

In the Missouri Public Service Commission

In the matter of

Janice Shands

Complainant) SC 2015-0044

V

MSD

Respondent

Complainant's Motion to strike and amended Response to Staff Motion to Dismiss

Comes now Complainant and for her Response and notes while she concurs in the dismissal (and already concurred in the MSD Motions) moves to strike the claimed references to the name of the account as if having some bearing for the reason that same is insufficient, impertinent and superfluous to the issue of dismissal. It also apparently fails to meet the CSR (CRS 240-2) as in the Staff Motion in not having any cited authority for same.

It is submitted same cannot be the law and should be stricken where :

1. RS Mo386.390.by its own terms makes

.. The commission shall not be required to dismiss any complaint because of the absence of direct damage to the complainant.

There is undisputed damage here . As also undisputed , at the time filed there was no one to act for assn. It was defunct . All the elected officers have resigned and even if they had not the Declaration and 1980 Act gives unit owners the right to enforce the rights of Assn. A condo assn is only a pass through where by law the duties including the ones to pay condo bills run with the land and are imposed on the unit owners such as Complainant. Especially where this was set out in the complaint, it should be taken as true and at a minimum a hearing held on same, and the assn added in if needed but the complaint not dismissed.

2 If PSC has an internal rule to the contrary is respectfully submitted it is respectfully submitted it should be void in that

a It is contrary to RS MO 536.014., as in conflict with the above law and and is so arbitrary and capricious as to create such substantial inequity as to be unreasonably burdensome on persons affected.

b. It would appear to be invalid where it does not appear to be in the CSR and promulgated with a notice hearing, and submission to legislature where as per RS Mo 536.024. It is confirmed "the validity of such rules and regulations is contingent upon the agency complying with the provisions of this section in promulgating such rules after June 3, 1994."

This is especially so where in DEPT. OF SOCIAL SERVICES, DIV. MED. SERV. v. Little Hills Healthcare, LLC, 236 S.W.3d 637 (Mo. 2007) and Young v. CHILDREN'S DIV., 284 S.W.3d 553 (Mo. 2008)¹. As stated in Young, supra :

.. In Little Hills, this Court addressed whether the division of medical devices ("DMS") was required to promulgate a rule for the method it uses to annually calculate the "estimated Medicaid days" of Medicaid service providers. 236 S.W.3d at 639. Section 208.153.1, provided that DMS "shall by rule and regulation define the reasonable costs, manner, extent, quantity, quality, charges and fees" for medical assistance services. Little Hills, 236 S.W.3d at 639 n. 3. DMS had no regulations setting forth the precise method for calculating the "estimated Medicaid days." Id. at 639. DMS considered three general components, but had no regulations for calculating each of the components. Id. at 639-40. This led to inconsistent "estimated Medicaid days" for Medicaid service providers from year to year. Id. at 640.

This Court found that "[w]hether an agency decision should be promulgated as a rule is a determination that is guided by section 536.010(6), RSMo Supp.2006." Id. at 641. That section states, in relevant part: "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of an existing rule, but does not include:

(a) A statement concerning only the internal management of an agency and which does not substantially affect the legal rights of, or procedures available to, the public or any segment thereof;

(b) A declaratory ruling issued pursuant to section 536.050, or an interpretation issued by an agency with respect to a specific set of facts and intended to apply on to that specific set of facts;

©) An intergovernmental, interagency, or intraagency memorandum, directive, manual or other communication which does not substantially affect *559 the legal rights of, or procedures available to,

¹As also cited in STATE of Missouri, ex rel BPS TELEPHONE COMPANY, et al.v USCOC of Greater Missouri, LLC d/b/a U.S. Cellular, 285 S.W.3d 395 (2009) confirming when there is a condition of general applicability (unlike there only to US Cellular) :.. If the requirement is generally applicable, the company argues, then the requirement is a new rule or the amendment of an existing rule and, as such, is invalid because it was not adopted according to rule-making procedures. See § 536.021.7; Young v. Children's Div., State Dep't. of Soc. Servs., 284 S.W.3d 553, 558, 2009 WL 1211314, at 6 (Mo. banc May 5, 2009) (a rule not adopted according to procedure is void).

the public or any segment thereof;

Section 536.010(6) (emphasis added).

Among its arguments that the "estimated Medicaid days" calculation does not fall under rulemaking, DMS asserted that the calculations were not generally applicable because they "related to specific facts for specific providers." *Little Hills*, 236 S.W.3d at 642. This Court disagreed and found that because, in each year, DMS applies one method for calculating "estimated Medicaid days" for all Medicaid service providers, the standard used to make the decision was a standard of "general applicability" for rulemaking purposes. *Id.*

This Court also addressed the effect of DMS's failure to promulgate a rule. *Id.* at 643. "[A] failure to promulgate a rule as required voids the decision that should have been properly promulgated as a rule." *Id.* (citing *NME Hospitals, Inc. v. DMS*, 850 S.W.2d 71, 74-75 (Mo. banc 1993)). DMS's "estimated Medicaid days" decision, then, was invalid because it was based on criteria or methodology that should have been promulgated as a rule. *Id.* at 643-44.

The division here attempts to distinguish this case from *Little Hills* on two grounds. First, the division argues that section 453.074 is not similar to section 208.153.1. Section 453.074.1 states the division, in administering the subsidy program, "shall. . . (2) Provide all petitioners for adoption with the rules and eligibility requirements for subsidies[.]" (Emphasis added). Section 208.153.1, on the other hand, provided that DMS "shall by rule and regulation define the reasonable costs, manner, extent, quantity, quality, charges and fees" for medical assistance services. (Emphasis added). Because section 453.074.1 just states that rules and eligibility requirements shall be provided, instead of stating that the eligibility requirements shall be defined by rule and regulation, the division argues that the Court's reasoning in *Little Hills* does not apply.

Contrary to the division's suggestion, the holding in *Little Hills* was not dependent on the statutory language of section 208.153.1.[3] As stated in *Little Hills*, section 536.010(6), defining an administrative "rule," guides the determination of whether the agency policy should be promulgated as a rule. 236 S.W.3d at 641-42.

In its brief, the division also attempts to distinguish this case from *Little Hills* on the basis that, unlike the methodology used to calculate "estimated Medicaid days," the criteria used to decide whether a child is eligible for BFC subsidy cannot be applied in a uniform fashion because it "requires that the division consider the specific needs and behavioral issues of each child on a case-by-case basis." As such, the division argues, the criteria for those decisions are not generally applicable and, therefore, are not subject to rulemaking.

The division is correct that the decision of whether a child is eligible for BFC subsidy is an individualized determination relating to the specific facts and circumstances of that particular child.[4] But that is not the decision that must be promulgated *560 as a rule. Here, as in Little Hills, at issue is the validity of an individualized decision that is based on a set of standards that has not been promulgated as a rule. In both these cases, it is the agency's policy of what criteria and methodology apply in making individualized determinations that must be promulgated as rules, because that policy is generally applicable. Here, the BFC subsidy application procedure, the required standard of proof, the type of evidence required, what behaviors qualify, how frequent and recent the behaviors must be, and whether professional treatment is required are all examples of eligibility requirements that are generally applicable to all children.

The division also asserts that it "uses the [Child Welfare] Manual, for itself and parents, to implement the adoption subsidy program." The manual sets forth a list of characteristics a BFC program candidate may exhibit. Child Welfare Manual, section 4, chapter 14, 5-7. This list includes: (1) behaviors that, if not modified, could result in the youth being designated as a status offender; (2) a history of irresponsible or inappropriate sexual behavior that has resulted in the need for extraordinary supervision; (3) threatening, intimidating or destructive behavior that is demonstrated by multiple incidents over a period of time; (4) problems of defiance when dealing with authority figures; (5) significant problems with peer relations; (6) significant problems at school that affect academic achievement or social adjustment; (7) significant problems with lying, stealing or manipulating; (8) significant problems with temper control; (9) mild substance abuse-related problems; (10) oppositional behavior that contributes to placement disruptions and an inability to function productively with peers, parent figures and/or birth family; (11) any of the above behaviors, coupled with medical problems; or (12) any of the above behaviors displayed by one or more children of a sibling group, qualifying the entire sibling group for placement together, if appropriate. *Id.* The manual, however, has not been promulgated as a rule under the Missouri Administrative Procedure Act ("MAPA") rulemaking procedures. Further, while the division claims that it uses the child welfare manual in deciding who qualifies for BFC subsidy, it denies that the child welfare manual contains the BFC subsidy eligibility requirements.

"Any agency announcement of policy or interpretation of law that has future effect and acts on unnamed and unspecified facts is a 'rule.'" Little Hills, 236 S.W.3d at 642 (citing NME Hospitals, 850 S.W.2d at 74). The criteria and methodology the division uses in determining a child's qualification for BFC subsidy under section 453.073 meets the definition of "rule" under section 536.010(6) as an "agency statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency." **As such, the division's eligibility requirements must be promulgated under rulemaking procedures,[5] or else they are void. *Id.* at 643.**

What is the effect of the division's failure to promulgate a rule on the division's determination that the Youngs were not entitled to the BFC subsidy? Again, Little Hills is instructive. In Little Hills, not only did the agency's failure to promulgate a rule void the agency's policy that should have been properly promulgated as a rule, but it also invalidated the agency's determination of the hospital's benefits that was based on the void rule. Little Hills, 236 S.W.3d at 643-44. Similarly, here, the division denied the Youngs' petitions for BFC subsidy based on standards and procedure that should have been promulgated as a rule; therefore, the division's denial is void.

End of quote

Wherefore for these reasons while would concur in the result but moves to strike and object to any PSC decision that seeks to rely on a unpromulgated rule and such other relief as proper.

By

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Certificate of service

A copy was sent by email to P.C. Office of General Counsel at staff counsel@psc.mo.gov, to Dustin Allen (Public Counsel) at opscervice@ded.mo.gov, and Byron Francis at his email on September 82014

_/s/ Susan H Mello