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Rules and Regulations

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 standard[975] to the facts at hand. Here, the Department applied the proportional methodology to all nongovernmental 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 Health[977]
(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.

funds."[979] The court held that the amendment was invalid and unconstitutional, having been improperly enacted without proper publication and notice.[980]

The Hospital, by resolution of its board of directors, created the fund in order to acquire depreciable assets for use in patient care.[981] However, for the years in question, the Hospital did not use any of the approximately $12 million in this account for capital projects. Instead, it borrowed money for this purpose, and applied to the Department for medicaid reimbursement of its interest expenses as capital costs.[982] The Department determined that the Hospital's reimbursement should be decreased by the amount of interest income earned through its depreciation fund.

The Department interpreted its regulations as permitting a hospital's interest income to be set off against the Hospital's claims for medicaid reimbursement. An exception is made for income from funded depreciation accounts, but only if such accounts are restricted by some external source, such as donors or lenders.[983] The Department cited an amendment to its regulations, which provided that "[b]oard-designated funds . . . shall not be recognized as funding of depreciation."[984] This amendment had the effect of "prevent[ing] a hospital from receiving a double benefit; [recovering] reimbursement of its interest expense on its borrowing, while at the same time receiving interest on unrestricted funds . . . ."[985]

The Department claimed that "'[a]lthough the corpus of the [Hospital's] account is externally restricted for use as collateral, the income from the account is only restricted for capital purposes by designation of the [Hospital's] Board of Directors . . . .'"[986] Thus, the income from the account was used to offset

979. *Id.* at 564 (citing N.Y. COMP. CODES R. & REGS. tit. 10, § 86-1.23(b) (1977)).

980. *Id.*

981. *Id.* at 562.

982. *Id.*

983. *Id.*

984. *Id.*

985. *Id.*

986. *Id.* (citation omitted).

reimbursement.

The New York State Constitution provides that "no . . . regulation made by any state department . . . shall be effective until it is filed in the office of the department of state [and that] [t]he legislature shall provide for the speedy publication of such . . . regulations by appropriate laws."[987] The State Administrative Procedure Act, section 202 provides that "prior to the adoption of a rule, an agency . . . shall afford the public an opportunity to submit comments on the proposed rule."[988] The Act further provides that "[t]he notice of proposed rulemaking shall . . . contain the complete text of the proposed rule"[989] and "include a regulatory impact statement . . . ."[990] The Executive Law, section 102(2) provides that when a new regulation is filed in the office of the department of state, "[a]ttached thereto shall be a certificate . . . citing . . . the date of adoption, and the date of publication in the state register of the prior notice required under the provisions of the state administrative procedure act . . . ."[991]

The Department did not dispute that: 1) they "'failed to afford the public an opportunity to comment[;]'" 2) the "'Notice of Proposed rule making' [in the state register] did not contain the language which [they] now claim they adopted[;]" 3) the "Regulatory Impact Statement" contained no reference to the language supposedly added by the amendment; 4) they represented "that the proposed amendment would impose 'no additional costs on health care providers[;]'" and 5) the "'Notice of Adoption' states that 'no substantive changes' were made after the text of the proposed rule was published . . . ."[992]

The Department claimed, however, that the State Administrative Procedure Act did "'not require that the rule that is finally adopted by the agency mirror the rule that was proposed [, but] contemplates that changes will be made in the rule before

987. N.Y. CONST. art. IV, § 8.
988. N.Y. A.P.A § 202(1)(a).
989. *Id.* § 202(1)(f)(v).
990. *Id.* § 202(1)(f)(vi) (McKinney Supp. 1992).
991. N.Y. EXEC. LAW § 102(2) (McKinney Supp. 1992).
992. *Long Island College Hosp.*, 573 N.Y.S.2d at 563 (citation omitted).

it is finally adopted . . .' ."[993]

The court rejected the Department's "theory of permissive changes."[994] The court reasoned that such an interpretation would permit the inclusion, without publication, of an amendment that would have been seriously contested.[995] Without proper publication, the amendment was held to be invalid and unconstitutional.[996]

The court did not hold, however, that the Hospital was entitled to the income from the depreciation fund account as a matter of law. The case was remanded for determination of whether: 1) the fund was properly established; 2) the income was properly used; and 3) the loan for capital construction was necessary.[997]

993. *Id.* at 564 (citation omitted).
994. *Id.*
995. *Id.*
996. *Id.*
997. *Id.* at 564-65.