Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Del Rosa Villa
Docket No. A-11-20
CRD Docket No. C-10-45
Ruling No. 2011-2
December 2, 2010

RULING DENYING REQUEST FOR INTERLOCUTORY REVIEW OF DENIAL OF STAY OF PROCEEDINGS OR POSTPONEMENT OF HEARING

On November 19, 2010, Del Rosa Villa (Petitioner) filed a request with the Departmental Appeals Board (Board) asking that we intervene to postpone the hearing before Administrative Law Judge (ALJ) Richard Smith in the above-captioned case currently scheduled to begin on December 6, 2010. CMS filed a response opposing the request. For the reasons explained below, we decline to intervene at this stage of the proceedings.

Board consideration of interlocutory appeals

Before reaching the merits of Petitioner's request, we note that the Board has previously stated that "[t]he hearing procedures at 42 C.F.R. Part 498 do not provide for interlocutory appeals, and the Board has declined to assume that it may take such appeals in the absence of express authority to do so." *Cooper University Hospital, Cooper Surgery Center and Rancocas Endoscopy Center*, App. Div. Docket No. A-09-72, Ruling Denying CMS Motion for Emergency Stay, Review of ALJ Rulings, and Request for Removal (March 24, 2009), quoting *United Presbyterian Residence*, App. Div. Docket No. A-03-59, Ruling Denying Interlocutory Appeal (May 19, 2003), citing *Rehabilitation & Healthcare Center of Tampa*, App. Div. Docket No. A-99-95, Ruling On Request for Removal of Hearing to Board (August 16, 1999)(copies of rulings attached).

The Appellate Division Practice Manual explains that, even where the Board does find that it has authority to intervene in a proceeding before an ALJ, the party seeking such action bears a very high burden:

> The Board has historically disfavored such appeals. In general, for the Board to consider an interlocutory appeal, a party would have to show that an interlocutory decision would promote efficient adjudication of the dispute and that the party would suffer irreparable harm by waiting for a final decision to appeal an ALJ's ruling. The Board's ruling to dismiss an interlocutory appeal is without prejudice to the party's right to renew its arguments in a timely appeal of the ALJ's decision, ruling or order dispositive of the case.

(Accessible at http://www.hhs.gov/dab/divisions/appellate/practicemanual/manual.html.)

Petitioner recognizes that its request is for "extraordinary interlocutory review" but states that the request it "reluctantly files" is necessary because of "the importance of the legal issue" and "the irreparable nature of the injury that could be caused to Petitioner and certain of its employees should this case proceed to hearing as scheduled . . . ." P. Request at 1. We consider next whether Petitioner has made a sufficient showing to demand extraordinary relief.

Case background

Petitioner reports that the relevant issues to be resolved at the hearing relate to a suicide which occurred at its facility and was the subject of deficiency findings leading to imposition of a civil money penalty. P. Request at 3. Petitioner requested a hearing which was initially scheduled for September 2010 after the parties' exchange of briefs, proposed exhibits and witness lists in March 2010.

Petitioner asserts that it learned some time in the spring of 2010 that state authorities had convened a grand jury to investigate the circumstances surrounding the death and that it presumes the purpose is to decide whether to bring state criminal neglect or abuse charges against Petitioner and/or one or more of its employees. *Id*. at 3-4. Petitioner asserts that many of its employees, represented by separate criminal counsel, have been advised to assert their Fifth Amendment rights if called to testify at the ALJ hearing. *Id.* at 4. Although some employees have obtained immunity grants, Petitioner alleges, those are limited to protection from the use of statements made before the grand jury. *Id*. at 5. Petitioner also alleges that its employees are "bound at this time by grand jury secrecy rules" and are thereby precluded, even if willing, "even from assisting counsel in the preparation for the hearing . . . ." *Id.* at 4.

On July 7, 2010, Petitioner requested that ALJ Smith postpone the hearing, and ALJ Smith did so over CMS's opposition. *Id.* at 6. The hearing was rescheduled to begin December 6, 2010. On November 17, 2010, Petitioner notified ALJ Smith that the parties had settled other issues in the case but that Petitioner would be seeking a further delay of the hearing because a criminal investigation was

ongoing. *Id.* at 7. By letter dated November 17, 2010, ALJ Smith denied the request for any further postponement or continuance of the hearing.

This interlocutory appeal followed.

Legal framework on parallel criminal and civil administrative proceedings

In a case involving an administrative investigation by the Food and Drug Administration that also generated a criminal indictment, the Supreme Court rejected the argument that the civil matter should be stayed where the government had not brought the civil action "solely to obtain evidence for its criminal prosecution" and the defendant was represented by counsel and had not shown "special circumstances" making parallel proceedings improper or unjust. *U.S. v. Kordel*, 397 U.S. 1, 11-12 (1970).

A leading case, relied on by Petitioner, articulated the principles governing parallel proceedings concerning the same conduct in criminal and administrative forums while explaining that the overlap of regulatory and criminal law is a regular part of the legal system in this country. *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1374 (D.C. Cir. 1980), *cert. denied* 449 U.S. 993 (1980). Parallel proceedings have been recognized as unobjectionable by the Supreme Court since at least 1912. *Id., citing Standard Sanitary Mfg. Co. v. U.S.*, 226 U.S. 20, 52 (1912) (civil and criminal antitrust proceedings). Based on the Supreme Court precedents, the *Dresser* court concluded that a stay of civil proceedings is not ordinarily compelled by a criminal proceeding, although a court "may decide in its discretion" to take some protective action, such as a stay, postponement of discovery, or protective orders where justice would be served. *Id.* at 1375. Absent a showing of bad faith by the government, a court may be most likely to consider protective action where a party "under indictment for a serious offense" would be prejudiced by having to expose the basis for its criminal defense prematurely or to rely on the Fifth Amendment to withhold testimony. *Id.* at 1376. Even in such situations, however, the court must balance potential injury to the public interest from delay of the noncriminal proceeding. *Id.* In *Kordel*, the Supreme Court found the factor of protecting the public compelling in a case involving government enforcement of health and safety laws, explaining that it "would stultify enforcement of federal law to require a governmental agency such as the FDA invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial." 397 U.S. at 11.

As CMS notes, any appeal by Petitioner would fall under the jurisdiction of the Ninth Circuit. CMS Opposition at 8-9. Although Ninth Circuit jurisprudence articulates somewhat differently the particular circumstances to be considered by a court in deciding whether to issue a discretionary stay of a parallel civil administrative proceeding, the Ninth Circuit agreed that no stay was required by

any constitutional principles. *FSLIC v. Molinaro*, 889 F.2d 899, 902 (9th Cir. 1989). The appeals court concluded that a district court did not abuse its discretion by denying a stay pending any criminal prosecution for breach of fiduciary duty by a banker. 889 F.2d at 902-03. In addition to taking into account the degree to which a defendant's Fifth Amendment rights may be implicated, the Ninth Circuit pointed to the following factors as relevant to guiding the exercise of discretion:

> (1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation.

889 F.2d at 903, *quoting Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc.*, 87 F.R.D. 53, 56 (E.D.Pa. 1980) *and citing Kordel*, 397 U.S. at 11-12 and *Dresser*, 628 F.2d at 1374-76; *see also U.S. v. Certain Real Property, Commonly known as 6250 Ledge Road, Egg Harbor, Wis.*, 943 F.2d 721 (7th Cir.1991); *United States v. Little Al*, 712 F.2d 133 (5th Cir.1983).

Furthermore, the Ninth Circuit denied that there exists any "absolute right not to be forced to choose between testifying in a civil matter and asserting [one's] Fifth Amendment privilege." *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 325 (9th Cir. 1995). Not only is a defendant not entitled to protection from this choice by means of a stay, a civil court may draw a negative inference from the invocation of the Fifth Amendment. *Id.* at 326; *see also Baxter v. Palmigiano*, 425 U.S. 308, 318-19 (1970); *KLA-Tencor Corp. v. Murphy*, 717 F. Supp. 895, 903 (N.D. Cal. 2010).

The case for delay is weakened where no indictment has actually been filed at the time the stay is sought. As the Ninth Circuit stated, the possibility of future criminal indictments may make "responding to civil charges more difficult," but the district court "did not abuse its discretion by deciding that this difficulty did not outweigh the other interests involved." 889 F.2d at 903. Furthermore, the absence of an indictment makes any assessment of the degree of overlap between civil and criminal matters speculative. *SEC v. Brown*, 2007 WL 4192000, at *4 (D. Minn. 2007).

Analysis

Petitioner admits from the outset, as the above legal authorities clearly require, that it has no "constitutional right to delay civil or regulatory proceedings pending

resolution of parallel criminal proceedings." P. Request at 7, *citing U.S. v. Kordel*, 397 U.S. 1 (1970). Petitioner identifies no statutory or regulatory authority requiring the ALJ to grant a stay of proceedings where the possibility of criminal prosecution is raised, and we find none. The ALJ has sufficient discretion under the regulations at 42 C.F.R. § 498.53(a) to postpone a hearing upon request for good cause and has declined to do so here. CMS Opposition, Ex. L. We review an exercise of discretion to determine whether it is arbitrary, capricious or an abuse of discretion.

Petitioner further concedes, as is equally well-established in law, that a corporate entity has no Fifth Amendment right against self-incrimination to evoke. P. Request at 7; *Braswell v. United States*, 487 U.S. 99, 110 (1998). Nevertheless, Petitioner cites to some instances in which courts have recognized that an entity without such rights itself may have its ability to defend a civil case impaired when employees' testimony is unavailable to it as a result of their individual refusals to speak on Fifth Amendment grounds. P. Request at 10, *citing Chagolla v. City of Chicago*, 529 F. Supp.2d 941, 948 (N.D. Ill. 2008) and *Britt v. Int'l Bus Srvs., Inc*., 255 A.D.2d 143 (N.Y. Appl. 1998). In both of the cited cases, the courts viewed the decision to stay as discretionary and dependent on the particular circumstances and status of the case. *See* 529 F. Supp.2d at 948 *and* 255 A.D.2d at 144 (motion to "stay a civil action pending resolution of a related criminal action is directed to the sound discretion of the trial court").

In *Chagolla*, the court noted that the city's request for a stay might not have prevailed on its own merits, since the city has no personal Fifth Amendment rights, but granted a partial stay as a matter of discretion because it had determined to do so for the individual defendants. 529 F.Supp.2d at 948. Here, Petitioner alone is subject to administrative sanctions and no individuals appear as defendants.

Petitioner argues that its ability to present its case was so impaired here that the ALJ's denial of its stay request was an abuse of discretion for two reasons. P. Request at 7. First, Petitioner alleges that the inability or unwillingness of its employees to participate as witnesses or "even in preparation of the case" materially limits its defense.[1] Petitioner states that their testimony is necessary to

[1] The claim that employees are precluded from assisting in case preparation is based on grounds of grand jury secrecy. P. Request at 4, 10. Petitioner cites nothing beyond its own bald assertion for the claim that grand jury secrecy somehow precludes willing employees from participating in Petitioner's preparation for the hearing. Federal grand jury secrecy rules contain no prohibition against witnesses speaking about the subject matter as to which they have testified or may be called to testify before the grand jury. Fed. Rules of Crim. Proc., Rule 6(e)(2). Indeed, the rule does not impose any secrecy requirements on grand jury witnesses at all and they are free to speak about their appearances. *See, e.g., In re Vescovo Special Grand Jury*, C.D.Cal.1979, 473 F.Supp. 1335. Petitioner identifies no different rule under state law. We therefore do not consider this claim by Petitioner in assessing whether the ALJ should have granted the stay.

its case, that they would vitiate their Fifth Amendment rights by testifying because the subject matter covered would likely be the same as that relevant to the criminal matter, and that Petitioner is "not willing to initiate the spectacle of subpoenaing its own employees to appear . . . simply to assert their personal Fifth Amendment rights."[2] The choice of whether to seek to elicit testimony from employees who may refuse to answer at least some questions or to forego calling those employees may be a difficult quandary, but it is the sort of difficult position from which courts have held that defendants are not necessarily entitled to be rescued by a stay.

The parties dispute before us whether the potential witnesses who might decline to testify are indeed central to Petitioner's case. Petitioner alleges that its administrator, director of nursing and the "nurses on duty at the time of death" were prospective witnesses who have been instructed by criminal counsel not to testify. P. Request at 5. Among the topics that Petitioner asserts that these witnesses could address are the facility's policies and practices, assessments of and care planning for the resident, the resident's behavior and demeanor, the circumstances of the suicide and the facility's investigation. *Id.* at 5-6. Petitioner does not indicate whether some or all of this information could be obtained from documents available to the facility, such as written policies, assessments, care plans, and nursing notes. CMS asserts that Petitioner has not listed as witnesses any of the nurses or aides who "provided direct care and services" to the resident or who were "on duty on the night" of the suicide." CMS Opposition at 7. Furthermore, CMS alleges that the facility administrator already testified by deposition based on her unavailability for the hearing and did not address the resident or suicide at all. *Id*. The ALJ has access to the complete record of the case and is most familiar with the issues, the proposed witnesses and the proffered testimony. We see no reason to second-guess the ALJ's judgment that the matter may proceed to hearing without undue prejudice.

Petitioner's second basis for claiming that the denial of stay abused the ALJ's discretion is that going forward "could require Petitioner prematurely to reveal its defenses to any prospective criminal charges, and even could help the State frame such charges." P. Request at 7-8. Courts have been concerned that governmental agencies not use civil proceedings merely as a device to obtain discovery for use in criminal prosecution that would not otherwise be permissible in the criminal proceeding. *See, e.g., U.S. v. Kordel*, 397 U.S. 1, 11. In this case, the governmental unit contemplating criminal charges is a state attorney general. CMS's responsibility for enforcement of Medicare participation requirements and protection of Medicare beneficiaries is a matter of federal law. No suggestion has

[2] Petitioner suggests that CMS might attempt to subpoena Petitioner's employees in order to force them to assert their rights and then seek an adverse inference based on that. P. Request at 9. CMS expressly denies any intention to subpoena any of Petitioner's employees, noting that in any case the deadline for CMS to identify any additional witnesses or seek subpoenas has already passed. CMS Opposition at 17.

been (or could reasonably be) made that CMS is pursuing the federal enforcement process merely to aid the state in discovering aspects of a possible defense to state criminal charges which might be brought at some future point. CMS also points out that Petitioner has already laid out its defenses to CMS's action "in detail" in its pre-hearing brief before the ALJ. CMS Opposition at 15. To the extent that its defense before the ALJ tracks any possible defense against a future criminal charge, therefore, Petitioner's administrative defense is already on the record. Again, the possibility that information disclosed in a civil case may impact a future criminal case may present a dilemma for the defendant but does not represent a reason to overturn the ALJ's discretion in denying a stay.

Two factors considered by courts as reflected in the legal authorities above cut against granting a stay here. The first is judicial efficiency. The second is the strong public interest in nursing home enforcement.

On the first point, Petitioner denies that it is seeking an indefinite stay but at the same time proposes that "the parties report to Judge Smith every 60 days regarding the status of the criminal investigation," with the hearing rescheduled when that status is clarified. P. Request at 11. This open-ended proposal could leave the matter in limbo for many months. Although Petitioner asserts that the criminal counsel believes that some clarification will be forthcoming by the end of January 2011, Petitioner does not, and presumably cannot, represent when the hearing might begin if charges are ultimately brought. This appeal was docketed in October 2009 and has been pending for more than a year. The hearing was already postponed once at Petitioner's request. The ALJ was entitled to consider in resolving the request for a further stay the "convenience of the court in the management of its cases, and the efficient use of judicial resources." *Molinaro*, 889 F.2d at 903.

If Petitioner ultimately prevails on the merits before the ALJ, moreover, the questions raised by Petitioner in its present request become moot. It is also possible that the difficulties Petitioner now envisions will not have materialized or will not have in fact materially impacted Petitioner's presentation, even if Petitioner does not prevail. If Petitioner does not prevail and can show that the ALJ's ruling in fact prejudiced it, Petitioner may raise that issue in a future appeal. At that time, the Board can review that matter with the benefit of a full record based on the actual course of events rather than on speculation about potential problems.

Perhaps most importantly, the second point cutting against imposing a stay here lies in the interest of vulnerable beneficiaries and their families in having confidence that facilities receiving public funds are indeed complying with the statute and regulations. The regulations at issue deal with the health, safety and well-being of nursing home residents and the imposition of remedies such as civil money penalties is intended to motivate prompt achievement and maintenance of

compliance. The ALJ could reasonably place a high value on the public interest in deciding not to grant the requested stay.

Conclusion

For the reasons explained above, we decline Petitioner's request that we intervene to overturn the ALJ's denial of a further stay of the hearing in this matter.

_____/s/_____
Judith A. Ballard

_____/s/_____
Constance B. Tobias

_____/s/_____
Leslie A. Sussan
Presiding Board Member