

Department of Health and Human Services
Commissioner's Office
221 State Street
11 State House Station
Augusta, Maine 04333-0011
Tel.: (207) 287-3707; Fax (207) 287-3005
TTY Users: Dial 711 (Maine Relay)

IN THE MATTER OF:

First Atlantic Healthcare)
c/o Charles Dingman, Esq.)
Preti Flaherty Beliveau & Pachios) **REMAND ORDER**
45 Memorial Circle)
Augusta, ME 04330)

The Recommended Decision of Hearing Officer Benedict, mailed April 13, 2017 and the responses and exceptions filed by the parties have been reviewed.

Pursuant to Section VI., J. 2. of the Office of Administrative Hearings Regulations, I hereby remand this case to the Hearing Office to issue an Amended Recommended Decision which states the amount of overpayment or underpayment for each facility that results from the allowance of the following costs:

- Per the 5/12/17 letter from AAG Leighton, the agreement of the parties regarding the following:
 - Allowance of cost associated with the Vice-President of Quality Assurance at all of the five facilities.
 - Allowance of travel costs with regards to all allowed positions, specifically including the Vice-President of Quality Assurance and the RN Clinical Consultant.
 - Increased allowance of central office accounting costs from \$21,285 to \$33,300.
 - Allowance of certain interest costs of \$6,737 for Marshall's Healthcare.
- Per the Exception of First Atlantic Healthcare, allowance of an allocation of the cost of the wages and benefits of the RN Clinical Consultant position to each facility as reasonable and necessary to provide nursing facility services.
- Per the Exception of First Atlantic Healthcare, allowance of an allocation of part of the cost of the carpenter to capital items being depreciated as a reasonable cost of new capital assets.

As necessary, the Hearing Officer may conduct further proceedings and receive additions to the record regarding the amount of any underpayment or overpayment that results from the allowance of the above costs and shall make recommendations where there is any disagreement between the parties.

I otherwise adopt the findings of fact and accept the Recommended Decision.

Finally, I order that the remand process be accomplished as expeditiously as possible.

DATED: 01.18.2018 SIGNED: 
RICKER HAMILTON, COMMISSIONER
DEPARTMENT OF HEALTH & HUMAN SERVICES

cc: Charles F. Dingman, Esq., Preti Flaherty, Beliveau & Pachios
Henry Griffin, III, AAG, Office of the Attorney General
Miranda Benedict, Esq., Hearing Officer



**Department of Health
and Human Services**

*Maine People Living
Safe, Healthy and Productive Lives*

Paul R. LaPage, Governor

Mary C. Mayhew, Commissioner

Department of Health and Human Services
Administrative Hearings
35 Anthony Avenue
11 State House Station
Augusta, Maine 04333-0011
Tel. (207) 624-5350; Fax (207) 287-8448
TTY Users: Dial 711 (Maine Relay)

Date Mailed: APR 13 2017

Mary C. Mayhew, Commissioner
Department of Health and Human Services
11 State House Station • 221 State Street
Augusta, ME 04333

In the Matter of: First Atlantic HealthCare

ADMINISTRATIVE HEARING RECOMMENDED DECISION

An administrative hearing in the above-captioned matter was held on February 3, 2017, before Hearing Officer Miranda Benedict, Esq., at Augusta, Maine. The Hearing Officer's jurisdiction was conferred by special appointment from the Commissioner of the Maine Department of Health and Human Services. A pre-hearing conference was held on October 20, 2016. At that pre-hearing conference, the parties requested that the date of January 6, 2017 be used as a 'place holder' date as parties explained that they were still in negotiation. The February 3, 2017 hearing date was chosen as it was the last employment date of the Department's primary witness, Stephen Baird, who retired at the close of business on February 3, 2017.

The hearing record was left open until February 22, 2017 to allow submission of written closing arguments. One of the parties requested an extension to February 27, 2017 which was granted and the record was closed.

Five Orders of Reference dated February 24, 2017 were issued in regards to this hearing. Atlantic Healthcare owns and operates more than 20 facilities in the State of Maine including nursing homes, skilled rehabilitation facilities, and assisted living facilities. The Orders of Reference were issued for five specific facilities, however, there were several issues that pertain to all the facilities. The issues presented *de novo* for hearing are as follows:

Was the department correct when it determined for the audit report issued for fiscal year ending 6/21/12 that Atlantic Rehabilitation and Nursing Center not be allowed the loss on disposal of assets and adjustments to the central office costs, which result in an underpayment of \$28,838.91¹? See HO-1.

Was the department correct when it determined for the audit report issued for fiscal year ending 12/31/12 that Marshall's Healthcare be disallowed central office costs, working capital interest and capitalized labor costs, which result in an overpayment of \$24,380.93? See HO-3.

¹ The underpayments cited in the Orders of Reference would be the result if the Department had allowed the costs requested by First Atlantic Healthcare.

FIRST ATLANTIC HEALTHCARE

Was the department correct when it determined for the audit report issued for fiscal year ending 12/31/12 that Portland Center for Assisted Living be disallowed central office costs and capitalized labor costs, which result in an overpayment of \$9,846.18? See HO-5.

Was the department correct when it determined for the audit report issued for fiscal year ending 12/31/12 that Hawthorne House be disallowed central office costs, which result in an underpayment of \$35,418.32? See HO-7.

Was the department correct when it determined for the audit report issued for fiscal year ending 12/31/12 that Colonial Healthcare be disallowed central office costs and capitalized labor costs, which result in an underpayment of \$57,759.70? See HO-9.

The Order of Reference listed for Atlantic Rehab and & Nursing Center regarding the disposal of assets pertains only to that facility.

The issue of capitalized labor costs pertains to the employment of a carpenter. This issue applies to Colonial Healthcare, Marshalls Healthcare, and the Portland Center for Assisted Living.

The issue of disallowed central office costs pertains to all five facilities and is in regard to Employee Recognition Parties and the employment of a RN consultant.

APPEARING ON BEHALF OF THE APPELLANT:

Charles Dingman, Esq.

Wanda Pelkey, CFO, First Atlantic HealthCare

Kim Bernard, Budget and & Reimbursement Manager, First Atlantic Healthcare

APPEARING ON BEHALF OF THE DEPARTMENT:

Christopher Leighton, AAG

Stephen Baird, Supervising Auditor

ITEMS INTRODUCED INTO EVIDENCE:

Hearing Officer Exhibits

- HO-1 Order of Reference for Atlantic Rehab & Nursing Center dated September 12, 2016
- HO-2 Fair Hearing Report Form for Atlantic Rehab & Nursing Center
- HO-3 Order of Reference for Marshall's Healthcare dated September 12, 2016
- HO-4 Fair Hearing Report Form for Marshall's Healthcare
- HO-5 Order of Reference for Portland Center for Assisted Living dated September 12, 2016
- HO-6 Fair Hearing Report Form for Portland Center for Assisted Living
- HO-7 Order of Reference for Hawthorne House dated September 12, 2016
- HO-8 Fair Hearing Report Form for Hawthorne House
- HO-9 Order of Reference for Colonial Healthcare dated September 12, 2016
- HO-10 Fair Hearing Report Form for Colonial HealthCare

FIRST ATLANTIC HEALTHCARE

HO-11 Scheduling Notice, Emails, and results of Pre-Hearing Conference
HO-12 Letter to parties from hearing officer dated February 6, 2017

Department Exhibits

DHHS-1 Chapter 101, MaineCare Benefits Manual, Chapter IIII (sic) Section 67, Nursing Facility Principles of Reimbursement
DHHS-2 Cost Report filed by Atlantic Rehab
DHHS-3 Audit Report Transmittal for Atlantic Rehab
DHHS-4 Final Informal Review Decision dated June 24, 2016 for Atlantic Rehab
DHHS-5 Extraordinary Circumstance Allowance response by Alec Porteous, Deputy Commissioner of Finance dated July 1, 2015
DHHS-6 Cost Report filed by Colonial Healthcare
DHHS-7 Audit Report Transmittal for Colonial Healthcare.
DHHS-8 Final Informal Review Decision dated June 24, 2016 for Colonial Healthcare 1(a)-(g) are identical to Atlantic Rehab FIRD, Section 2 is a disagreement over depreciation removed for central office capitalized labor)
DHHS-9 Cost Report filed by Hawthorne House
DHHS-10 Audit Report Transmittal for Hawthorne House
DHHS-11 Final Informal Review Decision dated June 24, 2016 for Hawthorne House (Sections 1(a)-(g) are identical to Atlantic Rehab FIRT. There is no Section 2)
DHHS-12 Cost Report filed by Marshall's Healthcare
DHHS-13 Audit Report Transmittal for Marshall's Healthcare
DHHS-14 Final Informal Review Decision dated June 24, 2016 for Marshall's Healthcare (Sections 1(a)-(g) are identical to Atlantic Rehab FIRD. Section 2 references central office capitalized wages. Section 3 references working capital interest as a fixed cost)
DHHS-15 MCBM, Chapter III, Section 97, Private Non-Medical Institutions
DHHS-16 Cost Report filed by Portland Center for Assisted Living (PCAL)
DHHS-17 Audit Report Transmittal for PCAL
DHHS-18 Final Informal Review Decision dated June 24, 2016 for PCAL (Sections 1(a)-(g) are identical to Atlantic Rehab FIRD. Section 2 references office capitalized wages)
DHHS-19 Closing Argument

Appellant Exhibits

FAH-A Impact of Allowable VP QA
FAH-B1 Impact of allowable Clinical Consultant
FAH-B2 Allowed Clinical Consultant in 2013 and 2014 CR's
FAH-B3 Facility v. State HPPD
FAH-C1 Peter timesheet, annual log, fixed asset support
FAH-C2 GAAP Fixed Asset Guidance
FAH-C2a GAAP Internal Capitalization of labor guidance
FAH-D1 2005 CR Appeal and settlement related to Renaissance loss on building disposal
FAH-D2 2014 med audited colliers
FAH-D3 Loss on disposal calculation
FAH-D4 Depreciation calculation
FAH-D5 Loss on Disposals by in service date
FAH-D6 Atlantic Rehab 2012 appeal of loss on disposal

FIRST ATLANTIC HEALTHCARE

- FAH-D7 Example of Recapture Calculation-Marshall's FY 2011
- FAH-E Berry Dunn invoice detail for accounting costs under appeal
- FAH-F1 Request for Informal Review – Portland Center for Assisted Living
- FAH-F2 Request for Informal Review – Atlantic Rehabilitation and Living Center
- FAH-F3 Request for Informal Review – Colonial Healthcare, LLC
- FAH-F4 Request for Informal Review – Marshall's Healthcare, LLC
- FAH-F5 Request for Informal Review – Hawthorne House,
- FAH-G1 Appeal and Request for Hearing – Portland Center for Assisted Living
- FAH-G2 Appeal and Request for Hearing – Atlantic Rehabilitation and Living Center
- FAH-G3 Appeal and Request for Hearing - Colonial Healthcare, LLC
- FAH-G4 Appeal and Request for Hearing – Marshall's Healthcare, LLC
- FAH-G5 Appeal and Request for Hearing - Hawthorne House
- FAH-H Closing Argument

STANDARD OF REVIEW:

The hearing officer reviews the Department's claim for recoupment against an approved MaineCare services provider *de novo*. DHHS Administrative Hearing Regulations, 10-144 C.M.R. Ch. 1, § VII (C)(1); Provider Appeals, MaineCare Benefits Manual, 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.21-1 (A). The Department bears the burden to persuade the Hearing Officer that, based on a preponderance of the evidence, it was correct in establishing a claim for repayment or recoupment against an approved provider of MaineCare services. 10-144 C.M.R. Ch. 1, § VII (B)(1), (2).

LEGAL FRAMEWORK

The Department administers the MaineCare program, which is designed to provide "medical or remedial care and services for medically indigent persons," pursuant to federal Medicaid law. 22 M.R.S. § 3173. *See also* 42 U.S.C. §§ 1396a, *et seq.* To effectuate this, the Department is authorized to "enter into contracts with health care servicing entities for the provision, financing, management and oversight of the delivery of health care services in order to carry out these programs." *Id.* Enrolled providers are authorized to bill the Department for MaineCare-covered services pursuant to the terms of its Provider Agreement, Departmental regulations, and federal Medicaid law. "Provider Participation," MaineCare Benefits Manual, 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.03. *See also* 42 C.F.R. § 431.107 (b) (state Medicaid payments only allowable pursuant to a provider agreement reflecting certain documentation requirements); 42 U.S.C. § 1396a (a)(27). Enrolled providers also "must ... [c]omply with requirements of applicable Federal and State law, and with the provisions of this Manual." 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.03-3 (Q). Enrolled providers are also required to maintain records sufficient to "fully and accurately document the nature, scope and details of the health care and/or related services or products provided to each individual MaineCare member." 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.03-3 (M). "The Division of Audit or duly Authorized Agents appointed by the Department have the authority to monitor payments to any MaineCare provider by an audit or post-payment review." 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.16. Pursuant to federal law, the Department is also authorized to "safeguard against excessive payments, unnecessary or inappropriate utilization of care and services, and assessing the quality of such services available under MaineCare." 10-144 C.M.R. Ch. 101, sub-Ch. I, §

FIRST ATLANTIC HEALTHCARE

1.17. See also 10-144 C.M.R. Ch. 101, sub-Ch. I, § 1.18; 22 M.R.S. § 42 (7); 42 U.S.C. § 1396a (a)(27); 42 C.F.R. § 431.960.

Issues Resolved by Agreement or Withdrawal:

There were six issues that were resolved prior to the hearing held on February 3, 2017. First, The Department reversed its position that there should be a disallowance of costs associated with the Vice President of Quality Assurance. Second, First Atlantic withdrew its appeal of the disallowance of net carpenter's wages and benefits in the central office. However, First Atlantic maintains its opposition to the Department's failure to provide specific assignment of a portion of those wages and benefits to particular capital projects. Third, the Department is now allowing for travel costs. Fourth, the allowable accounting costs in the central office were increased from \$21,285.00 to \$33,300.00. Fifth, First Atlantic withdrew its appeal of the disallowance of a central office vehicle expense. And finally, the interest expense is now allowed for Marshall's Healthcare.

RECOMMENDED FINDINGS OF FACT:

1. First Atlantic Healthcare is the parent corporation of Atlantic Rehabilitation and Nursing Center, Marshall's Healthcare, Portland Center for Assisted Living, Colonial Healthcare and Hawthorne House.
2. Atlantic Rehabilitation and Nursing Center was a nursing facility located in Calais, Maine.
3. On January 9, 2012, DHHS granted a Certificate of Need to Colliers Nursing Home in Ellsworth Maine, which included the closing of Atlantic Rehabilitation and Nursing Center.
4. Atlantic Rehabilitation and Nursing Center ceased operation on or about 2012.
5. The physical plant and material assets were demolished or scrapped.
6. Marshall's Healthcare is a nursing facility located in Machias, Maine.
7. Portland Center for Assisted Living is a residential care facility located in Portland, Maine.
8. Colonial Healthcare is a nursing facility/assisted living facility located in Lincoln, Maine.
9. Hawthorne House is a nursing facility located in Freeport, Maine.
10. As MaineCare providers, each facility is required to file a cost report with the Department of Health and Human Services, Division of Audit at the end of each fiscal year.
11. All the facilities timely filed the cost report for their fiscal year ending December 31, 2012.
12. First Atlantic Healthcare requested informal reviews for all the facilities.
13. The Division of Audit issued Final Informal Review Decisions on June 26, 2016.
14. First Atlantic Healthcare timely appealed the Final Informal Review Decisions.
15. First Atlantic Healthcare has employed a RN Clinical Consultant since at least 2013 who is a member of the centralized staff.
16. The RN Clinical Consultant is a full time employee of Hawthorne House.
17. Costs associated with the Consultant's ½ time corporate responsibilities are charged to First Atlantic as contract labor at the prorated cost of her wages and benefits at Hawthorne House.
18. The Division of Audit allowed for the cost of the RN Clinical Consultant in 2013-2014.

FIRST ATLANTIC HEALTHCARE

19. First Atlantic Healthcare employs a carpenter as part of its centralized staff.
20. First Atlantic asked that cost of employee recognition events for the central staff be allowed as a central office cost.

RECOMMENDED DECISION:

The hearing officer recommends that the Commissioner find that the department was correct when it determined for the audit report issued for fiscal year ending 6/21/12 that Atlantic Rehabilitation and Nursing Center not be allowed the loss on disposal of assets and adjustments to the central office costs, which result in an underpayment of \$28,838.91.

The hearing officer recommends that the Commissioner find that the department was correct when it determined for the audit report issued for fiscal year ending 12/31/12 that Marshall's Healthcare be disallowed central office costs, working capital interest and capitalized labor costs, which result in an overpayment of \$24,380.93.

The hearing officer recommends that the Commissioner find that the department was correct when it determined for the audit report issued for fiscal year ending 12/31/12 that Portland Center for Assisted Living be disallowed central office costs and capitalized labor costs, which result in an overpayment of \$9,846.18.

The hearing officer recommends that the Commissioner find that the department was correct when it determined for the audit report issued for fiscal year ending 12/31/12 that Hawthorne House be disallowed central office costs, which result in an underpayment of \$35,418.32.

The hearing officer recommends that the Commissioner find that the department was correct when it determined for the audit report issued for fiscal year ending 12/31/12 that Colonial Healthcare be disallowed central office costs and capitalized labor costs, which result in an underpayment of \$57,759.70.

RECOMMENDED DECISION #1:

The Department was correct when it determined for the audit report issued for fiscal year ending 6/21/12 that Atlantic Rehabilitation and Nursing Center not be allowed the loss on disposal of assets and adjustments to the central office costs, which result in an underpayment of \$28,838.91.

REASONS FOR RECOMMENDATION:

Atlantic Rehabilitation and Nursing Center was a nursing facility located in Calais, Maine. On January 9, 2012, DHHS granted a Certificate of Need to Colliers Nursing Home in Ellsworth Maine, which included the closing of Atlantic Rehabilitation and Nursing Center. Atlantic Rehabilitation and Nursing Center ceased operation on or about 2012. The physical plant and material assets were demolished or scrapped.

First Atlantic's cost report for Atlantic Rehabilitation and Nursing Center requested reimbursement of \$187,445.00 of costs as a loss on disposal of assets in the fixed cost component as permitted by the Principles.

FIRST ATLANTIC HEALTHCARE

Of relevance to this issue are two principles, 44.2.9 and 24.2 of the Principles of Reimbursement for Nursing Facilities, Chapter III §67, MaineCare Benefits Manual². Principle 44.2.9 pertains to the disposal of depreciable assets.

This is the principle upon which First Atlantic relied upon in requesting reimbursement for the loss when the nursing home was closed and demolished,

Gains and losses realized from the disposal of depreciable assets are to be included in the determination of allowable costs. The extent to which such gains and losses are includable is calculated on a proration basis recognizing the amount of depreciation charged under the program in relation to the amount of depreciation, if any, charged or assumed in a period prior to the provider's participation in the program, and in the current period. See 44.2.9, Principles of Reimbursement for Nursing Facilities, Chapter III §67, MaineCare Benefits Manual.

The Department does not deny that Principle 44.2.9 applies to this case, but argues that Principle 24.2 must also be considered. According to the Department, First Atlantic is not due any reimbursement because by the time the nursing facility was closed, the assets were not related to resident care,

Costs must be ordinary and necessary and related to resident care. They must be of the nature and magnitude that prudent and cost conscious management would pay for a specific item or service. See 24.2, Principles of Reimbursement for Nursing Facilities, Chapter III §67, MaineCare Benefits Manual.

First Atlantic framed their argument in their Request for Informal Review, which disputed that the costs were not related to resident care, and arguing that their request for reimbursement is allowable under Principle 44.2.9,

"These costs represent the loss on disposal of building, land improvement and equipment assets that were sold, scrapped and demolished upon the closing of ARNC which closed pursuant to a granted CON that required the MaineCare revenue stream of ARNC to transfer to a replacement facility in Ellsworth (sic) Maine. Audit adjustment #3 disallows the loss on disposal of assets from abandonment and the auditor cited section 42.2.9 and 24.2 reference work paper #13 as authority for this adjustment. We do not understand the reference to 42.2.9 as basis to disallow the loss as this principle clearly allows loss from the disposal of depreciable assets. The equipment assets were disposed of by sale and scrapping. The building was torn down within one year of facility closure. We respectfully disagree that the costs are not related to patient care as the building and real property depreciation had historically been allowable as related to patient care and have irreversibly been disposed of." See F-2, FAHC.

² Cites to the Principles of Reimbursement for Nursing Facilities are to a prior version of the rules. Currently, the cite for 44.2.9 would be to 18.2.3.8. The cite for 24.2 is now 9.2.

FIRST ATLANTIC HEALTHCARE

The Department argues that Mainecare will not pay for depreciable assets in a facility that no longer provides care for MaineCare recipients. According to the Department, their decision is supported by the overall system established by the Principles. The Department goes on to cite several principles which echo Principal 24.2's emphasis on costs related to resident care.

The Department cites Principle 12 (now Principle 1.3) to underscore the point that the payment rate is set in advance of the provision of services, not after it ceases to provide services,

A prospective case mix payment system for nursing facilities is established by these rules in which the payment rate for services is set in advance of the actual provision of those services. The rate is established in a two-step process. In the first step, a facility's base year cost report is reviewed to extract those costs that are allowable costs. A facility's costs may fall into an allowable cost category, but be determined unallowable because they exceed certain limitations. Once allowable costs have been determined and separated into three (3) components - direct, routine and fixed costs, the second step is accomplished in which the costs which must be incurred by an efficiently and economically operated facility are identified. See Principle 12 (now 1.3).

The Department cites Principle 37.1 (now 14.1) for the underlying basis of the Principles that nursing facilities are reimbursed for services provided for members.

Nursing care facilities will be reimbursed for services provided to members based on a rate which the Department establishes on a prospective basis and determines is reasonable and adequate to meet the costs which must be incurred by an efficiently and economically operated facility in order to provide care and services in conformity with applicable State and Federal laws, regulations and quality and safety standards.

The Department also cites Principle 85.1 (now 26.1), for the concept that the Department reimburses facilities for actual allowed fixed costs that which incurred during a fiscal year, not after a facility has closed,

The Department will reimburse facilities for the actual allowable fixed costs which are incurred during a fiscal year. Upon final audit of a facility's cost report, if the Department's share of the allowable fixed costs actually incurred by the facility is greater than the amount paid by the Department (the fixed cost component of the final prospective rate multiplied by the number of days of care provided to MaineCare beneficiaries), the difference will be paid to the facility by the Department. If, the Department's appropriate share of the allowable fixed costs actually incurred by a facility is less than the amount paid by the Department, the difference will be paid to the Department by the facility.

The Department summarizes its argument thusly,

"Thus the concept of payment for allowable costs are fundamentally premised on the ongoing provision of services to members, and once those services end so does the Department's obligation to participate in future costs as interest or depreciation." See DHHS-19.

FIRST ATLANTIC HEALTHCARE

First Atlantic agrees that the Principles' underlying general premise is that costs must be related to patient care. However, First Atlantic argues that it does not override the specific provision allowing for losses on disposition of assets.

First Atlantic also argues that the disallowance of the loss on disposition of a facility after closure is not consistent with the Division of Audit's past practice, citing the example of Renaissance, a facility that was closed in 2005. According to First Atlantic, Renaissance, another facility owned by First Atlantic, was allowed to claim losses on equipment when it closed.

First Atlantic also argues that it is necessary to look to other sources of law, since the Principles do not fully address the situation. First Atlantic cites both GAAP and HIM #14 (Medicare rules). First Atlantic contends that HIM #14 specifically permits losses relating to disposals made within one year after a provider's termination to include such losses in its final cost reporting period. See FAH-H.

The hearing officer has determined that the Department was correct when it determined for the audit report issued for fiscal year ending 6/21/12 that Atlantic Rehabilitation and Nursing Center not be allowed the loss on disposal of assets and adjustments to the central office costs, which result in an underpayment of \$28,838.91.

The hearing officer agrees with the Department's interpretation of its own rules. There is no doubt that the fundamental underpinning of the Principles in question is that reimbursement is based upon the care of residents. Once Atlantic Rehabilitation was closed and not serving any residents, it ceased to fulfill that basic premise. The hearing officer also agrees with the Department's argument that the Renaissance facility is distinguishable from Atlantic Rehabilitation and Nursing Center. The testimony at hearing was that residents were immediately relocated to another facility immediately upon the closure of Renaissance. As the Department stated,

The new facility was for all practical purposes the successor to the ageing Renaissance facility. There was never any lapse in the provision of services to those residents by First Atlantic. In the present case, the facts are very clear that Atlantic Rehab had no true successor facility, there was no plan or intent to treat this as a 'Renaissance to Seal Rock' situation by First Atlantic, and thus there was no continuity of operation or care which the Division could follow. See DHHS-19.

The hearing officer also finds no reason to look to other sources of law. The hearing officer agrees with the Department that the Principles are clear and concise, and control the issues at hand.

Lastly, the Principles govern the reimbursement for costs associated with the Medicaid Program. Thus what may appear to be a prudent business decision is not necessarily in accordance with the Principles. In this case, allowing for the loss on disposal of assets is not in accordance with the Principles.

FIRST ATLANTIC HEALTHCARE

RECOMMENDED DECISION #2:

Capitalized Labor Costs-Carpenter:

The Department was correct when it determined for the audit report issued for fiscal year ending 12/31/12 that Marshall's Healthcare be disallowed central office costs, working capital interest and capitalized labor costs, which result in an overpayment of \$24,380.93.

The Department was correct when it determined for the audit report issued for fiscal year ending 12/31/12 that Portland Center for Assisted Living be disallowed central office costs and capitalized labor costs, which result in an overpayment of \$9,846.18. See HO-5.

The Department was correct when it determined for the audit report issued for fiscal year ending 12/31/12 that Colonial Healthcare be disallowed central office costs and capitalized labor costs, which result in an underpayment of \$57,759.70. See HO-9.

REASON FOR RECOMMENDATION:

First Atlantic employs a carpenter that performs construction and repair at three facilities, Marshall's Healthcare, Colonial Healthcare, and Portland Center for Assisted Living. First Atlantic made this business decision because, according to First Atlantic, it is often difficult to locate a competent contractor to perform these duties in a timely and cost conscious manner. According to First Atlantic, the cost is at least competitive with the use of outside contractors. As explained in the Informal Review request for Marshall's Healthcare,

"The capitalized wages are those provided by a carpenter who is an employee of First Atlantic, the facility's home office. Just as an outside vendor would do, the carpenter tracks his time and costs for each project. No mark-up is charge by First Atlantic Healthcare for is work." See FAH F-4.

The Department does not dispute that the employment of a carpenter by First Atlantic was a prudent business decision. There was no evidence to dispute the argument that working with outside contractors produced less than optimal results, often at inflated prices. According to the Department, the wages of the carpenter's position were disallowed as an unallowable central office cost per Principle 43.4.2(G).

According to Principle 43.3.2.(G)³

Central Office Operational Costs. Central office bookkeeping costs and related clerical functions that are not included in the administration and policy-planning ceiling may be allocated to each facility on the basis of total resident census limited to the reasonable cost of bookkeeping services if they were performed by the individual facilities.

(1). All central office operational costs other than those listed in this principle are considered unallowable costs.

³ The current Principals have changed its format for the routine cost components section. Therefore, there is no identical principle in the current rules.

FIRST ATLANTIC HEALTHCARE

According to the Department, the position of a carpenter is not expressly recognized in the Principles, and it is duplicative of maintenance staff that exist in the facilities.

The Department argues that maintenance staff is characterized as routine costs, and therefore the labor performed should not be capitalized. Their wages and benefits have already been accounted for. According to the Department, by adding the value of their wages and benefits to an asset effectively double counts their wages and benefits. The Department suggests that First Atlantic's argument for the capitalization of the labor cost would also avoid the cap that is placed on routine costs, citing 80.4 (That cite cannot be verified).

First Atlantic argues that the work of a skilled carpenter is in no way duplicative of the work of the maintenance staff,

“Here, however, we are not discussing services that constitute maintenance or repair expenses. Rather, the cost claimed by First Atlantic are the costs of building new capital assets which fall outside of the category of maintenance and are recoverable through depreciation over their estimated useful lives.” See FAH-H.

The hearing officer agrees with the Department that the Principles do not recognize the position of a carpenter. In addition, since maintenance staff are characterized as routine costs, their wages and benefits have already been accounted for.

The Principles govern the reimbursement for costs associated with the Medicaid Program. Thus what may appear to be a prudent business decision is not necessarily in accordance with the Principles. In this case, the employment of a Carpenter is not reimbursable as a capitalized labor cost.

RECOMMENDED DECISION #3:

Clinical RN Consultant:

The department was correct when it determined for the audit report issued for fiscal year ending 6/21/12 that Atlantic Rehabilitation and Nursing Center not be allowed the loss on disposal of assets and adjustments to the central office costs, which result in an underpayment of \$28,838.91. See HO-1.

The department was correct when it determined for the audit report issued for fiscal year ending 12/31/12 that Marshall's Healthcare be disallowed central office costs, working capital interest and capitalized labor costs, which result in an overpayment of \$24,380.93. See HO-3.

The department was correct when it determined for the audit report issued for fiscal year ending 12/31/12 that Portland Center for Assisted Living be disallowed central office costs and capitalized labor costs, which result in an overpayment of \$9,846.18. See HO-5.

FIRST ATLANTIC HEALTHCARE

The department was correct when it determined for the audit report issued for fiscal year ending 12/31/12 that Hawthorne House be disallowed central office costs, which result in an underpayment of \$35,418.32. See HO-7.

The department was correct when it determined for the audit report issued for fiscal year ending 12/31/12 that Colonial Healthcare be disallowed central office costs and capitalized labor costs, which result in an underpayment of \$57,759.70. See HO-9.

First Atlantic employs a RN clinical consultant. The RN clinical consultant is a full time employee of Hawthorne House. Costs associated with the Consultant's ½ time corporate responsibilities are charged to First Atlantic as contract labor at the prorated cost of her wages and benefits at Hawthorne House. According to First Atlantic, this position was created, in part, to ensure regulatory compliance,

“The work of the RN clinical consultant is plainly related to delivering resident care, as it consists of auditing and monitoring compliance, and providing staff training, to promote clinical best practices using standardized approaches across First Atlantic’s system.” See FAH-H.

According to First Atlantic, this position is in keeping with Medicaid's requirement of a strong corporate compliance environment. First Atlantic also argues that it is a prudent business decision to have such a position,

“Because First Atlantic has the advantage of scale, it is able to employ an individual to carry out these functions across its various facilities, rather than adding staff hours in the individual locations to shoulder off if this work. Just as the cost of such work would be reasonable if incurred on an individual facility level, it is reasonable when carried out in a centralized, efficient fashion, for a number of facilities under common ownership and management.” See FAH-H.

The Department’s argument is simple. The position is not recognized by the principles. According to the Department, under principle 41.1, the principles expressly recognize under direct costs, registered nurse, LPNs and nurse’s aides, patient activities personal and clerks. (now 16.1). However, the Principles recognize only three types of consultant services: Pharmacists, Dietary, and Medical Directors. See Principle 43.4.5(1-3)(now 17.4.12). The Principles do not recognize a RN Clinical Consultant as a central office cost.

The Department also dismisses First Atlantic's argument that, because this position was allowable under a previous audit, it should now be allowable now. According to the Department, the Principles provide that an action by an auditor is not binding upon the Division,

The failure of the Department to insist, in any one (1) or more instances, upon the performance of any of the terms or conditions of these Principles, or to exercise any right under these principles, or to disapprove of any practice, accounting procedure, or item of account in any audit, shall not be construed as a waiver of future performance of the right. The obligation of the Provider with respect to

FIRST ATLANTIC HEALTHCARE

future performance shall continue, and the Department shall not be stopped from requiring such future performance. See Principle 60. (now Principle 19).

The hearing officer agrees with the Department that Mr. Baird's past allowance of the RN Clinical Consultant is not binding on the Department per Principle 60. In addition, the Department is correct that the Principles do not recognize the position.

The Principles govern the reimbursement for costs associated with the Medicaid Program. Thus what may appear to be a prudent business decision is not necessarily in accordance with the Principles. In this case, a Clinical RN Consultant is not allowable under the direct costs, in accordance with the Principles.

RECOMMENDED DECISION #4:

Employee Recognition Events for First Atlantic Central Staff:

The department was correct when it determined for the audit report issued for fiscal year ending 6/21/12 that Atlantic Rehabilitation and Nursing Center not be allowed the loss on disposal of assets and adjustments to the central office costs, which result in an underpayment of \$28,838.91. See HO-1.

The department was correct when it determined for the audit report issued for fiscal year ending 12/31/12 that Marshall's Healthcare be disallowed central office costs, working capital interest and capitalized labor costs, which result in an overpayment of \$24,380.93. See HO-3.

The department was correct when it determined for the audit report issued for fiscal year ending 12/31/12 that Portland Center for Assisted Living be disallowed central office costs and capitalized labor costs, which result in an overpayment of \$9,846.18. See HO-5.

The department was correct when it determined for the audit report issued for fiscal year ending 12/31/12 that Hawthorne House be disallowed central office costs, which result in an underpayment of \$35,418.32. See HO-7.

The department was correct when it determined for the audit report issued for fiscal year ending 12/31/12 that Colonial Healthcare be disallowed central office costs and capitalized labor costs, which result in an underpayment of \$57,759.70. See HO-9.

First Atlantic disputes the Department's disallowance of \$4,382.00 in 'employee appreciation activities'. First Atlantic argues that the amount was reasonable and an important component of boosting morale and retaining retention of valuable employees.

The Department argues that such recognition events have been allowed in nursing facilities for employees involved in direct care. These events would be 'ordinary and necessary and related to resident care'. See Principle 24.2 (now 9.2). However, the Department argues that central office employees are neither crucial nor directly related to resident care.

The hearing officer agrees with the Department that the employee recognition events for First Atlantic Central staff is no 'ordinary, necessary, or involved in direct care'. The hearing officer

FIRST ATLANTIC HEALTHCARE

also understands the distinction that the Department makes for recognition events for direct care staff, which can be allowable expenses as opposed to central staff,

"In terms of expenses that are 'ordinary and necessary and related to resident care' (see Principle 24.2), it would be cold indeed to argue that supporting employees providing direct care in nursing facilities does not meet this criteria. Their salaries are not significantly above minimum wage, the work is difficult and retention of good employee in nursing facility has to be a priority." See DHHS-19.

As stated before, it may be a prudent business decision to have employee recognition events for central staff, however it is not allowable under the Principles.

CONCLUSION:

In conclusion, the hearing officer recommends that the Commissioner find in favor of the Department in regards to all five Orders of Reference:

The department was correct when it determined for the audit report issued for fiscal year ending 6/21/12 that Atlantic Rehabilitation and Nursing Center not be allowed the loss on disposal of assets and adjustments to the central office costs, which result in an underpayment of \$28,838.91.

The department was correct when it determined for the audit report issued for fiscal year ending 12/31/12 that Marshall's Healthcare be disallowed central office costs, working capital interest and capitalized labor costs, which result in an overpayment of \$24,380.93.

The department was correct when it determined for the audit report issued for fiscal year ending 12/31/12 that Portland Center for Assisted Living be disallowed central office costs and capitalized labor costs, which result in an overpayment of \$9,846.18.

The department was correct when it determined for the audit report issued for fiscal year ending 12/31/12 that Hawthorne House be disallowed central office costs, which result in an underpayment of \$35,418.32.

The department was correct when it determined for the audit report issued for fiscal year ending 12/31/12 that Colonial Healthcare be disallowed central office costs and capitalized labor costs, which result in an underpayment of \$57,759.70.

MANUAL CITATIONS

- DHHS Administrative Hearing Regulations, 10-144 C.M.R. Ch. 1, § VII (2014)
- MaineCare Benefits Manual, 10-144 C.M.R. Ch. 101 (2014). Chapter III, §67

RIGHT TO FILE RESPONSES AND EXCEPTIONS

THE PARTIES MAY FILE WRITTEN RESPONSES AND EXCEPTIONS TO THE ABOVE RECOMMENDATIONS. ANY WRITTEN RESPONSES AND EXCEPTIONS MUST BE

FIRST ATLANTIC HEALTHCARE

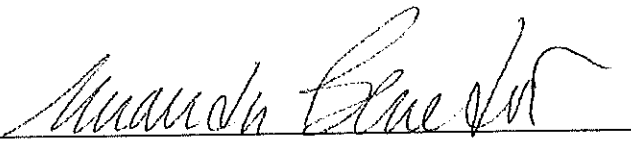
RECEIVED BY THE DIVISION OF ADMINISTRATIVE HEARINGS WITHIN FIFTEEN (15) CALENDAR DAYS OF THE DATE OF MAILING OF THIS RECOMMENDED DECISION.

A REASONABLE EXTENSION OF TIME TO FILE EXCEPTIONS AND RESPONSES MAY BE GRANTED BY THE CHIEF ADMINISTRATIVE HEARING OFFICER FOR GOOD CAUSE SHOWN OR IF ALL PARTIES ARE IN AGREEMENT. RESPONSES AND EXCEPTIONS SHOULD BE FILED WITH THE DIVISION OF ADMINISTRATIVE HEARINGS, 11 STATE HOUSE STATION, AUGUSTA, ME 04333-0011. COPIES OF WRITTEN RESPONSES AND EXCEPTIONS MUST BE PROVIDED TO ALL PARTIES. THE COMMISSIONER WILL MAKE THE FINAL DECISION IN THIS MATTER.

CONFIDENTIALITY

THE INFORMATION CONTAINED IN THIS DECISION IS CONFIDENTIAL. See 42 U.S.C. § 1396a (a)(7); 22 M.R.S. § 42 (2); 22 M.R.S. § 1828 (1)(A); 42 C.F.R. § 431.304; 10-144 C.M.R. Ch. 101 (I), § 1.03-5. ANY UNAUTHORIZED DISCLOSURE OR DISTRIBUTION IS PROHIBITED.

Dated: April 11, 2017



Miranda Benedict, Esq.
Administrative Hearing Officer

cc: Christopher Leighton, AAG
Charles Dingman Esq. Preti-Flaherty Beliveau & Pachios, LLP, 45 Memorial Circle,
Augusta, Maine