COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.	**Division of Administrative Law Appeals**
Bridgewater Nursing Home, Petitioner,	Nos. RS-00-668, RS-99-253, RS-00-438, RS-00-665, RS-00-666, RS-00-667, RS-00-780
Blackstone Nursing Home, Petitioner,	Nos. RS-00-437, RS-00-658, RS-00-659, RS-00-660, RS-00-661, RS-00-784, RS-01-227
and **Holbrook Manor**, Petitioner,	Nos. RS-00-441, RS-00-675, RS-00-676, RS-00-677, RS-00-678, RS-00-781
v.	
Executive Office of Health and Human Services, Respondent.	Dated: October 19, 2023

Appearance for Petitioner:
Jonathan Langfield
John McKenna

Appearance for Respondent:
Michael Capuano, Esq.

Administrative Magistrate:
Yakov Malkiel

SUMMARY OF DECISION

EOHHS erred by disallowing certain elements of the petitioners' "cost reports" based on the absence of supporting documentation. Under the applicable regulations, the petitioners were no longer required to possess the pertinent documentation by the time EOHHS conducted its audit. On the other hand, the method by which EOHHS calculated the petitioners' "administrative costs" was consistent with the pertinent regulations and not unfair in a manner that warrants relief on appeal.

DECISION

These are appeals from rates of payment established by the Executive Office of Health and Human Services (and predecessor agencies) under G.L. c. 118E, § 13C (and predecessor statutes). The appeals were consolidated on the petitioners' unopposed motions and submitted

on the papers. 801 C.M.R. § 1.01(10)(c).[1] I admit into evidence exhibits marked 1-13 in DALA's case file.[2]

Findings of Fact

I find the following facts.

Background

1. The three petitioners are nursing facilities. Their shared parent company is Rehabilitation Associates, Inc. The parent company's senior officers include Nicholas Thisse, Marion Thisse, and Denise Allen. (Exhibits 4, 5.)

2. EOHHS[3] is responsible for establishing rates of payment to nursing facilities in Massachusetts. EOHHS's process for establishing such rates relies on periodic cost reports filed by the facilities. The cost report for any given year is filed during the following year. (Exhibits 4, 5.)

3. The petitioners filed cost reports for 1992 (in 1993) and 1993 (in 1994). EOHHS set the petitioners' rates of payment for 1994 (using the 1992 report) and 1995-1997 (using the 1993 report). The petitioners did not dispute the original rates established for those years. (Exhibits 4, 5.)

4. EOHHS audited the petitioners in 1998 and revised the petitioners' rates on the basis of the auditors' findings. The parties' disputes arise from those revisions. (Exhibits 6-11.)

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[1] The parties agreed to file affidavits in lieu of testimony, then filed no affidavits. The petitioners' briefs, while reflecting technical expertise, were unusually difficult to understand. This decision may therefore imperfectly relate the petitioners' intended claims.

[2] Exhibits 1-11 are listed in the petitioners' submission of September 29, 2023. Exhibit 12 was originally filed as Exhibit 4 to Bridgewater's April 2023 prehearing memorandum. Exhibit 13 was originally filed as Exhibit 4 to Holbrook's May 2023 prehearing memorandum.

[3] Including its predecessor agencies and relevant components.

Record Retention

5. EOHHS regulations in effect during the 1990s required nursing facilities to retain the records substantiating their cost reports for "at least three years following the submission of such reports or until the final resolution of any appeal involving a rate for the period covered in the report, whichever occurs later." The regulations stated that costs unsupported by properly maintained records would be disallowed. 114.2 C.M.R. § 5.03(1), (6) (1993-1994). (Exhibits 1, 2.)

6. During the 1998 audit, EOHHS disallowed certain items claimed in the petitioners' 1993 cost reports on the grounds that the petitioners had not retained records supporting those items. (Exhibits 6-9.)

Administrative Costs[4]

7. Regulations in effect until 1993 estimated each nursing facility's "administrative" costs by deriving a standardized allowance from the facility's size. That allowance stood in for any administrative expenses that a facility actually incurred, including administrators' salaries. 114.2 C.M.R. § 5.08 (1993). (Exhibit 1.)

8. Each petitioner's cost report for 1992 included a section about the petitioners' shared parent company. Pertinent entries there disclosed a total of $308,488 in salaries to enumerated administrators, including Ms. Allen. (Exhibits 4, 12, 13.)

9. In the facility-specific portion of the 1992 cost reports, each petitioner completed a Schedule 27, captioned "Detail of Administrator's Salary and Benefits." Each petitioner there

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[4] An argument about administrative costs appeared in Bridgewater's individual prehearing memorandum but not in Holbrook's; Blackstone did not file a prehearing memorandum of its own. However, each of the petitioners raised the issue in at least one of its original appeals, and EOHHS does not argue waiver as to any petitioner.

identified a specific administrator, disclosed the administrator's salary, and commented that the administrator served multiple facilities. For example, Bridgewater identified its administrator as Dennis DiGloria, reported a salary of $46,580, and wrote: "Represents full salary and benefits paid by management company to administrator of more than one facility." (Exhibits 12, 13.)[5]

10. EOHHS changed its methodology effective in 1994. Its new regulations calculated each facility's administrative costs by applying a mathematical formula to the facility's "total claimed base year administrative and general costs" (total administrative amount). The total administrative amount equaled the sum of twenty-five enumerated cost-report items, one of which was "Administrator Salaries, reported on [Schedule] 27." 114.2 C.M.R. § 5.08(3)(a) (1994). (Exhibit 2.)

11. When EOHHS originally calculated the petitioners' 1994 rates, it included the sum stated on each petitioner's 1992 Schedule 27 in that petitioner's total administrative amount (e.g., $46,580 in Bridgewater's case). But during the 1998 audit, EOHHS decided that, because the pertinent administrators served multiple facilities, each petitioner should be credited with only a portion of its Schedule 27 figure. (Exhibits 6-7, 10-11.)

Procedural History

12. The 1998 audit reduced the petitioners' rates for 1994-1997. The adjustment to the 1997 rate then impacted the rates for 1998-2000,[6] because one element of EOHHS's calculations during that timeframe compared each year's costs to the preceding year's costs. (Exhibits 6-11.)

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[5] Holbrook reported a salary of $8,332 to Margaret Pomeroy. (Exhibit 13.) The facility-specific portion of Blackstone's 1992 cost report is not in evidence, but this evidentiary gap does not affect the outcome of the appeals.

[6] With respect to 1999, only Bridgewater maintains a live appeal.

13. EOHHS published the petitioners' revised rates during the year 2000. The petitioners timely filed these appeals. For reasons discussed in interlocutory orders, the appeals then sat mostly idle until recent months. (Exhibits 10-11.)

Analysis

EOHHS is obligated by statute to establish "rates of payment for health care services." G.L. c. 118E, § 13C. Such rates are intended to cover the costs that would be incurred by efficient facilities operating in accordance with applicable laws, regulations, quality standards, and safety standards. *Id.* EOHHS arrives at its rates by applying elaborate formulas to each facility's cost reports in certain "base years." § 13D. On appeal to DALA, "the rate determined for any provider . . . shall be adequate, fair and reasonable for such provider, based upon[] the costs of such provider, but not limited thereto." § 13E. *See generally Salisbury Nursing & Rehab. Ctr., Inc. v. Division of Admin. L. Appeals*, 448 Mass. 365, 366 (2007).

I

EOHHS's regulations required the petitioners to preserve the records supporting their 2013 cost reports "at least three years following the submission of [the] reports or until the final resolution of any appeal involving a rate for the period covered in the report, whichever occurs later." 114.2 C.M.R. § 5.03(1) (1993-1994).

EOHHS's audit took place in 1998. By that time, more than three years had passed since the 1993 cost reports were filed. The rates "covered in" the 1993 reports were those of 1994-1997, which the petitioners accepted without appeals. The straightforward upshot of these facts is that, by the time of the audit, the petitioners were not required to possess the 1993 reports' supporting documentation. The documentation's absence from the petitioners' files was therefore not a proper basis for disallowances.

EOHHS offers two counterarguments, both groundless. EOHHS first observes that, *after* the 1998 audit prompted adjustments to the petitioners' 1994-1997 rates, the petitioners appealed from the revised rates. EOHHS argues that, as a result, appeals concerning rates derived from the 1993 cost reports were not yet over by the time of the audit. If adopted, this approach would mean that facilities must retain their records forever: otherwise, an audit *at any time* could make disallowances based on absent records; the disallowances could be contested only through new appeals; and those appeals would render the records' absences no-longer permissible. With due regard for EOHHS's role as the promulgating agency, its interpretation is not a logical reading of the pertinent regulation. *See Friends & Fishers of Edgartown Great Pond, Inc. v. Department of Envtl. Prot.*, 446 Mass. 830, 837 (2006). Once a facility's obligation to retain documents expires (in this case, in 1997), the documents may be destroyed permissibly, and the retention obligation cannot logically be revived.

EOHHS next focuses on the regulatory language requiring records to be retained for "*at least* three years" (emphasis added). EOHHS contends that the words "at least" mean that a facility may be expected to keep its records for more than three years, and may be penalized for failing to do so.[7] This suggestion ignores the regulation's plain meaning. "At least" in this context means that a facility *must* retain its records for three years (and until pertinent appeals have been resolved), but *may* keep them for longer. *See, e.g.*, *People v. Herrera*, No. F069894, 2017 WL 4564227, at *26 (Cal. Ct. App. Oct. 13, 2017); *Hornady v. Outokumpu Stainless USA*, 572 F. Supp. 3d 1162, 1215 (S.D. Ala. 2021). It is difficult to view EOHHS's contrary position

[7] EOHHS claims relatedly that, in real time, the petitioners did not seem to challenge the auditors' demand to see documentation supporting the 1993 cost reports. But the petitioners presented such a challenge no later than in their notices of appeal.

as a good faith argument. Presumably EOHHS does not believe that, when it establishes certain rates once per year, it may be violating its statutory obligation to perform that task "at least annually." G.L. c. 118E, § 13D.

II

The remaining disagreement focuses on EOHHS's computation of the petitioners' administrative costs in 1994. Although they originally claimed otherwise, the petitioners now concede that EOHHS was not required to include each facility's full Schedule 27 figure in its total administrative amount.

The petitioners argue instead that each petitioner's costs should be viewed as including a portion of the salaries of Ms. Allen, Mr. Thisse, and Ms. Thisse. Ms. Allen actually received a salary from the petitioners' parent company. With respect to Mr. Thisse and Ms. Thisse, the petitioners propose that salaries from the parent company should be imputed to those individuals and then allotted proportionally to the pertinent facilities.

The 1992 cost reports did not report salaries to Ms. Allen, Mr. Thisse, or Ms. Thisse as "Administrator Salaries, reported on [Schedule] 27." 114.2 C.M.R. § 5.08(3)(a) (1994). The pertinent regulation thus did not call for these individuals' actual or imputed pay to be included in the petitioners' total administrative amounts. The petitioners fall back on a fairness-based argument. They explain that, under the regulations in force when they prepared the 1992 reports, the compensation actually paid to administrators lacked practical consequences (since each facility received a standardized allowance). If the petitioners could have foreseen EOHHS's change of methodology in 1994 (they say), they would have included more elaborate information in their 1992 Schedule 27s.

EOHHS's rejoinder is that considerations of fairness cannot establish an error by EOHHS and cannot warrant relief. As a general proposition, this is an overstatement. It is true that

administrative agencies possess only the authority conferred on them by statute, and thus lack the powers that the courts have drawn from their traditional jurisdiction in equity. *See Rochester Bituminous Products, Inc. v. FLD*, No. LB-22-5, 2022 WL 19303188, at *1 (DALA Oct. 25, 2022). But the statute applicable here specifically instructs DALA to ensure that providers' rates are not only "adequate" but also "fair and reasonable." G.L. c. 118E, § 13E. *See Salisbury Nursing*, 448 Mass. at 366.

It is nonetheless clear that an adjudicatory agency applying considerations as elastic as fairness and reasonableness must exercise care and restraint. The Legislature did not mean to make DALA "the ground level rate setter." *Baystate Med. Ctr., Inc. v. Rate Setting Comm'n*, 36 Mass. App. Ct. 345, 348 (1994). DALA's role in the statutory scheme is to "review . . . action[s] initially taken by [EOHHS]." *Id.*

The concerns that the petitioners raise with respect to EOHHS's computation of their administrative costs are insufficiently compelling to justify a reversal of EOHHS's approach. Nothing prevented the petitioners from including additional information in their original Schedule 27s. If they were unsure about the scope of the information that belonged on that page, they could have asked EOHHS. Also, the record does not disclose the extent of the services that Ms. Allen, Mr. Thisse, or Ms. Thisse actually contributed to the petitioners. These considerations counsel against interference with EOHHS's treatment of this issue.

III

The governing statute might be read as expecting DALA on appeal to specify the precise rates of payment that a facility should receive. *See* G.L. c. 118E, § 13E. Given the technical nature of the requisite calculations, it is more realistic for DALA to instruct EOHHS (when appropriate) to recalculate a facility's rates in accordance with specified guidance about points of law or fact.

In this case, EOHHS reports that it is no longer capable of recalculating rates under the rules that governed the years at issue. Making matters more manageable, EOHHS expresses willingness to adopt the petitioners' calculations of the bottom-line sums to which their various claims would entitle them. The order that follows relies on that sensible concession.

Order

In view of the foregoing, the rates of payment challenged in these appeals are AFFIRMED in part, REVERSED in part, and remanded to EOHHS to be finalized in accordance with the following instructions:

1. The petitioners' rates of payment for the pertinent years shall be deemed amended to reverse EOHHS's disallowances of elements of the 1993 cost reports based on missing documentation. Otherwise, the rates shall remain unchanged.

2. The sums owed to the petitioners under paragraph 1 of this order for the years 1995-1997 shall be as stated on page 5 of EOHHS's memorandum dated October 3, 2023.

3. The petitioners shall promptly present EOHHS with a clear and accurate computation of the amounts owed to them under paragraph 1 of this order for the years 1998-2000. EOHHS shall promptly either adopt that computation or confer with the petitioners in an effort to agree on revisions. In the event that such discussions are unfruitful, EOHHS may promptly file a post-decision motion for clarification. Any party's failure to take the actions described in this paragraph with all reasonable speed will be viewed as a forfeiture of that party's rights under this paragraph.[8]

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[8] Any appeal from this decision must be brought in the Superior Court within thirty days. *See* G.L. c. 30A, § 14.

Division of Administrative Law Appeals

/s/ Yakov Malkiel
Yakov Malkiel
Administrative Magistrate