

ATTORNEY GENERAL

May 9, 1979

MR. THOMAS RUSSO, *Director*  
Division of Medical Assistance  
and Health Services  
Department of Human Services  
324 East State Street  
Trenton, New Jersey 08625

FORMAL OPINION NO. 10—1979

Dear Mr. Russo:

The Department of Health, which assists in administering the program for setting the rate of reimbursement payable to nursing homes under the New Jersey Medical Assistance and Health Services Act (N.J.S.A. 30:4D-1 *et seq.*) (Medicaid), has asked whether any nursing home dissatisfied with the rate set for it should have its administrative appeal heard by an administrative law judge. It is our opinion that such a rate reimbursement appeal is a contested case and should be heard by an administrative law judge.

By authority of N.J.S.A. 30:4D-7(b) the Division of Medical Assistance and Health Services in the Department of Human Services is responsible for determining the amount of payment for services rendered to Medicaid recipients by providers of medical services. *See Formal Opinion No. 8-1976*. Reimbursement rates for certified nursing home providers participating in the Medicaid program are set in accordance with Cost Accounting and Rate Evaluation (CARE) regulations adopted by the Department of Human Services (N.J.A.C. 10:63-3 *et seq.*) and administered in substantial part by the Department of Health. Nursing home rates are set prospectively on an annual basis, depending on the fiscal year used by the facility for its accounting purposes. A rate is based on the specific cost data submitted by the particular facility and is set in terms of a *per diem* amount for that particular nursing home.

The CARE regulations make available two stages of administrative appeal to resolve disputes concerning the rate that is initially established. N.J.A.C. 10:63-3.20. The nursing home may request a meeting with a Health Department rate analyst for review and adjustment of the rate (Level I Appeal). Thereafter, the home may request a conference with a panel of representatives of the Departments of Health and Human Services. On occasion the panel may include a representative of the Department of Transportation which furnishes appraisals of the value of nursing home land and property, elements that are factored in the reimbursement rate. This "Level II" appeal is conducted in an informal manner. It concludes by the panel's submitting a memorandum containing its recommendations to the Director of the Division of Medical Assistance and Health Services, who makes the final administrative decision.

Through the recent amendments to the Administrative Procedure Act (L. 1978, c. 67), N.J.S.A. 52:14B-1 *et seq.*, 52:14F-1 *et seq.*, all "contested cases" heard by a State agency must be conducted by an administrative

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law judge instead of by Departmental hearing officers. N.J.S.A. 52:14B-10(c). A "contested case" is defined by N.J.S.A. 52:14B-2(b) as:

a proceeding, including any licensing proceeding, in which the legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are required by constitutional right or by statute to be determined by an agency by decisions, determinations, or orders, addressed to them or disposing of their interests, after opportunity for an agency hearing.

Thus where, by statute or constitutional law, a hearing is required before a State agency may determine the legal rights of specific parties, the matter constitutes a "contested case" which must be heard by an administrative law judge. See *Public Interest Research Group v. State of New Jersey*, 152 N.J. Super. 191, 205, (App. Div. 1977), certif. denied, 75 N.J. 538 (1977); *Formal Opinion No. 6-1979*.

In considering whether a nursing home rate dispute is a "contested case" within the scope of N.J.S.A. 52:14B-2(b), it should be noted that the Medicaid statute requires that the State "provide that either the recipient or the provider shall be afforded the opportunity for a fair hearing within a reasonable time on any valid complaint." N.J.S.A. 30:4D-7(f). This statutory hearing right, however, has been interpreted by the Department of Human Services to apply only to cases involving a recipient's eligibility for assistance termination or suspension of a provider agreement, or the payment of claims for services rendered. N.J.A.C. 10:49-1.16. From the inception of the nursing home rate-setting program the Department of Human Services has consistently held to the position that a rate dispute is not suitable to formal hearing. The issues in such a case are frequently matters of estimation, judgement and policy; in addition, any rate that is set is always subject to the limitation of available appropriated funds, N.J.S.A. 30:4D-2, 30:4D-7.

Rate-setting has, indeed, long been viewed as a quasi-legislative function and, where the Legislature entrusts that rate-setting power to an administrative agency, that agency is constrained by no greater procedural requirements than would otherwise apply to the Legislature itself. *Consolidation Coal Co. v. Kandle*, 105 N.J. Super. 104, 113 (App. Div. 1969), *aff'd* 54 N.J. 11 (1969); *Public Serv. Coordinated Transport v. State*, 5 N.J. 196, 214 (1950). Accordingly, neither the Legislature nor the delegated agency would be under a duty to provide a hearing before fixing a flat rate or maximum levels of increase on a general or Statewide basis. *Jamouneau v. Harner*, 16 N.J. 500, 522 (1954), *cert. denied*, 349 U.S. 904, 75 S. Ct. 580, 99 L. Ed. 1241 (1955).

The nursing home rate-setting program, however, does not mirror the pure legislative model of setting a uniform rate across the board for all facilities regardless of individual differences. The program instead sets a certain reimbursement rate for a particular facility taking into consideration that facility's own operating expenses, property evaluation and working capital needs. The CARE regulations expressly recognize that because of unusual situations inequities may result from strict adherence to the initial rate, and they provide for review of the special circumstances of

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the facility. N.J.A.C. 10:63-3. The nursing home rate-setting program is thus directed towards establishing the legal right of a *specific party* to a rate of reimbursement for services it provides to Medicaid recipients.\* Moreover, by statute the facility is entitled to a reasonable rate for those services, N.J.S.A. 30:4D-7(b).

Although rate-making powers may be characterized as legislative or quasi-legislative, a rate determination in many respects will also require the exercise of quasi-judicial functions when property rights of specific facilities are at stake. *Central R. Co. v. Department of Public Utilities*, 7 N.J. 247, 257 (1951). In such instances rate-making will combine "the elements of policy making and adjudication, being a blend of prescription for the future with the disposition of a particular, immediate petition." *Yellow Cab Corp. v. City Council of Passiac*, 124 N.J. Super. 570, 580 (Law Div. 1973). It has been expressly established by case law that where the property interests of a specific facility are involved in fixing a rate of reimbursement, due process requires the affording of an opportunity for a hearing thereon by the facility. Thus, in *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 56 S. Ct. 720, 80 L. Ed. 1033 (1935), the action of the Secretary of Agriculture in prescribing maximum charges for a stockyard company's services was attacked as a confiscation of the company's property. The Court stated that the "fixing of rates is a legislative act." 298 U.S. at 50. Yet it went on to hold that

When the Legislature appoints an agent to act within that sphere of legislative authority, it may endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily. . . .

. . . [T]he Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. . . . It is not difficult for . . . [administrative agencies] to observe the requirements of law in giving a hearing and receiving evidence. [298 U.S. at 51-52.]

In *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292, 57 S. Ct. 724, 81 L. Ed. 1093 (1937), the Court reversed an order of a State Commission setting the rates chargeable by a telephone company for intrastate telephone service to its subscribers because factual data on which the Commission had relied, including the valuations of the company's land, labor, buildings and equipment, had not been disclosed to the company. The Court stated, "The right to . . . [a fair and open] hearing is one of 'the rudiments of fair play' . . . assured to every litigant by the Fourteenth Amendment as a minimal requirement. . . . There can be no compromise

\* It is noteworthy that these appeal procedures for nursing home rate reimbursement are governed by the same statutory provisions which deal with hospital rate reimbursement where the Department of Health has expressly recognized the need for a formal hearing.

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on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored." 301 U.S. at 304-305. It is apparent from these cases that

[W]hile rate-making is labelled a legislative process, the due process clause of the U.S. Constitution provides that no one shall be deprived of his property without due process of law, and the 'due process' which must be accorded includes the affording of an opportunity for a hearing. [*Yellow Cab Corp. v. City Council of Passaic, supra*, 124 N.J. Super. at 579.]

See also *Cunningham v. Department of Civil Service*, 69 N.J. 13, 21 (1975); *In re Matter of Public Hearings (C.O.A.)* 142 N.J. Super. 136, 151-152 (App. Div. 1976), *certif. denied*, 72 N.J. 457 (1976).

The type of hearing that must be afforded necessarily depends on whether adjudicative facts are at issue in the individual case. *Cunningham v. Department of Civil Service, supra*, 69 N.J. at 22-23, *Yellow Cab Corp. v. City Council of Passaic, supra*, 124 N.J. Super. at 580; Davis, *Administrative Law* §7.04 at 420-426 (1958). As noted in *Yellow Cab Corp. v. City Council of Passaic, supra*, 124 N.J. Super. at 580-582, administrative agency rate-making is a blend of quasi-judicial and quasi-legislative functions, entailing a consideration of large questions of public policy, reference to broad data from surveys, studies and experience as well as a determination of discrete facts. Where, as in the nursing home rate-setting process, final agency decisions are based on individual grounds for administrative appeal, including the factual characteristics, situation and valuation of the facility's property, an adjudicative hearing is required. Davis, *Administrative Law, supra*, §7.04 at 421.

Accordingly, you are advised that since an opportunity to be heard is required before a rate dispute concerning a specific nursing home may be finally resolved by agency decision, such a dispute constitutes a "contested case" that should be heard by an administrative law judge. Provision for hearing before an administrative law judge may be superimposed upon an informal administrative scheme for voluntary resolution of the dispute and may be substituted for both or either one of the existing appeal levels.

Very truly yours,  
JOHN J. DEGNAN  
*Attorney General*

By CHARLOTTE KITLER  
*Deputy Attorney General*

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