

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 0391

POSITIVE CHOICES COUNSELING SERVICES, INC.

VERSUS

**STATE OF LOUISIANA,
DEPARTMENT OF HEALTH AND HOSPITALS**

**On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 586,973, Section 22
Honorable Timothy E. Kelley, Judge Presiding**

BJC by TMH
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BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

Judgment rendered OCT 28 2011

PARRO, J.

Positive Choices Counseling Services, Inc. (Positive Choices) appeals a district court judgment affirming the decision of an administrative law judge (ALJ), who upheld the administrative sanction of the Louisiana Department of Health and Hospitals (the Department), which terminated for one year Positive Choices' certification as a mental health rehabilitation (MHR) services provider. For the following reasons, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Positive Choices is a Louisiana non-profit corporation, which has been enrolled in the Department's Medicaid Mental Health Rehabilitation program since 1999. As a services provider in that program, it is required to undergo an annual recertification process to ensure that it continues to meet the standards of the program. In July 2009, Positive Choices submitted its application for recertification to the Department and received approval in a letter from the Department on July 23, 2009. However, after checking some of the information provided by Positive Choices, the Department learned that Positive Choices had lost its accreditation status from the Joint Commission on Accreditation of Healthcare Organizations (JCAHO), effective August 14, 2008, due to non-payment of fees. The Department immediately sent Positive Choices a "Notice of Sanction" letter, advising that it was rescinding its recertification approval and was terminating Positive Choices' contract as an MHR services provider, effective August 12, 2009. The letter also stated that Positive Choices could not reapply for MHR enrollment for one year from the effective date of termination. The reasons given for this action were Positive Choices' loss of accreditation status and its failure to report that loss of status to the Department.

As soon as it received this letter and learned of its non-accredited status, Positive Choices paid the past-due fees and brought its account current with JCAHO. In a letter dated August 19, 2009, JCAHO acknowledged receipt of all outstanding survey and annual fees in full and stated that Positive Choices was "on track for an accreditation

survey later this year." Positive Choices asked the Department for an informal review to have the Department reconsider the administrative sanction it had imposed. The informal review was held on September 3, 2009, and the Department reaffirmed its decision to terminate Positive Choices as an MHR services provider for one year. Positive Choices then requested an administrative appeal of the Department's decision. A hearing was held before an ALJ on December 8, 2009, after which the Department's decision was again upheld. Having exhausted its administrative remedies, on February 3, 2010, Positive Choices filed a petition for judicial review of the ALJ's decision. The district court reviewed the briefs of the parties and the entire record of the administrative proceeding. Following a hearing on November 8, 2010, during which both parties argued their positions, the court signed a judgment on December 7, 2010, decreeing that:

[T]he decision of the administrative law judge upholding the Department of Health and Hospital's rescission of the July 23, 2009 Recertification Approval Letter, termination of Positive Choices Counseling Services, Inc. from participation as a provider of Mental Health Rehabilitation services in the Mental Health Rehabilitation program for one year from the effective date of termination, and termination of Positive Choices Counseling Services, Inc.'s provider contract, ... is hereby affirmed at plaintiff/appellant's costs.

Positive Choices then appealed that judgment to this court. In this appeal, Positive Choices asserts the district court and ALJ erred in upholding the Department's decision to terminate its participation as an MHR services provider, despite evidence that Positive Choices was not notified by JCAHO of the revocation of its accreditation.

APPLICABLE LAW

The Louisiana Administrative Procedure Act (LAPA) governs the judicial review of an agency adjudication. Specifically, LSA-R.S. 49:964(A) states that a person who is aggrieved by a final decision or order in an adjudication proceeding is entitled to judicial review. See Women's and Children's Hosp. v. State, Dept. of Health and Hospitals, 08-0946 (La. 1/21/09), 2 So.3d 397, 401-02. The review is to be conducted by the court without a jury and is confined to the record. If there are allegations of procedural irregularities before the agency that are not shown on the record, the court may receive

proof concerning those irregularities. The court may also hear oral argument and receive written briefs. See LSA-R.S. 49:964(F). According to LSA-R.S. 49:964(G), the court may affirm the agency's decision or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced, because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (6) Not supported and sustainable by a preponderance of evidence as determined by the reviewing court. In the application of this rule, the court shall make its own determination and conclusions of fact by a preponderance of evidence based upon its own evaluation of the record reviewed in its entirety upon judicial review. In the application of the rule, where the agency has the opportunity to judge the credibility of witnesses by first-hand observation of demeanor on the witness stand and the reviewing court does not, due regard shall be given to the agency's determination of credibility issues.

LSA-R.S. 49:964(G).

The general principle governing judicial review is that, where some evidence as reasonably interpreted supports the regulatory body's determination, the orders of regulatory bodies exercising discretionary authority are accorded great weight and will not be overturned by the courts in the absence of a clear showing that the administrative action is arbitrary and capricious. Baton Rouge Water Works Co. v. Louisiana Pub. Serv. Comm., 342 So.2d 609, 612 (La. 1977), cert. denied, 434 U.S. 827, 98 S.Ct. 105, 54 L.Ed.2d 86 (1977). The test for determining whether an action was arbitrary or capricious is whether the action taken was without reason. Calcasieu League for Environmental Action Now v. Thompson, 93-1978 (La. App. 1st Cir. 7/14/95), 661 So.2d 143, 150, writ denied, 95-2495 (La. 12/15/95), 664 So.2d 459.

The rules governing the Mental Health Rehabilitation program have been

developed to satisfy certain mandatory requirements that states must follow in order to qualify for federal financial assistance from the Medicaid Program. See LAC 50:XV.101(B). In order to be certified or recertified as an MHR services provider under the program, an applicant must provide certain documentation to the Department, including proof of accreditation with an approved national accrediting body and proof of payment to the accrediting body.¹ See LAC 50:XV.703(A), (B), and (C)(5). Certified providers must apply for recertification annually. LAC 50:XV.709(B). If an MHR services provider fails to meet all requirements for recertification, it will receive a written notice identifying the deficiencies. The MHR provider must correct these deficiencies within 60 days from the date of the notice of the deficiencies. If the deficiencies are not corrected within this 60-day period, the provider's certification may be terminated. LAC 50:XV.709(C). If the applicant fails to meet any recertification requirements and recertification is denied, the provider may be terminated and may not reapply for one year from the date of the notice of termination. LAC 50:XV.707(B). There may be an immediate loss of certification if at any time the enrolled MHR provider fails to maintain program requirements or accreditation status. The provider may not reapply for certification for one year following the effective date of termination. LAC 50:XV.707(C). All enrolled providers of MHR services shall maintain accreditation status. Denial or loss of accreditation status, or any negative change in accreditation status, shall be reported to the Department in writing within five working days of receiving the notice from the national accreditation organization. LAC 50:XV.719(B). If at any time, an MHR provider loses accreditation, an automatic loss of certification may occur. The applicant may not reapply for one year from the effective date of the termination. LAC 50:XV.719(C). Failure to notify the Department of accreditation denial, loss of accreditation status, or any negative change in accreditation status may result in sanctions to the MHR agency. LAC 50:XV.719(D).

¹ JCAHO is one of the approved accrediting bodies. See LAC 50:XV.719

ANALYSIS

It is obvious from a simple reading of the regulations in the Louisiana Administrative Code concerning MHR services providers that maintenance of accreditation status is a key requirement. This requirement and the possible penalty of an automatic loss of certification for one year is repeated in several regulations. The sheer redundancy of these statements in the regulations emphasizes the importance of maintaining accreditation status. In addition, the failure to notify the Department of a loss of accreditation status within five days of being notified by the accrediting organization of that loss is a basis for sanctions.

It is this second requirement that Positive Choices has identified in this appeal as error on the part of the Department and the district court. It claims that JCAHO did not notify it that its accreditation status had been withdrawn due to non-payment of fees. Since Positive Choices allegedly did not know of this problem, it could not notify the Department within five days of notification, as required by LAC 50:XV.719(B). Positive Choices also points out that as soon as it learned of its non-accreditation status, it paid all outstanding fees and brought its account with JCAHO current. Regardless of this response, Positive Choices claims that the Department failed to consider these mitigating circumstances and imposed a sanction that will cause irreparable damage to Positive Choices. Therefore, it contends the Department's decision to terminate its certification for one year was arbitrary, capricious, and an abuse of discretion.

If this were the only regulation for which the one-year termination of certification could be imposed, we might be tempted to agree with this argument. The administrative record does not contain any evidence that JCAHO notified Positive Choices in August 2008 of its loss of accreditation. The information concerning this change in status was communicated to the Department by JCAHO by an email on July 31, 2009, and a letter on August 3, 2009, when the Department was investigating Positive Choices' application for recertification. Edward Brown, the owner/director of Positive Choices, testified that JCAHO had not notified it of the loss of accreditation, and

his first knowledge of this situation was when the Department rescinded its approval of Positive Choices' recertification in a "Notice of Sanction" letter dated August 12, 2009. The record does contain an acknowledgment letter from JCAHO dated August 19, 2009, confirming that Positive Choices had applied for accreditation, had paid the application deposit, had paid in full all outstanding survey and annual fees, and was "on track for an accreditation survey later this year." Therefore, Positive Choices' argument on this issue could possibly be considered to have some merit.

However, Positive Choices ignores the other, more basic, problem for which this sanction could be imposed, namely, the loss of accreditation. Positive Choices does not contest the fact that JCAHO did, indeed, deny accreditation status to Positive Choices, effective August 14, 2008, due to non-payment of fees. Whether Positive Choices knew about this loss of status at the time does not alter the reality of the situation. The regulations could not be more emphatic in stating that the loss of accreditation was grounds for immediate termination of Positive Choices' position as an MHR services provider.

We recognize that the regulations consistently state that a loss of accreditation "may" be grounds for this sanction. Therefore, the Department was not required by law to impose this particular sanction. Nevertheless, the decision made by the Department, after considering the evidence, was not an unreasonable one. The record in the administrative proceeding contains a letter written to the Department by Mr. Brown on July 9, 2009, before submitting Positive Choices' application for recertification. In this letter, he admits that Positive Choices had "fallen behind in [its] payments to JCAHO," resulting in a delay of the site visit required by the accrediting agency. Mr. Brown requested an extension to the recertification deadline in order to accommodate this problem. While Mr. Brown may not have realized that falling behind in the payments to JCAHO had already resulted in the loss of accreditation status, he obviously knew that there was a problem that might interfere with Positive Choices' recertification. Yet, there was no mention of any problem in the application for

recertification, and the Department did not learn of the loss of accreditation until it undertook its own research of the information provided by Positive Choices.

Under these circumstances, we conclude that the Department was not arbitrary or capricious in imposing the administrative sanction of terminating Positive Choices' certification as an MHR services provider for one year. Nor did the administrative law judge or the district court err in affirming this decision of the Department. Finding no error, this court must affirm the judgment of the district court.

CONCLUSION

Based on the above, we affirm the judgment of December 7, 2010, and assess all costs of this appeal to Positive Choices Counseling Services, Inc.

AFFIRMED.