent has the ability to exercise discretion, we must recognize that discretion involves a choice. Just as Respondent can choose to exercise discretion, Respondent also can decide against exercising discretion. In this matter, it is clear that Respondent decided to reclassify Petitioner as a Class I facility and adjust its rate accordingly.

Petitioner asserts that Respondent's reclassification of Petitioner as a Class I facility is arbitrary, capricious or unreasonable, but such assertion is not supported by the record. In 2012, Respondent received an inquiry from CMS. CMS questioned the status of Petitioner as a Class II facility. Respondent then advised Petitioner and sought evidence to support Petitioner's Class II status. When Petitioner did not provide proof, Respondent reclassified Petitioner to the appropriate class and, as a result of the reclassification, adjusted Petitioner's reimbursement rate to reflect the appropriate classification. Respondent's actions were based on the events as they occurred.

The reason for or history behind Respondent's treatment of Petitioner as a Class II facility is irrelevant to Respondent's course of action in 2012. Whether it was a "mistake" or it was intentional, the bottom line is that Respondent took action to address the improper classification of Petitioner. The reclassification was the foundation and the impetus for the adjustment to the Medicaid reimbursement rate. Petitioner was entitled to neither the Class II status nor the Class II rate. Petitioner is a privately owned facility that had been treated as a Class II facility. In order to properly reclassify Petitioner for Fiscal Year 2013 and adjust its rate accordingly, Respondent reclassified Petitioner and reset the reimbursement rate as of June 30, 2012, with the adjusted rate not taking effect until July 1, 2012 (Fiscal Year 2013). I agree with the ALJ that the reclassification on June 30, 2012, removed Petitioner from the protection of Class II rates allowed in Fiscal Year 2013.

Petitioner relies upon the Appropriations Act to perpetuate reimbursement as a Class II facility, which it is not. The purpose of the Appropriations Act is to provide a fiscally responsible annual budget process. Burgos v. State, 222 N.J. 174, 183 (2015). The Appropriations Act is not intended to protect the improper classification of a nursing facility. Consequently, the Appropriations Act cannot be used to protect the reimbursement of a rate that is improperly based on an improper classification. For Fiscal Year 2012, Petitioner was paid at a rate of $207.45. Respondent adjusted only the rate for Fiscal Year 2012, not the actual reimbursement. For Fiscal Year 2013, Petitioner was not entitled to Class II status or the higher rate of reimbursement that resulted therefrom. For these reasons, I agree with the ALJ that the Appropriations Act would logically freeze only legitimate rates.

Petitioner argues that, although Respondent can prospectively change the classification, Respondent is equitably estopped from retroactively adjusting the Medicaid reimbursement rate for Fiscal Year 2012 and carrying that rate into Fiscal Year 2013. To be clear, the Medicaid reimbursement rate at issue is for Fiscal Year 2013. Petitioner was paid the rate of $207.45 for Fiscal Year 2012.

By way of correspondence dated July 18, 2012, Respondent notified Petitioner that its Class II status was in question. As a result, Petitioner was put on notice in the beginning of Fiscal Year 2013. Petitioner had an opportunity to provide evidence to support its Class II status. When no evidence was forthcoming, Respondent could not continue to treat Petitioner as a Class II facility. Respondent properly reclassified Petitioner and adjusted its Medicaid reimbursement rate accordingly. The adjusted rate took effect July 1, 2012, the Fiscal Year in which Petitioner received notice that its Class II status was in jeopardy. Since Petitioner was on notice as of July 18, 2012, it would not have been reasonable for Petitioner to rely on its previous treatment as a Class II facility and expect a reimbursement rate as a Class II facility in Fiscal Year 2013.

Additionally, there can be no detrimental reliance on the Medicaid reimbursement rate for Fiscal Year 2013 in the purchase of the facility in 2002. As noted by the ALJ, Petitioner was aware at the time of purchase that it was seeking treatment as a Class II facility, which was not warranted. As part of the purchase agreement, Hudson County agreed to cooperate in order to continue the facility's Class II status, but Hudson County did not guarantee such status. (See Certification of Avery Eisenreich, paragraph 5, and attached Contract for Sale, Section 3.1(g)). Furthermore, Petitioner was treated as a

Class II facility for many years, for whatever reason, until it failed to provide evidence of its status when requested by Respondent in 2012.

Based upon a full review of the record, the Director hereby **REJECTS** the conclusion of the Administrative Law Judge regarding the application of attorney-client privilege to advice and opinions from the Division of Law provided to Respondent and hereby **ADOPTS** the conclusions of the Administrative Law Judge in upholding Respondent's adjustment to Petitioner's Medicaid per diem reimbursement rate and granting Respondent's cross-motion for summary decision.

Petitioner has the right to appeal this Final Order within 45 days to the New Jersey Superior Court, Appellate Division, Richard J. Hughes Justice Complex, PO Box 006, Trenton, New Jersey 08625-0006.

THEREFORE, it is on this 18 day of July, 2017,

ORDERED:

That the Initial Decision of the Administrative Law Judge is hereby **REJECTED IN PART** and **ADOPTED IN PART**; and Respondent's cross-motion for summary decision is granted.

FURTHER ORDERED:

That any action required by this decision be promptly implemented by the appropriate Division staff.

Date: 7/18/17

Laura Otterbourg
Division Director