[Cite as *Aetna Better Health, Inc., v. Colbert*, 2012-Ohio-6206.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Aetna Better Health, Inc., dba Aetna Better Health of Ohio,	:	
Plaintiff-Appellee,	:	
(Amerigroup Ohio, Inc.,	:	No. 12AP-720
Intervening Plaintiff-Appellant),	:	(C.P.C. No. 12CV-7968)
v.	:	(ACCELERATED CALENDAR)
Michael Colbert, Director, Ohio Department of Job & Family Services et al.,	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on December 28, 2012

Ice Miller, LLP, John P. Gilligan, Robert J. Cochran and *Mary F. Geswein*, for appellant Amerigroup Ohio, Inc.

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Bennington, for CareSource; *Marshall & Melhorn, LLC, Gerardo R. Rollison, Marshall A. Bennett, Jr.*, and *Michael A. Gonzalez*, for Paramount Advantage; and *Calfee, Halter & Griswold, LLP, Albert Lucas* and *Stanley Dobrowski*, for Molina Healthcare of Ohio, Inc.

Thompson Hine LLP, Scott A. Campbell, Alan F. Berliner, Philip B. Sineneng and *Michael L. Dillard, Jr.*, for appellee Buckeye Community Health Plan, Inc.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶1} Appellant, Amerigroup Ohio, Inc. ("Amerigroup"), appeals from the judgment of dismissal of its claims against appellees, the Ohio Department of Job & Family Services and its Director, Michael Colbert (collectively, "ODJFS"). For the reasons that follow, we affirm.

Facts

{¶2} The following facts are taken from the amended complaint and deemed true for reviewing the Civ.R. 12(B)(6) motion.

{¶3} ODJFS issued a Request for Application ("RFA") seeking vendors to provide managed health care services to underprivileged Ohioans under the Ohio Medicaid Managed Care Program. ODJFS is the state agency responsible for the administration of Ohio's Medicaid program. Medicaid is a federal and state funded assistance program that provides health coverage to certain low-income and medically vulnerable individuals.

{¶4} Amerigroup is one of Ohio's incumbent managed care providers and has been providing managed care services to Ohioans since 2005. Amerigroup also provides services in 13 different state Medicaid programs and has scored in the top three of all their bids over the last several years. Amerigroup contends that it was improperly denied a contract with ODJFS under a flawed RFA process.

{¶5} As part of an effort to transform Ohio's Medicaid program, the RFA required successful applicants to materially improve health outcomes for Ohio's Medicaid populations by providing access to medically necessary services and to deliver efficient

and coordinated care. To determine the winning bidders, the RFA set forth a 100,000 point objective scoring system. Interested applicants were required to submit their answers in the form of five appendices labeled "A-E."

{¶6} On its face, the scoring system did not require any interpretation by the evaluators at ODJFS. The questions, answers, and scoring were established in advance. For example, one question asked:

> Does the Applicant have more than 24 months experience as of July 2011 in performing all of the five (5) care management functions listed below for the Medicaid population?
>
> A. "yes" answer received 1,125 points and a "no" answer received "0" points.

Even where answers could fall across a range, the RFA contemplated an objective scoring system by assigning points to a range of answers. For example, a question asked applicants to report the total months of experience in administering a disease management and/or acute care management for a Medicaid population as of December 2011. An applicant who reported 36 or more months received 55 points; 25-35 months received 30 points, and so on.

{¶7} Ultimately, the five highest scoring applications were selected to receive tentative awards. Amerigroup scored last (11th place) in the initial scoring of the RFA.

{¶8} Amerigroup reviewed its responses and scores along with those of the other applicants and filed a protest with ODJFS. Other providers also filed protests. ODJFS responded to the protests and rescored some, but not all, of the RFA applications. The rescored applications showed dramatic changes to the initial scoring. One applicant was disqualified for not supplying accurate information about its health insuring corporation license. After several protesters pointed out that Aetna Better Health, Inc. ("Aetna") had provided inaccurate information in its responses to Appendix B, ODJFS verified Aetna's Appendix B information and reduced its score by 17,036 points. Accordingly, Aetna fell from first place to ninth place. Four contract awardees were not rescored, even though bid protests raised questions about the accuracy of the information supplied by the applicants. In sum, after the partial re-scoring, 40 percent of the original winners were

losers, and one-third of losing applicants were declared winners. Because of ODJFS's partial rescoring, Amerigroup moved from last (11th) place to 6th place, still out of the winners' group.

{¶9} Where ODJFS did verify some of the information supplied by the applicants, it found the information to be inaccurate. However, ODJFS never attempted to validate *all* of the problems identified by the protesting applicants and most of the appendices to the RFA were not re-scored. In some cases where responses were internally inconsistent, applicants were improperly awarded points. In one case, three companies provided the same set of services to the same population, and were paid in the same manner, yet they were awarded different points. In addition, the RFA required ODJFS to verify the applicants' complex/high-risk care management experience, but it did not. ODJFS took the responses at face value even though it knew or should have known the applicants misinterpreted the instructions, supplied inaccurate information, or made material misrepresentations in their responses.

{¶10} The partial re-scoring revealed, but did not correct, all of the defective scoring. After the partial rescoring, ODJFS would not consider further protests filed by some applicants, thereby exhausting Amerigroup's administrative remedies. If ODJFS had rescored even some of the applicants' responses in the manner set forth by Amerigroup, Amerigroup would have the fourth highest score overall and become one of the contract awardees.

Procedural Background

{¶11} Following ODJFS's ruling on the protests and its announcement of the recipients of tentative awards of provider agreements, Aetna sued ODJFS in the Franklin County Court of Common Pleas, alleging that ODJFS abused its discretion in its selection of the five highest scoring applicants. Each winning applicant was granted intervention as of right, as a defendant, pursuant to Civ.R. 24(A). Amerigroup and another unsuccessful bidder sought leave to intervene as plaintiffs, pursuant to Civ.R. 24(B), and the trial court granted the motion over ODJFS's objection. ODJFS and the winning applicants moved to dismiss Amerigroup's complaint pursuant to Civ.R. 12(B)(6). Amerigroup responded and simultaneously filed an amended complaint. Amerigroup's amended complaint stated

four "causes of action:" injunction; declaratory judgment; violations of due process; and mandamus. The trial court dismissed Amerigroup's amended complaint deciding that the complaint failed, as a matter of law, because the allegations did not establish, as a matter of law, an abuse of discretion on the part of the agency.

{¶12} On the other hand, a trial on the merits went forth on Aetna's claims. At the conclusion of Aetna's case, the trial court dismissed the action under Civ.R. 41(B)(2). The trial court found that Aetna failed to prove by clear and convincing evidence that ODJFS abused its discretion or denied Aetna due process. The trial court specifically mentioned a lack of credibility of some witnesses. The trial court further found that ODJFS reasonably and fairly administered the RFA process.

{¶13} After the trial court entered final judgment, Amerigroup appealed, raising a single assignment of error as follows:

> The Trial Court erred when it dismissed Amerigroup Ohio, Inc.'s Amended Complaint under Civil Rule 12(B)(6).

{¶14} This court enjoined ODJFS from entering into final, signed contracts for the Ohio Medicaid Managed Care Program during the pendency of this appeal.

Standard of Review

{¶15} In *Morrow v. Reminger & Reminger Co., L.P.A.*, 183 Ohio App.3d 40, 2009-Ohio-2665, ¶ 7 (10th Dist.), this court set forth the applicable standard of review for a dismissal under Civ.R. 12(B)(6):

> A motion to dismiss for failure to state a claim is procedural and tests whether the complaint is sufficient. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548, 605 N.E.2d 378. In considering a Civ.R. 12(B)(6) motion to dismiss, a trial court may not rely on allegations or evidence outside the complaint. *State ex rel. Fuqua v. Alexander* (1997), 79 Ohio St.3d 206, 207, 680 N.E.2d 985. Rather, the trial court may review only the complaint and may dismiss the case only if it appears beyond a doubt that the plaintiff can prove no set of facts entitling the plaintiff to recover. *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 71 O.O.2d 223, 327 N.E.2d 753, syllabus. Moreover, the court must presume that all factual allegations in the complaint are true and draw all reasonable inferences in favor of the nonmoving party.

> *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753. The court need not, however, accept as true unsupported legal conclusions in the complaint. See *Hodge v. Cleveland* (Oct. 22, 1998), 8th Dist. No. 72283, 1998 WL 742171; *Eichenberger v. Petree* (1992), 76 Ohio App.3d 779, 782, 603 N.E.2d 366. We review de novo a judgment on a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5.

{¶16} As long as there is a set of facts, consistent with a plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss. *Morrissette v. DFS Servs., LLC*, 10th Dist. No. 10AP-633, 2011-Ohio-2369, ¶ 10.

{¶17} Amerigroup incorporated by reference various exhibits attached to the complaint, including the RFA, the scoring, the protest letter, and the agency response. The trial court did not convert the motion to dismiss to a motion for summary judgment as provided by Civ.R. 12(B), but did take note of the materials incorporated by reference. This court too notes the additional materials attached to the complaint. *See State ex rel. Crabtree v. Franklin Cty. Bd. of Health*, 77 Ohio St.3d 247, 249 (1997), fn. 1 ("Material incorporated in a complaint may be considered part of the complaint for purposes of determining a Civ.R. 12(B)(6) motion to dismiss."). Nevertheless, the factual allegations in the complaint are of primary importance in deciding a motion to dismiss for failure to state a claim. In reviewing the briefs, we noticed that in some instances, appellees have sought to refute the factual allegations in the complaint. We may not consider these arguments. Resolution of factual disputes is outside our purview in reviewing a motion to dismiss and is a matter for summary judgment or trial.

Assignment of Error

{¶18} Amerigroup argues that the trial court erred in concluding that ODJFS's discretion in awarding managed care contracts is "not limited in any way." The statement was a small part of an overall discussion of abuse of discretion. The trial court's statement is as follows:

> The legal standard is abuse of discretion. Ohio R.C. Section 5111.17 grants discretion to ODJFS. The Ohio Department of Jobs and Family Services may enter into contract with managed care organizations. Under the RFA, ODJFS reserves the right to reject any and all applications, in whole or part, and has the authority, in its sole discretion * * * to enroll any additional Medicaid populations * * * and may in its sole discretion, waive minor errors, omissions, or other defects in applications. ODJFS is therefore not limited in any way.

(Emphasis sic.) Decision and Entry Granting Motions to Dismiss Defendant Amerigroup, at 3.

{¶19} The trial court further stated at 3-4:

> At the risk of repetition, abuse of discretion is a stringent standard that requires more than a mistake or poor judgment but requires Amerigroup plead facts that, if true, could establish ODJFS acted irrationally with unreasonable, arbitrary or unconscionable attitude and without adequate determining principle. *Cedar Bay Construction v. Fremont*, (1990), 50 Ohio St.3d 19, 21.

{¶20} Since our review of the motion to dismiss is de novo, we need not address whether the trial court misspoke or, in fact, truly believed that the RFA gave ODJFS unlimited discretion over the process.

{¶21} An abuse of discretion "connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary. *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161 (1990). A decision is unreasonable if there is no sound reasoning process that would support that decision. *Id.* It is not enough that the reviewing court, were it deciding the issue de novo, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result. *Id.* An abuse of discretion implies that a decision is both without a reasonable basis and is clearly

wrong. *Hartzog v. Ohio State Univ.*, 27 Ohio App.3d 214 (10th Dist.1985), citing *Angelkovski v. Buckeye Potato Chips Co., Inc.*, 11 Ohio App.3d 159 (10th Dist.1983).

{¶22} With this standard in mind, we must determine if Amerigroup has alleged facts sufficient to show that the process used by ODJFS in its scoring of the applications was unreasonable or unsound, thereby rising to the level of an abuse of discretion. As is obvious from the amended complaint, the initial scoring was deeply flawed.

{¶23} Amerigroup claims that even after the protests and partial rescoring, substantial errors persisted. For example, in Appendix D, Amerigroup claimed that one applicant stated that it had over 64 years of experience (772 months) administering disease management and/or acute care management to a Medicaid population despite being in business only 23 years and the Medicaid program being in existence only 46 years.

{¶24} In late 2011, ODJFS put a high-risk care management program in place and required Ohio Medicaid managed care organizations to provide a complex/high-risk care management program with state of the art requirements that are currently in place in very few state Medicaid managed care programs. ODJFS took the applicants' responses at face value, even though some applicants claimed experience in some states for 11 to 24 years. However, ODJFS did not verify the applicants' reported out-of-state experience with complex/high-risk care management programs. Amerigroup alleged such responses were the result of applicants misinterpreting the RFA instructions, providing inaccurate information, or making material misrepresentations. Amerigroup claimed that if ODJFS had rescored the responses concerning months of experience in complex/high-risk care management programs, Amerigroup would move to fourth place.

{¶25} ODJFS disagreed that re-scoring was necessary, reasoning that even though Ohio had not implemented a complex/high-risk care management program prior to late 2011, nothing prevented applicants from providing such care before 2011.

{¶26} Another example provided by Amerigroup involved board certification of specialists. Certain applicants were awarded full points for their responses even though Amerigroup's investigation revealed that there were no board certified providers

available in the area. Amerigroup claims that even a cursory examination of the responses would have brought to light a myriad of inconsistencies, and that ODJFS had a duty to clarify all of these instances.

{¶27} As is the case with most disappointed bidders, Amerigroup has alleged aspects of the RFA process to be unfair, arbitrary, and unreasonable. This court has stated: "We recognize that generally a reviewing court will not intrude into areas of administrative discretion for the reason that a rebuttable presumption of validity attaches to actions of administrative agencies." *Morning View Care Center-Fulton v. Ohio Dept. of Human Serv.*, 148 Ohio App.3d 518, 2002-Ohio-2878, ¶ 47 (10th Dist.), citing *Ohio Academy of Nursing Homes, Inc. v. Barry*, 56 Ohio St.3d 120, 129 (1990); and *Ohio Academy of Nursing Homes, Inc. v. Creasy*, 10th Dist. No. 83AP-47 (Aug. 16, 1983), quoting *Country Club Home, Inc. v. Harder*, 228 Kan. 756, 763, 771 (1980). The presumption favoring the regularity and lawfulness of administrative actions imposes on the challenging party the burden to show that the agency abused its discretion. *Kokosing Constr. Co. v. Dixon*, 72 Ohio App.3d 320, 326 (2d Dist.1991).

{¶28} In essence, Amerigroup claims that ODJFS abused its discretion in not investigating clear errors on applicants' submissions even after such errors were brought to the attention of ODJFS. Amerigroup also contends that after the partial re-scoring, ODJFS should have allowed additional protests and recalculated the scores.

{¶29} While ODJFS has broad discretion in matters related to public contracts, its discretion is not limitless. An abuse of discretion can occur when the award of a public contract is based on nebulous or nonexistent standards. *Id.* In *Dayton ex rel. Scandrick v. McGee*, 67 Ohio St.2d 356, 360-61 (1981), the Supreme Court of Ohio found use of an unannounced standard to select one other than the lowest bidder to be an abuse of discretion.

{¶30} In a similar case, this court has stated: "There is no language in the RFP which grants explicitly to the Registrar of the Bureau of Motor Vehicles the unbridled discretion to re-grade the proposals, change the weight given to the criteria after the fact, and choose the deputy registrar based on this new criteria which is unknown both

to the candidates and the evaluators." *Fouche v. Denihan*, 66 Ohio App.3d 113, 118 (10th Dist.1990).

{¶31} However, the fact that ODJFS may have interpreted the RFA in a different manner than Amerigroup has not been considered an abuse of discretion. *See MCI Telecommunications Corp. v. Bd. of Franklin Cty. Commrs.*, 127 Ohio App.3d 127, 136 (10th Dist.1998) (different interpretations of terms is not dispositive of whether county commissioners abused their discretion). Differences of interpretation, or even simple mistakes by ODJFS are not an abuse of discretion. *State ex rel. Shafer v. Ohio Turnpike Comm.*, 159 Ohio St. 581, 590-91 (1953).

{¶32} What is required is that ODJFS deal in good faith with bidders and comply with the terms of the RFA. *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgt. Dist.*, 73 Ohio St.3d 590, 596 (1995). In other words, a lack of good faith and a failure to comply with its own RFA can state a claim for an abuse of discretion. The facts in this case show neither. Under an abuse of discretion standard, there is nothing in the complaint to indicate that ODJFS was motivated by any unreasonable, improper or arbitrary consideration. In *Prime Contrs., Inc. v. Girard*, 101 Ohio App.3d 249, 259 (11th Dist.1995), a city's contract award was based on criteria set forth in the bid proposal, and there was no evidence that the city's officials were predisposed to reject the bid or acted in bad faith. Therefore, the city did not abuse its discretion even if the investigation results were faulty or incomplete.

{¶33} Nor is there a provision in the RFA that requires ODJFS to conduct further investigation or allow a second protest period. The RFA stated that "ODJFS will verify an Applicant's reported experience with * * * complex/high risk care management program for other states with the appropriate Medicaid state agency as needed." The phrase "as needed" provided ODJFS with the discretion to decide what, if any, responses needed verification.

{¶34} The RFA sets forth a procedure to allow one round of protests after the initial awarding of the contracts. ODJFS cannot be found to have abused its discretion by following its own procedure set forth in the RFA.

{¶35} In *Michael L. Kirtley d.b.a., M.L. Administration v. Portage Cty. Bd. of Commrs.*, 11th Dist. No 95-P-0013 (Oct. 27, 1995), the court held that the county was entitled to judgment as a matter of law because even under the presumption that the commissioners did not investigate, such a failure would not warrant a finding of abuse of discretion. Here, ODJFS exercised its discretion in deciding what claims of Amerigroup and the other protesters had merit and what claims did not warrant further investigation. If ODJFS had been required to investigate every allegation to the satisfaction of the protesting applicants, the agency would not have been able to exercise any discretion, and the process could be extended indefinitely. ODJFS's allegedly incomplete investigation, absent bad faith, does not state a claim for abuse of discretion.

{¶36} Amerigroup next argues that the trial court erred in failing to address Amerigroup's claims for declaratory judgment and injunction. Those claims are also governed by the same abuse of discretion standard set forth in *McGee*. Therefore, regardless of whether those claims stand apart from the due process claim, Amerigroup must plead facts setting forth an abuse of discretion. As discussed above, Amerigroup has failed to do so.

Disposition

{¶37} Our review of the record leads us to conclude that Amerigroup has not alleged sufficient facts to state a claim for an abuse of discretion. Accordingly, the single assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas must be affirmed.

Judgment affirmed.

SADLER, J., concurs.
FRENCH, J., dissents.

FRENCH, J., dissenting.

{¶38} I respectfully dissent. I agree with appellant that it has met the low threshold required to state a claim that ODJFS's selection of contract awardees was an abuse of its discretion. To recover on such a claim, appellant would have to prove that ODJFS acted with an unreasonable, arbitrary or unconscionable attitude. *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgmt. Dist.*, 73 Ohio St.3d 590, 605 (1995). In its complaint, appellant alleged that ODJFS acted unreasonably and arbitrarily in the following ways: (1) ODJFS's scoring was flawed in that some applicants submitted inaccurate information or made material misrepresentations; (2) ODJFS failed to verify responses and relied on inaccurate information or material misrepresentations; and (3) ODJFS failed to ensure fair and accurate evaluations and scoring, as required by Ohio and federal law. Appellant alleged specific facts to support its claims. Therefore, in my view, appellant has stated a claim for relief sufficient to meet Civ.R. 12(B)(6).

{¶39} To the contrary, in a one-paragraph analysis, the trial court determined that those allegations "do not establish as a matter of law, abuse of discretion." In support, the court cited *Cleveland Constr., Inc. v. Cincinnati*, 118 Ohio St.3d 283, 2008-Ohio-2337. *Cleveland Constr.* did not, however, involve a motion to dismiss or the question whether the plaintiff had stated a claim for relief. Nor did *Kirtley v. Portage Cty. Bd. of Commrs.*, 11th Dist. No. 95-P-0013 (Oct. 27, 1995), which arose from a trial court's grant of summary judgment, *following discovery*. Nor did *Danis Clarkco Landfill*, which arose from a trial court's denial of a preliminary injunction *following an evidentiary hearing* and the parties' stipulation that the preliminary injunction hearing should be deemed consolidated with a trial on the merits. On appeal in *Danis Clarkco Landfill*, the Supreme Court of Ohio found "that the record before the trial court justified a finding that the [solid waste management district] substantially complied with the procedures it had announced in its RFP." *Danis Clarkco Landfill* at 604. The Supreme Court expressly considered the evidence and testimony each side presented. In the end, the Supreme Court held that the trial court's finding that the appellant failed to meet its "burden of proof" was "not against the manifest weight of the evidence." *Id.* at 605. Here, in stark contrast, the trial court simply concluded that, through its complaint alone, appellant had

failed to "establish" an abuse of discretion "as a matter of law." That is not the standard under Civ.R. 12(B)(6), and, at a minimum, this case should be remanded to the trial court for a complete analysis of appellees' motion to dismiss using the appropriate standard. Because the majority has determined otherwise, I dissent.