

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ISMAT CHAUDHERY; AND
CHAUDHERY PEDIATRICS,
Appellants,

vs.

THE STATE OF NEVADA,
DEPARTMENT OF HEALTH AND
HUMAN SERVICES, DIVISION OF
HEALTH CARE FINANCING AND
POLICY, NEVADA MEDICAID,
Respondent.

No. 81070-COA

FILED

JUN 16 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

*ORDER REVERSING IN PART, AFFIRMING IN PART, AND
REMANDING*

Dr. Ismat Chaudhery and Chaudhery Pediatrics appeal from a district court order denying their petition for judicial review of an administrative agency decision. First Judicial District Court, Carson City; James E. Wilson, Judge.

This case arises from Nevada Medicaid's decision to terminate Chaudhery and her professional corporation as individuals/entities that provide services to Medicaid recipients.¹ Chaudhery is a pediatric specialist that practices under her professional corporation, Chaudhery Pediatrics d/b/a Mountain View Pediatrics ("MVP"). Both Chaudhery and MVP were enrolled with the State of Nevada Department of Health and Human Services, Division of Health Care Financing and Policy ("DHCFP") as Nevada Medicaid providers.

In 2010, both Chaudhery and MVP pleaded guilty to criminal charges. Chaudhery pleaded guilty to the performance of act or neglect of duty in willful or wanton disregard of safety of persons and property, a gross

¹We do not recount the facts except as necessary to our disposition.

misdemeanor, for failure to timely resubmit a Notification of Collaboration with an Advanced Nurse Practitioner to the State of Nevada Board of Medical Examiners. In addition to paying an administrative fee of \$25, she was required to pay a fine of \$500. A hearing officer in the underlying administrative hearing specifically found that Chaudhery's gross misdemeanor conviction did not relate to Nevada Medicaid, her billing practices, or her ability to provide care to her patients.

MVP pleaded guilty to Medicaid fraud, a felony violation of NRS 422.540(1), and was required to pay over \$100,000 in restitution. Although the State did not charge Chaudhery individually with a felony, the State Board of Medical Examiners ("Board") disciplined Chaudhery for her corporation's felony conviction because the Board, which licenses physicians, could only exercise jurisdiction over Chaudhery and not MVP. Chaudhery entered into a Settlement Waiver and Consent Agreement (settlement agreement) with the Board; she agreed to pay a \$10,000 fine, be publicly reprimanded, reimburse the Board for fees and costs associated with prosecution, and attend 11.75 hours of continuing medical education.

A year after the criminal convictions, Chaudhery hired attorney Ken Hogan to prepare correspondence to clarify and explain to health insurance companies the nature of the criminal convictions against herself and MVP. Hogan wrote two letters explaining that the convictions were not serious and were equivalent to minor ministerial mistakes, and enclosed copies of Chaudhery's and MVP's convictions and Chaudhery's settlement agreement with the Board. John Butler, MVP's office manager, uploaded the letters and the supporting documents to the Council for Affordable Quality Healthcare database, a standard credentialing database for insurers, and the documents became a part of a "standard package" that

Chaudhery used in applying and reapplying to insurance companies to become a qualified provider of services, including Nevada Medicaid.

Chaudhery and MVP reapplied to be Nevada Medicaid providers in 2012 and again in 2015. The 2012 application asked whether Chaudhery had a criminal conviction. When completing a prior health insurance application containing a similar question, Butler had consulted Hogan about how to answer the question. On that separate health insurance application, Hogan advised Butler to answer “no” to the question, and so Butler assumed that he could do the same on the Nevada Medicaid application. Although Butler answered “no” on the Nevada Medicaid application, he testified that he submitted Hogan’s letters, which included Chaudhery’s and MVP’s convictions as well as Chaudhery’s settlement agreement with the Board, with the application. Similar to the 2012 application, on her 2015 Nevada Medicaid application Chaudhery also denied any criminal convictions by either herself or MVP, but this time the standard documents pertaining to their convictions were submitted and received by Medicaid. However, in MVP’s Provider Re-Enrollment Application signed on February 18, 2014, by Chaudhery as MVP’s business owner, Chaudhery responded affirmatively to a similar question that asked about criminal convictions and purportedly attached the standard documents, although there is a dispute as to which documents were attached. Nevada Medicaid approved both Chaudhery and MVP’s applications to be providers in 2012 and again in 2015.

Almost eight years after Chaudhery and MVP’s criminal convictions, Chaudhery and MVP submitted a third reapplication to Nevada Medicaid to continue to be providers, which was denied. An employee for Nevada Medicaid, Catherine Vairo, reviewed the Board’s disciplinary actions against Chaudhery and MVP and decided that Nevada

Medicaid should terminate its contract with Chaudhery and MVP in January 2018.² She testified that Chaudhery never submitted copies of the judgment of convictions nor the settlement agreement with the first application in 2012. The documents definitely were attached to the 2015 application. Although Butler testified that the documents were attached to both the 2012 and 2015 applications, the hearing officer appears to have relied on Vairo's testimony that the 2012 application was submitted without the standard documents. It also appears that while she found Butler a "knowledgeable and credible witness" she questioned his veracity at the hearing regarding when he became aware of Chaudhery's 2010 gross misdemeanor conviction. Specifically, Butler testified that he had only recently become aware of this conviction, which did not make sense in light of his testimony that he included Hogan's letters regarding both convictions with attachments to the 2012 application and 2014 Provider Re-Enrollment Application.

According to Vairo, Nevada Medicaid should never have reenrolled MVP because it had a felony conviction related to its involvement in Medicaid. Therefore, MVP received a tier-1, permanent sanction pursuant to Nevada Medicaid Services Manual ("MSM") 106.3(1) (June 29, 2017). As to Chaudhery, Vairo reasoned that Chaudhery misrepresented on the application that she was not convicted of a crime (the gross misdemeanor offense), which permitted termination pursuant to MSM 106.2(A)(7). Nevada Medicaid terminated Chaudhery and issued a tier 3, 12-month sanction pursuant to MSM 106.3(3).

²The hearing officer relied on the June 2017 Nevada Medicaid Services Manual in determining the appropriate sanctions because MVP and Chaudhery's terminations occurred on January 29, 2018, before the new regulations went into effect in February 2018.

Chaudhery and MVP then made a request for a fair hearing pursuant to NRS 422.306. After the hearing, the hearing officer affirmed Nevada Medicaid's decision to terminate Chaudhery and MVP as Medicaid providers. The hearing officer found that Chaudhery inaccurately answered "no" to the question as to whether she had ever been convicted of a misdemeanor, gross misdemeanor or felony in the 2012 and 2015 applications, which was sufficient to terminate her pursuant to MSM 106.2(A)(13). As to MVP, the hearing officer found that MVP's felony conviction of Medicaid fraud was sufficient to terminate the contract under MSM 106.2(A)(1), even though MVP disclosed the conviction in 2015. Chaudhery and MVP filed a petition for judicial review in district court, but the district court denied the petition concluding that the hearing officer's decision was not arbitrary or capricious and it was supported by substantial evidence. Chaudhery and MVP now appeal.

Dr. Chaudhery's Contract Termination

Dr. Chaudhery claims that Nevada Medicaid erred in terminating her and imposing a tier 3 sanction against her for three reasons. First, she argues that Nevada Medicaid acted arbitrarily and capriciously because she disclosed her gross misdemeanor conviction when she attached the documents to the 2012 and 2015 applications, and Vairo testified that the attached documents were part of the application process at least as to the 2015 application, and the hearing officer did not determine the effect of this disclosure. Second, she claims that it is arbitrary and capricious to terminate a "long-standing, quality provider" for an inconsistency on the application that was not made in bad faith.³ Third, she

³Chaudhery does not cite to any legal authority requiring bad faith conduct to terminate a contract and we therefore need not consider it on

claims that Nevada Medicaid abused its discretion in issuing a tier 3 sanction because her gross misdemeanor conviction was not incompatible with Nevada Medicaid's mission.

When a Nevada Medicaid provider appeals a hearing officer's determination, the reviewing court defers to the hearing officer's findings of fact. NRS 422.306(7). Additionally, the reviewing court may only reverse the determination in situations where the hearing officer's findings, inferences, conclusions, or decisions prejudiced the appellant's substantial rights. *Id.* This occurs when the hearing officer's decisions were: "(a) [i]n violation of constitutional or statutory provisions; (b) [i]n excess of the division's statutory authority; (c) [m]ade upon unlawful procedure; (d) [a]ffected by other error of law; (e) [c]learly erroneous in view of the reliable, probative and substantial evidence on the whole record; or (f) [a]rbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." NRS 422.306(7)(a)-(f). "Substantial evidence exists if a reasonable person could find the evidence adequate to support the agency's conclusion." *Law Offices of Barry Levinson v. Milko*, 124 Nev. 355, 362, 184 P.3d 378, 384 (2008).

Federal regulations provide state agencies the discretion to terminate a provider if the state agency determines that a provider falsified information on an application. 42 C.F.R. § 455.416(g)(1) (2012). The MSM requires a provider to disclose a conviction of any offense, including information, documentation, and an explanation regarding their conviction, when applying. MSM 102.7(A)(3). Nevada Medicaid has the authority under its regulations to terminate a contract with a provider for a variety

appeal. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006). Nevertheless, it may be relevant to the penalty imposed, as explained hereinafter.

of reasons, including situations where the provider failed to disclose information to Nevada Medicaid under MSM 102 or if the provider had a criminal conviction incompatible with the DHCFP's mission. MSM 106.2(A)(7), (A)(12). The MSM also requires that terminated providers serve a sanction period. *See* MSM 106.3. A tier-3 sanction is permitted when Nevada Medicaid terminates a provider for offering false information on the enrollment application. MSM 106.3(3)(a). A tier-3 sanction is also permitted when Nevada Medicaid terminates a provider due to a criminal conviction that is incompatible with its mission. MSM 106.3(3)(e).

In this case, the hearing officer's decision to uphold Chaudhery's termination from Nevada Medicaid was based solely on the fact that Chaudhery checked "no" in response to a question asking whether she ever had any criminal convictions; however, the balance of Chaudhery's 2015 application unquestionably did not supply false information, as all parties agree that she attached her criminal conviction to it. We conclude that the hearing officer failed to take into account the inconsistency within the 2015 application where the check box indicated that Chaudhery had not been convicted of a crime but the documents attached to the application indicated she had. Further, the hearing officer failed to consider whether the actual disclosure of the gross misdemeanor conviction satisfied the disclosure requirement. Additionally, because the hearing officer may have assumed that the "no" answer on the application alone was sufficient to sustain disciplinary action, the hearing officer declined to fully consider whether Chaudhery's gross misdemeanor conviction, which was not incompatible with Nevada Medicaid's mission, warranted termination and a tier-3 sanction pursuant to MSM 106.2(A)(12) and MSM 106.3(3)(a).

In light of the foregoing, the hearing officer should have considered whether Nevada Medicaid's actions of punishing Chaudhery for

a 3-year-old inconsistent application, where the information regarding her conviction was attached, and where the conviction itself was not incompatible with Nevada Medicaid's mission, was an unwarranted exercise of discretion by Nevada Medicaid requiring reversal or reduction of the sanction. These circumstances are of particular importance when there were no allegations of any violations during the eight-year period following the conviction, nor was the care provided by Chaudhery ever questioned, and Nevada Medicaid approved the applications multiple times after 2010. We therefore reverse the hearing officer's decision as to Chaudhery as being clearly erroneous in light of the probative and substantial evidence of the whole record, and remand this matter to the district court to remand back to the hearing officer to consider these issues and make the appropriate findings.⁴

MVP's Contract Termination and Sanction

MVP argues that Nevada Medicaid erred in permanently terminating its status as a Medicaid provider and issuing a tier-1 sanction for two reasons. First, it argues that Nevada Medicaid abused its discretion in terminating the contract because the MSM requires a person or an owner with five percent or greater interest to be convicted of Medicaid fraud, but MVP is a corporate entity and not a person, and no person with a five

⁴In the event the hearing officer again affirms Nevada Medicaid's action to impose a sanction, it should then consider the severity of the sanction in light of the circumstances described above. The nature of the sanction is subject to federal and state exceptions as the hearing officer noted multiple times in her order on pages 10-13, and again on page 16, and the applicability of such exceptions was never addressed by Nevada Medicaid. The hearing officer characterized the sanctions as "harsh" but did not determine the effect of the lack of determinations by Nevada Medicaid as to the applicability of any penalty exceptions.

percent interest in MVP was convicted of Medicaid fraud. Second, it claims that Nevada Medicaid arbitrarily and capriciously terminated the contract years after allowing MVP to reenroll as a Medicaid provider, but it does not cite to binding legal authority to support its claims.⁵

We review purely legal issues, such as statutory interpretation, de novo. *UMC Physicians' Bargaining Unit of Nev. Serv. Emps. Union v. Nev. Serv. Emps. Union/SEIU Local 1107*, 124 Nev. 84, 88, 178 P.3d 709, 712 (2008). We give effect to a regulation's plain language unless the regulation is ambiguous. *Id.* at 88-89, 178 P.3d at 712; *see also Silver State Elec. Supply Co. v. State, Dep't of Taxation*, 123 Nev. 80, 85, 157 P.3d 710, 713 (2007) ("Statutory construction rules also apply to administrative regulations."). When a regulation's language is unclear, we look beyond the regulation's language to construe it according to the public policy the regulatory body intended. *UMC*, 124 Nev. at 88-89; 178 P.3d at 712. We read regulations within a regulatory scheme harmoniously with one another to avoid an unreasonable or absurd result. *See Allstate Ins. Co. v.*

⁵MVP cites to a recent United States Supreme Court case for the proposition that it is arbitrary and capricious for an administrative agency to ignore reliance interests before reversing a prior policy. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, ___, U.S. ___, ___, 140 S. Ct. 1891, 1913 (2020); *see also Encino Motorcars, LLC v. Navarro*, ___, U.S. ___, ___, 136 S. Ct. 2117, 2126 (2016) (stating that unexplained inconsistencies in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice). However, Nevada Medicaid did not reverse any longstanding policy. Instead, Nevada Medicaid apparently corrected its own mistake when a provider gave false information in its application and appropriately followed its longstanding procedures by terminating a provider incompatible with its mission. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009) ("[I]t is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.").

Fackett, 125 Nev. 132, 138, 206 P.3d 572, 576 (2009). We also avoid construing regulations in a way that renders language meaningless or superfluous. *Great Basin Water Network v. State Eng'r*, 126 Nev. 187, 196, 234 P.3d 912, 918 (2010). Additionally, “[t]his court defers to an agency’s interpretation of its governing statutes or regulations if the interpretation is within the statute’s or regulation’s language.” *Wynn Las Vegas, LLC v. Baldonado*, 129 Nev. 734, 738, 311 P.3d 1179, 1182 (2013) (internal quotation omitted).

The June 2017 MSM provided that Nevada Medicaid “shall not enroll any provider (individual or entity having a person with a five percent or greater direct or indirect ownership interest in the provider, including management personnel) who has been convicted of a felony or misdemeanor under Federal or State law for any offense which the State agency determines is inconsistent with the best interest of recipients under the State plan.” MSM 102.2(B); *see also* 42 C.F.R. 455.416(b) (2012). Moreover, the June 2017 MSM granted Nevada Medicaid the authority to terminate contracts with providers that have a felony or misdemeanor conviction related to their participation in the Medicaid program. MSM 106.2(A)(1). It then specified that Nevada Medicaid may issue tier-1 sanctions, which permanently make a provider ineligible to enroll, when an individual or entity has criminal convictions related to its involvement in Medicaid and fraud. MSM 106.3(1)(a), (1)(b). But the June 2017 MSM also expressly set forth an additional basis on which it could sanction an entity. It provided, “[s]anctions apply to entities when individuals meet the criteria below who have a five percent or greater ownership or control interest, or are an agent or managing employee.” *See* MSM 106.3(1). In this case, although Chaudhery, who was the sole owner of MVP, did not have a felony conviction, which would have supported sanctioning MVP for her conduct

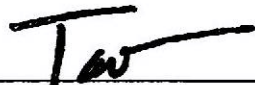
(as she unequivocally had the minimum five percent ownership interest), MVP as a provider had its own felony conviction directly related to Nevada Medicaid's mission for which tier-1 sanctions could be imposed.⁶

We conclude that Nevada Medicaid's interpretation of its regulation is consistent with the regulation's plain language, and that it could terminate "any provider" convicted of a felony incompatible with Nevada Medicaid's mission regardless of whether an individual with a five percent or greater ownership interest in that entity also meets the termination or sanctioning criteria. Thus, we affirm the hearing officer's decision to uphold Nevada Medicaid's termination of MVP as a provider and the issuance of tier-1 sanctions.

Therefore, we

ORDER the judgment of the district court REVERSED IN PART AND AFFIRMED IN PART AND REMAND to the district court for proceedings consistent with this order.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. James E. Wilson, District Judge
Clark Hill PLLC
Attorney General/Carson City
Attorney General/Las Vegas
Carson City Clerk

⁶We note that Dr. Chaudhery was not terminated as a Nevada Medicaid provider based on her relationship with MVP, but only based on her alleged failure to disclose her own gross misdemeanor conviction.