**[Cite as *DHSC, L.L.C. v. Ohio Dept. of Job & Family Servs.*, 2012-Ohio-1014.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| DHSC, LLC, dba Affinity Medical Center, | : | |
| Appellant-Appellee, | : | No. 11AP-424 |
| v. | : | (C.P.C. No. 09CVF12-17825) |
| Ohio Department of Job & Family Services, | : | (REGULAR CALENDAR) |
| Appellee-Appellant. | : | |

D E C I S I O N

Rendered on March 13, 2012

*Bricker & Eckler LLP, Anne Marie Sferra* and *Allen Killworth*, for appellee.

*Michael DeWine*, Attorney General, and *Rebecca L. Thomas*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

**{¶1}** Appellee-appellant, the Ohio Department of Job and Family Services ("ODJFS"), appeals from a judgment of the Franklin County Court of Common Pleas entering judgment in favor of appellant-appellee, DHSC, LLC, dba Affinity Medical Center ("Affinity"), on Affinity's appeal pursuant to R.C. 5112.42(C). For the reasons that follow, we reverse.

## I. Ohio's Hospital Assessment Program

**{¶2}** In 2009, the General Assembly created a hospital assessment fund to be used to pay for the costs of the state's Medicaid program. R.C. 5112.45. The fund is supported by an assessment imposed on Ohio hospitals under R.C. 5112.41 ("hospital assessment program"). The assessment is imposed annually for a period known as an

"assessment program year," which is the 12-month period from October 1 of one year through September 30 of the following year. R.C. 5112.40(B). For the first assessment program year, the law imposed an assessment equal to 1.52 percent of a hospital's total facility costs.[1]

**{¶3}** Each hospital's total facility costs are determined from cost-reporting data submitted to ODJFS. R.C. 5112.41(A). The law provides that a hospital's assessment shall equal the applicable percentage of the hospital's total facility costs for "the hospital's cost reporting period that ends in the state fiscal year that ends in the federal fiscal year that precedes the federal fiscal year that precedes the assessment program year for which the assessment is imposed." R.C. 5112.41(B). A "state fiscal year" is a 12-month period beginning July 1 of one year and ending on June 30 of the following year. R.C. 5112.40(I). Thus, for the first assessment program year (October 1, 2009 through September 30, 2010), the law imposed an assessment on each hospital equal to 1.52 percent of its total facility costs for state fiscal year 2008 (July 1, 2007 through June 30, 2008).

**{¶4}** Under the hospital assessment program, ODJFS is charged with implementing the hospital assessment program. ODJFS is required to notify each hospital of its preliminary determination of the amount of the hospital's assessment ("preliminary determination") for that assessment program year. R.C. 5112.42(A). The hospital may then request that ODJFS reconsider the preliminary determination by submitting a written request for reconsideration, along with written materials setting forth the basis for reconsideration, within 14 days after the preliminary determination was mailed to the hospital. R.C. 5112.42(B). If a timely request for reconsideration is filed, ODJFS is required to reconsider the preliminary determination and may adjust the preliminary determination based on the written materials submitted by the hospital. The

[1] As originally enacted, R.C. 5112.41(B)(1) specified that for the first assessment program year, hospitals would be imposed an assessment equal to 1.52 percent of their total facility costs and that, for the second program year, they would be imposed an assessment of 1.61 percent of their total facility costs. In 2011, the General Assembly adopted legislation amending the hospital assessment program. Among other changes, this legislation deleted the specified assessment percentages for the first two assessment program years and required ODJFS to adopt rules specifying the percentage of hospitals' total facility costs to be used in calculating hospitals' assessments under R.C. 5112.41. 2011 Am.Sub.H.B. No. 153. At all times relevant to this appeal, Affinity was subject to the statutory assessment of 1.52 percent of its total facility costs for the first assessment program year.

result of the reconsideration is considered the final determination of the hospital's assessment for that assessment program year. R.C. 5112.42(B). ODJFS is required to mail each hospital written notice of its final determination of the hospital's assessment for the assessment program year. The hospital may then appeal that final determination to the Franklin County Court of Common Pleas. R.C. 5112.42(C).

## II. Determination of Affinity's Assessment for the First Assessment Program Year

**{¶5}** In February 2006, Affinity was formed by the merger of two separate facilities: Doctors Hospital of Stark County ("Doctors Hospital") and Massillon Community Hospital. Following the merger, these facilities were considered a single hospital with two campuses. On September 4, 2008, the Doctors Hospital facility was closed, and all services were consolidated in the facility previously known as Massillon Community Hospital.

**{¶6}** On September 16, 2009, ODJFS notified Affinity of its preliminary determination of Affinity's assessment under the hospital assessment program for the first assessment program year. On October 7, 2009, Affinity submitted a request for reconsideration of the preliminary determination, asserting that the cost-reporting time period was not a fair representation of Affinity's total facility costs. Affinity argued that the closure of Doctors Hospital on September 4, 2008 resulted in a reduction of its total facility costs of almost $10 million. Affinity claimed that, due to this reduction, its total facility costs for state fiscal year 2009 (July 1, 2008 through June 30, 2009) were a more accurate representation of its facility costs than the state fiscal year 2008 (July 1, 2007 through June 30, 2008) data used by ODJFS in calculating the preliminary assessment.

**{¶7}** Although Affinity's request for reconsideration was filed more than 14 days after the notice of preliminary determination, ODJFS agreed to consider the request. ODJFS refused to modify the preliminary determination, explaining that it was required by statute to impose the first assessment based on Affinity's facility costs during state fiscal year 2008. On October 30, 2009, ODJFS notified Affinity by certified mail of its final determination of Affinity's assessment for the first assessment program year and the payment schedule for the assessment. Affinity received the final determination notice by certified mail on November 3, 2009.

### III. Appeal to Franklin County Court of Common Pleas

**{¶8}** On December 1, 2009, Affinity filed a notice of appeal with ODJFS and the Franklin County Court of Common Pleas. ODJFS moved to dismiss the appeal, arguing that the lower court lacked jurisdiction over the appeal because it was not filed within the time permitted by law. The lower court denied that motion, finding that Affinity's appeal was timely filed based on the date that Affinity received notice of the final determination. The parties then submitted briefs and affidavits. On April 14, 2011, the lower court filed a decision and judgment entry in favor of Affinity, concluding that ODJFS's final determination of Affinity's assessment was unreasonable.

**{¶9}** ODJFS appeals from the denial of its motion to dismiss for lack of jurisdiction and from the lower court's judgment, assigning four errors for this court's review:

> Appellant's First Assignment of Error
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> The lower court erred when it denied ODJFS's motion to dismiss for lack of jurisdiction, because Affinity failed to timely appeal and thus failed to invoke the lower court's jurisdiction.
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> Appellant's Second Assignment of Error
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> The lower court erred by not affirming ODJFS's final determination, in light of the fact that Affinity had failed to provide relevant support for its own theory both before ODJFS and before the lower court.
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> Appellant's Third Assignment of Error
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> The lower court erred in holding that ODJFS's final determination of Affinity's franchise-fee assessment was subject to—and violated—franchise-tax standards.
>
> Appellant's Fourth Assignment of Error
>
> The lower court erred in concluding that, given Affinity's request for reconsideration of its assessment amount, ODJFS could have and should have deviated from the statutory formula for calculating hospital franchise fees and calculated a new assessment amount for Affinity.

## IV. Jurisdiction of Franklin County Court of Common Pleas over Appeal

**{¶10}** In its first assignment of error, ODJFS asserts that the court below erred by denying its motion to dismiss for lack of jurisdiction. ODJFS argued that the lower court lacked jurisdiction because Affinity's appeal was not filed within the time permitted for an appeal from an administrative agency order.

**{¶11}** ODJFS issued the letter notifying Affinity of the final determination of Affinity's assessment on October 30, 2009 and sent the letter to Affinity by certified mail on that same date. Affinity received the letter on November 3, 2009. R.C. 5112.42(C) provides that "[a] hospital may appeal the final determination to the court of common pleas of Franklin [C]ounty." The statute does not provide a procedure for the appeal and, therefore, the process is governed by the general statutory provisions governing appeals from administrative decisions; specifically, R.C. 2505.07, which states that, unless otherwise provided by law, an administrative appeal must be perfected within 30 days of "the entry of a final order of * * * [a] department."

**{¶12}** Affinity filed its notice of appeal of the final determination letter on December 1, 2009.[2] ODJFS moved to dismiss the appeal for lack of jurisdiction, arguing that Affinity did not timely appeal from the final determination. The court below denied the motion to dismiss, concluding that the appeal was timely filed.

**{¶13}** Resolution of ODJFS's motion to dismiss turns on a determination of what constituted "entry of a final order," thereby triggering the 30-day appeal period under R.C. 2505.07. Interpretation of a statute is a matter of law and we review a trial court's interpretation of a statute under the de novo standard of review. *BP Exploration & Oil, Inc. v. Ohio Dept. of Commerce*, 10th Dist. No. 04AP-619, 2005-Ohio-1533, ¶ 10.

**{¶14}** ODJFS argues that it entered a "final order" on October 30, 2009, when it issued and mailed the final determination letter. If that position is correct, the 30-day appeal period would have ended on November 30, 2009, and Affinity's appeal would have

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[2] We note that the clerk of courts' date stamp on Affinity's notice of appeal to the common pleas court reads "2010 DEC - 1 PM12:25," indicating that the notice of appeal was filed on December 1, 2010. However, this appears to be a clerical error. The case was assigned the number 09CVF12-17825, indicating that it was filed in 2009, and the parties agree that the notice of appeal was filed with the clerk of courts on December 1, 2009.

been untimely.[3] By contrast, Affinity argues that the appeal period should be deemed to have begun after it received the final determination letter on November 3, 2009. Affinity claims that its appeal of December 1, 2009, was timely filed because the appeal period did not end until December 3, 2009.

**{¶15}** As the court below noted, we have not previously directly addressed the issue of when the appeal period would begin under the circumstances presented here. This case presents a unique question because of the nature of the administrative process involved in the hospital assessment determination. Under the statute, ODJFS calculates a preliminary determination of each hospital's assessment based on cost-reporting data or other financial statements provided by the hospital. R.C. 5112.42(A). The hospital may then request reconsideration of the preliminary determination and provide written materials setting forth the basis for the reconsideration. R.C. 5112.42(B). If the hospital does not request reconsideration, the preliminary determination becomes the final determination 15 days after it is mailed to the hospital. R.C. 5112.42(A). If reconsideration is requested, the result of the reconsideration constitutes the final determination of the hospital's assessment. R.C. 5112.42(B). As in this case, a hospital may appeal the final determination to the Franklin County Court of Common Pleas.

**{¶16}** Thus, the process employed under the hospital assessment program is notably different from other types of administrative action taken following an administrative hearing or board meeting. There is no docket, journal, or meeting minutes in which the final determination order is entered, as there would be in the context of a hearing or meeting. *Compare In re Pepperney*, 10th Dist. No. 94AP-314, 1994 WL 461799, *4 (Aug. 23, 1994) (holding that there was no final order from which an appeal could be taken under R.C. 2505.07 because the city council's meeting minutes were neither signed nor approved); *Singh v. Holfinger*, 10th Dist. No. 90AP-639, 1991 WL 10936, *4 (Jan. 29, 1991) ("In this case, there is no evidence that appellants' appeal has not been timely filed because there is no evidence as to when the minutes of the village

[3] A 30-day period after October 30, 2009 would actually have ended on November 29, 2009. However, that was a Sunday, and by operation of law the deadline to file the appeal would have advanced to Monday, November 30, 2009. See R.C. 1.14 ("The time within which an act is required by law to be done shall be computed by excluding the first and including the last day; except that, when the last day falls on Sunday or a legal holiday, the act may be done on the next succeeding day that is not Sunday or a legal holiday.").

council had been journalized."). Notwithstanding this distinction, we can look to prior cases involving administrative hearings or board meetings in determining when the time for appeal begins.

**{¶17}** Although no court has yet addressed the exact question presented in this appeal, appellate courts in other districts have reached different conclusions as to whether the time for appeal under R.C. 2505.07 begins when a notice of an administrative ruling or decision is mailed or when that notice is received. The Second, Eighth, and Ninth District Courts of Appeals have held that the time to perfect an appeal of an order of an administrative board under R.C. 2505.07 begins to run when a copy of the final decision is mailed to the interested party or the interested party's attorney. *601 Properties, Inc. v. Dayton*, 2d Dist. No. 11620, 1990 WL 2892, *3 (Jan. 19, 1990); *McPhillips v. Cleveland*, 8th Dist. No. 60687, 1991 WL 125693, *1 (July 3, 1991); *Cornacchione v. Akron Bd. of Zoning Appeals*, 118 Ohio App.3d 388, 392 (9th Dist.1997). By contrast, the Fourth, Sixth, and Eleventh District Courts of Appeals have held that the time to file an appeal begins to run when the interested party receives a mailed copy of the final decision. *Guysinger v. Bd. of Zoning Appeals of City of Chillicothe*, 66 Ohio App.3d 353, 358 (4th Dist.1990); *Sturdivant v. Toledo Bd. of Edn.*, 157 Ohio App.3d 401, 2004-Ohio-2878, ¶ 20 (6th Dist.); *Manholt v. Maplewood Joint Vocational School Dist. Bd. of Edn.*, 11th Dist. No. 91-P-2410, 1992 WL 207800, *2 (Aug. 21, 1992).

**{¶18}** Further, ODJFS argues that this court, like the Second, Eighth, and Ninth Districts, has "either squarely held or strongly suggested" that the mailing of an agency decision triggers the appeal period under R.C. 2505.07, citing *McGath v. Hamilton Loc. School Dist.*, 10th Dist. No. 10AP-340, 2010-Ohio-5445. (Appellant's brief at 8-9.) In *McGath*, a student who had been expelled from school appealed the school board's ruling to the Franklin County Court of Common Pleas. *Id*. at ¶ 2-4. The school board conducted a hearing on the expulsion on December 14, 2009 and voted to affirm the expulsion at that hearing. *Id*. at ¶ 3. The school board sent a copy of the findings of fact and conclusions from the hearing by certified mail on December 21, 2009. The student received the certified mail on December 22, 2009. *Id*. The student filed a notice of appeal with the clerk of courts for the Franklin County Court of Common Pleas on January 20, 2010, but he did not serve the notice on the school board. Instead, the clerk of courts

served the school board with a copy of the notice of appeal on January 27, 2010. *Id*. at ¶ 4.

**{¶19}** The central issue on appeal in *McGath* was whether the student complied with R.C. 2505.04, which states that an administrative appeal is perfected by serving the notice of appeal with the relevant agency. *Id*. at ¶ 11. This court noted that the Supreme Court of Ohio had a pending case addressing the question of whether the clerk of courts' service of a notice of appeal on an administrative agency was sufficient to satisfy R.C. 2505.04. *Id*. at ¶ 13. However, the court noted that, even if the Supreme Court ruled that service by the clerk of courts was sufficient to satisfy R.C. 2505.04, the appeal in this case would have been untimely because the clerk of courts did not serve the school board until January 27, 2010. *Id*. at ¶ 14. The court stated that the school board issued its written decision on December 21, 2009, which allowed the student to appeal by January 20, 2010. However, the question of whether mailing or receipt of the decision constituted entry of a final order was not considered by the court. Thus, the statement that the period for appeal began on the date that the school board issued the written decision was dictum. The student received the school board's written decision on December 22, 2009; therefore, an appeal filed on January 27, 2010 still would have been untimely even if measured from the date of receipt. Because the *McGath* decision did not squarely address the issue of whether mailing or receipt of the decision triggered the 30-day appeal period under R.C. 2505.07, that decision does not control the outcome of the present appeal.

**{¶20}** After reviewing the decisions from other courts of appeals, we find the reasoning of the Sixth District Court of Appeals in *Sturdivant* to be persuasive. Sturdivant was a teacher who had been employed on a limited contract by the Toledo Board of Education ("board"). *Sturdivant* at ¶ 2. Pursuant to a collective bargaining agreement, her status was evaluated by an Intern Board of Review ("IBOR"). *Id*. The IBOR recommended that Sturdivant's contract not be renewed by the board. The board approved the IBOR's recommendation at the board's regular session on April 29, 2002. *Id*. at ¶ 3. Sturdivant met with the IBOR, but it refused to change its recommendation. The IBOR sent Sturdivant a letter on May 9, 2002, confirming its recommendation that her contract not be renewed. The board then sent a letter by certified mail on May 14, 2002, officially notifying Sturdivant that her contract would not be renewed. She received the board's letter on May 17, 2002. *Id*. at ¶ 4. Sturdivant appealed the board's final

decision to the court of common pleas on June 13, 2002. *Id.* at ¶ 21. The board argued that Sturdivant's appeal was not timely because it was filed more than 30 days after the April 29, 2002 meeting where the board approved the recommendation that her contract not be renewed. The common pleas court rejected that argument. *Id.* at ¶ 13.

**{¶21}** On appeal, the Sixth District Court of Appeals affirmed the lower court's conclusion, holding that the appeal was timely filed because it was filed within 30 days of Sturdivant receiving notice of the board's final action on May 17, 2002. *Id.* at ¶ 21. The court concluded that, although the board may have acted at its meeting on April 29, 2002, Sturdivant did not receive actual notice of this final action until she received the board's letter. *Id.* The court noted the general principle that "[r]easonable notice of a final order is essential to due process and fundamental to the right of appeal." *Id.* at ¶ 20, citing *Moldovan v. Cuyahoga Cty. Welfare Dept.*, 25 Ohio St.3d 293, 296 (1986). Further, the court looked to a line of cases from the Supreme Court of Ohio holding that "[i]n the absence of applicable statutory provisions, if certified mail is used to give notice of an order or decision, the appeal time begins to run from the date of receipt." *Sturdivant* at ¶ 20, citing *State ex rel. Francu v. Windham Bd. of Edn.*, 25 Ohio St.3d 351, 352 (1986), citing *State ex rel. Peake v. S. Point Loc. School Dist. Bd. of Edn.*, 44 Ohio St.2d 119, 122 (1975). Accordingly, the court found that Sturdivant's time for appeal began to run when she received the letter notifying her of the board's final action. *Sturdivant* at ¶ 21.

**{¶22}** Under the circumstances presented in this case, we conclude that for purposes of determining whether Affinity's appeal was timely filed, ODJFS's final order should be considered to have been "entered" when Affinity received actual notice of the final determination through receipt of the certified mailing on November 3, 2009. As noted above, there is no docket, journal, or other independently accessible document that reflects ODJFS's final determination of Affinity's assessment. Thus, there was no way for Affinity to ascertain the amount of its assessment until it received the written notice sent by ODJFS. The statute granting a right to appeal a final determination, R.C. 5112.42(C), does not clearly indicate when the time for perfecting an appeal begins. Moreover, under R.C. 5112.46, ODJFS is empowered to adopt rules necessary to implement the hospital assessment statutes, but the only rule that ODJFS has promulgated relating to hospital assessments lacks any information regarding the appeal process. *See* Ohio Adm.Code

5101:3-2-30. Under these circumstances, in order to assure due process to the appealing party, we construe R.C. 5112.42 and 2505.07 as allowing a hospital 30 days from the date of receipt of the written notice of the final determination required under R.C. 5112.42(C) to appeal the final determination to the Franklin County Court of Common Pleas. Because Affinity filed its appeal within 30 days of receiving ODJFS's notice of final determination, the appeal was timely.

**{¶23}** Accordingly, ODJFS's first assignment of error is without merit and is overruled.

## V. Scope of ODJFS's Authority in Reconsideration of Preliminary Determination

**{¶24}** Next, we turn to ODJFS's fourth assignment of error because it involves the threshold question of whether ODJFS had the authority to make the modification Affinity sought. ODJFS asserts that the lower court erred in determining that ODJFS could have and should have deviated from the statutory formula in calculating Affinity's assessment. The lower court applied the standard of review under R.C. 2506.04 and examined whether ODJFS's decision not to modify Affinity's final assessment was "unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record." However, we find that the question of whether ODJFS had authority to grant the modification Affinity sought involves a matter of statutory interpretation, which we review de novo. *BP Exploration & Oil*, 2005-Ohio-1533, at ¶ 10.

**{¶25}** R.C. 5112.42(B) provides that "[o]n receipt of [a] timely request [for reconsideration], the department shall reconsider the preliminary determination and may adjust the preliminary determination on the basis of the written materials accompanying the request." Affinity argues that, pursuant to this provision, ODJFS had the authority to revise the preliminary determination of Affinity's assessment to reflect the reduction in total facility costs resulting from the closure of Doctors Hospital in September 2008. The lower court agreed, concluding that ODJFS was obligated to reconsider its preliminary determination based on Affinity's documentation showing that its annual total costs were reduced following the closure of Doctors Hospital. By contrast, ODJFS argues that the reconsideration process permits a hospital to argue that the statutory formula was

improperly applied but does not allow ODJFS to deviate from that statutory formula.

**{¶26}** The statute clearly provides that, upon a timely request, ODJFS *shall* reconsider a preliminary determination. Accordingly, ODJFS was required to consider Affinity's supporting documentation and reconsider the preliminary determination. Further, the statute provides that ODJFS *may* adjust the preliminary determination as a result of this reconsideration. Thus, the key issue is the permissible scope of adjustments that ODJFS may make as a result of reconsideration.

**{¶27}** In enacting the hospital assessment program, the General Assembly carefully defined the formula to be used in determining a hospital's assessment. The law provided that in the first assessment program year, the assessment "shall equal" 1.52 percent of a hospital's total facility costs. The law further provided that this assessment would be calculated based on a hospital's total facility costs for "the hospital's cost reporting period that ends in the state fiscal year that ends in the federal fiscal year that precedes the federal fiscal year that precedes the assessment program year for which the assessment is imposed." R.C. 5112.41(B). For the first assessment program year, this meant that the assessment would be based on a hospital's total facility costs for the state fiscal year running from July 1, 2007 through June 30, 2008. Thus, the express language of the statute limited ODJFS to considering Affinity's total facility costs from July 1, 2007, to June 30, 2008.

**{¶28}** ODJFS argues that, under the reconsideration process, a hospital may argue that ODJFS improperly applied the statutory formula in calculating the preliminary determination. Affinity claims that this interpretation would reduce the reconsideration process to a mere correction of mathematical errors. Affinity asserts that the phrase "may adjust the preliminary determination" authorizes ODJFS to do more than error correction and that the statute implicitly recognizes this by requiring a hospital to submit written materials in support of its request for reconsideration. Affinity argues that supporting written materials would be unnecessary if reconsideration was limited to correcting typographical or mathematical errors.

**{¶29}** After reviewing the statutes enacting the hospital assessment program, we disagree with Affinity's argument. There is a presumption that every word in a statute is intended to have some effect. *Ford Motor Co. v. Ohio Bur. of Emp. Servs.*, 59 Ohio St.3d

188, 190 (1991). Therefore, the phrase "may adjust" must be presumed to give ODJFS some power to change the preliminary determination. However, when read as a whole, the statutory scheme creating the hospital assessment program demonstrates that ODJFS does not have discretion to make the adjustment Affinity seeks in this case.

**{¶30}** In determining the meaning of the phrase "may adjust" in R.C. 5112.42(B), it is instructive to consider the language in R.C. 5112.41 prescribing the statutory formula for determining a hospital's assessment. R.C. 5112.41(A) provides that a hospital's total facility costs shall be derived from cost-reporting data submitted to ODJFS. The statute further provides that "[t]he cost-reporting data or financial statements used to determine a hospital's assessment *is subject to the same type of adjustments* made to the cost-reporting data under the hospital care assurance program." (Emphasis added.) R.C. 5112.41(A). The hospital care assurance program ("HCAP") is governed by R.C. 5112.01 through 5112.21. ODJFS is authorized to adopt rules for the purpose of administering HCAP. R.C. 5112.03. These rules include provisions for making adjustments to the cost-reporting data used to determine the assessment owed by each hospital under HCAP. *See* Ohio Adm.Code 5101:3-2-08.

**{¶31}** Thus, the reference to adjustments to the cost-reporting data upon which the assessment is determined suggests another function of the reconsideration process under R.C. 5112.42(B). In addition to notifying ODJFS of mathematical or typographical errors, a hospital would have an opportunity to argue that its cost-reporting data should have been adjusted under R.C. 5112.41(A) and that the preliminary determination was inaccurate due to the failure to make the appropriate adjustment. However, in this case Affinity did not seek an adjustment to its cost data for state fiscal year 2008. Rather, Affinity argued that its assessment should be based on its cost data for state fiscal year 2009. Nothing in R.C. 5112.41 or 5112.42 suggests that ODJFS may consider a time period other than the one defined in R.C. 5112.41(B), which for the first assessment program year was state fiscal year 2008.[4] Yet that is precisely what Affinity requested in

[4] We note that under the rules governing the HCAP program, it appears that there are limited situations in which data from outside the prescribed cost-reporting period may be used. *See, e.g.*, Ohio Adm.Code 5101:3-2-08(B)(1)(a) (providing that for new hospitals, the first available cost report will be used until a cost report meeting the requirements of the rule is available). However, none of those limited exceptions allow for the type of adjustment Affinity sought.

this case. There is no dispute that Doctors Hospital closed in September 2008 *after* the cost-reporting period defined in the statute for the first assessment program year. Therefore, ODJFS did not have authority under the statute to adjust its calculation of Affinity's total facility costs for the period from July 1, 2007 through June 30, 2008, to account for the closure of Doctors Hospital. Any cost savings resulting from the closure of Doctors Hospital in September 2008 would be reflected in Affinity's assessment for the *second* assessment program year, which under the statute would be based on Affinity's cost-reporting data for July 1, 2008 through June 30, 2009. The court below erred in concluding that ODJFS had authority under the reconsideration process to adjust Affinity's preliminary determination to account for cost savings resulting from an event that occurred after the statutorily defined cost-reporting period.

**{¶32}** Accordingly, ODJFS's fourth assignment of error is sustained.

## VI. Application of Franchise-Tax Standards to Hospital Assessment Program

**{¶33}** We next turn to ODJFS's third assignment of error, in which it asserts that the lower court erred in applying franchise-tax standards to the hospital assessment program and in concluding that Affinity's assessment violated these standards. To properly analyze this assignment of error, it is necessary to ascertain the precise nature of Affinity's challenge to the hospital assessment program. The lower court concluded that "[Affinity] does not challenge the constitutionality" of the hospital assessment program but, rather, "contends that the statutory scheme, when applied to [Affinity], has resulted in an assessment that is not commensurate with Appellant's actual total facility costs for the first Assessment Program Year." (Decision at 6-7.) Based on this conclusion, the trial court applied the statutory standard of review for administrative decisions.

**{¶34}** We agree with the lower court that Affinity did not present a *facial* challenge to the constitutionality of the hospital assessment program. However, upon review of the briefs filed before us and in the court below, we conclude that Affinity has asserted an *as-applied* constitutional challenge to the hospital assessment program.[5]

[5] *See* Affinity's Brief at 24 ("That is, when the Hospital Franchise Fee assessment exceeds a reasonable value or is derived from calculations that are unreasonable or unjust, it should be deemed unconstitutional."); Affinity's Brief to Franklin County Court of Common Pleas at 7-8 ("[T]he assessment imposed on a hospital

Accordingly, we will first analyze the third assignment of error under the standard of review applied by the trial court and then consider it under the applicable standard of review for an as-applied constitutional challenge.

**{¶35}** Under R.C. 2506.01(A), with limited exceptions, every final order, adjudication, or decision of an administrative agency, such as ODJFS, may be reviewed by the appropriate court of common pleas. In conducting such a review, the court of common pleas may find that an administrative agency's decision was "unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record." R.C. 2506.04. In this case, the court of common pleas concluded that ODJFS's decision was unreasonable because it did not adjust Affinity's assessment to reflect the reduction in costs following the closure of the Doctors Hospital facility.

**{¶36}** Pursuant to R.C. 2506.04, an appellate court has limited authority in reviewing a lower court's decision in an appeal of an administrative decision. "The appellate court is to determine only if the trial court has abused its discretion." *Krumm v. Upper Arlington City Council*, 10th Dist. No. 05AP-802, 2006-Ohio-2829, ¶ 11, citing *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.*, 40 Ohio St.3d 257, 261 (1988). An abuse of discretion occurs when a court's decision is "unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

**{¶37}** The court below did not find that ODJFS improperly applied the statutory formula in calculating Affinity's assessment. Rather, the court found that it was unreasonable for ODJFS to impose the assessment that resulted from applying the statutory formula because that assessment was calculated by including costs for the Doctors Hospital facility that closed in September 2008. We disagree with the lower court's conclusion.

**{¶38}** An administrative agency must apply statutes as they exist. *See State ex rel. Columbus Bd. of Edn. v. Thompson*, 10th Dist. No. 89AP-60, 1989 WL 125065, *2 (Oct. 19, 1989) ("An administrative agency like the Board of Tax Appeals has no authority

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must be reasonable and fair, as applied to the taxpayer, to be constitutional. * * * Affinity Medical Center challenges the hospital assessment statute as unreasonable in amount, *as applied to it* for the Assessment Program Year beginning October 1, 2009.") (emphasis added).

to determine the constitutionality of statutes but, instead, is required to apply the statutes as they exist."). Therefore, the lower court's conclusion that the assessment imposed on Affinity was unreasonable necessarily depended on finding that, under the reconsideration process in R.C. 5112.42(B), ODJFS had discretion to vary from the statutory formula set forth in R.C. 5112.41. However, as explained in our discussion of the fourth assignment of error, ODJFS lacked authority to make the adjustment that Affinity sought. Although ODJFS was permitted to make certain adjustments to the cost-reporting data, in making any adjustments, ODJFS was limited to considering the time period defined in the statute—for the initial assessment program year that time period was July 1, 2007 through June 30, 2008. R.C. 5112.41(B). Likewise, ODJFS's authority to adjust the preliminary determination based on Affinity's request for reconsideration did not permit it to consider data from outside the cost-reporting time period defined in the statute.

**{¶39}** The court below held that it was unreasonable for ODJFS not to adjust Affinity's assessment to account for the cost reduction resulting from the closure of a facility in September 2008, an event that occurred *after* the end of the cost-reporting time period set forth in the statute. Thus, in effect, the lower court found that ODJFS acted unreasonably by applying the statute as it was written. Complying with the lower court's order would require ODJFS to exceed its authority by calculating Affinity's assessment based on a cost-reporting time period other than the time period defined in the statute. Requiring ODJFS to go beyond the express provisions of the statute constitutes an abuse of discretion by the lower court.

**{¶40}** Further, viewing Affinity's appeal to the lower court as an as-applied challenge to the constitutionality of the hospital assessment program, Affinity has failed to meet its burden of proof. "To prevail on a constitutional challenge to [a] statute as applied, the challenger must present clear and convincing evidence of the statute's constitutional defect." *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St.3d 568, 2006-Ohio-5512, ¶ 21. Clear and convincing evidence is a degree of proof that " 'will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.' " *Id.*, quoting *Lansdowne v. Beacon Journal Publishing Co.*, 32 Ohio St.3d 176, 180-81 (1987), quoting *Cross v. Ledford*, 161

Ohio St. 469 (1954), paragraph three of the syllabus. In determining a constitutional challenge, we are mindful that laws are entitled to a strong presumption of constitutionality. *Ohio Grocers Assn. v. Levin*, 123 Ohio St.3d 303, 2009-Ohio-4872, ¶ 11. Our review of the constitutionality of a statute is de novo. *State v. Watkins*, 10th Dist. No. 09AP-669, 2010-Ohio-4187, ¶9, citing *State v. Cook*, 83 Ohio St.3d 404 (1998).

**{¶41}** The lower court found that the hospital assessment under R.C. 5112.41 was analogous to a franchise tax. ODJFS argues that the hospital assessment should not be subject to franchise tax standards, and that even if those standards are applied, the assessment does not violate the constitutional limits on franchise taxes. For purposes of analysis, we assume, without deciding, that franchise tax limits apply to the hospital assessment and will consider whether it violates those limits.

**{¶42}** A franchise tax is a tax on the privilege of doing business. *Ohio Grocers* at ¶ 16. The Supreme Court of Ohio has declared that "a tax on privileges and franchises cannot exceed the reasonable value of the privilege or franchise originally conferred, or its continued annual value hereafter." *S. Gum Co. v. Laylin*, 66 Ohio St. 578 (1902), paragraph three of the syllabus. Further, the court has stated that "[t]he General Assembly may prescribe the rules for arriving at the value of the franchise for computing the tax to be assessed thereon, but such rules must be reasonably fair and just in their operation. An arbitrary rule or standard which has no relation to the true value is invalid." *Fifth Third Union Trust Co. v. Peck*, 161 Ohio St. 169, 174 (1954). The General Assembly may determine the appropriate "measuring stick" for valuing the privilege of doing business, but the measure used must be a reasonably fair reflection of the value of the franchise. *See Ohio Grocers* at ¶ 16-18.

**{¶43}** The measuring stick that the General Assembly has chosen to use for the hospital assessment program is comprised of two components: (1) the data set of "total facility costs," which is measured across (2) the time period of the "state fiscal year that ends in the federal fiscal year that precedes the federal fiscal year that precedes the assessment program year for which the assessment is imposed." R.C. 5112.41(A) and (B). With respect to the data set used in determining a hospital's assessment, we note that under the statutes, total facility cost data are derived from financial statements provided to ODJFS by the hospitals themselves. Thus, presumably, the data in these statements

are accurate and reflect the hospitals' actual operating expenses for the measured time period. We note that Affinity has not asserted that the data set component of the measuring stick is unconstitutional; rather, Affinity argues that the hospital assessment program is not reasonably fair and just as applied to it because of the time period over which total facility costs are measured.

**{¶44}** Essentially, Affinity objects to the fact that the General Assembly chose to require ODJFS to look back two years in determining a hospital's total costs. In its request for reconsideration, Affinity argued that its costs were lower in state fiscal year 2009 than they were in state fiscal year 2008 and that its assessment should be based on those lower costs. In effect, Affinity is making a *policy* argument that its facility costs for state fiscal year 2009 were a more accurate basis to determine the assessment that it was required to begin paying in October 2009. But making such a policy decision was within the authority of the General Assembly. *See Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, ¶ 113 ("[T]he General Assembly is responsible for weighing [policy] concerns and making policy decisions; we are charged with evaluating the constitutionality of their choices.").

**{¶45}** Further, Affinity has failed to demonstrate by clear and convincing evidence that the time period component of the "measuring stick" chosen by the General Assembly was not a reasonably fair and just method of approximating the value of the privilege of operating a hospital. Although requiring ODJFS to look back two years means that the assessment is not based on the most current data, as noted above, the data used in the calculation are reflective of each facility's *actual* costs at a particular time. Moreover, the assessments are recalculated each year to accurately reflect changes in the hospitals' total facility costs for the relevant time period. Thus, any cost savings resulting from the closure of Doctors Hospital would be reflected in Affinity's assessment for the second program year, which would be based on cost-reporting data for July 1, 2008 through June 30, 2009. Because ODJFS appears to have properly applied the law, absent clear and convincing proof that the law is unconstitutional as applied to Affinity, the trial court erred by holding that the final determination was unreasonable.

**{¶46}** Accordingly, ODJFS's third assignment of error is sustained.

**{¶47}** Finally, in ODJFS's second assignment of error, it asserts that the trial court

erred by not affirming its final determination of Affinity's assessment because Affinity failed to provide relevant support for its theory in its request for reconsideration to ODJFS and in its appeal for the lower court. As explained above, we conclude that, in conducting the reconsideration under R.C. 5112.42(B), ODJFS lacked authority to adjust its preliminary determination of Affinity's assessment for the first assessment program year to account for cost savings resulting from the closure of a facility that occurred after the end of state fiscal year 2008. Further, we hold that the court below erred in concluding that the assessment violated franchise-tax standards. Because ODJFS lacked the authority to make the adjustment Affinity sought and the assessment did not otherwise violate the law, the lower court was obligated to affirm ODJFS's final determination. Therefore, ODJFS's second assignment of error is moot.

**{¶48}** For the foregoing reasons, ODJFS's first assignment of error is overruled, its second assignment of error is moot, and its third and fourth assignments of error are sustained. We reverse the judgment of the Franklin County Court of Common Pleas and remand this cause to that court for further proceedings in accordance with law and consistent with this decision.

*Judgment reversed and cause remanded.*

KLATT and SADLER, JJ., concur.

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