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Rules and Regulations

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Rules and Regulations

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RULES AND REGULATIONS

N.Y. CONST. art. IV, § 8:

No rule or regulation made by any state department, board, bureau, officer, authority or commission, except such as relates to the organization or internal management of a state department, board, bureau, authority or commission shall be effective until it is filed in the office of the department of state. The legislature shall provide for the speedy publication of such rules and regulations, by appropriate laws.

SUPREME COURT, APPELLATE DIVISION

THIRD DEPARTMENT

Central General Hospital, Inc. v. Axelrod⁹⁵⁷
(decided January 24, 1991)

Central General Hospital (Hospital) brought an Article 78 proceeding claiming, *inter alia*, that the use of a Department of Health (Department) directive to calculate reimbursement rates for malpractice insurance premiums from nongovernmental third party payors was within the rule or regulation requirement of the New York State Constitution⁹⁵⁸ and, therefore, was invalid absent the requisite filing with the secretary of state.⁹⁵⁹ The court held that where the Department applied its own directive when the payor was a nongovernmental entity, the directive was within the rule or regulation requirement of the state constitution. Therefore, absent a filing of the directive with the secretary of state, the directive was invalid.⁹⁶⁰

957. 169 A.D.2d 967, 564 N.Y.S.2d 862 (3d Dep't 1991).

958. N.Y. CONST. art. IV, § 8.

959. *Central Gen. Hosp.*, 169 A.D.2d at 968-69, 564 N.Y.S.2d at 864-65.

960. *Id.* In addition, the court declared that "when an agency makes a determination based on a policy directive requiring alternative methodologies, the determination made as a result of that directive is invalid." *Id.* at 968, 564

In 1985, the New York State Legislature enacted the Medical Malpractice Reform Act.⁹⁶¹ Among other reforms, the Act addressed the issue of the cost of excess medical malpractice insurance coverage.⁹⁶² Subsequently, the Department promulgated regulations to govern and administer the excess malpractice insurance pool and to determine the amount of reimbursement to hospitals for their malpractice insurance costs.⁹⁶³ The Hospital Association of New York State (HANYS) was designated by the Department to administer the excess malpractice insurance pool.⁹⁶⁴

In May 1988, HANYS notified the Hospital that it was responsible for a large share of the premium for excess malpractice insurance.⁹⁶⁵ While HANYS calculated reimbursement rates for governmental entities on the basis of payor experience, it calculated reimbursement rates for nongovernmental entities by totalling all malpractice losses by nongovernmental entities and charging individual institutions a proportionate amount based on total patient days or total patient discharges. The Hospital objected to the alternate methodology used by HANYS to calculate its premium. Challenges to the determination were filed with the Hospital's third party payor, Empire Blue Cross/Blue Shield, who referred the challenges to the Department.⁹⁶⁶ The Department denied the challenges and the Hospital appealed.⁹⁶⁷

N.Y.S.2d at 864. Here, the Hospital Association of New York State applied the methodology described in § 86-1.70 of the New York Compilation of Code, Rules & Regulations, N.Y. COMP. CODES R. & REGS. tit. 10, § 86-1.70 (1990), for calculating the government's reimbursement rates, but applied the alternative method when the payor was a nongovernmental entity. *Central Gen. Hosp.*, 169 A.D.2d at 968, 564 N.Y.S.2d at 864.

961. Act of July 1, 1985, ch. 294, § 25, 1985 N.Y. Laws 685, 701 (McKinney) (codified as amended at N.Y. PUB. HEALTH LAW § 2803-e (McKinney 1985 & Supp. 1992)).

962. *Hospital Ass'n of New York State v. Axelrod*, 113 A.D.2d 9, 10, 494 N.Y.S.2d 905, 907 (3d Dep't 1985).

963. N.Y. COMP. CODES R. & REGS. tit. 10, § 86-1.70 (1990).

964. *Central Gen. Hosp.*, 169 A.D.2d at 967, 564 N.Y.S.2d at 863.

965. *Id.* at 967, 564 N.Y.S.2d at 863-64.

966. *Id.* at 967, 564 N.Y.S.2d at 864.

967. *Id.*

The Hospital's administrative appeal was denied and the Hospital brought an article 78 proceeding challenging the alternate methodology for computing reimbursement rates.⁹⁶⁸ The supreme court held that the Department arbitrarily ignored its own rules and regulations in calculating the Hospital's reimbursement rates, and this appeal followed.⁹⁶⁹

The court reasoned that resolution of the dispute turned on whether the directive was "a rule or regulation or merely a guideline to be used as an aid in arriving at a determination."⁹⁷⁰ The court distinguished between guidelines which were "'fixed, general principle[s] to be applied by [the] administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers,'"⁹⁷¹ and guidelines which merely aided an administrator in arriving at a determination. The court concluded that the former are to be considered rules or regulations requiring filing, whereas the latter are "merely" guidelines. The court found that the directive was within the rule or regulation requirement of the state constitution.⁹⁷²

The Federal Constitution does not require rules or regulations promulgated by and through departments of the executive branch to be filed or noticed in any particular manner. The federal requirement for notice of proposed rules and regulations is statutory.⁹⁷³

In contrast, the state requirement of notice for all rules and regulations promulgated by any "state department, board, bureau, officer, authority or commission" has constitutional underpinnings.⁹⁷⁴ Thus, the failure of a federal agency to notice regulations may be challenged as a violation of federal law, whereas

968. *Id.* at 967-68, 564 N.Y.S.2d at 864.

969. *Id.* at 968, 564 N.Y.S.2d at 864.

970. *Id.*

971. *Id.* (quoting *Roman Catholic Diocese of Albany v. New York State Dep't of Health*, 66 N.Y.2d 948, 951, 489 N.E.2d 749, 750, 498 N.Y.S.2d 780, 781 (1985)).

972. *Id.* at 968-69, 564 N.Y.S.2d at 864-65.

973. 5 U.S.C. § 553 (1988).

974. N.Y. CONST. art. IV, § 8.

the failure of a state agency to notice proposed regulations may be challenged as violative of the rules and regulations requirement of the state constitution.

Central General Hospital was an easy case, as the unanimity of the court makes clear. The court broke no new ground; rather, it merely applied a familiar standard⁹⁷⁵ to the facts at hand. Here, the Department applied the proportional methodology to all non-governmental entities without regard to other facts and circumstances relevant to the regulatory scheme. A clearer example of “a fixed, general principle . . . applied . . . without regard to other facts and circumstances”⁹⁷⁶ is hard to imagine. Once it was determined that the payor was a nongovernmental entity, the proportional methodology applied. No other fact was relevant.

SUPREME COURT

KINGS COUNTY

Long Island College Hospital v.
New York State Department of Health⁹⁷⁷
(decided June 3, 1991)

Petitioner, Long Island College Hospital (Hospital), brought an article 78 proceeding to recover the income earned on its “Depreciation Construction Fund” (Fund) that the New York State Department of Health (Department) set off against Medicaid reimbursement.⁹⁷⁸ The Department’s action was based upon an amendment to its own regulations concerning “board-designated

975. See *Roman Catholic Diocese of Albany*, 66 N.Y.2d at 951, 489 N.E.2d at 750, 498 N.Y.S.2d at 781; *Tenenbaum v. Axelrod*, 132 A.D.2d 37, 39, 522 N.Y.S.2d 290, 291-92 (3d Dep’t 1987), *appeal dismissed*, 71 N.Y.2d 950, 524 N.E.2d 148, 528 N.Y.S.2d 828 (1988); *Connell v. Regan*, 114 A.D.2d 273, 275, 498 N.Y.S.2d 929, 930 (3d Dep’t 1986).

976. *Central Gen. Hosp.*, 169 A.D.2d at 968, 564 N.Y.S.2d at 864 (quoting *Roman Catholic Diocese of Albany*, 66 N.Y.2d at 951, 489 N.E.2d at 750, 498 N.Y.S.2d at 781).

977. 573 N.Y.S.2d 560 (Sup. Ct. Kings County 1991).

978. *Id.* at 561.