SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2919-15T2

OUR LADY OF LOURDES HOSPITAL
— BURLINGTON,

Petitioner-Appellant,

v.

DIVISION OF MEDICAL
ASSISTANCE AND HEALTH
SERVICES,

Respondent-Respondent.

Argued October 3, 2017 - Decided October 25, 2017

Before Judges Yannotti, Carroll and Mawla.

On appeal from the Division of Medical Assistance and Health Services, Docket No. HMA 4005-2006.

James A. Robertson argued the cause for appellant (McElroy, Deutsch, Mulvaney & Carpenter, LLP, attorneys; Mr. Robertson, of counsel and on the briefs; Paul L. Croce and Marissa Koblitz Kingman, on the briefs).

Jacqueline R. D'Alessandro, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney

General, of counsel; Ms. D'Alessandro and Jennifer Simons, Deputy Attorneys General, on the brief).

PER CURIAM

Our Lady of Lourdes Hospital — Burlington (the Hospital) appeals from a final decision of the Director, Division of Medical Assistance and Health Services (Division), which denied the Hospital's application to recalculate its 1995 Medicaid reimbursement rates for inpatient services.[1] We affirm.

I.

Medicaid is a federally-established, state-run program, Estate of F.K. v. Div. of Med. Assistance & Health Servs., 374 N.J. Super. 126, 133—34 (App. Div.), certif. denied, 184 N.J. 209 (2005), "designed to provide medical assistance," at public expense, "to individuals 'whose income and resources are insufficient to meet the cost of necessary medical services,'" N.M. v. Div. of Med. Assistance & Health Servs., 405 N.J. Super. 353, 359 (App. Div.) (quoting 42 U.S.C.A. § 1396), certif. denied, 199 N.J. 517 (2009).

[1] We note that in October 2016, the court consolidated this appeal with Atlanticare Regional Medical Center v. Division of Medical Assistance & Health Services, No. A-0364-15. We have determined that the appeals should be addressed in separate opinions. Therefore, we vacate the order consolidating the appeals.

A state's participation in Medicaid is voluntary, but participating states must comply with the federal Medicaid statutes and any regulations promulgated by the United States Department of Health and Human Services implementing the statute. Mistrick v. Div. of Med. Assistance & Health Servs., 154 N.J. 158, 166 (1998). In addition, states must adopt and adhere to a plan that establishes the scope of the program and sets forth reasonable standards for its administration, including a "scheme for reimbursing health care providers for the medical services provided to needy individuals." Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 502, 110 S. Ct. 2510, 2513, 110 L. Ed. 2d 455, 462 (1990). Federal approval of the plan permits states to receive matching federal funds for applicable medical services reimbursed through the program. 42 U.S.C.A. § 1396(b).

New Jersey participates in the Medicaid program pursuant to the New Jersey Medical Assistance and Health Services Act, N.J.S.A. 30:4D-1 to -19.5, which assigns the responsibility for administering our state program to the Division. N.J.S.A. 30:4D-7. The Hospital is an acute care facility that participates and receives reimbursement for its provision of services covered under the program.

In accordance with New Jersey's federally-approved state plan, those reimbursements are calculated based upon standard

rates for each Diagnosis Related Group, In re Hosps.' Petitions for Adjustment of Rates for Reimbursement of Inpatient Servs. to Medicaid Beneficiaries, 383 N.J. Super. 219, 232 (App. Div.), certif. denied, 187 N.J. 82 (2006), that is, each class of patients defined by shared characteristics related to diagnosis, procedure, and other relevant factors, N.J.A.C. 10:52-1.2. In addition, federal regulations require that those rates be set such that payments made under the state's Medicaid program do not exceed upper payment limits established for Medicare, a separate federally-administered program. 42 C.F.R. § 447.253(b)(2) (2017); 42 C.F.R. § 447.272(b) to (c) (2017).

In 1993, the Division promulgated regulations that set forth the calculation methodology at issue here. 25 N.J.R. 2560(a) (May 10, 1993). Among other things, the regulations provide for the application of an "economic factor" to account for inflation in setting reimbursement rates:

> The economic factor calculated by the Department of Health is the measure of the change in prices of goods and services used by New Jersey hospitals. After the 1993 rate year, the economic factor will be the factor recognized under the TEFRA target limitations.
>
> [Id. at 2568.]

The regulation was codified at N.J.A.C. 10:52-5.17(a). The rule was later re-codified without change, effective December 21, 1999, at N.J.A.C. 10:52-5.13.[2]

The term "TEFRA target limitations" in N.J.A.C. 10:52-5.17(a) refers to the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, § 101, 96 Stat. 324, 331-36 (codified at 42 U.S.C.A. § 1395ww, but since amended). As an incentive to contain costs, TEFRA imposes "target" limits on the rate of increase in allowable costs for inpatient services a facility may recover through reimbursement. Episcopal Hosp. v. Shalala, 994 F.2d 879, 881 (D.C. Cir. 1993), cert. denied, 510 U.S. 1071, 114 S. Ct. 876, 127 L. Ed. 2d 73 (1994).

When the Division adopted N.J.A.C. 10:52-5.17(a), the TEFRA provision outlining the legislation's "target amount[s]" stated:

> (A) . . . [T]he term "target amount" means, with respect to a hospital for a particular 12-month cost reporting period--
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> (i) in the case of the first such reporting period for which this subsection is in effect, the allowable operating costs of inpatient hospital services (as defined in subsection (a)(4)) recognized under this title for such hospital for the preceding 12-month cost reporting period, and

[2] In this opinion, we refer to the regulation as N.J.A.C. 10:52-5.17(a), because that was the regulation in effect when this dispute began.

(ii) in the case of a later reporting period, the target amount for the preceding 12-month cost reporting period, increased by the applicable percentage increase under subparagraph (B) for that particular cost reporting period.

(B) . . . .

(ii) . . . [T]he "applicable percentage increase" for 12-month cost reporting periods beginning during--

(I) fiscal year 1986, is 0.5 percent,

(II) fiscal year 1987, is 1.15 percent,

(III) fiscal year 1988, is the market basket percentage increase minus 2.0 percentage points, and

(IV) subsequent fiscal years is the market basket percentage increase.

(iii) For purposes of this subparagraph, the term "market basket percentage increase" means, with respect to cost reporting periods and discharges occurring in a fiscal year, the percentage, estimated by the Secretary before the beginning of the period or fiscal year, by which the cost of the mix of goods and services (including personnel costs but excluding nonoperating costs) comprising routine, ancillary, and special care unit inpatient hospital services, based on an index of appropriately weighted indicators of changes in wages and prices which are representative of the mix of goods and services included in such inpatient hospital services, for the period or fiscal year will exceed the cost of such mix of goods and services for the preceding 12-month cost reporting period or fiscal year.

[42 U.S.C.A. § 1395ww(b)(3) (1992).]

Shortly after the Division adopted N.J.A.C. 10:52-5.17(a), TEFRA was amended to provide an updated schedule of inflationary increases, which changed the increase that would have been applicable for the 1995 rate year from the market basket percentage to a reduced rate based on that percentage:

> [T]he "applicable percentage increase" for 12-month cost reporting periods beginning during—
>
> (I) fiscal year 1986, is 0.5 percent,
>
> (II) fiscal year 1987, is 1.15 percent,
>
> (III) fiscal year 1988, is the market basket percentage increase minus 2.0 percentage points,
>
> (IV) a subsequent fiscal year ending on or before September 30, 1993, is the market basket percentage increase,
>
> (V) fiscal years 1994 through 1997, is the market basket percentage increase minus the applicable reduction (as defined in clause (v)(II)), or in the case of a hospital for a fiscal year for which the hospital's update adjustment percentage (as defined in clause (v)(I)) is at least 10 percent, the market basket percentage increase, and
>
> (VI) subsequent fiscal years, is the market basket percentage increase.
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> [Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13502(a)(1), 107 Stat. 312, 577 (codified at 42 U.S.C.A. § 1395ww(b)(3)(B)(ii), but since amended).]

The legislation further provided:

> For purposes of clause (ii)(V)—
>
> > (I) a hospital's "update adjustment percentage" for a fiscal year is the percentage by which the hospital's allowable operating costs of inpatient hospital services recognized under this title for the cost reporting period beginning in fiscal year 1990 exceeds the hospital's target amount (as determined under subparagraph (A)) for such cost reporting period, increased for each fiscal year (beginning with fiscal year 1994) by the sum of any of the hospital's applicable reductions under subclause (V) for previous fiscal years; and
> >
> > (II) the "applicable reduction" with respect to a hospital for a fiscal year is the lesser of 1 percentage point or the percentage point difference between 10 percent and the hospital's update adjustment percentage for the fiscal year.
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> [Id. § 13502(a)(2), 107 Stat. at 577-78 (codified at 42 U.S.C.A. § 1395ww(b)(3)(B)(v)).]

Moreover, as an incentive for hospitals to maintain efficiency, TEFRA authorized supplementary bonus payments to hospitals whose costs remained within these limits or, as the case may be, penalties for those hospitals whose costs exceeded these limits. Episcopal Hosp., supra, 994 F.2d at 881.

II.

On March 3, 1995, the Division provided the Hospital a schedule of its Medicaid reimbursement rates for the 1995 calendar

year.[3] The Hospital responded on March 22, 1995. It claimed the Division made thirteen errors in the calculation of its rates. One of the claimed errors pertained to the Division's interpretation and application of N.J.A.C. 10:52-5.17(a), the economic factor regulation. The Hospital stated:

> The regulations require the Division to use the TEFRA update factor to adjust costs from year to year after 1993. The regulations do not include any provision for incorporating adjustments to the TEFRA update factor in the payment rates. The TEFRA update factors for 1994 and 1995 have each been understated by [one percent]. This error understates the Hospital's preliminary cost base.

In March 1996, the Division advised the Hospital that only one of the alleged errors, the error regarding the House Staff Medicaid amounts, was a proper calculation error challenge, and the other issues raised pertained to the Division's interpretation of its regulations. In May 1996, the Hospital asked the Division to further explain its decision.

In October 1996, the Division informed the Hospital that the one calculation error had no impact on its rates and it considered the matter closed. The Hospital filed an administrative appeal, which the Division dismissed. In re Zurbrugg Mem'l Hosp.'s 1995 Medicaid Rates, 349 N.J. Super. 27, 32—33 (App. Div. 2002). We

[3] At the time, the Hospital was known as Zurbrugg Memorial Hospital.

reversed the Division's determination and remanded the matter to the Division for further proceedings. Id. at 29–30.

On March 8, 2006, the Division issued a decision again denying the Hospital's request for an adjustment of its rates. The Hospital then filed a request for an administrative hearing, and in May 2006, the Division transferred the matter to the Office of Administrative Law (OAL) for an initial decision as a contested case.

The OAL placed the case on the inactive list pending a decision by this court on an appeal challenging amendments to certain regulations pertaining to Medicaid reimbursements. We upheld the regulations. In re Adoption of Amendments to N.J.A.C. 10:52, No. A-6649-04 (App. Div. April 26, 2007), certif. denied, 192 N.J. 296 (2007). Thereafter, the OAL reactivated the case.

In June 2009, the Division filed a motion for partial summary decision on the Hospital's claim regarding N.J.A.C. 10:52-5.17(a). While that motion was pending, the Hospital filed two discovery motions. The first motion sought leave to communicate with R.S., who previously had been employed by the Division and the Division's financial intermediary.[4] The Hospital wanted to speak with R.S. about the Division's interpretation and application of the

[4] We use initials to preserve R.S.'s privacy.

regulation. The Hospital also sought to compel the Division to produce certain documents it had withheld as privileged.

On July 5, 2011, the Administrative Law Judge (ALJ) denied the Division's motion for partial summary decision, finding that there were genuine issues of material fact pertaining to the calculation of the hospital's rates. Even so, the ALJ decided that the term "economic factor" in N.J.S.A. 10:52-5.17(a) refers to the "applicable percentage increase" under TEFRA rather than the TEFRA "market basket percentage increase." The ALJ also decided that the economic factor adjustment does not include the incentive bonus payments that are available under TEFRA.

On October 4, 2011, the ALJ ordered the Division to produce the withheld documents for in camera review. The ALJ also ordered the Division to provide a specific explanation as to why each withheld document was either privileged or otherwise not subject to discovery. The Division thereafter submitted the documents and explanations to the ALJ.

In November 2011, the Hospital filed another motion, this time seeking permission to depose R.S. In August 2012, the ALJ denied that motion, and the Director later denied the Hospital's application for administrative review of the ALJ's interlocutory decision. In September 2012, the Hospital voluntarily withdrew its claims regarding twelve of the alleged calculation errors, leaving

only the Hospital's claim regarding the Division's decision on the economic factor adjustment.

In October 2012, the Hospital filed a motion for summary decision and in December 2012, the Division cross-moved seeking the same relief. After hearing oral argument on the motions, the ALJ issued an initial decision dated November 25, 2015, denying the Hospital's motion and granting the Division's cross-motion in its entirety. The ALJ found that there were no genuine issues of material fact, and the Division was entitled to summary decision as a matter of law. The ALJ also found that there was no need for further discovery and denied the Hospital's discovery motions as moot.

The ALJ again found that the term "economic factor" in N.J.A.C. 10:52-5.17(a) refers to the "applicable percentage increase" under TEFRA, not the TEFRA "market basket percentage increase." The ALJ also rejected the Hospital's claim that the Division was required to apply the version of TEFRA that was in effect when the regulation was adopted in May 1993. In addition, the ALJ again rejected the Hospital's contention that incentive bonus payments available under TEFRA should be included in calculating the Hospital's rates.

The Director issued a final decision on February 18, 2016. The Director adopted the initial decision of the ALJ. This appeal followed.

III.

On appeal, the Hospital first argues that the Division erred in its interpretation of N.J.A.C. 10:52-5.17(a). As noted previously, the regulation states that an "economic factor" will be applied to the hospital's rates to account for inflation, and the economic factor "will be the factor recognized under TEFRA target limitations." Ibid.

We note that the scope of our review of an administrative agency's decision is limited. Circus Liquors, Inc. v. Governing Body of Middletown Twp., 199 N.J. 1, 9 (2009) (citation omitted). Our inquiry is limited to the following:

> (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
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> [In re Proposed Quest Acad. Charter Sch. of Montclair Founders Grp., 216 N.J. 370, 385-86 (2013) (citing Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995)).]

Although we are not bound by an agency's legal conclusions, we generally defer to the agency's interpretation of its own regulations and enabling statutes. Utley v. Bd. of Review, 194 N.J. 534, 551 (2008). We give considerable deference to the agency's interpretation of its own rules "because the agency that drafted and promulgated the rule should know [its] meaning[.]" N.J. Healthcare Coal. v. N.J. Dep't of Banking & Ins., 440 N.J. Super. 129, 135 (App. Div.) (quoting In re Freshwater Wetlands Gen. Permit No. 16, 379 N.J. Super. 331, 341–42 (App. Div. 2005)), certif. denied, 222 N.J. 17 (2015).

The Hospital argues that the phrase "the factor recognized under the TEFRA target limitations" in N.J.A.C. 10:52-5.17(a) refers to the TEFRA "market basket percentage increase," not the TEFRA "applicable percentage increase." The Hospital notes that the regulation defines the economic factor as "the measure of the change in prices of goods and services used by New Jersey Hospitals." Ibid. The Hospital asserts that the only "factor" that represents the change in prices of goods and services under TEFRA is the "market basket percentage increase."

The principles governing the interpretation of statutes apply to the construction of rules and regulations. Krupp v. Bd. of Educ. of Union Cty. Reg'l High Sch. Dist. No. 1, 278 N.J. Super. 31, 38 (App. Div. 1994), certif. denied, 140 N.J. 277 (1995). The

primary goal is to interpret a statute in accordance with the Legislature's intent, and "the best indicator of that intent is the statutory language." DiProspero v. Penn, 183 N.J. 477, 492 (2005) (citing Frugis v. Bracigliano, 177 N.J. 250, 280 (2003)). The court must interpret the words in the enactment in accordance with "their ordinary meaning and significance." Ibid. (citing Lane v. Holderman, 23 N.J. 304, 313 (1957)).

If the statute is clear and unambiguous, the court's role is "to construe and apply the statute as enacted." Ibid. (quoting In re Closing of Jamesburg High Sch., 83 N.J. 540, 548 (1980)). However, if there is any ambiguity in the statutory language that leads to more than one plausible interpretation, the court may consider extrinsic evidence, including the legislative history. Id. at 492–93 (citing Cherry Hill Manor Assocs. v. Faugno, 182 N.J. 64, 75 (2004)).

We are not persuaded by the Hospital's argument that the phrase "the factor recognized under the TEFRA target limitations" in N.J.A.C. 10:52-5.17(a) means the TEFRA "market basket percentage increase." Such a construction is not compelled by the plain language of the regulation. The Division did not refer to the "market basket percentage increase" in the regulation. As the Division notes, if it had intended that the economic factor would

be the "market basket percentage increase," the regulation would have said so.

Rather, the regulation defines "economic factor" to mean "the factor recognized under the TEFRA target limitations." As the Division found, TEFRA does not use the term "target limitations," but it does use the term "target amount," which is defined in 42 U.S.C.A. § 1395ww(b)(3) to mean allowable operating costs of inpatient hospital services for a twelve month period, increased by the "applicable percentage increase" under subparagraph (B) of that statute.

The Division noted that under TEFRA, the "applicable percentage increase is essentially a limit on the rate of increase in the target amount. The Division reasonably determined that the term "applicable percentage increase" is consistent with the concept of "target limitations" in the regulation. Therefore, the Division properly found that "TEFRA target limitations" referred to in N.J.A.C. 10:52-5.17(a) is the "applicable percentage increase" under TEFRA.

The Division's response to comments submitted when the regulation was proposed support the Division's interpretation. The Division indicated that it intended to utilize the TEFRA allowable increase for the economic factor adjustments provided in the regulation. The Division noted that the TEFRA allowable increase

had in recent years been "based on the national hospital market basket rate of inflation." See 25 N.J.R., supra, at 2561.

As the Division found here, this statement was consistent with the version of TEFRA that was in effect when the regulation was adopted. Indeed, TEFRA had provided that in some fiscal years (1986 and 1987) the "applicable percentage increases" were specified percentages, not the "market basket percentage increase." Therefore, the Division's comment recognized that while the TEFRA allowable increase might be the "market basket percentage increase," this might not always be the case.

The Division's interpretation is also consistent with the State's need to comply with the federal requirement that its aggregate Medicaid payments will not exceed those for Medicare. Interpreting the term "economic factor" in N.J.A.C. 10:52-5.17(a), the TEFRA "applicable percentage increase" allows the Division to provide the federal agency administering Medicaid the necessary assurance that it will not exceed the upper payment limits. As the Division noted, the federal agency allows states to base their assurances upon the use of the TEFRA limits.

We are therefore convinced that the Division's interpretation of the term "economic factor" in N.J.A.C. 10:52-5.17(a) is consistent with the language of the regulation, the Division's intent as reflected in the comments provided when the regulation

was adopted, and the purpose of the regulation. We reject the Hospital's contention that the phrase "TEFRA target limitations" was a specific reference to the TEFRA "market basket percentage increase."

IV.

The Hospital argues that if the Division correctly interpreted the term "TEFRA target limitations" in N.J.S.A. 10:52-5.17(a) to mean the "applicable percentage increase" under TEFRA, the Division erred by finding that the regulation incorporated future amendments to TEFRA. The Hospital argues that under the version of TEFRA that was in effect when the regulation was adopted, the "applicable percentage increase" was the TEFRA "market basket percentage increase." The Hospital argues that the Division could not apply changes to the definition of "applicable percentage increase" enacted by Congress after the regulation was adopted.

In support of this argument, the Hospital relies upon the principles of statutory construction enunciated in In re Commitment of Edward S., 118 N.J. 118 (1990). In that case, the Court stated:

> The general rule is that when a statute incorporates another by specifically referring to it by title or section number, only the precise terms of the incorporated statute as it then exists become part of the

> incorporating statute; absent language to the contrary, subsequent amendments to the incorporated statute have no effect on the incorporating statute. Indeed, even repeal of the incorporated statute does not ordinarily affect the incorporating statute. The latter remains in force just as it would if the referenced words had been written directly into it. On the other hand, if a statute, instead of incorporating the terms of another statute, incorporates a general body of law, the rule is that subsequent changes in that body of law do become part of the incorporating statute.
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> [Id. at 132-33 (citing N. Singer, 2A Sutherland Statutory Construction, § 51.07; 51.08 (Sands 4th ed. 1984 & Supp. 1989)).]

See also Hassett v. Welch, 303 U.S. 303, 314, 58 S. Ct. 559, 564, 82 L. Ed. 858, 866-67 (1938) (noting that when a statute adopts the provisions of another statute, the adoption incorporates the statute as it existed at that time and does not include subsequent amendments to the adopted statute, unless a contrary intent is indicated). The Hospital's reliance upon the general rule of construction in Commitment of Edward S. and Hassett is misplaced.

Here, the Division referred to TEFRA when it adopted N.J.A.C. 10:52-5.17(a), but there is no indication that it intended to incorporate the provisions of TEFRA which existed at that time. The Division found that the phrase "the factor recognized under the TEFRA target limitations" in N.J.A.C. 10:52-5.17(a) was intended to mean the "target limitations" as determined in

accordance with the version of TEFRA that is in effect for the year in which the rates are set. It was not intended to incorporate the specific provisions of TEFRA as they existed at the time the rule was adopted.

As the Division notes, the language of N.J.A.C. 10:52-5.17(a) is forward looking. The regulation states that "the economic factor will be the factor recognized under the TEFRA target limitations." Ibid. (emphasis added). The language of the regulation supports the Division's view that the TEFRA target update factor must be the inflation factor that is in existence at the time it sets the rates.

Moreover, as noted previously, a state participating in the Medicaid program may use the TEFRA target limitations to provide the federal government with assurance that the state will comply with Medicare's upper payment limits. Interpreting the term "TEFRA target limitations" to incorporated amendments to TEFRA enacted after the rule's adoption, allows the State to provide the federal Medicaid agency with assurance that it will comply with the upper-payment limits.

The Hospital also argues that the Division's interpretation of the regulation is in conflict with N.J.A.C. 1:30-2.2(c), which provides:

> [a]ny agency incorporating any section of a source by reference shall adopt and file as a rule appropriate language indicating:
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> 1. What is incorporated including either:
>
> i. The specific date or issue of the section of the source incorporated; or
>
> ii. A statement indicating whether the section incorporated includes future supplements and amendments.
>
> 2. Where and how a copy of the section may be obtained.

As the ALJ and Director noted in their respective decisions, the regulation at issue here does not incorporate any specifically designated sections of TEFRA. The regulation only incorporates a concept used in TEFRA, specifically, the TEFRA rate of increase. Therefore, the Division's interpretation of the regulation does not contravene N.J.A.C. 1:30-2.2(c).

V.

The Hospital further argues that the Division erred by finding that it is not entitled to an incentive bonus payment under TEFRA. According to the Hospital, the reference in the regulation to "TEFRA target limits" is a general reference to TEFRA, which incorporates the entire TEFRA statutory scheme, including incentive bonus payments for "efficient" hospitals provided for in that legislation. We find no merit in this argument.

As the ALJ and Director noted in their respective decisions, there is nothing in the rule, which suggests the Division intended to incorporate the entire TEFRA statutory scheme into its Medicaid ratemaking process. Indeed, incentive or bonus payments are not mentioned in N.J.A.C. 10:52-5.17(a), in the comments provided when the rule was proposed in 1993, or in the Division's responses to those comments.

Here, the Division found that the intent at the time the rule was adopted was to use the TEFRA target limitation, specifically, the TEFRA "applicable percentage increase," as an inflationary adjustment for determining Medicaid reimbursement rates. Under the rule, the economic factor is the TEFRA "applicable percentage increase," and it does not include the TEFRA incentive bonus payments.

The Hospital argues that the Division's interpretation of the regulation is inconsistent with the policies and goals of TEFRA. The Hospital contends that rather than rewarding efficiency, the Division "punished" efficient hospitals by providing them with a lesser increase in their rates than other less efficient hospitals received. The Hospital therefore argues that the Division's interpretation of the regulation is arbitrary, capricious, and unreasonable.

We are convinced that these arguments are without sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E). We conclude the Division did not err by finding that N.J.A.C. 10:52-5.17(a) did not incorporate the entire TEFRA statutory scheme, including the incentive bonus payments provided for in TEFRA.

VI.

In addition, the Hospital argues that by interpreting the regulation to incorporate amendments to TEFRA that were not enacted until after N.J.A.C. 10:52-5.17(a) was promulgated, the Division improperly engaged in retroactive rulemaking. The Hospital contends the Division failed to afford the Hospital and other regulated entities notice of its proposed interpretation of the rule, and did not provide them with an opportunity to comment, as required by the Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 to -15. The Hospital contends that because the agency did not comply with the APA's rulemaking procedures, it was denied due process.

The APA defines an "administrative rule" as an "agency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice requirements of any agency." N.J.S.A. 52:14B-2(e). When an administrative agency action meets that definition, "its validity requires compliance with the

specific procedures of the APA that control the promulgation of rules." Airwork Serv. Div., Div. of Pac. Airmotive Corp. v. Dir., Div. of Taxation, 97 N.J. 290, 300 (1984), cert. denied, 471 U.S. 1127, 105 S. Ct. 2662, 86 L. Ed. 2d 278 (1985).

Whether an agency must undertake formal rulemaking depends on the extent to which the agency's action

> (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.
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> [Metromedia, Inc. v. Dir., Div. of Taxation, 97 N.J. 313, 331-32 (1984).]

Formal rulemaking may be required if the factors favoring rulemaking predominate. Id. at 331.

Although the Division's interpretation applies to a broad segment of the regulated population, and it is intended to apply to all similarly-situated hospitals, the interpretation was not

intended to operate only in future cases. Furthermore, the Division interpreted the regulation, which has been in effect since 1993. As we have determined, the Division's interpretation is consistent with the language of the rule. It was not inconsistent with any previously-announced interpretation of policy. In addition, the Division's interpretation of the rule was not a material or significant change of past agency policy.

Therefore, the Division's interpretation of N.J.A.C. 10:52-5.17(a) does not constitute "rulemaking" under the APA. The Division was not required to engage in the APA's rulemaking procedures before implementing and applying its interpretation to the Hospital.

VII.

The Hospital further argues that the Division abused its discretion by summarily deciding its administrative appeal without permitting the Hospital to complete discovery. The argument is entirely without merit.

Generally, a motion for summary judgment should not be granted if the opposing party has not been afforded a reasonable opportunity for discovery. Wilson v. Amerada Hess Corp., 168 N.J. 236, 253-54 (2001). However, to warrant denial of a motion for summary judgment on this basis, the party opposing the motion must demonstrate "with some degree of particularity the likelihood that

[the] discovery will supply the missing elements" of its case and therefore influence the outcome of the litigation. Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div.) (quoting Auster v. Kinoian, 153 N.J. Super. 52, 56 (App. Div. 1977)), certif. denied, 177 N.J. 493 (2003). Furthermore, a decision whether to grant a motion to compel discovery is reviewable only for an abuse of discretion. Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011).

The Hospital contends that it had good cause to communicate with R.S. and compel his deposition. According to the Hospital, R.S. had "intimate knowledge" regarding the Division's intended definition of N.J.A.C. 10:52-5.17(a) and its application in setting the Hospital's reimbursement rates.

Based on certain handwritten notes and calculations, the Hospital asserts that R.S. may have personally calculated an incentive payment included in the Hospital's 1990 cost report. The Hospital asserts that this was the only evidence created at the time the regulation was promulgated.

According to the Hospital, R.S.'s knowledge as to why the incentive payment was included in the 1990 report is "crucial to this dispute." The Hospital also asserts that the ALJ should have completed his in camera review of the records that the Division

withheld, because if discoverable, these records would provide some evidence regarding the Division's intent.

We are convinced, however, that the Division did not abuse its discretion by finding that summary decision was appropriate and further discovery not warranted. Here, the Division made a legal decision when it interpreted the meaning of the regulation, based on its language, the regulatory history, and other legal sources.

The Division was not required to allow the Hospital to communicate with or depose R.S. before addressing that legal issue. Whatever personal views R.S. may have as to the meaning of the regulation, they are not binding upon the Division or its Director. Furthermore, if R.S. prepared the Hospital's cost report for 1990 and included an incentive bonus payment, there is no evidence that he did this in accordance with any specific announced policy of the Division.

Moreover, summary decision was appropriate even though the ALJ had not completed his in camera review of the documents that the Division had withheld. The Hospital contends that the documents are relevant because they relate to the Division's implementation and interpretation of the regulation. However, as we have determined, the Division's interpretation of the regulation was a legal determination. We cannot assume that the records were

discoverable, or that they had any specific bearing on the legal issues resolved by the ALJ and the Director.

We note, however, that both the Division and the Hospital sought summary decision on the issues raised in the administrative appeal. Thus, the Hospital apparently believed the legal issues presented could be resolved based on the existing record, without the need for further discovery. The ALJ and the Director did not err by finding that the record was sufficient to resolve the legal questions presented.

Affirmed.