IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania, Department of Public Welfare, Petitioner	:	
v.	:	No. 1935 C.D. 2012
James Eiseman, Jr. and the Public Interest Law Center of Philadelphia, Respondents	:	
Aetna Better Health, Inc.,Health Partners of Philadelphia, Inc., and Keystone Mercy Health Plan, Petitioners	:	
v.	:	No. 1949 C.D. 2012
James Eiseman, Jr., and the Public Interest Law Center of Philadelphia, Respondents	:	
UnitedHealthcare of Pennsylvania, Inc. D/B/A UnitedHealthcare Community Plan and HealthAmerica Pennsylvania Inc. D/B/A CoventryCares, Petitioners	:	
v.	:	No. 1950 C.D. 2012
James Eiseman, Jr. and the Public Interest Law Center of Philadelphia, Respondents	:	

MEMORANDUM OPINION

Before me is Respondents' Application to hold the Department of Human Services, formerly the Department of Public Welfare, (Department) in Contempt, and for Civil Penalties and Attorney Fees and Costs.

Background

In 2012, Respondents James Eiseman, Jr., and the Public Interest Law Center of Philadelphia requested records from the Department under the Right-to-Know Law (RTKL)[1] related to its administration of the HealthChoices Program in the Southeast Zone. Specifically, Respondents sought rates paid by the Department to Managed Care Organizations (MCOs)[2] and rates paid by the MCOs to subcontractors (MCO Rates). The Department denied access, in part based on the confidential proprietary exception in Section 708(b)(11) of the RTKL, 65 P.S. §67.708(b)(11). Respondents appealed to the Office of Open Records (OOR).

The MCOs participated in the appeal. After holding a hearing where it accepted expert testimony as to the alleged confidentiality of the rates at issue, OOR granted Respondents' appeal, ordering disclosure of existing records. The Department appealed to this Court, staying disclosure. This Court heard the matter en banc, and affirmed OOR in part, and reversed as to rates paid by the MCOs. We held the rates paid by the MCOs qualified for protection as confidential proprietary information. Respondents appealed to our Supreme Court.

The Supreme Court reversed our order in part, holding the term "financial record" encompassed all rates paid by MCOs to their subcontractors. As such, the rates were public records to which the confidential proprietary exception did not apply. See Section 708(c) of the RTKL, 65 P.S. §67.708(c). The Supreme

[1] Act of February 14, 2008, P.L. 6, 65 P.S. §§67.101-67.3104.

[2] Aetna Better Health, Inc., HealthAmerica Pennsylvania, d/b/a CoventryCares, Health Partners of Philadelphia, Inc., Keystone Mercy Health Plan, and United Healthcare of Pennsylvania, Inc.

Court remanded to this Court to address the matter consistent with its opinion. See Dep't of Pub. Welfare v. Eiseman, 125 A.3d 19 (Pa. 2015).

Pursuant to the remand, on February 3, 2016, this Court ordered disclosure of "the amounts paid by MCOs to provide dental services, for the period between January 1, 2008 through June 15, 2011, that were required to be submitted to and approved by [the Department]" within 60 days (Remand Order)[3] (emphasis added). Thus, the Remand Order required disclosure by April 4, 2016.

This dispute arose because the rates paid by MCOs include not only rates paid to organizational subcontractors, (Dental Benefit Providers and DentaQuest) but also, in few cases, rates paid to providers. Dep't of Pub. Welfare v. Eiseman, 85 A.3d 1117, 1121 n.7 (Pa. Cmwlth. 2014), rev'd in part, 125 A.3d 19 (Pa. 2015) ("MCO Rates are comprised of the rates paid to [s]ubcontractors and rates paid directly by MCOs to providers."). Despite this Court's and the Supreme Court's treatment of the rates paid by MCOs collectively, the MCOs took the position that rates MCOs paid to providers directly were not subject to disclosure. The Department agreed. Although the Department disclosed rates[4] paid by MCOs to organizational subcontractors, it did not disclose rates paid by MCOs to providers by April 4.[5]

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[3] Initially, we directed the parties to file a "joint" status report. However, the parties were unable to agree on the status of the dispute. Respondents maintained only an order effectuating the Supreme Court's opinion was necessary. The Department and MCOs argued there was a dispute as to whether rates paid to providers were public under the Supreme Court's holding; they requested additional briefing. This Court then issued the Remand Order to conclude the matter.

[4] Requesters accepted rates in affidavit form as opposed to contracts containing the rates. Requesters do not challenge the Department's form of disclosure. See Application at 2 n.2.

[5] In a companion case, the Supreme Court held rates paid by subcontractors to providers are not subject to the RTKL. Dental Benefit Providers, Inc. v. Eiseman, 124 A.3d 1214 (Pa. 2015).

Respondents' Application invokes the common law remedy of civil contempt and seeks statutory remedies for the Department's noncompliance with the Remand Order. On June 23, 2016, I conducted a hearing on the contempt aspect of the Application only.[6]

In lieu of testimony, Respondents submitted the attachments to the Application, which were received. The Department presented the testimony of Laurie Rock, the Bureau Director of the Bureau of Managed Care Operations for the Department. The MCOs presented the testimony of Allison Davenport, CEO of United Healthcare Community Plan of Pennsylvania, and Kearline Jones, Vice-President for Government Relations and Compliance Officer for HealthPartners. Relevant here, all of the witnesses credibly testified that the Department does not receive rates paid by MCOs, whether paid to subcontractors or paid to providers.

Analysis

"The purpose of civil contempt is to compel performance of lawful orders[.]" Cecil Twp. v. Klements, 821 A.2d 670, 675 (Pa. Cmwlth. 2003). Respondents bear the burden of proving civil contempt "by [a] preponderance of the evidence that the [Department] is in noncompliance with a court order." Lachat v. Hinchcliffe, 769 A.2d 481, 488 (Pa. Super. 2001). However, "a mere showing of noncompliance with a court order ... is never sufficient alone to prove civil contempt." Id.; see also Habjan v. Habjan, 73 A.3d 630 (Pa. Super. 2013).

[6] At common law, a court may impose sanctions, if any, after an adjudication of contempt. Cleary v. Dep't of Transp., 919 A.2d 368 (Pa. Cmwlth. 2007). Here, Respondents also seek civil penalties and attorney fees under Sections 1304(b)-(c) and 1305(b) of the RTKL, 65 P.S. §§67.1304(b)-(c), 67.1305(b).

"To sustain a finding of civil contempt, the complainant must prove certain distinct elements: (1) that the contemnor had notice of the specific order or decree which he is alleged to have disobeyed; (2) that the act constituting the contemnor's violation was volitional; and (3) that the contemnor acted with wrongful intent." West Pittston Borough v. LIW Invs., Inc., 119 A.3d 415, 421 (Pa. Cmwlth. 2015). If an alleged contemnor is unable to perform, and attempted to comply with the order in good faith, the purpose of civil contempt is eliminated. Dep't of Envtl. Res. v. Pa. Power Co., 337 A.2d 823 (Pa. 1975).

There is no dispute the Department had notice of the Remand Order. Further, the MCOs compiled all responsive records in sufficient time to comply. That the Department did not comply with the Remand Order is evident because it did not disclose only the rates paid *by* the MCOs when those amounts were paid *to* providers. Thus, we consider the Department's reason for noncompliance.

The Department claims it did not disclose all rates paid by MCOs because the language, "that were required to be submitted to and approved by" the Department rendered the Remand Order ambiguous. This contention lacks merit.

The Remand Order was clear and consistent with the Supreme Court's holding that the first level of payment by MCOs (Department → MCO → subcontractor) is public.[7] The Remand Order followed the Supreme Court's

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[7] This is in contrast to the payments twice removed from the Department (Department → MCO → subcontractor → provider), which are not accessible. See Dental Benefit Providers v. Eiseman, 86 A.3d 932 (Pa. Cmwlth. 2014) (en banc), aff'd, 124 A.3d 1214 (Pa. 2015).

reasoning that amounts paid by the MCOs to subcontractors that are in contracts required to be approved by the Department qualify as financial records dealing with the disbursement of public funds.

The Department construed the Remand Order to require disclosure of only a subset of the MCO Rates, those paid to subcontractors. With no legal or evidentiary basis, the Department withheld the rates paid directly to providers. During the hearing, neither the Department nor the MCOs showed any reason to differentiate between the rates paid by MCOs based on the recipient of the funds.

All of the witnesses' testified unequivocally: the Department and the MCOs treat MCO Rates the same, whether paid by MCOs to subcontractors, or paid by MCOs directly to providers. On cross-examination, the witnesses revealed neither subset of MCO Rates was ever submitted to the Department; rather, the Department accepts template contracts to assess compliance with delivery of services required under the HealthChoices Program. As the Court clarified, the content in the template contracts submitted to and approved by the Department amounts to approximately 95% of a final contract, without party names, signatures or rates.

That the Department accepts templates of agreements in lieu of executed contracts, containing rates, is irrelevant to this proceeding. The issue before the Court is simple: what records were provided, what records were not, and why not. The Department's reason for withholding a subset of MCO Rates, because the rates themselves are not submitted to the Department, appears more calculated

than confused. Because *none* of the MCO Rates are submitted to and approved by the Department, this is not a rational basis to differentiate between rates paid to subcontractors (which have been disclosed) and rates paid directly to providers (which have not been disclosed).

During the hearing, the MCOs and the Department attempted to relitigate whether rates paid to providers are financial records. Essentially, they argued the rates themselves are not subject to disclosure because they are not submitted to or approved by the Department. Indeed, the Department disclaims possession. Our Supreme Court already rejected the Department's assertion that it does not possess the rates as "not well-taken" because neither the Department nor the MCOs raised this argument before reaching our highest court. Eiseman, 125 A.3d at 29.

To the extent the Department intended to prove a reason for carving out those few instances where MCOs pay the rates directly to providers, its opportunity to submit evidence was before the factfinder. Levy v. Senate of Pa., 94 A.3d 436 (Pa. Cmwlth. 2014). Neither the Department nor the MCOs point to any evidence submitted to support differentiation here.

I also decline the parties' invitation to delve into the details of the standard contract. Contract provisions, or the parties' construction of them, do not govern the public status of records. Tribune-Review Publ'g Co. v. Westmoreland Cnty. Housing Auth., 833 A.2d 112 (Pa. 2003). Likewise, the Department's practice of accepting template contracts as opposed to executed contracts containing the

rates does not undermine the public status of financial records like the rates at issue.

Conclusion

In sum, the evidence reflects there are contract templates which are submitted to and approved by the Department that later contain the rates paid by MCOs directly to dental services providers. Further, there is no basis for differentiating between the rates paid by MCOs to subcontractors and the rates paid by MCOs directly to providers. Because the Department treats the rates the same, the Department did not have a good faith basis for withholding only those rates paid by MCOs directly to providers.

Accordingly, the Court enters the following civil contempt citation.

CIVIL CONTEMPT CITATION

AND NOW, this 28th day of June, 2016, after hearing evidence, and upon consideration of Respondents' Application to hold the Department of Human Services in Contempt, and for Civil Penalties and Attorney Fees and Costs, the Application is hereby **GRANTED IN PART** as to civil contempt only. The Department of Human Services is **ADJUDICATED IN CONTEMPT** for noncompliance with the Remand Order. The Department may purge the Adjudication of Contempt by disclosing the MCO Rates, including rates paid by MCOs directly to dental services providers, to Respondents within **60 days** of the date of this order. The form of disclosure may include disclosure of executed unredacted contracts between MCOs and providers that contain the rates, where any aspect of the contract was submitted to or approved by the Department, or, with Respondents' consent, a more limited disclosure akin to the affidavits previously disclosed, containing only the rates paid by MCOs directly to dental services providers.

Upon praecipe of any party, we may hold additional proceedings on the Application as needed.

ROBERT SIMPSON, Judge

Certified from the Record

JUN 28 2016

and Order Exit