



7-17-2008

CUMBERLAND MANOR NURSING HOME,  
Petitioner, vs. TENNESSEE DEPARTMENT OF  
HEALTH, BUREAU OF HEALTH LICENSURE  
AND REGULATION, Respondent

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**BEFORE THE TENNESSEE DEPARTMENT OF HEALTH  
BOARD FOR LICENSING HEALTH CARE FACILITIES**

<b>CUMBERLAND MANOR NURSING</b>	)	
<b>HOME,</b>	)	
	)	
<b>Petitioner,</b>	)	
	)	
<b>v.</b>	)	<b>Docket No. 17.17-099303J</b>
	)	
<b>TENNESSEE DEPARTMENT OF</b>	)	
<b>HEALTH, BUREAU OF HEALTH</b>	)	
<b>LICENSURE AND REGULATION</b>	)	
	)	
<b>Respondent.</b>	)	

**ORDER GRANTING  
STATE’S MOTION TO DISMISS**

This matter came on to be heard on July 17, 2008 via teleconference hearing upon the State’s Motion to Dismiss. Ms. Erin Begley was present and represented the State. Mr. Christopher Vrettos<sup>1</sup> and Mr. Christopher Puri were present on behalf of Petitioner Cumberland Manor Nursing Home (hereinafter “Cumberland Manor”).

The State filed a Motion to Dismiss Petitioner Cumberland Manor’s Request for Contested Case Hearing and Petition for Declaratory Order. The State asserts that Petitioner Cumberland Manor is not entitled to a contested case hearing pursuant to T.C.A. §68-11-208 because Petitioner has not been “aggrieved by a decision or action of the department or board.” The State also moves for dismissal of Petitioner Cumberland Manor’s Petitioner based upon its

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<sup>1</sup> Mr. Vrettos argued Petitioner’s response in opposition to the motion to dismiss.

argument that the Petitioner does not have standing to obtain declaratory order relief.

### ***Introduction***

Petitioner Cumberland Manor filed a “Request for Contested Case Hearing and Petition for Declaratory Order” on May 28, 2008. On June 12, 2008, the State filed its Motion to Dismiss. Petitioner opposes the Motion to Dismiss.

### ***Background***

The Tennessee Board for Licensing Health Care Facilities, which is administratively attached to the Tennessee Department of Health, Division of Health Care Facilities, is responsible for state licensure of nursing homes, and, if needed, any disciplinary action against nursing homes for violations of state regulations. Surveyors employed by the Tennessee Department of Health inspect all licensed nursing homes on an annual basis. Surveys are also conducted, as necessary, in response to complaints by the public.

The Tennessee Department of Health has a contract with the Federal Center for Medicare and Medicaid Services (CMS) to conduct surveys of nursing homes. Pursuant to that contract, Department of Health surveyors inspect each nursing home that participates in the Medicare/Medicaid reimbursement program to ensure compliance with applicable federal laws and rules.

If a nursing home is both licensed by the State of Tennessee and certified for Medicare/Medicaid reimbursement, Department of Health surveyors conduct the state licensure and federal certification surveys during the same

survey visit, rather than making two separate visits. When Tennessee Department of Health surveyors complete a nursing home survey, the survey findings are submitted to the Federal Center for Medicare and Medicaid Services (CMS). Additionally, the Tennessee Department of Health is required to investigate complaints against nursing homes made by members of the public, and any “incidents” that a nursing facility reports, which could violate the conditions of the nursing home participating in the Medicare/Medicaid reimbursement program. CMS makes any final deficiency determinations, and may impose sanctions or fines to encourage compliance with federal regulations.

State survey agencies do not have Medicare/Medicaid determination-making functions or authority. That authority is delegated to CMS’s Regional Offices. See: <http://www.cms.hhs.gov/CertificationandCompliance/Downloads/CertandComplianceProcess.pdf>.

42 CFR 483, *et seq.*, sets forth the requirements for states and long term care facilities, including standards and certification. 42 CFR 498, *et seq.*, contains federal appeal procedures for facilities to appeal determinations (by CMS) that affect a skilled nursing facility’s or long-term nursing facility’s participation in the Medicare/Medicaid programs. There are also federal procedures in place if a facility believes that state surveyors did not conduct a survey properly or accurately.

## **DISCUSSION**

### ***Rule 12.02(6) Motions to Dismiss***

Rule 12.02(6) of the *Tennessee Rules of Civil Procedure* provides that a party may file a motion to dismiss if the pleading requesting the claim for relief fails to state a claim upon which relief can be granted. At the hearing of the motion to dismiss, the parties argued certain facts which were not contained in the pleadings. No affidavits or other exhibits were filed in support of those facts. Accordingly, the parties were informed at the motion hearing that matters outside the pleadings would not be considered for purposes of the Motion to Dismiss.

A motion to dismiss for failure to state a claim upon which relief can be granted admits the truth of all relevant and material averments contained in the Petition, but asserts that such facts do not constitute a cause of action as a matter of law. Mills v. Shelby County Election Commission, 218 S.W. 3d 33, 39 (Tenn. Ct. App. 2006), *perm. to appeal denied* (Tenn. 2006). A court is required to construe liberally all relevant and material allegations in the petition in favor of the petitioner. Stein v. Davidson Hotel Co., 945 S.W.2d 714, 716 (Tenn. 1997).

### ***Facts Set Forth in Cumberland Manor's Petition for Contested Case Hearing and Declaratory Order***

1. At all relevant times, Cumberland Manor is and was a licensed nursing home as defined by T.C.A. §68-11-201. Cumberland Manor is located at 4343 Hydes Ferry Pike, Nashville, Tennessee.

2. From October 29, 2007 until November 13, 2007, surveyors from the Tennessee Department of Health, Bureau of Health Licensure and Regulation, Middle Tennessee Regional Office, conducted an annual survey<sup>2</sup> and complaint investigation at Cumberland Manor.

3. The state surveyors found that Cumberland Manor was not in compliance with various state regulations. The state surveyors also found that the facility was not in substantial compliance with federal requirements for participating in Medicare and/or Medicaid programs.

4. On December 5, 2007, state surveyors from the Tennessee Department of Health, Bureau of Health Licensure and Regulation, Middle Tennessee Regional Office of Health Care Facilities conducted a “revisit survey” at Cumberland Manor.

5. The “revisit” surveyors found Cumberland Manor remained in noncompliance with various regulations.

6. The Bureau of Health Licensure and Regulation failed to give Cumberland Manor notice of the findings of its “revisit survey” within 10 days.

***Undisputed Facts set forth in the State’s Motion to Dismiss***

7. The Commissioner of Health has the authority granted by statute, T.C.A. §68-11-210(a)(3)(5) to suspend new admissions to a nursing home, and to impose a civil penalty against a nursing home pursuant to T.C.A. §68-11-207(b) (1). The Commissioner did not exercise that authority against the

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<sup>2</sup> Rule 1200-8-6-.01(65), *Rules of Tennessee Department of Health, Board for Licensing Health Care Facilities, Division of Health Care Facilities, Standards for Nursing Homes*, defines “survey” as: “An on-site examination by the [Tennessee] department [of Health] to determine the quality of care and/or services provided”.

Petitioner in this matter. No decision or action was taken by the Commissioner of the Department of Health or the Board for Licensing Health Care Facilities. Petitioner Cumberland Manor does not dispute that Commissioner did not suspend new admissions, impose civil penalties, or institute other disciplinary measures.

8. The surveyors at the Tennessee Department of Health are responsible for conducting an annual state licensing survey as described in T.C.A. §68-11-210. In addition to conducting an annual state licensing survey, the surveyors also are responsible for conducting a federal recertification survey pursuant to a contractual agreement with the Center for Medicare and Medicaid Services (CMS).

#### **APPLICABLE LAW AND LEGAL CONCLUSIONS**

1. Petitioner Cumberland Manor asserts that the Department of Health surveyors failed to give Cumberland Manor notice of its “revisit survey” findings within 10 days following the “resurvey”. It alleges that the failure of the Department of Health to supply the notice of its “revisit survey” findings within 10 days deprived Cumberland Manor “of the opportunity to expeditiously correct any alleged deficiencies.”

2. Importantly, Petitioner Cumberland Manor does not assert that the Commissioner or the Department of Health suspended admissions, assessed fines, or took any action against Petitioner’s state license such as suspension, revocation, probation, etc.

3. While the state Department of Health surveyors supply information to CMS, pursuant to the contract with the Center for Medicare/Medicaid Services, it is CMS which must, as is set forth in 42 CFR 483 – 498, determine whether or not federal Medicare and Medicaid regulations have been violated.

4. Further, 42 CFR 483 permits CMS to allow for some “variances” of alleged deficiencies under certain conditions.

### ***Petitions for Declaratory Orders***

5. T.C.A. § 4-5-223 provides as follows:

Declaratory orders.---

(a) Any affected person may petition an agency for a declaratory order as to the validity or applicability of a ***statute, rule or order*** within the primary jurisdiction of the agency. The agency shall:

(1) Convene a contested case hearing pursuant to the provisions of this chapter and issue a declaratory order, which shall be subject to review in the chancery court of Davidson County, unless otherwise specifically provided by statute, in the manner provided for the review of decisions in contested cases; or

(2) Refuse to issue a declaratory order, in which event the person petitioning the agency for a declaratory may apply for a declaratory judgment as provided in §4-5-225

(b) A declaratory order shall be binding between the agency and parties on the state of facts alleged in the petition unless it is altered or set aside by the agency or a court in a proper proceeding.

(c) If an agency has not set a petition for a declaratory order for a contested case hearing within sixty (60) days after receipt of the petition, the agency shall be deemed to have denied the petition and to have refused to issue a declaratory order.

(d) Each agency shall prescribe by rule the form of such petitions and the procedure for their submission, consideration and disposition. (Emphasis added.)

6. T.C.A. § 68-11-208 states:

**Hearings before board---Judicial review.**---(a) Any licensee, or applicant for license, ***aggrieved by a decision or action of the department or board***, pursuant to this part, may request a hearing before the board.

(b) These proceedings and judicial review of the board's decision shall be in accordance with the Uniform Administrative Procedures Act[.]

7. Part 2 of the Tennessee Health Facilities and Resources Act, which addresses the regulation of Health and Related Facilities, does not provide a definition of "aggrieved".

8. A review of statutory law and case law does not reveal the definition or legal meaning of an "aggrieved person" as contemplated by the Health Facilities and Resources Act.

9. Petitioner urges the undersigned to adopt an extremely broad interpretation or definition of the term "aggrieved person". A nursing facility's merely being unhappy with a survey or disagreeing with a survey would fit the definition of "aggrieved person" suggested by Petitioner.

10. The State argues that an "aggrieved" licensee is a licensee who has actually had proceedings against its license, suspension of admissions, imposition of fines, and other disciplinary measures by the Department or Board.

11. Petitioner asserts that it seeks a declaratory order which "invalidates the findings of deficiencies cited as a result of the initial survey and the revisit survey".

12. If the undersigned was to adopt Petitioner's definition of "aggrieved person", any licensee who disagreed with a state survey would be entitled to petition the board for a declaratory order invalidating the survey. Doubtless

the Board would be kept extremely busy double-checking and reviewing each survey performed by Department of Health surveyors.

13. The fact that the Commissioner or Department of Health did not institute disciplinary measures against Petitioner was in the Petitioner's favor.

14. There is no language in either T.C.A. §4-5-223 or T.C.A. §68-11-208 which suggests that the legislature intended for the Board for Licensing Health Care Facilities to review any and all state surveys with which a nursing facility disagreed, in the absence of disciplinary measures by the state. If such were the case, the Board would be placed in the position of giving "advisory opinions" on surveys when there is no real case or controversy presented.

15. The Court in Huggins v. Nichols, 440 S.W. d 618, 620 (Tenn. 1968) discusses what constitutes an "aggrieved party. The Huggins court states that:

[T]he general rule is that a plaintiff or defendant cannot appeal or prosecute...a judgment, order, or decree in his own favor, since he is not aggrieved thereby. Ordinarily a defendant is not aggrieved...by a voluntary dismissal or nonsuit. This rule has been so applied as to prevent an appeal merely for the purpose of having a decree in appellant's favor affirmed.

16. In administrative state civil service cases, the term "aggrieved" or "grievant" is used to denote a person who has been subject to *disciplinary action* such as suspension, demotion, or termination. Such disciplinary actions must actually effect a change in the employee's job. Evaluations, written and/or verbal reprimands, and other employer administrative or supervisory assessments, are not considered *grievable matters* nor is the person considered "aggrieved". As such, non-grievable matters cannot be

appealed to the Administrative Judge (sitting for the Civil Service Commission) or the Civil Service Commission.

17. Whether or not a party is “aggrieved” for purposes of being allowed to pursue an administrative civil service appeal is analogous to the Cumberland Manor situation.

18. In this matter, no disciplinary action was taken by the department or board against Petitioner’s license, and no disciplinary action was taken to suspend admissions to the facility, assess a fine, or otherwise institute disciplinary measures against Petitioner.

19. The undersigned declines to find that Petitioner is an “aggrieved party” as contemplated by T.C.A. § 68-11-208.

20. The undersigned agrees with the State that because Petitioner is not an “aggrieved party” as defined by T.C.A. § 68-11-208, Petitioner has no standing to pursue a declaratory order action before the Board.

### ***Statutory Construction***

21. Petitioner also urges the undersigned to give a very broad statutory construction to the terms “statute”, “rule”, or “order” as contemplated by T.C.A. § 4-5-223.

22. Pursuant to T.C.A. §4-5-223, it is necessary to ask whether the validity or applicability of a statute, rule or order within the jurisdiction of the agency (the Department of Health) is at issue in this matter, such that this matter is properly subject to a declaratory order proceeding.

23. In the matter before the undersigned, Petitioner does not assert that the relevant statutes, T.C.A. §68-11-201, *et seq.*, are not valid or were not correctly applied in this matter. Nor does the Petitioner assert that applicable state rules are not valid or applicable in this matter. The Petitioner does not allege that the Commissioner for the Tennessee Department of Health issued an invalid order. There is no averment by Petitioner that any order of the Commissioner's was incorrectly applied to this situation.

24. Rather, Petitioner asserts, in its Petition, that the State surveyors abused their discretion in conducting the initial survey, refused to consider certain evidence, attributed incorrect, inaccurate and/or misleading statements to Petitioner's staff, made findings without adequate factual support, misinterpreted and misapplied "relevant state regulations" (no specific regulations which may have been "misinterpreted or misapplied" were cited), and "misinterpreted and/or misapplied relevant legal standards (no specific "legal standards" which may have been "misinterpreted or misapplied" were cited in the Petition).

25. Petitioner also contends that the Department of Health failed to give Petitioner notice of its revisit survey findings within 10 days of the survey. Petitioner cites no state or federal statute, rule, or regulation as authority for the statement that the State's failure to give Petitioner notice of its "revisit survey" findings, within 10 days of the "revisit survey", violates any state statute, rule, or regulation.

26. It is noted that 42 CFR 488.318 sets forth categories of “inadequate survey performance” by state surveyors. Additionally, 42 CFR 488.320 provides federal sanctions for a state’s inadequate survey performance. Finally, 42 CFR 488.331 provides an informal dispute resolution procedure for a nursing home to dispute state survey findings, upon the facility’s receipt of the “official statement of deficiencies” from CMS.

27. For a complete analysis, a question which must be asked is whether or not the state survey constituted “a statute, rule or order” as contemplated by T.C.A. §4-5-223.

28. T.C.A §4-5-102(7) defines an “order” as:

[A]n agency *action* of particular applicability that determines the legal rights, duties, privileges, immunities or other legal interests of a specific person or persons. (Emphasis added.)

29. Neither the Department of Health, the Board, or the agency issued an “order” in this matter as defined in T.C.A §4-5-102 (7).

30. Petitioner cites no specific statute, regulation, or rule which was incorrectly applied.

31. Petitioner does not assert that the Department of Health surveyors violated or failed to appropriately apply any particular state or federal statute, rule, or regulation. Its vague reference to “failure to supply findings within 10 days” of the “re-survey visit” is not sufficient. As such, the Petition fails to state a basis for a declaratory order proceeding.<sup>3</sup>

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<sup>3</sup> Neither the Petitioner nor the State mentioned in its pleadings that State surveyors routinely conduct “exit interviews” with nursing facility administrators, at which the surveyors review their findings with the administrators. If that was done in this matter, Petitioner would have

32. Petitioner argues that the state construes T.C.A. §4-5-223 too narrowly. The undersigned respectfully disagrees.

33. Statutory construction requires courts to ascertain and effectuate the legislature's intent as reflected in the statute's language. Newsom v. White, 2003 WL 22994288 (Tenn. Ct. App. 2003).

34. Statutory construction involves giving statutory language its natural and ordinary meaning in order to accomplish the intention of the legislature. Carr v. Ford, 833 S.W. 2d 68, 69 (Tenn. 1992); State v. Williams, 690 S.W. 2d 517 (Tenn. 1985).

35. If a statute is unambiguous, the plain and ordinary meaning of the statute must be followed. Robinson v. Fulliton, 140 S.W. 3d 312, 317 (Tenn. Ct. App. 2002), perm. to app. *denied* (Tenn. 2003).

36. It is a well established principle that the Court's role in construing statutes is to " 'ascertain and give effect to' the legislative purpose without unduly restricting or expanding a statute's coverage beyond its extended scope." Poper v. Rollins, 90 S.W.3d 682,684 (Tenn. 2002).

37. "The legislative intent and purpose are to be ascertained primarily from the natural and ordinary meaning of the statutory language, *without a forced or subtle interpretation that would limit or extend the statute's application.*" Mooney v. Sneed, 30 S.W.3d 304,305 (Tenn. 2000), quoting State v. Blackstock, 19 S.W.3d 200,210 (Tenn. 2000). (Emphasis added.)

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had "notice" of the State's "revisit survey" findings. Because neither party addressed an "exit interview" being performed, whether the Petitioner received actual notice via an "exit interview" will not be considered for purposes of this discussion.

38. When a statute is without contradiction or ambiguity, courts should not force its interpretation or construction, and courts are not at liberty to depart from the words of the statute. Gleaves v. Checker Cab Transit Corporation, Inc., 15 S.W. 3d 799, 803 (Tenn. 2000). It is not for the courts to alter or amend a statute. Gleaves v. Checker Cab Transit Corporation, Inc., 15 S.W. 3d 799, 803 (Tenn. 2000), *citing* Town of Mount Carmel v. City of Kingsport, 397 S.W. 2d 379, 382 (1965).

39. A court must not question the “reasonableness of a statute or substitut[e] [its] own policy judgments for those of the legislature.” BellSouth Telecomms. Inc. v. Greer, 972 S.W.2d 663,673 (Tenn. Ct. App. 1997). Courts must “presume that [what the] legislature says in a statute [is] what it means and means in a statute what it says there.” BellSouth Telecomms. Inc. v. Greer, 972 S.W.2d 663,673 (Tenn. Ct. App. 1997).

40. The plain and ordinary language of the T.C.A. § 4-5-223(a) states:

Any affected person may petition an agency for a declaratory order as to the validity or applicability of a **statute, rule or order** within the primary jurisdiction of the agency. (Emphasis added.)

41. Petitioner cites no specific statute, rule, or order as being invalid, or being applied incorrectly. The undersigned declines to expand the meaning of “order” to include a survey conducted by Department of Health surveyors.

42. Construction of and interpretation of the application of *federal* rules and regulations is not within the jurisdiction of the state agency in this matter.

43. Federal regulations provide administrative proceedings for the Petitioner to pursue if it disagrees with the Statement of Deficiencies issued by the CMS. Additionally, federal regulations provide federal sanctions for a state's inadequate survey performance.

44. The Petition fails to state *specific* state statutes, rule or orders which are invalid or were wrongly applied. The Petition fails to address the application of *specific* state statutes, rules, or orders which would confer jurisdiction upon the agency.

45. Conclusory statements set forth in the Petition are not sufficient.

46. In this matter, if the truth of all relevant and material facts contained in the Petition are deemed true, such facts do not constitute a cause for a declaratory order as a matter of law.

47. Federal administrative law provides the Petitioner with an avenue to address its dissatisfaction with the surveyors' findings. In the absence of disciplinary proceedings against Petitioner by the State, neither State statutes nor State regulations provide a remedy for Petitioner.

Respondent's Motion to Dismiss is well taken. The undersigned agrees with Respondent that the Petition does not state facts or relevant state law which would subject this matter to a contested case hearing for a declaratory order before the Board. Further, to the extent that Petitioner may be alleging violations of federal law, the Board has no jurisdiction to hear such violations.

Respondent Department of Health's Motion to Dismiss is **GRANTED**.

The Cumberland Manor Nursing Home's Petition is **DISMISSED**.

It is so ordered.

This order entered and effective this 30<sup>th</sup> day of July, 2008.

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Joyce Grimes Safley  
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State,  
this 30<sup>th</sup> day of July 2008.



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Thomas G. Stovall, Director  
Administrative Procedures Division