

State of New York : Department of Health

In the Matter of the Request of

Christine Wise-Vasquez (Appellant)

Case # 15-F-3499

For a hearing pursuant to Part 519 of Title 18 of the
Official Compilation of Codes, Rules and Regulations
of the State of New York (NYCRR) to review a
determination of the Department to impose the sanction
of exclusion of 5 years

Before: James F. Horan, Administrative Law Judge

Held at: New York State Department of Health
90 Church Street
New York, NY 10007
February 20, 2018

New York State Department of Health
Bureau of Adjudication
150 Broadway – Suite 510
Menands, NY 12204
February 22 & 28, 2018

Parties: Office of the Medicaid Inspector General (OMIG)
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The OMIG determined to exclude the Appellant from the Medicaid Program for 5 years (Exclusion) for deceiving clients and families in skilled nursing facilities, furnishing excessive services beyond the clients' needs and causing false statements and thereby false claims to be submitted to the Medicaid Program. Following a hearing at which the Appellant challenged the OMIG findings and Exclusion, the ALJ overturns the findings that the Appellant engaged in and directed unacceptable practice and overturns the Exclusion.

I. Background

Title 18 (Family Assistance) of the Official Codes, Rules and Regulation of the State of New York (NYCRR) §519.4 entitles a Medicaid provider to a hearing to review the Department's determination to impose sanctions. After the OMIG issued the March 31, 2017 Notice of Agency Action (NOAA) seeking Exclusion, the Appellant requested the hearing, which took place on February 20, 22 and 28, 2018 at the Department's Offices in Manhattan and Menands. The ALJ conducted the hearing in this matter pursuant to New York Social Services Law (SSL) Articles 1 and 5 (McKinney Supp. 2018), New York Public Health Law (PHL) Article 1 (McKinney Supp. 2017), New York State Administrative Procedure Act (SAPA) Articles 3-5 (McKinney 2018) and Title 18 NYCRR Parts 515, 517 & 519.

The OMIG presented as hearing witnesses: Nicholas Lanza, Maura Brennan and OMIG Chief Investigator Edward Meyer. The Appellant testified on her own behalf and called two other witnesses: Eileen Masterson and Carl Kelly. All witnesses testified under oath and subject to cross-examination. The OMIG offered 14 exhibits into evidence that the ALJ received into the record:

OMIG A Hearing Requests 5/12/17 and 1/17/18,
OMIG B Notice of Proposed Agency Action (NOPAA) 7/19/16,
OMIG C Appellant Response,
OMIG D NOAA 3/31/17,
OMIG E E-Mails,
OMIG F Deposition Transcript of Christine Wise-Vasquez, with E-Mail Exhibits, 5/23/13,
OMIG G Elant Settlement Agreement 12/8/15,
OMIG H Notice of Pre-Hearing Disclosure,
OMIG I Maura Brennan Decision BNHA,
OMIG J Todd Whitney Stipulation,
OMIG K Cheryl Dorn Stipulation,
OMIG L Donna McAleer Stipulation.

The Appellant offered 17 exhibits which the ALJ received into the record:

Appellant A E-Mail Brennan to Kaszuba-Czauz 12/25/10,
Appellant B E-Mail Brennan to Lanza 10/29/10,
Appellant C E-Mail Brennan to Lanza 10/29/10,
Appellant D E-Mail Brennan to Marquez-McKerrell 11/28/10,
Appellant E E-Mail Brennan to Marquez-McKerrell 4/4/11,
Appellant F E-Mail Brennan to Marquez-McKerrell 4/5/11,
Appellant G E-Mail Brennan to Tolosky-Heine 4/6/11,
Appellant H E-Mail Brennan to Dillon 5/4/11,
Appellant I E-Mail Kaszuba-Czauz to Brennan 5/5/11,
Appellant J E-Mail Kaszuba-Czauz to Brennan 5/20/11,
Appellant K E-Mail Brennan to Lanza 5/20/11,
Appellant L E-Mail Brennan to Lanza 8/30/11,
Appellant M E-Mail Brennan to Lanza 11/2/11,
Appellant N E-Mail Frazier to Brennan 11/2/11,
Appellant O E-Mail Brennan to Multiple Parties 11/17/11,
Appellant P E-Mail Lanza to Kensell 12/16/11,
Appellant Q E-Mail Whitney to Brennan 1/25/12.

The ALJ granted the Appellant's request for a Subpoena Duces Tecum to Raul Tabora, Esq., of Bond, Schoeneck & King, Counsel for Elant, Inc., for records relating to the New York Attorney General's probe into Elant. The Subpoena and related documents appear in the record as ALJ Exhibit 1. The record also contains the hearing transcript pages 1-489. Following the hearing, both parties submitted briefs [OMIG Brief June 6, 2018; Appellant's Brief May 8, 2018].

Under SAPA § 306(2), all evidence, including records and documents in an agency's possession of which an agency wishes to avail itself, shall be offered and made a part of the

record of a hearing. In addition to testimony and documents in evidence, and pursuant to SAPA § 306(4), an ALJ may take Official Notice (ON) of any matter for which Judicial Notice may be taken.

Under SAPA § 306(1), the burden of proof in a hearing falls on the party which initiated the proceeding. Title 18 NYCRR § 519.18(d) provides that the Appellant bears the burden to show a determination of the Department was incorrect and that all claims submitted were due and payable and to prove any mitigating factors affecting the severity of the sanction imposed. Title 18 NYCRR 519.18(h) and SAPA § 306(1) provide that a decision after hearing must be in accordance with substantial evidence. Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or fact; less than a preponderance of evidence, but more than mere surmise, conjecture or speculation and constituting a rational basis for decision, Stoker v. Tarantino, 101 A.D.2d 651, 475 N.Y.S.2d 562 (3rd Dept. 1984), appeal dismissed 63 N.Y.2d 649. The substantial evidence standard demands only that a given inference is reasonable and plausible, not necessarily the most probable, Ridge Road Fire District v. Schiano, 16 N.Y.3d 494 (2011).

II. Findings of Fact

The ALJ made the following findings of fact (FF) after affording the parties an opportunity to be heard and after considering the evidence. The items in brackets that follow the findings represent documents in evidence [OMIG or APP], testimony from the record [T] and matters under Official Notice [ON] on which the ALJ relied in making the findings. In instances

in which conflicting evidence appears in the record, the ALJ considered and rejected that other evidence.

1. The New York State Department of Health (Department) is the single state agency responsible for administering the Medicaid Program in New York State [ON SSL § 363-a, PHL § 201.1(v)].
2. The OMIG is an independent office within the Department with the responsibility for investigating, detecting and preventing Medicaid fraud, waste and abuse and for recouping improper Medicaid payments [ON PHL § 30].
3. Elant Inc. [Elant] is a not-for-profit corporation with its principal place of business at 44 Harriman Drive, Goshen, New York [OMIG G].
4. Elant provides administrative services, which include human resources, information systems, marketing, finance and administration to its affiliated health care organizations [OMIG G].
5. Elant is the sole member of the skilled nursing facilities (SNF) Brandywine, Fishkill, Glen Arden, Goshen and Newburgh [OMIG G].
6. Elant also operates a continuing care retirement community at Glen Arden and an adult home at Goshen [OMIG G].
7. Elant is a Medicare and Medicaid provider and is thus subject to the rules and regulations of those programs concerning nursing home administration [OMIG G].
8. The Department of Health (DOH) and the Medicaid Fraud Control Unit (MFCU) of the Office of the New York State Attorney General investigated discharges of short-term residents from the five Elant SNF during the years 2008-2012 (relevant period) and Elant's transfers of long-term nursing home residents from Newburgh, Goshen and Fishkill during the relevant period [OMIG G].
9. Elant entered into a settlement agreement (Settlement) with DOH, MFCU and OMIG on September 9, 2015 [OMIG G].
10. In the Settlement, Elant acknowledged that it engaged in the practice of delaying or postponing discharges of short-term residents, who were clinically appropriate for discharge, and provided additional services that were not medically necessary in order to delay discharge from facilities [OMIG G].
11. As a result of such practices, Elant acknowledged that it billed Medicare and Medicaid for services that were not medically necessary [OMIG G].

12. The Settlement also acknowledged that Elant engaged in the practice of moving long-term residents with Medicaid coverage to Brandywine from other Elant SNF [OMIG G].
13. The Settlement indicated that Elant's goals in delaying discharges were to maintain revenues derived from residents receiving rehabilitation services and to keep the census in Elant SNF above 95% occupancy level [OMIG G].
14. Maintaining a 95% occupancy level, or census, is necessary under Medicaid rules to permit an operator to receive daily Medicaid reimbursement and hold a bed open (bed hold) for a resident in the hospital or temporarily away from the facility [OMIG G; T 36].
15. As a result of these practices and the Settlement, Elant paid \$275,037.95 in a civil penalty to DOH and \$324,962.05 in a civil penalty to MFCU and entered into a corporate integrity agreement with OMIG [OMIG G].
16. The Settlement provided that OMIG reserved the right to impose administrative penalties individually and/or collectively against Elant as a condition of settlement [OMIG G].
17. The Appellant served as Vice-President for Placement Services (VPPS) for Elant during the relevant period [T 345].
18. In her position as VPPS for Elant, the Appellant was supervised by Elant executives Donna McAleer, Nicholas Lanza and Todd Whitney [T 79].
19. From the beginning of the relevant period until 2010, Donna McAleer was President and Chief Executive Officer (CEO) of Elant [T 79].
20. From 2010 to the end of the relevant period, Todd Whitney was President and CEO of Elant [T 79].
21. Nicholas Lanza was hired a Chief Financial Officer (CFO) at Elant in January 2008 and then re-assigned as Chief Operating Officer (COO) or Senior Vice President for Operations in June 2008 [T 17, 351].
22. Ms. McAleer and Mr. Whitney started the Elant organization and were the only C-suite executives for many years [T 241, 251].
23. Below the C-suite executives came the senior management team, which included the Elant SNF administrators and the vice-presidents of human resources, rehab, marketing and the Elant Foundation [T 251].

24. The Appellant joined the senior management team when she became VPPS in 2015 [T 351].
25. In her position as VPPS, the Appellant was responsible for coordination of admissions across Elant facilities, for increasing admissions through marketing, business development, record census and payer information and to report such information to Elant's corporate executives [T 377-379].
26. From October 2007 through March 2008 and again from March 2010 through October 2010, the Appellant was also temporary Administrator for Elant at Goshen SNF, while continuing to serve as VPPS [T 367].
27. The Appellant held no Nursing Home Administrator's License at the time, but instead worked under Todd Whitney's license pursuant to DOH regulations [T 367].
28. In 2007, Elant hired a consultant, HealthPro, to assist the corporation in centralizing its admissions and discharge practices [T 442].
29. Elant instituted a HealthPro suggestion to plan discharges for short-term residents with the goal to maintain census and maximize revenue [T 410].
30. During the relevant period, Elant's discharge process for all residents went through the Medicare meetings, which were held weekly at each Elant SNF and were specific to the residents at each SNF [T 187, 252].
31. The attendees at the Medicare meeting included members of nursing home nutrition, rehabilitation and nursing teams, social workers and the SNF administrators [T 252].
32. Members of nursing staff and rehabilitation staff communicated discharge decisions to residents [T 107].
33. The Appellant was not a member of any of those teams or staffs [T 253].
34. During the Medicare meetings, the members of different disciplines conferred on appropriateness of a particular patient's discharge [T 252, 371-375, 188].
35. The meetings also involved a discussion among the interdisciplinary team about patient needs and services available to the patients [T 41-42; 257].
36. A physician was ultimately responsible for ordering the discharge of any particular resident [T 56, 254].
37. Managing census was a critical component of revenue generation as both planned and unplanned discharges impacted census [T 33].

38. The Elant corporate policy of limiting discharges to three per week (the Rule of Three) was an attempt to maintain census [T 40-41].
39. The Rule of Three was applied primarily to short-term rehabilitation patients because facilities were best able to control such patients' point of discharge [T 41].
40. The application of the Rule of Three was achieved through the Medicare meetings [T 41].
41. At these meetings, a document was distributed that listed patients in short-term rehabilitation, their applicable payor, their date of admission, their estimated discharge date and their available services [T 42].
42. Todd Whitney made the decision to begin transferring patients from one facility to another to protect Medicaid bed-hold [T 36].
43. The initiative to transfer residents was mostly in the hands of administrators to make it happen, to talk to families and to talk to residents [T 37-38].
44. The OMIG issued a NOPAA on July 19, 2016 alleging six unacceptable practices against the Appellant and imposing the Exclusion [OMIG B].
45. The NOPAA alleged that the Appellant, as a member of the Elant senior management team, committed six unacceptable practices as defined in Title 18 NYCRR §§ 515.2(b)(1), 515.2(b)(2), 515.2(b)(3), 515.2(b)(9) 515.2(b)(11) & 515.2(b)(18) as follows: false claims, false statements, failure to disclose, client deception, excessive services and other prohibited acts [OMIG B].
46. The Appellant submitted objections to the NOPAA on September 12, 2016 [OMIG C].
47. The OMIG issued a NOAA on March 31, 2019 that continued the NOPAA findings that the Appellant directed and participated in the practice of delaying the discharge of short-term residents who were clinically ready to leave a facility and as a top executive at Elant engaged in the practice of moving long-term care residents from one Elant facility to another.

III Issue

Has the Appellant established that the OMIG erred in finding that the Appellant engaged in unacceptable practices and in determining to exclude the Appellant from the Medicaid Program for five years.

The ALJ finds that OMIG erred in the findings and determination and the ALJ overturns the Exclusion.

IV. Controlling Regulations

Title 18 NYCRR § 515.2 defines unacceptable practices to include conduct contrary to rules, rates or fees, false claims, false statements, failure to disclose, client deception, excessive services and failure to meet recognized standards. Under Title 18 NYCRR §504.3(e), by enrolling in the Medicaid Program, a provider agrees to submit claims for payment only for services actually furnished and which are medically necessary or otherwise authorized. Title 18 NYCRR §504.3(i) provides that by enrolling, a provider agrees to comply with the rules, regulations and official directives of the Department. Upon a determination that a provider has engaged in an unacceptable practice, Title 18 NYCRR §515.3(a)(1) provides that the Department may impose sanctions, including exclusion for a reasonable time. Title 18 NYCRR § 519.18(a) limits the issues and documentation for consideration at hearing to issues directly relating to the NOAA and the Appellant may raise no new matter not considered by the OMIG upon submission of objections to the NOPAA.

V. Discussion and Conclusions

This case resulted from the MFCU/DOH investigation into Elant and the Settlement. There was no separate OMIG audit or investigation in the matter [T 152-155]. The NOAA allegations against the Appellant track closely to Elant's admissions in the Settlement [OMIG D]. The Appellant was neither a party to nor a signatory on the Settlement [OMIG G]. Edward Meyer, the Chief of the Division of Medicaid Investigations at the OMIG, testified that he considered the Appellant on the same level of management at Elant as CEO McAleer, successor CEO Whitney and COO/CFO Lanza [T 145]. On cross-examination, Mr. Meyer conceded he saw no evidence that the Appellant:

- was the person at Elant responsible for discharges,
- reviewed clinical records for the purpose of holding discharges, or
- spoke or communicated with residents about their discharge decisions [T156].

Mr. Meyer also conceded that he found no specific violations regarding transfers, knew no names of residents allegedly transferred, interviewed no residents about transfer and knew nothing about what residents wished regarding their transfers [T 157].

In addition to Mr. Meyer, the OMIG called two other witness at the hearing, former Elant COO/CFO Lanza and Maura Brennan, the Nursing Home Administrator at Elant at Brandywine and Elant at Goshen during the relevant times. The ALJ finds that the testimony by Lanza and Brennan disproved the assumption by OMIG that the Appellant was an executive at Elant on the same level as McAleer, Whitney and Lanza. Mr. Lanza testified that the Appellant was variously supervised by McAleer, Whitney and Lanza and that those three were the corporate executives running Elant during the relevant period [T 79]. Ms. Brennan testified that there was a clear line

of demarcation between McAleer/Whitney/Lanza, the C-suite executives, and the Senior Management Team, which included vice-presidents such as the Appellant and Elant SNF Administrators such as Ms. Brennan [T 241, 251]. The Rule of Three and the resident transfers were means to generate revenue, preserve bed-hold and address Elant's eroding financial situation. Mr. Lanza testified that the means to address eroding revenue did not originate with the Senior Management Team, but was a message from Ms. McAleer, which included threats to people's positions [T 35]. Mr. Lanza also testified that Todd Whitney first thought of using patient transfers between facilities as a way to protect the bed-hold [T 36]. Further, Mr. Lanza testified that the SNF Administrators were charged with making the transfers happen and talking to families and residents about the moves [T 37]. Carl Kelly, the former COO at Elant, testified for the Appellant. Mr. Kelly corroborated Mr. Lanza's testimony about transfers, testifying that Placement Services merely processed paperwork for transfers and made no decisions in regard to transfers [T 292].

Both Ms. Brennan and Mr. Lanza testified that the discharge process for all residents went through the Medicare meetings [T 41-42, 252]. Ms. Brennan testified that the interdisciplinary team included social work, nursing, nutrition, rehabilitation and the SNF Administrators [T 252] and that the Appellant was not a member of any of those teams [T 252-253]. Eileen Masterson, R.N., the former Director of Nursing at Elant Goshen, appeared for the Appellant. Ms. Masterson testified that she did not remember the Appellant being regularly at the Medicare meetings, although the Appellant or someone else from Placement Services might have attended one or two of the weekly meetings [T 189]. Ms. Masterson testified further that the admissions office was very busy trying to keep beds filled [T 189]. In her testimony, the Appellant denied any role in the Medicare meetings [T 402]. Mr. Lanza testified that the

Appellant did not attend the Medicare meetings at first, but that the Appellant or her staff were present as Elant's financial position deteriorated [T 53]. Mr. Meyer testified that he saw no evidence that the Appellant was the person at Elant responsible for discharges [T 156]. The ALJ concludes that the credible evidence demonstrates that the Appellant was not in regular attendance at the Medicare meetings that controlled the discharge process and was not a member of or a supervisor over the teams that made discharge decisions.

The OMIG post-hearing brief (OB) argued that the evidence at the hearing established that the Appellant engaged in the practice of transferring or moving residents between Elant facilities and that the Appellant directed and participated in delaying or postponing discharges of short-term residents at Elant facilities [OB 4]. The ALJ finds that the testimony by Mr. Lanza and Mr. Kelly disproves the allegation that the Appellant engaged in the transfer process. Todd Whitney initiated the use of patient transfer between facilities to protect the bed-hold [T 36] and the SNF administrators were charged with making the transfers happen and talking to families and residents about the moves [T 37]. Placement Services merely processed paperwork for transfers and made no decisions in regard to transfers [T 292]. On the allegation regarding discharges, the OMIG Chief of Investigations, Mr. Meyer conceded that he saw no evidence that the Appellant was the person at Elant responsible for discharges or reviewed clinical records for the purpose of delaying discharges [T 156]. Further, the ALJ finds that the testimony of Ms. Brennan, Ms. Masterson and the Appellant disproves the allegation that the Appellant directed and participated in delaying and postponing discharges [T 189, 252, 401].

The NOAA charged that the Appellant engaged in unacceptable practices by deceiving and misleading clients at Elant by delaying medically approved discharges from facilities and without so informing residents [OMIG D]. Mr. Meyer testified that he saw no evidence that the

Appellant spoke or communicated with residents about their discharge decisions [T156]. Mr. Lanza testified that nursing and rehab staffs were responsible to communicate discharge decisions to residents [T 106-107] and that it was not the formal duty of the Appellant [T 115]. Mr. Lanza testified further that he was not even sure the Appellant had patient contact [T 115]. The ALJ finds no specific evidence in the record to show that the Appellant deceived residents. The ALJ holds that the testimony by Mr. Lanza and Mr. Meyer disproves the allegations that the Appellant deceived residents. The OB argues only that the Appellant had patient contact and offers no proof of specific acts of deceit.

The OB offered other arguments that the ALJ found unconvincing or irrelevant. The OMIG argued that proof established that the Appellant knew about the Rule of Three [OB 7]. The ALJ finds that the Appellant's knowledge about the Rule constitutes no proof that the Appellant committed unacceptable practices. This OMIG argument may go to the Appellant's credibility, in that, her response to the NOPAA claims she was unaware of all discharge procedures at Elant and became aware only from the DOH/MFCU investigation [OMIG C]. The OB also argued that the Appellant failed to investigate the discharge practices at Elant and to report to the Elant Board about the practices [OB 15]. The OB fails to cite a regulation, however, that imposes a duty on the VPPS to perform investigations for the Elant Board. The NOAA alleged that the Appellant failed to "disclose" but there was no allegation that the Appellant engaged in unacceptable practices for failing to "investigate" [OMIG D].

In addition to the arguments noted above, the OB also made reference to the findings in an ALJ Report from a Health Department proceeding concerning the Nursing Home Administrator License of the OMIG Witness Christine Brennan [OMIG I]. The OMIG noted that several of those findings identified the Appellant as the person dictating the discharge policy at

Elant facilities [OB 20]. The ALJ finds the findings from the ALJ Report constitute no evidence in this proceeding. Just as with the Settlement, the Appellant was not a party to that Health Department proceeding and had no opportunity to present a defense to accusations against her at that hearing and held no unity of interest in the prior matter with Ms. Brennan, Ryan v. New York Tel. Co., 62 N.Y.2d 494 (1984). The OMIG also made no mention about the ALJ Report in the NOPAA [OMIG D], so the Appellant had no notice to address the Report in her response to the NOPAA.

As the evidence in this proceeding disproves the allegations that the Appellant engaged in unacceptable practices, no grounds exist to impose a sanction against the Appellant.

VI. Decision

After reviewing the evidence from the hearing and the parties' post-hearing briefs, the ALJ:

1. Overturns the OMIG Determination that the Appellant committed unacceptable practices, and
2. Overturns the OMIG Determination to exclude the Appellant as from the Medicaid Program for five years.

Administrative Law Judge James F. Horan renders this decision pursuant to the designation by the Commissioner of Health of the State of New York to render final decisions in hearings involving Medicaid sanctions.

Dated: November 26, 2019
Menands, New York

James F. Horan
Administrative Law Judge

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