THE SMART WAY TO APPEAL A FOOLISH FAIR HEARING DECISION

We've all read Fair Hearing Decisions and wondered whether the Administrative Law Judge and Commissioner's Designee deciding the hearing actually knows the law. I recently had a decision come across my desk where the Department of Health concluded that the skilled nursing facility had no standing to file an application on behalf of a deceased resident. I imagine that when we had this foolishness reversed, the Commissioner's Designee who signed off on the hearing decision was rather embarrassed by his displayed ignorance of 42 CFR §400.203 and Article VI, Clause II of the United States Constitution, which is more commonly known as the "Supremacy Clause". But perhaps my favorite "foolish" fair hearing decision of all time is one where the Department of Health concluded that the applicant/appellant's daughter must be her Power of Attorney because documentation submitted in support of the Medicaid application indicated that she was present in the room with her mother during a medical exam (yes indeed, they were confusing a Health Care Proxy with a Power of Attorney).

What I'm driving at here is that foolish decisions after fair hearing are issued rather frequently. The challenge that SNF's face is how best to reverse these adverse decisions in a cost-effective manner. Unfortunately, the costs associated with formally appealing a decision after fair hearing via an Article 78 proceeding is nothing short of astronomical. As such, many SNFs, upon receiving an adverse fair hearing decision, are simply writing off the balance as bad debt. However, SNFs "in the know" are aware of an alternative, that being the filing of a reconsideration or rehearing request with the Office of Temporary and Disability Assistance ("OTDA") pursuant to 18 NYCRR§ 358-6.6 (a) and 18 NYCRR§ 358-6.6(b).

A reconsideration or rehearing of a decision after fair hearing can be used to correct **any error of law or fact** which is substantiated by the fair hearing record. Typically, the attorney simply writes a letter to OTDA addressing the errors in law made by the ALJ and/or Commissioner' Designee. In addition to being specific as to the alleged errors of fact and/or law, the letter must also contain enough information to identify the issue, problem, and error and state what the decision should be.

Despite the availability of this cost-effective alternative to filing an Article 78 appeal, statistics taken from OTDA's Annual Reports tell us that this avenue is grossly underutilized. By way of example, in 2019 statewide 84,395 fair hearing decisions were issued. Of those 84,395 issued decisions, only 513 reconsideration/rehearing requests were submitted to OTDA. In 2020, statewide 75,789 fair hearing decisions were issued with only 392 reconsideration/rehearing requests submitted. Why such a disproportionate number of requests compared to fair hearing decisions issued? The answer has to be that many are simply unaware that this option exists as statistics also reveal that the reconsideration/rehearing is an extremely effective tool. Let's look again at 2019. Of the aforementioned 513 decision reviewed, 299 were modified. And in 2020, 282 of the 392 submitted reconsideration/rehearing requests were modified. These numbers speak for themselves. Well-crafted reconsideration/rehearing requests of foolish fair hearing decisions work.

In short, know the tools available to you. And make sure you hire knowledgeable and experienced attorneys like Cona Elder Law who offer the most cost-effective solutions.

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