COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. **Division of Administrative Law Appeals**

Guilford Health management, Inc., d/b/a Birch Manor Rehabilitation & Skilled Nursing Center,
Appellant

v. Docket Nos. RS-99-104, RS-00-483, RS-00-1153, RS-01-377, RS-02-414, RS-03-286, RS-03-527

Massachusetts Executive Office of Health and Human Services,
Respondent

Appearance for Petitioner:

Jeffrey Lindequist, Esq.

Appearance for Respondent:

Michael Capuano, Esq.

Administrative Magistrate:

Timothy M. Pomarole, Esq.

SUMMARY OF DECISION

The Appellant claims that the Executive Office of Health and Human Services ("EOHHS") improperly allocated insurance costs to the wrong category of expenses for purposes of calculating its Medicaid reimbursement, resulting in an under-reimbursement and that it improperly used an audit of costs reported by twenty-five sample facilities to reduce one of the components for calculating the Appellant's reimbursement rate. This Division lacks jurisdiction over these appeals, which turn on the correctness of EOHHS's interpretation of its regulations, and not on the Appellant's particular circumstances. To the extent EOHHS seeks dismissal based on the Appellant's failure to prosecute these appeals, the request is denied. Because this Division shoulders some of the responsibility for the advanced ages of these appeals, it would not be appropriate to dismiss them in the interest of docket management. As for prejudice to EOHHS, the agency has not explained why some lesser sanction would be insufficient to remedy the prejudice arising from the delay in adjudicating these matters. Finally, although these appeals are dismissed for lack of subject matter jurisdiction, they are also unavailing on their substantive merits.

DECISION

The Appellant, Guilford Health Management, Inc. d/b/a Birch Manor Nursing Home ("GHM") appeals seven Medicaid reimbursement rates set by the predecessor agency to the Massachusetts Executive Office of Health and Human Services ("EOHHS") for the 1998 through 2003 rate years.[1] The *gravamen* of these appeals is two-fold: (1) with respect to the 1998-2002 rates, EOHHS erred by allocating the costs of insurance premiums to the "Administrative and General Costs" category rather than to the "Other Fixed Costs" category, resulting in an under-reimbursement; and (2) with respect to the 2003 rate, EOHHS improperly used an audit of costs reported by twenty-five sample facilities (not including Birch Manor) to reduce one of the components for calculating the reimbursement rate.

I held a hearing on April 12, 2023, via the WebEx teleconferencing platform. The hearing was recorded. I admitted into evidence Appellant's Exhibits 1-14 and Respondent's Exhibits 1-5. Attorney Michael Parker, counsel to GHM, testified on behalf of the Appellant. Pavel Terpelets, the Director of Institutional Programming for the Office of Long Term Services and Supports for MassHealth, testified on behalf of the Respondent. Both parties submitted post-hearing briefs and post-hearing reply briefs, after which submissions the record was closed.

FINDINGS OF FACT

Based on the evidence presented by the parties, along with reasonable inferences drawn therefrom, I make the following findings of fact:

[1] In these appeals, EOHHS has been substituted as respondent for its predecessor, the Division of Health Care Finance and Policy. For the sake of simplicity, this decision will refer to EOHHS throughout.

1. GHM operated Birch Manor, a skilled nursing facility in Chicopee, Massachusetts, during the time period relevant to this appeal. The Massachusetts Medicaid program paid for the care of many of Birch Manor's residents. The payments at issue were made via reimbursements calculated by EOHHS. (Parker Test.).

A. "Administrative and General Costs" Versus "Other Fixed Costs"

2. Reimbursement rates are based, in part, on certain costs incurred by a facility. These costs fall into different categories. Costs allocated to the Other Fixed Costs category are eligible for 100% reimbursement. Costs categorized as Administrative and General Costs are subject to a cap on reimbursements. (Parker Test.; Respondent's Exhibits 1-4).

3. The versions of 114 CMR 6.00 in effect during the time periods at issue in this appeal contain the following definition of Other Fixed Costs:

> Other Fixed Costs. Other Fixed Costs include Real Estate Taxes, Personal Property Taxes on the Nursing Facility Equipment, the Non-Income portion of the Massachusetts Corporate Excise tax, Building Insurance, and Rental of Equipment located at the facility.

(Respondent's Exhibits 1-4).

The only type of insurance expressly referenced under this definition is "Building Insurance."

4. The versions of 114 CMR 6.00 in effect during the time periods at issue in this appeal contain the following definition of Administrative and General Costs:

> Administrative and General Costs. Administrative and General Costs include the amounts reported in the following accounts: administrator salaries; payroll taxes - administrator; worker's compensation - administrator; group life/health - administrator; administrator pensions; other administrator benefits; clerical; EDP/payroll/bookkeeping services; administrator-in-training; office supplies; phone; conventions and meetings; help wanted advertisement; licenses and dues, resident-care related; education and training - administration; accounting - other;

> insurance - malpractice; other operating expenses; realty company variable costs; management company allocated variable costs; and management company allocated fixed costs. For facilities organized as sole proprietors or partnerships and for which the sole proprietor or partner functions as administrator with no reported administrator salary or benefits, administrative and general costs shall include an imputed value of $69,781 to reflect the costs of such services.
>
> (Respondent's Exhibits 1-4).

The only type of insurance expressly referenced in this definition is malpractice insurance.

5. For the 1998-2002 rate years, EOHHS allocated GHM's costs for certain insurance premiums to the Administrative and General Costs category. (Parker Test.).
6. The record does not contain any invoices for insurance premiums, insurance binders, declarations pages, or other policy information. Nor does the record contain the precise documentation that GHM submitted to EOHHS during the relevant periods.
7. The record does contain GHM's financial statements for 1998-2003. (Appellant's Exhibits 2, 4, 6, 8, 11, and 14). The financial data contained in these statements was used to complete a reporting form submitted to EOHHS. (Parker Test.). The schedules of operating expenses appended to these statements list three kinds of insurance expenses: business, workers' compensation, and group. These insurance costs are listed under "Administrative and General" expenses, rather than "Property and Related" or "Plant Operation and Maintenance" expenses. (Appellant's Exhibits 2, 4, 6, 8, 11, and 14).
8. It is the premiums for the "business insurance" referenced in the Financial Statements that GHM says were improperly allocated to Administrative and General Costs. (Parker Test.). It is not clear whether the "business" insurance premiums bore that designation when these amounts were reported to EOHHS. Nor is it clear how these

costs were categorized when they were reported to EOHHS (whether, for example, they were included under a category described as "Administrative and General" – as they were in the financial statements).

9. The appeals submitted for the 1998-2002 rate years state that EEOHS had allocated the costs of "general liability insurance" to the Administrative and General Costs category. (Appeals in Docket Nos. RS-99-104, RS-00-483, RS-00-1153, RS-01-377, RS-02-414). GHM's prehearing memorandum also references "general liability insurance." GHM, through Mr. Parker's testimony, suggested for the first time that property casualty insurance premiums were also included in the amounts they claim had been misallocated to Administrative and General Costs. (Parker Test.).
10. Because the administrative expenses of operating GHM exceeded the cap on such costs, the allocation of the insurance costs to the Administrative and General Costs category resulted in no reimbursement for those costs. If they had been allocated to the Other Fixed Costs category, they would have been reimbursed in full. (Parker Test.).

B. Audit of Twenty-Five Sample Facilities

11. GHM claims that EOHHS "committed material and unsubstantiated [*sic*] audit errors in the process of examining the 2000 cost reports and underlying records of twenty-five (25) nursing facilities" and that as a "result of and based upon such errors, [EOHHS] has arbitrarily and capriciously reduce[d] the Other Operating Standard portion of the rate of payment as set forth in 114.2 CMR 6.04(1)(a)" thus failing to "establish a rate of payment to providers of services that ensures reimbursement for those costs which are incurred by efficiently and economically operated facilities and

providers (Birch Manor Nursing Home being such a facility and provider)." (Appeals in Docket Nos. RS-03-286 and RS-03-527). Based on GHM's submissions and Mr. Parker's testimony, the error in question is the reliance on audits of other facilities to reduce the other operating cost standard payment.[2]

12. The version of 114.2 CMR 6.03 in effect during the relevant time periods reads:

> Other Operating Cost Standard Payments
> (a) For the period July 1, 2002 through February 28, 2003 the Other Operating Cost Standard Payment is $56.05.
> (b) For the period on and after March 1, 2003 the Other Operating Cost Standard Payment is $52.33.

(Respondent's Exhibit 4). (It is not clear if this standard payment is per bed, but resolution of the question is not necessary for purposes of this decision.).

13. Costs for twenty-five sample facilities were audited, resulting in a downward adjustment to the standard payments for operating costs. (Parker Test.). The notice of rates appended to GHM's 2003 appeals state that the "Other Operating Cost Standard" payment would be $52.33. (Exhibit A to Appeals in Docket Nos. RS-03-286 and RS-03-527).

C. These Appeals

14. The first of these appeals was filed in 1998. (RS-00-1153).[3] The last of these appeals was filed in 2003. (RS-03-527).

15. The files for these appeals reflect orders to file status reports in 2008 (for RS-00-

[2] There are two appeals challenging 2003 rates. One was filed in challenge to interim rates; the other was filed with respect to the final rates.

[3] For reasons not entirely apparent from the file, this appeal, originally docketed as RS-98-315, was later given a new docket number: RS-00-1153.

1153), in 2016 (for RS-99-104), and in 2018 (for various of the appeals). GHM responded to these requests and noted that GHM "stands ready to prosecute this matter without any further delay."

16. Apart from these status reports and the responses thereto, these appeals appear to have lain largely dormant until February 23, 2022, when this Division, the Division of Administrative Law Appeals ("DALA"), requested a further status update from the parties.
17. On October 3, 2022, EOHHS filed a motion to dismiss these appeals. It made three arguments: (1) DALA lacks subject matter jurisdiction to consider these appeals because they challenge "broad-based generally applicable implementation of the regulations" that "apply equally to the entire class of eligible providers covered by the regulations"; (2) GHM failed to prosecute these appeals; and (3) GHM lacked evidence in support of its claims. On October 22, 2023, Magistrate Kenneth Bresler denied the motion to dismiss.
18. EOHHS requested reconsideration of this denial in its post-hearing submissions.

CONCLUSION AND ORDER

As explained in greater detail below, DALA lacks jurisdiction over this rate setting appeal. Nevertheless, because I have had the benefit of receiving the parties' evidence, and in the interest of perhaps streamlining future proceedings in the event my conclusions about jurisdiction are reversed, I will also address (1) EEOHS's argument

that these appeals should be dismissed for failure to prosecute; and (2) the substantive merits of the appeals.[4]

A. DALA Does Not Have Jurisdiction to Consider These Appeals

1. *The legal framework*

This Division's authority to hear rate-setting appeals is circumscribed by G.L. c. 118E, § 13E, as interpreted by the courts.[5] In the *Salisbury* decision, the critical case on DALA's jurisdiction to hear rate appeals, the Supreme Judicial Court observed that "DALA may properly hear challenges to specific rate calculations, but it may not entertain substantive attacks on the rate regulations themselves." *Salisbury Nursing & Rehabilitation Center, Inc. v. Div. of Administrative Law Appeals*, 448 Mass. 365, 375 (2007). Among other considerations, allowing challenges to generally applicable regulations by means of an "ad hoc adjudicatory proceeding" would "wreak havoc on the regulatory plan established by the Legislature." *Beth Israel Hospital, Inc. v. Rate Setting*

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[4] GHM argues that EOHHS's motion to reconsider this Division's prior denial of its motion to dismiss is procedurally defective. Be that as it may, there is no impediment to my consideration of the underlying arguments in light of the testimony and evidence adduced during the hearing. It also bears mention that subject matter jurisdiction may be raised and considered at any time during the proceedings. *Commonwealth v. Nick N.*, 486 Mass. 696, 702 (2021).

[5] G.L. c. 118E, 13E is the currently operative statute. The immediate predecessor statute was G.L. c. 118G, § 9, which in turn was preceded by G.L. c. 6A, § 36. These statutory developments do not materially affect the analysis. *Cf. Rizkallah v. EOHHS*, RS-22-0006, 2022 WL 16921465, at *1 n. 2 (DALA April 6, 2002) (observing that replacement of G.L. c. 118G, § 9 with G.L. c. 118E, § 13E did not effect a substantive change with regard to review of a rate determination); *Salisbury Nursing & Rehabilitation Center, Inc. v. Division of Administrative Law Appeals*, 448 Mass. 365, 365 n.4 (2007) (observing that enactment of G.L. c. 118G, § 9 had no effect on the holdings of earlier cases referring to G.L. c. 6A, § 36). Accordingly, opinions and decisions addressing all of these statutes are applicable to these appeals.

Comm'n, 24 Mass. App. Ct. 495, 505 (1987). Instead, "an across-the-board challenge" to "regulations of general applicability ought to be determined on a record established and under the standard of review provided in a declaratory judgment action under G.L. c. 30A, § 7, and G.L. c. 231A." *Id.*

Although appellants cannot evade DALA's jurisdictional limitation through the simple expedient of phrasing its appeal as an appeal from an individual rate determination, the courts have acknowledged that it can be difficult to draw the line between general challenges to a regulation and challenges to an individual rate calculation. *Id.* at 503 n.16. To "differentiate between the two types of challenges, one must look to the essence of the controversy and determine whether the issues raised relate predominantly to the individual provider or more generally to the regulated class." *Rizkallah v. EOHHS*, RS-22-0006, 2022 WL 16921465, at *1 (DALA April 6, 2002) (citing *Geriatric Authority of Holyoke v. Rate Setting Comm'n*, 21 Mass. App. Ct. 953, 954 (1986)). This inquiry takes the form of a two-part test:

> First, were there special circumstances making application of the rate to a particular provider different from its application to all others? Second, were those circumstances the result of something other than voluntary business decisions?

Salisbury, 448 Mass. at 375. This test restricts DALA's jurisdiction to hear rate setting appeals "to situations in which the provider can demonstrate circumstances – other than voluntary business decisions – which make application of the rate to that provider *different* from its application to all other providers in the class." *Id.* (citation and internal quotation marks omitted) (emphasis in original). To put it another way, the provider must present "evidence of special circumstances demonstrating that the general rate has been improperly applied to the provider, or that some factors exist, beyond the

provider's control, which affect the provider but not the class as a whole." *Rate Setting Comm'n v. Div. of Hearing Officers*, 401 Mass. 542, 545 (1988).

In this case, GHM asserts that it is not lodging a challenge against the regulations themselves. EOHHS, for its part, has suggested that it has had a long-standing practice interpreting Administrative and General Costs as including premiums for liability insurance. Leaving aside for the moment the soundness of these two assertions, they do give rise to the question of whether the foregoing jurisdictional rules are triggered not only by application of the rate-setting regulations themselves, but also by the application of EOHHS's generally applicable interpretations of those regulations. I conclude that they are.

The distinction between challenges to "to the substantive validity, that is, the adequacy of a regulation of general application" and those directed toward "the peculiar application of that regulation to a provider," *Salisbury*, 448 Mass. at 374, developed in light of the two-fold recognition that challenges to generally applicable rate regulations could be raised through a declaratory judgment action and that the controlling statutes "were written for individual provider appeals setting forth a particular rate or rates for that provider alone" rather than review of "industry-wide" rates. *Mass. State Pharmaceutical Ass'n v. Rate Setting Comm'n*, 387 Mass. 122, 139 (1982). Elaborating upon this distinction, the Appeals Court remarked that to allow DALA to "reach the underlying substantive validity of a general regulation in an ad hoc proceeding, ostensibly challenging only a particular rate as yielding an unreasonable return, would indeed make [DALA] the ground level rate setter – a role reserved to the [EOHHS]."

Beth Israel Hospital, 24 Mass. App. Ct. at 505 (citation and internal quotation marks omitted).

The foregoing considerations apply with equal force to general interpretations of those regulations. Like facial challenges to a regulation, challenges to a generally applied interpretation of a regulation, may be brought in a declaratory judgment action. *See* G.L. c. 231A, § 2 (declaratory judgment action may be brought to "secure determination" of legal rights under an "administrative regulation, including determination of any question of construction or validity thereof which may be involved in such determination" and to obtain determination of legality of "administrative practices and procedures" in violation of the law where "such violation has been consistently repeated"); *see also Peterborough Oil Co., Inc., Department of Environmental Protection*, 474 Mass. 443, 445 (2016) (remarking that declaratory relief is appropriate where plaintiff challenged, as a matter of law, the agency's interpretation of its own regulation); *Cucchi v. City of Newton*, 93 Mass. App. Ct. 750, 757 (2018) ("A dispute about an agency's interpretation of a regulation may be an appropriate subject for declaratory relief if that interpretation is consistently repeated and applied and the other requirements for declaratory relief are met." (citation and internal quotation marks omitted)); *Henderson v. Commissioners of Barnstable County*, 49 Mass. App. Ct. 455, 458 (2000) (noting that challenge to the defendants' interpretation of a statute, the applicable regulations, and the inmate handbook were appropriately brought through declaratory judgment claim).

DALA review of an EOHHS interpretation of a regulation could implicate much the same concerns as review of a facial challenge to the text of the regulation itself. And a challenge to an interpretation of a regulation rather than to the face of the regulation

itself would not make the challenge somehow more peculiar to the provider, such that it could be shoe-horned into DALA's jurisdiction. A challenge to a general interpretation of a regulation is much closer to the "general application" side of the *Salisbury* jurisdictional divide than to the "peculiar application" side.[6]

This is not to suggest that DALA lacks authority to consider and opine on interpretive questions in rate-setting cases. It does have that authority. *See Cliff House Nursing Home, Inc. v. Rate-Setting Comm'n*, 378 Mass. 189 (1979) (DALA has authority to make rulings of law in rate-setting appeals). The sole point is that that the jurisdictional analysis turns on the generality/particularity of the appellant's challenge. If the challenge is general, it does not matter whether that generality arises from the text of a regulation or emerges from an agency interpretation of that regulation.

There is one additional component of the legal framework that needs to be addressed: the burden of proof. Does GHM have the burden of proof of establishing DALA's jurisdiction or is it EOHHS's burden to show that DALA lacks jurisdiction? Although I have not found any case law directly addressing the issue, I conclude that in a rate-setting appeal the burden is on the provider to establish that the *gravamen* of its rate

[6] In another rate-setting case, Magistrate Yakov Malkiel observed that (a) "adjudicative agencies must assume the validity of on-the-books statutes and regulations" and that challenges to an agency's interpretation of its regulations faces different "doctrinal hurdles"; and (b) that DALA generally has the jurisdiction to entertain interpretive disputes, but the case law has articulated a more specific jurisdictional test in rate-setting appeals. *New England Deaconess Association/Rockridge at Laurel Park v. EOHHS*, RS-22-611 (Order DALA Oct. 12, 2023). This decision does not dispute point (a), only that, for purposes of ascertaining DALA's jurisdiction under the rate-setting statute, the relevant features are the generality that attaches to facial and interpretive challenges to a regulation. This decision acknowledges point (b). DALA generally has authority to consider questions of statutory and regulatory interpretation, but its authority has been cabined by statute (as interpreted by the courts) for these particular types of appeal.

appeal arises from its own particular circumstances rather than a generally applicable challenge.

As an initial matter, the burden generally rests with the party seeking to avail itself of a tribunal to establish jurisdiction. *See Miller v. Miller*, 448 Mass. 320, 325 (2007) ("The burden is on the party asserting jurisdiction to prove jurisdictional facts."); *Williams v. Episcopal Diocese of Mass.*, 436 Mass. 574, 577 n.2 (2002) (plaintiff responding to motion to dismiss under Mass. R. Civ. P. 12(b)(1) "bears the burden of proving jurisdictional facts"); *cf. Marchese v. Boston Redevelopment Auth.*, 483 Mass. 149, 156-157 (2019) (plaintiff has burden to establish standing, the question of which "is a jurisdictional matter," to challenge actions of administrative agency). The language used in *Salisbury* is consistent with this general principle. For example, the Court frames the question in terms of "whether the provider can demonstrate" that its challenge satisfies the jurisdictional test. *Salisbury*, 448 Mass. at 375 (citation and internal quotation marks omitted). And its statements about how the provider fell short further underscores the fact that establishing jurisdiction was the provider's burden to discharge. *Id.* at 375-76 ("Salisbury has not shown that any [special circumstances] apply to it. Nor has Salisbury provided any other example of how application of [rate adjustment] to its rates differed from its application to other facilities.").

2. *DALA lacks jurisdiction over the insurance claims*

As I construe the jurisdictional test, GHM has the burden of showing that a general standard was improperly applied or that the application of a general standard had a peculiar impact upon it, different from the general class of providers, that is not traceable to its voluntary business decisions.

First, though, there is the threshold question of whether EOHHS's treatment of the insurance premiums reflected a generally applicable interpretation of the regulation. (I assume, without deciding, that an interpretation applied uniquely to GHM would pass jurisdictional muster.). Unfortunately, the parties submitted barely any evidence on whether EOHHS generally interpreted Administrative and General Costs as including liability insurance premiums.[7] Regardless, I am satisfied that it is more likely than not that EOHHS's allocation of liability insurance to Administrative and General costs was generally applied. If EOHHS had allocated liability insurance premiums to Administrative and General Costs for GHM, but did not do so for other providers, three possible explanations come to mind: (1) some feature of GHM's insurance expenses differed from those of other providers; (2) EOHHS purposefully singled GHM out for special treatment; or (3) EOHHS inadvertently treated GHM differently. The first scenario would involve some unusual feature that led EOHHS, through error or insight, into treating GHM differently. The second would involve some obscure motivation for singling GHM out. Under the third, EOHHS would have inadvertently treated GHM

[7] EOHHS cites the regulation governing payments to resident care facilities, 114 CMR 4.00 (effective January 1, 2002) (Respondent's Exhibit 5), which lists "malpractice and general liability insurance" as variable expenses. 114 CMR 4.05(1). That regulation includes "insurance on Buildings and Equipment" in the definition of Fixed Costs. 114 CMR 4.02. There is no definition of Administrative and General Costs. Notwithstanding the fact that 114 CMR 6.00 and 114 CMR 4.00 are different regulations pertaining to different types of facilities, the inclusion of general liability insurance as a variable expense is suggestive. Nevertheless, given the technical complexity of the regulations and the rate-setting scheme, I cannot be sure that "variable costs" are the same as "Administrative and General Costs." And even if they are, there may well be distinctions that undermine reliance on 114 CMR 4.00 --- at least not without a guided tour, which was not provided.

differently for not just one, but several back-to-back rate-setting years. None of these scenarios, taken singly or in some combination are supported by any evidence.

I turn next to whether GHM has shown that the allocation of liability insurance premiums to Administrative and General Costs was incorrectly applied to it or had a peculiar impact upon GHM that was not traceable to its voluntary business decisions.

GHM disputes EOHHS's interpretation of Administrative and General Costs and Other Fixed Costs, but it is couched as pure question of interpretation. Any other provider could have made the same argument. There is no evidence that the regulation, or EOHHS's interpretation of that regulation, were improperly applied to GHM in particular.

Nor has GHM shown that EOHHS's practice of allocating liability insurance premiums to Administrative and General Costs had some sort of unique or peculiar impact on GHM --- let alone that such unique results were traceable to some feature of GHM's operation other than a voluntary business decision. The Supreme Judicial Court has provided some useful examples of circumstances that could meet this requirement:

> For example, a particular provider may service an area containing an unusually high concentration of patients with extreme health care needs; may require unusual equipment because of the unique nature of its services within the class, or because of the nature of its clientele; may traverse a territory with unusual geographic or transportation characteristics imposing a burden that other providers in the same class do not experience; or may cover an area where the population density differs greatly from that in areas covered by similar providers.

Rate Setting Comm'n v. Div. of Hearings Officers, 401 Mass. 542, 545-46 (1988).

Notably, all of these examples "involve factors external to the provider affecting the context in which its business operates." *Salisbury*, 448 Mass. at 375.

Here, GHM has not proffered anything even remotely comparable to these examples.[8] The record does not disclose any peculiar impact upon GHM, let alone an impact derived from something other than GHM's voluntary business decisions.

3. *DALA lacks jurisdiction over the audit claim*

Similar considerations lead me to conclude that DALA lacks jurisdiction over GHM's audit claim. GHM challenges the use of an audit of twenty-five sample facilities to reach a standard payment of $52.33 for Other Operating Costs, which is reflected in 114 CMR 6.00. (It bears mention that GHM challenges the use of the audit itself and does not identify any errors in the sample audit itself.). Other than the fact that it is a single facility operator (which consideration is addressed in footnote 8), GHM has not identified circumstances that make application of this standard payment "*different* from its application to all other providers in the class." *Salisbury*, 448 Mass. at 439 (citation and internal quotation marks omitted) (emphasis in original).

[8] With respect to its insurance claims and the audit claim, GHM has said that it is uniquely impacted because it is a single facility provider. The argument appears to be that it has certain administrative overhead that occupies a larger proportionate share of its expenses than larger operators. As a result, (1) disallowance of administrative costs will have a greater proportionate impact; and (2) audits relying on other providers to reach an estimate of what GHM's costs "should" be will tend to penalize GHM as a small operator. The argument is unavailing. It is not clear how unique or peculiar single facility operations are. Moreover, its small size is not a circumstance "external to the provider affecting the context in which its business operates." *Salisbury*, 448 Mass. at 375. Finally, to the extent rates are supposed to effect "reimbursement for those costs which must be incurred by efficiently and economically operated facilities and providers," G.L. c. 118E, § 13D, it is not obvious to me that a single facility's inability to avail itself of certain economies of scale, warrants special solicitude under the rate setting statutory scheme.

B. <u>Failure to Prosecute</u>

Under 801 CMR 1.01(7)(g)(2), a case may be dismissed if the petitioner/appellant fails to prosecute her action. In the civil litigation context, the Supreme Judicial Court has observed:

> Involuntary dismissal is a drastic sanction which should be utilized only in extreme situations. As a minimal requirement, there must be convincing evidence of unreasonable conduct or delay. A judge should also give sufficient consideration to the prejudice that the movant would incur if the motion were denied, and whether there are more suitable, alternative penalties. Concern for the avoidance of a congested calendar must not come at the expense of justice. The law strongly favors a trial on the merits of a claim.

Monahan v. Washburn, 400 Mass. 126, 128-29 (1987).

Consonant with this approach, although appeals to this Division should be resolved on the merits where practical, "the system of administrative adjudication would break down if parties were allowed to ignore cases and orders with impunity." *Fox v. State Bd. of Retirement*, CR-20-117, at 3 (DALA July 29, 2022) (citations and internal quotation marks omitted).

That said, to the extent dismissal for failure to prosecute is desgined "to allow tribunals to keep their dockets in motion," this "rationale loses cogency when no progess is forthcoming --- by force of rules, orders, or motions --- for the claimant's indolence to hamper." *Bridgewater Nursing Home v. EOHHS*, RS-00-668 & Others, 2023 WL 7278112, at *1 (DALA Sept. 12, 2023) (Order) (citations omitted). Here, GHM complied with requests for status and noted that it was ready to prosecute its appeals; there was nothing else for GHM to hamper, hinder, or obstruct.

Leaving aside DALA's interest in managing its docket, there is also the question of prejudice to EOHHS because of the delay in adjudicating these matters.[9] These are quite old cases, and it would be wholly unsurprising if this resulted in prejudice to EOHHS. But the very plausible specter of prejudice, standing alone, does not excuse EOHHS from having to respond to these appeals. Nor do I beleive EOHHS, or this tribunal, are absolved from considering whether alternative sanctions would remedy any prejudice. EOHHS has not proffered any remedies short of dismissal and, given the disposition of the other issues, the question is moot.

Because the hearing evidence does not provide any reason to revisit the earlier denial of the motion to dismiss for failure to prosecute, EOHHS's request to dismiss on these grounds is denied.

C. The Merits

For its insurance claims, GHM's primary argument appears to be that its liability insurance premiums should have been allocated to the Other Fixed Costs category rather than Administrative and General Costs because liability insurance is a type of "Building Insurance," which is one of the expenses falling under the Other Fixed Costs aegis. (Mr. Parker testified that liability insurance is Building Insurance because --- unlike malpractice insurance, which would cover facility personnel even if they engaged in malpractice at some other location --- liability insurance covers incidents that occur on the premises (a slip and fall, for example). (Parker Test.).

[9] I leave to one side the question of whether there is more that EOHHS could have or should have done to either push these appeals forward or preserve documentary evidence or witness testimony.

With due respect to Mr. Parker, GHM has adduced no support for this proposition other than his fairly conclusory testimony. And I doubt it is true. Liability insurance, or at least commercial general liability insurance, which is what I construe GHM to be referencing here, can, and frequently does, cover off-site occurrences. *See* 9A Jordan R. Plitt, *et. al.*, Couch on Insurance, § 129.2 (3d ed. Nov. 2023 update) (collecting cases). In any case, even if the coverage in question was limited to occurences on the premises, I would not be convinced that it should thereby be considered Building Insurance. As the name "Other Fixed Costs" implies, items falling under this category of expenses are likely those that are, relatively speaking, fixed rather than variable. It may well be that liability insurance could be properly categorized as a fixed cost, but the record does not establish this.

Administrative and General Costs appears to encompass a wider, more "general," array of expenses. The record in this case does not permit me to conclude that it was "arbitrary, unreasonable, or inconsistent with the plain terms of the rule" for EOHHS to interpret liability insurance premiums as falling under this category. *See Carey v. Comm'r of Correction*, 479 Mass. 367, 369-70 (2018) (citation and internal quotation marks omitted).

Property casualty insurance is probably a better fit for Other Fixed Costs. GHM gamely suggests in its post-hearing briefing that even if liability insurance costs did not constitute Other Fixed Costs, the premiums for property casualty insurance should have been allocated to that category. There are several difficulties with this argument. First, neither GHM's claims for adjudicatory proceedings nor its pre-hearing brief ever mention this category of insurance. It is first mentioned in Mr. Parker's testimony. The nature of

the insurance to be reimbursed is not an ancillary detail. Given the *gravamen* of the claim, it should have been raised earlier. Second, even assuming that claims of misallocated property casualty insurance premiums were properly raised, there is absolutely no evidence regarding how much of GHM's premiums were for property casualty as opposed to liability insurance, or even if they can be disentangled. Third, there is no evidence that the costs of property casualty insurance were ever expressly identified in GHM's reporting to EOHHS. EOHHS cannot be faulted for mis-allocating property casualty premiums if those premiums were not identified as such.

I turn now to GHM's claim regarding the use of the audits. GHM points out that when audits are expressly mentioned in 114.2 CMR 6.00, it is always with reference to audits of the specific provider at issue (or those of a related entity). (*See* Respondent's Exhibit 4, 114.2 CMR 6.02, 6.07(6)). The argument misses the mark. Just because the regulation states that the agency may audit a provider to ensure the accuracy of its reporting does not mean it is precluded from using audits from a sampling of providers to calculate *standard* rates. GHM does not explain how a standard payment for Other Operating Costs *should* be calculated or provide any context for its argument. Given the technical complexity of the regulation, GHM's argument falls short.

For the reasons stated in sections A(2) and A(3) above, these appeals are dismissed for lack of subject matter jurisdiction.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ *Timothy M. Pomarole*

Timothy M. Pomarole, Esq.
Administrative Magistrate

March 8, 2024