NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0235-08T1

COMM-UNITY, INC.,

Petitioner-Appellant,

v.

DIVISION OF MEDICAL
ASSISTANCE AND HEALTH
SERVICES,

Respondent-Respondent.

Argued November 4, 2009 - Decided January 5, 2010

Before Judges Skillman and Simonelli.

On appeal from a Final Agency Decision of the Director of the Division of Medical Assistance and Health Services.

Dennis J. Cummins, Jr., argued the cause for appellant.

Dianna Rosenheim, Deputy Attorney General, argued the cause for respondent (Anne Milgram, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Zoe J. McLaughlin, Deputy Attorney General, on the brief).

PER CURIAM

Appellant Comm-Unity, Inc. (Comm-Unity) appeals from the final decision of respondent Division of Medical Assistance and

Health Services (DMAHS) adopting the initial decision of an Administrative Law Judge (ALJ) granting summary decision in DMAHS's favor sustaining the termination Comm-Unity's Medicaid provider agreement pursuant to N.J.A.C. 10:49-11.1(d)22. We affirm.

Comm-Unity is a New Jersey corporation, which operated a partial care facility for patients suffering from serious mental disabilities. Because Comm-Unity received Medicaid funding, it was required to periodically submit a re-enrollment application. N.J.A.C. 10:49-3.2(b)1.i.

Comm-Unity does not deny that Harold Katz and Robert Lieberman are officers of the corporation. Lieberman was also Comm-Unity's program director. On March 24, 2006, Lieberman submitted a re-enrollment application to DMAHS on Comm-Unity's behalf (the application). Section I, Question 23 requested the following information:

> Have any of the entities named in the response to questions 1 or 7,[1] or their officers or partners, or any individuals named in response to question 15, ever been the subject of any license suspension, revocation, fine, reprimand, probation or other adverse licensure action in this State or any other jurisdiction?

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[1] In response to Question 1, Lieberman identified "Comm-Unity, Inc." as the provider; he gave his name and title in response to Question 7, which requests the name of the chief executive officer or other responsible management.

[(Emphasis added.)]

Question 25 requested the following information:

> Have any of the entities named in response to questions 1 or 7, <u>or their officers</u> or partners, or any of the individuals named in the response to question 15, <u>ever been the subject of any</u> suspension, debarment, disqualification or <u>recovery action involving Medicaid (Title XIX)</u>, Medicare (Title XVIII), any other federally or state-funded health care program, or any private or non-profit health insurance plan or any of the other programs administered in whole or in part by DMAHS <u>in this state or any other jurisdiction</u>?
>
> [(Emphasis added.)]

Lieberman answered "No" to both questions.

Katz and Lieberman do not deny that they were also officers of Eden House Residential Health Care Facility (Eden House). In November 2004, the New Jersey Department of Health and Senior Services (DHSS) penalized Eden House $33,250 for extensive regulatory violations and revoked its license.

Eden House appealed, and the matter was transmitted to the Office of Administrative Law (OAL) for a hearing. In her initial decision issued on December 20, 2005, the ALJ emphasized that "[i]t is impossible to fully describe in this Initial Decision the squalid and unsafe conditions in which the residents of Eden House are forced to live[;]" that the conditions at the facility reflected "the facility's usual state

of deterioration, filth, mold, insects, vermin, unsafe and unpleasant conditions, and resident neglect[;]" and that "Eden House was historically in violation of [N.J.A.C. 8:43-4.1(c)] and its staff continuously failed to provide the merest semblance of cleanliness or maintenance, so that its residents were forced to live in permanent squalor."

The ALJ specifically faulted Katz and Lieberman, who testified at the hearing, which began on June 6, 2005, for stalling DHSS's attempts to enforce its regulations and bring Eden House into compliance. She recommended that "the appropriate agencies make further inquiries into the operations conducted by Katz and Lieberman[,]" including Comm-Unity and two other facilities they operated.

As a result of the ALJ's recommendation, DMAHS investigated the application and determined that Lieberman's answers to Questions 23 and 25 were false.[2] As to Question 23, DMAHS concluded that as officers of Eden House, Katz and Lieberman were subject to the penalty and license revocation

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[2] DMAHS also determined that Lieberman failed to respond to Question 30, which requests information about Comm-Unity's professional staff. The parties do not address this determination in their appellate briefs. The issue therefore is deemed waived. Jefferson Loan Co. v. Session, 397 N.J. Super. 520, 525 n. 4 (App. Div. 2008); Pressler, Current N.J. Court Rules, comment 4 on R. 2:6-2 (2010).

imposed by DHSS. As to Question 25, DMAHS concluded that in November 2004, as officers of Comm-Unity, Katz and Lieberman were subject to a Medicaid recovery action against Comm-Unity for re-payment of $115,560 based, in part, on Comm-Unity's failure to have a qualified program director. On December 27, 2006, DMAHS provided Comm-Unity sixty days written notice of its intent to terminate the provider agreement.

Comm-Unity sought a stay and an expedited hearing, contending that Lieberman's statements were not knowingly and willfully false because he did not view the Eden House matter as connected to the application, and because that matter was not final at the time he submitted the application. The Director of DMAHS transferred the matter to the OAL for an emergency hearing.

DMAHS filed a motion for summary decision. The ALJ granted the motion, finding no material fact in dispute and concluding as follows, in relevant part:

> The uncontested facts are that Harold Katz and Robert Lieberman, officers of [Comm-Unity], were involved in a civil penalty and adverse licensure action in New Jersey regarding Eden House. Both individuals featured prominently in that matter. Therefore, . . . [the application] . . . contained unequivocally inaccurate information. Because of Mr. Lieberman's involvement with Eden House, he knew or should have known that his responses were untruthful. The circumstances are

> compelling that he must have been consciously aware that the application contained false information. The excuses offered in his affidavit are disingenuous and totally lacking in credibility. . . . Finally, by its terms, the provider agreement can be terminated on notice without cause.

Comm-Unity filed exceptions to the ALJ's initial decision, arguing that the ALJ erroneously made a credibility determination by concluding that Lieberman knew that the answers to Questions 23 and 25 were false. Comm-Unity also argued that DMAHS had to prove that Lieberman willfully and intentionally falsified the application. DMAHS responded that N.J.A.C. 10:49-11.1(d)22 does not require such proof but merely requires that the application contain false information.

The Director adopted the ALJ's findings and conclusions, finding there was no dispute that the application contained false statements. The Director also concluded that no hearing was necessary to determine whether Lieberman knowingly and willfully made a false statement because

> [N.J.A.C. 10:49-11.1(d)22] does not require that the provider intended to deceive, manipulate, or defraud Medicaid, in order for an application to be denied. Rather, the mere submission of false information is grounds for denial. Indeed, a provider must be held to a high standard in order to preserve the integrity of the Medicaid program.

On appeal, Comm-Unity contends that it did not submit a false application because Questions 23 and 25 only refer to Comm-Unity, Lieberman is not an "owner" of Comm-Unity, and Lieberman and Katz are not licensed by any agency. Comm-Unity also contends that the ALJ violated its due process rights by deciding, without a hearing, that Lieberman knowingly and willfully provided false information on the application. Comm-Unity further contends that DMAHS should be equitably estopped from terminating its provider agreement because DMAHS permitted it to relocate its facility despite knowing of the Eden House matter.

Our role in reviewing an agency decision is limited. In re Taylor, 158 N.J. 644, 656 (1999); Brady v. Bd. of Review, 152 N.J. 197, 210 (1997). We "can intervene only in those rare circumstances in which an agency action is clearly inconsistent with its statutory mission or other state policy." In re Musick, 143 N.J. 206, 216 (1996). Thus, we will not reverse an agency decision and must defer to it unless it is arbitrary, capricious or unreasonable, or it is not supported by substantial credible evidence on the record as a whole, or is in violation of express or implicit legislative policy. In re Distrib. of Liquid Assets Upon Dissolution of the Union County Reg'l High Sch. Dist. No. 1, 168 N.J. 1, 10-11 (2001); Taylor,

supra, 158 N.J. at 656-57. Applying these standards, we discern no reason to disturb DMAHS' decision.

DMAHS is responsible for protecting the interests of the New Jersey Medicaid Program and its beneficiaries. N.J.A.C. 10:49-11.1(b). Accordingly, DMAHS may "terminate any existing agreement with a provider, if good cause for exclusion of the provider from program participation exists under any of the provisions of N.J.A.C. 10:49-11.1(d)1 through 27." N.J.A.C. 10:49-3.2(f).[3] The submission of a false application for provider status constitutes good cause for suspension, debarment, or disqualification from state contracting with Medicaid. N.J.A.C. 10:49-11.1(d)22. N.J.A.C. 10:49-11.1(d)22 does not require that a false statement on an application be made knowingly and willfully.

Question 23 specifically asks whether Comm-Unity "or" any of its officers have ever been the subject of a fine or other adverse licensure action "in this State or any other jurisdiction." This question is not limited to fines, license revocations or other adverse licensure actions against Comm-Unity, and it does not require that the officer be an owner of Comm-Unity or a licensed individual. Rather, the question

[3] Because N.J.A.C. 10:49-3.2(f) requires good cause, we reject DMAHS' argument that it can terminate a provider agreement without cause on sixty days written notice.

requires disclosure of any Comm-Unity officer who has ever been subjected to any fines, license revocations or adverse licensure actions for any reason whatsoever. The same is true of Question 25, which specifically asks whether Comm-Unity "or" any of its officers were ever the subject of a Medicaid recovery action.

There is no question that Lieberman and Katz were officers of Comm-Unity and Eden House; that Lieberman knew about both the Eden House matter and that he and Katz were subject to the penalties and license revocation DHSS imposed on Eden House; and that Lieberman knew that he and Katz were subject to the Medicaid recovery action against Comm-Unity. Accordingly, there is no material dispute that Lieberman's answers to Question 23 and 25 were false. No hearing was necessary and no due process violation occurred.

Comm-Unity's contention that DMAHS should be equitably estopped from terminating the provider agreement is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). However, we add the following comments.

Equitable estoppel applies when one party engages in voluntary conduct, upon which another party relies in good faith and to his detriment, precluding the first party from asserting rights that he might otherwise have had. County of Morris v. Fauver, 153 N.J. 80, 104 (1998). "The essential elements of

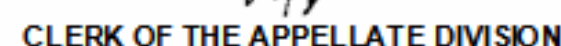
equitable estoppel are a knowing and intentional misrepresentation by the party sought to be estopped under circumstances in which the misrepresentation would probably induce reliance, and reliance by the party seeking estoppel to his or her detriment." O'Malley v. Dep't of Energy, 109 N.J. 309, 317 (1987).

"The requirements of equitable estoppel are quite exacting." W.V. Pangborne & Co. v. N.J. Dep't of Transp., 116 N.J. 543, 553 (1989). The doctrine is rarely applied against governmental entities. Middletown Twp. Policemen's Benevolent Ass'n Local No. 124 v. Twp. of Middletown, 162 N.J. 361, 367 (2000). It will be applied against a governmental entity only under "compelling circumstances," County of Morris, supra, 153 N.J. at 104, to prevent a "manifest injustice." O'Malley, supra, 109 N.J. at 316.

Comm-Unity has shown no compelling circumstances warranting application of equitable estoppel against DMAHS. DMAHS was not involved in the Eden House matter, and Comm-Unity offers no evidence that DMAHS knew about that matter or that it made any misrepresentation about Comm-Unity's relocation of its facility.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION