STATE OF NORTH CAROLINA	**IN THE OFFICE OF ADMINISTRATIVE HEARINGS**
COUNTY OF WAKE	**13 DHR 19958**

HEARTFELT ALTERNATIVES, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	**FINAL DECISION**
ALLIANCE BEHAVIORAL HEALTHCARE,	)	
as legally authorized contractor of and agent for	)	
N.C. DEPARTMENT OF HEALTH AND	)	
HUMAN SERVICES,	)	
	)	
Respondent.	)	

THIS MATTER came on to be heard before the undersigned Administrative Law Judge, Augustus B. Elkins II, on May 7, 2014 in Raleigh, North Carolina. After presentation of testimony and exhibits, the record was left open for the parties' submission of materials, including but not limited to supporting briefs, and proposals after receipt of the official transcript by all parties. Mailing time was allowed for submissions including the day of mailing as well as time allowed for receipt by the Administrative Law Judge. Petitioner and Respondent filed timely materials. For good cause shown and by order of the Chief Administrative Law Judge, the Undersigned was granted an extension until October 31, 2014 to file the decision in this case.

On October 20, 2014, Respondent Alliance Behavioral Healthcare ("Alliance") filed a Motion to Reconsider Prior Motion to Dismiss Based on Subsequently Decided Authority, thereby staying the issuing of the final decision until after ruling on Alliance's motion. After consideration of Alliance's Motion to Reconsider, the documents submitted in connection with the Motion to Reconsider by both Petitioner and Respondent, and the arguments of counsel made, the Undersigned issued its Order Denying Motion to Reconsider Alliance's Motion to Dismiss on December 3, 2014.

APPEARANCES

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APPLICABLE LAW

N.C. Gen. Stat. Chapter 150B, Article 3, and N.C. Gen. Stat. Chapter 108C.

PROCEDURAL HISTORY

On December 9, 2013, Petitioner Heartfelt Alternatives, Inc. ("Petitioner" or "Heartfelt") filed a Petition for Contested Case Hearing against Alliance Behavioral Healthcare ("Respondent" or "Alliance"), as legally authorized contractor of the N.C. Department of Health and Human Services. Heartfelt contemporaneously filed a Motion for a Temporary Restraining Order and Stay of Contested Action. A Temporary Restraining Order was entered by the Undersigned on December 13, 2013, and Petitioner's Motion for Stay was scheduled for hearing on December 20, 2013. On December 18, 2013, Alliance's Motion to Dismiss for lack of subject matter jurisdiction was denied, and a written Order was entered setting forth the basis of the Office of Administrative Hearings' ("OAH") jurisdiction in this contested case. The Undersigned hereby incorporates the decision denying Alliance's Motion to Dismiss as well as the Order Denying Motion to Reconsider Alliance's Motion to Dismiss as part of this Decision to the extent they address issues related to this Tribunal's jurisdiction. A hearing was held on Heartfelt's Motion for Stay and Preliminary Injunction on December 20, 2013, and a written Order was entered granting a Stay and Preliminary Injunction. On May 15, 2014, a Revised Order Granting Motion to Stay the Contested Action was entered.

BURDEN OF PROOF

Under N.C. Gen. Stat. § 108C-12(d), Respondent has the burden of proof as to any "adverse determination." The definition of "adverse determination" includes the decision to terminate a provider from participation in the Medical Assistance program. *See* N.C. Gen. Stat. § 108C-2(1).

ISSUES

Petitioner contends the issue is whether pursuant to N.C. Gen. Stat. § 108C, Respondent Alliance Behavioral Healthcare, Inc. violated the standards of N.C. Gen. Stat. § 150B-23(a) when it denied Petitioner Heartfelt Alternatives, Inc. the ability to continue forward in the Request for Proposal Process ("RFP") created by Alliance for Intensive In-Home and Community Support Team Services provided in the Alliance Catchment Area. Heartfelt

contends that Alliance's erroneous decision had the effect of terminating Heartfelt from the Medicaid program in the Alliance catchment area.

Respondent contends that the Office of Administrative Hearings lacks jurisdiction of this matter for the reasons previously considered and rejected by this Tribunal. *See* Order Denying Motion to Dismiss, entered on January 21, 2014 and Order Denying Motion to Reconsider Alliance's Motion to Dismiss entered on December 3, 2014.

Respondent contends the issue is whether Petitioner has any right to participate in the Medicaid program or the network; and if so, whether Alliance acted arbitrarily or capriciously in setting and enforcing the minimum requirement that providers had to be in good standing with other LME/MCOs at the time they submitted their responses to Alliance's RFP. Respondent contends that this matter involves the decisions by Alliance: (1) not to advance Heartfelt to stage two of Alliance's process of reviewing responses to Requests for Proposal based on Alliance's decision that Heartfelt did not meet the minimum requirements set forth in the RFPs; and (2) not offer Heartfelt a contract after the expiration of the contract in place at the time, which expired on December 31, 2013. As stated by the Undersigned at the conclusion of the preliminary injunction hearing, the issue to be decided was whether Alliance should be required to advance Heartfelt to step two of the RFP process (called "desk review").

WITNESSES

Petitioner presented the testimony of Carl Noyes

Respondent presented the testimony of William Carlyle Johnson

EXHIBITS

Petitioner's Exhibits

Exhibit No.	Description
1.	Excerpts from 1915(b)/(c) North Carolina Waiver Plan
2.	Alliance Provider Operations Manual
3.	September 18, 2013 Alliance "All Provider Meeting" PowerPoint Presentation
4.	October 8, 2013 Community Support Team ("CST") RFP Pre-Proposal Conference
5.	October 7, 2013 Intensive In-Home ("IIH") Services RFP Pre-Proposal Conference
6.	Alliance "RFPs for IIH, CST, SAIOP, and SE" Website Snapshot
7.	Alliance RFP #2013-301 for CST
8.	Alliance RFP #2013-302 for IIH
9.	Alliance RFP Selection Summary
10.	Excerpts from Heartfelt's CST Response to RFP

Exhibit No.	Description
11.	Excerpts from Heartfelt's IIH Response to RFP
12.	Alliance "Request for Information/Request for Proposal Procedure" Website Search Results
13.	November 12, 2013 Alliance Tentative Notice of Termination
14.	January 9, 2014 Recommendations of Vendors in Response to Requests for Proposals
15.	September 3, 2013 MeckLINK Tentative Notice of Termination
16.	April 2, 2014 Voluntary Consent Withdrawal from MeckLINK and Superseding of Prior Notice of Termination
17.	Excerpts from Evergreen Behavioral Management, Inc. IIHS Response to RFP
18.	December 13, 2013 Letter from Alliance to Evergreen Indicating that Evergreen's IIH Response to RFP Met Minimum Criteria for Desk Review
19.	Notice of 30(b)(6) Deposition of Respondent
20.	Transcript of 30(b)(6) Deposition of Respondent (Carlyle Johnson and Alison Rieber) (April 21, 2014)
21.	Heartfelt Document Submission to Alliance
22.	Letter dated October 16, 2013 from Alliance to Heartfelt re plan of correction follow-up visit
23.	Alliance-DHHS Contract

Respondent's Exhibits

Exhibit No.	Description
1.	Contract between Alliance and Heartfelt (plus two extensions)
2.	Alliance's RFP for Community Support Team (CST) services
3.	Alliance's RFP for Intensive In-Home (IIH) services
4.	Excerpt from Heartfelt's Response to RFP for CST (pages 31–36)
5.	Excerpt from Heartfelt's Response to RFP for IIH (pages 31–36)
6.	Alliance Provider Manual
7.	Alliance Procedure # 6029 – Selection and Retention of Providers
8.	Non-renewal letter from Alliance to Heartfelt dated November 12, 2013
11.	Attachment 1.1 B of the State Plan
13.	Deposition transcript (Dr. Carlyle Johnson and Alison Rieber)
15.	MeckLINK's termination letter to Heartfelt (September 3, 2013)
17.	Statement of money paid by Alliance to Heartfelt since January 1, 2014
18.	Settlement Agreement between Heartfelt and MeckLINK

BASED UPON careful consideration of the sworn testimony of the witness presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following Findings of Fact. In making the Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility of each witness by taking into account the appropriate factors for judging credibility, including

but not limited to, the demeanor of the witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other credible evidence in the case.

FINDINGS OF FACTS

1. Petitioner Heartfelt is a provider of mental health and behavioral health services with its principal place of business in Raleigh, North Carolina. Heartfelt assists consumers, including Medicaid recipients, at home, in school and in the community in preventing, overcoming and managing functional deficits caused by mental health issues and developmental delays. Heartfelt provides Intensive In-Home ("IIH") services, Community Support Team ("CST") services, outpatient therapy, medication management, and Level III residential services.

2. In order to provide IIH services or CST services, a provider must be certified as a Critical Access Behavioral Health Agency ("CABHA"). To be certified as a CABHA, a provider was required to have a medical director, a clinical director, and training/quality management director. The CABHA had to attest to a continuum of care and comply with various other requirements. Heartfelt became a CABHA in 2010.

3. Heartfelt employs 42 staff members pursuant to this Tribunal's Stay Order. Heartfelt currently provides IIH to consumers. Heartfelt provided services to CST consumers until December 2013. Heartfelt discontinued CST services because it was unable to attract a sufficient number of patients. A PowerPoint presentation created by Alliance and subsequent Alliance communications to referral sources, which did not include Heartfelt as a CST provider, led to Heartfelt's inability to attract CST clients. Heartfelt intends to resume providing CST services if it prevails in this contested case.

4. Carl Noyes testified on behalf of Petitioner. Mr. Noyes is Heartfelt's Quality Management Director. Mr. Noyes testified as to Heartfelt's history as a provider, Heartfelt's services to Alliance consumers, and Alliance's decision to terminate Heartfelt.

5. Respondent Alliance is a multi-county area mental health, developmental disabilities, and substance abuse authority established pursuant to N.C. Gen. Stat. § 122C-115(c). Alliance is a Local Management Entity (LME), Managed Care Organization (MCO), and Prepaid Inpatient Health Plan (PIHP).

6. Pursuant to Sections 1915(b) and 1915(c) of the Social Security Act, the United States Department of Health and Human Services has waived portions of North Carolina's traditional "fee-for-service" (also known as "any willing provider") Medicaid programs and allowed them to be replaced with a managed care program ("the 1915(b)/(c) Medicaid Waiver") with closed networks of providers managed by LME/MCO/PIHPs. Under the 1915(b)/(c) Medicaid Program, the State of North Carolina has promised to offer consumers at least as much choice in individual providers as they had in the non-managed care environment.

7. Alliance is one of several entities hired as a contractor by the N.C. Department of Health and Human Services ("DHHS") to operate the 1915(b)/(c) Medicaid Program as a managed care program. Since February 1, 2013, Alliance has operated as a LME, MCO, and PIHP pursuant to the 1915 Medicaid Waiver and a contract with the North Carolina Department of Health and Human Services. Alliance manages a closed network in the following four counties: Cumberland, Durham, Johnston, and Wake. Heartfelt has provided services to consumers in these four counties since 2007 and continued providing services to these consumers through Alliance's creation in 2013.

8. Alliance is the Department's legally authorized agent, which, acting within the scope of its authorized activities, is responsible for identifying, recruiting, vetting, contracting with, assessing, managing, reviewing, auditing, and reimbursing providers for Medicaid and State-funded mental health, substance abuse, and intellectual/developmental disability services within its catchment area pursuant to Title XIX or XXI of the Social Security Act, the North Carolina State Plan of Medical Assistance, and the waivers of the federal Medicaid Act granted by the United States Department of Health and Human Services. Alliance does not provide services, but seeks to ensure that individuals who qualify for services receive those services and supports for which they are eligible. These services are delivered by a closed network of private providers that contract with Alliance.

9. Because Alliance contracts with providers under the 1915(b)/(c) Medicaid Program, if a provider does not have a contract with Alliance, that provider cannot participate in the 1915(b)/(c) Medicaid Program that Alliance operates.

10. Alliance receives state funds for operating the closed network of providers. Alliance operates an "at risk" closed network of providers, meaning that Alliance is responsible for managing and budgeting the funds it receives to deliver Medicaid services to the enrollees and for staying within its budget. Choices have to be made by Alliance as to how many and which providers to have in its network and which services to authorize.

11. The 1915(b) Medicaid Waiver provides in Section A: Program Description; Part 1: Program Overview, Section B Delivery Systems as follows: "North Carolina's model is based on the assumption that the MH/IDD/SAS local management entities are the only organizations in North Carolina capable of managing the complex services and support needs of the specialty population at this time."

12. Dr. William Carlyle Johnson testified on behalf of Respondent. Dr. Johnson is Alliance's Director of Provider Network Development. Dr. Johnson testified as to Alliance's process for selecting and retaining providers and Alliance's decision to terminate Heartfelt.

13. Starting February 1, 2013, Alliance entered into contracts with providers pursuant to which providers were authorized to provide Medicaid services, through qualified professionals, to enrollees. Alliance and Heartfelt entered into such a contract. Heartfelt's contract (like the other provider contracts) was set to expire on December 31, 2013. Heartfelt's contract with Alliance contained no right to renewal or extension. None of the other provider contracts contained any right to a renewal or extension of said contract.

14. The contract between Alliance and DHHS/DMA permits Alliance to use a Request for Proposal process. Specifically, the contract provides that "if there is a competitive Request for Proposal, a scoring process will be developed to assess the providers' competencies specific to the requirements of the Request for Proposal, the service definition, and enrollment requirements . . ." (Contract between Alliance and DHHS/DMA, Attachment O, Section B (19) at page 94.)

15. In the fall of 2013, Alliance issued requests for proposals ("RFPs") for Medicaid services including two service programs: Intensive In-Home ("IIH") and Community Support Team ("CST"). Both IIH and CST services have to be authorized by Alliance before a provider can deliver the services and be paid for those services.

16. IIH services are for children up to the age of 21, if the services are Medicaid-funded, or 17, if the services are State-funded. IIH services are provided to consumers who have severe emotional or behavioral needs. IIH is the highest form of community-based mental health treatment. IIH is delivered by a three-person team, which includes a licensed individual as the team leader and two full-time non-licensed staff. The team works with up to eight consumers and their families. The service is available 24 hours a day, 365 days a year, in case of emergencies. CST services are similar in scope to IIH services, but CST services are provided to adults only. CST services are also delivered by a three-person team. The team typically works with about 35 to 40 adult consumers. These consumers qualify for the services based upon meeting the medical necessity criteria set forth by Medicaid.

17. Alliance's witness testified that the basis for conducting the RFP process was that Alliance had "excess capacity" and "significant concerns about quality of care." (Johnson, Tr. p. 31). Despite the testimony of Alliance's witness, Alliance communicated to providers that the purpose of the RFP was not to "right-size the network." Alliance did no study or review to determine the appropriate number of providers needed in the catchment area to serve consumers in need of services.

18. The RFPs were issued on September 30, 2013. RFP responses were due November 1, 2013, by 5:00 pm. The IIH and CST RFPs contained a section setting forth the minimum criteria to continue participation in Alliance's network. The minimum criteria required that the provider be in "good standing" with Alliance and other LME/MCOs. Alliance, in its RFP, asked providers to list sanctions, whether those sanctions were appealed, and what the status of the appeals were.

19. Alliance's RFP response review process involved four steps. Step 1 was to review whether the applicant met the minimum criteria, including the "good standing" check. Step 2 was a desk review of the applicant's written materials. Step 3 was an interview of applicants who met a certain threshold in the desk review. Step 4 was approval by Alliance's Board of Directors based upon the Step 3 interview scores. The Board of Directors selected every provider that received a passing score in the interview.

20. In the first step if providers did not meet minimum requirements, they went no further in the RFP process. If providers met the minimum requirements, Alliance offered three-

month contract extensions from December 31, 2013, to March 31, 2014. In the second step if providers met minimum requirements, Alliance evaluated and scored the written proposals. Providers who achieved a certain score at desk-review went to step three.

21. Step three involved an in-person interview. Several employees of Alliance met with several employees of each provider in a question and answer session, and Alliance then evaluated and scored each provider. Depending upon the score, Providers were recommended for either 6 month or 12 month contracts. The fourth step was evaluation and final decision by the Board of Directors of Alliance as to whether to offer 6-month or 12-month contracts.

22. Heartfelt timely submitted responses to both the IIH and CST RFPs, and Heartfelt's responses were in the proper form. The parties agree that Heartfelt was in good standing with Alliance. Heartfelt did not have any paybacks owed to Alliance and did not have any open plans of correction. Heartfelt was also in good standing with other federal and State agencies at the time the RFP responses were submitted.

23. In both responses to the RFPs, Heartfelt included the following information in response to the RFP question asking Heartfelt to explain any current or pending sanctions including information regarding if the sanction was under appeal:

> On September 3, 2013, MeckLINK notified [Heartfelt] that [its] participation with the 1915(b)/(c) Medicaid Waiver that MeckLINK operates would be terminated effective October 3, 2013. The issue revolved around the qualifications and make-up of an Intensive In Home team that MeckLINK alleges violated DMA Clinical Coverage Policy 8A. [Heartfelt] requested a reconsideration of the initial notice. On September 27, 2013, the reconsideration was denied and the termination was upheld. On October 28, 2013, [Heartfelt] filed a Petition for Contested Case Hearings challenging MeckLINK's termination.

(Pet. Exs. 10, 11).

24. Heartfelt's RFP responses explained that the status of the pending appeal of the MeckLINK termination: "At the time of submitting this Response, this matter is still pending at the Office of Administrative Hearings." (Pet. Exs. 10, 11).

25. When Heartfelt submitted its RFP responses, Heartfelt understood that it was in good standing with other LME/MCOs, including MeckLINK, because the MeckLINK termination was under appeal and not final.

26. When Heartfelt submitted its RFP responses, it understood that Alliance would consider the appeals information as relevant because Alliance specifically asked for this appeals information.

27. At the time Heartfelt responded to the RFPs, MeckLINK Behavioral Healthcare ("MeckLINK") was another LME/MCO. Heartfelt was participating in the network operated by MeckLINK. Heartfelt was only serving one consumer at the time.

28. On August 15, 2013, MeckLINK conducted an on-site review of Heartfelt. As a result of the on-site review, on September 3, 2013, MeckLINK notified Heartfelt that its participation with the 1915(b)/(c) Medicaid Program that MeckLINK operates would be terminated effective October 3, 2013. MeckLINK's notice expressly states that its decision would not have any impact on Heartfelt's status with other LME/MCOs.

29. MeckLINK's purported basis for termination related to the staffing of Heartfelt's IIH team in Mecklenburg County. The issue cited by MeckLINK occurred when a staff member resigned her position with Heartfelt, leaving only two team members instead of three. Heartfelt actively recruited a new staff member and provided MeckLINK with over 100 pages of documentation showing its efforts to hire a replacement. During the time when Heartfelt had only a two-person team, Heartfelt was only serving one consumer. At the time the MeckLINK monitoring occurred, an additional staff member had been hired and the team consisted of three clinicians.

30. A three-person IIH team can serve up to eight consumers. Typically, one team member provides direct services to the consumer. The purpose of a three-person team requirement is to ensure coverage for continuous crisis response. At no time did the Medicaid recipient served in the MeckLINK area not receive the services authorized, and there has been no allegation that quality of care was not provided by Heartfelt. The policy does not state how a provider should address a team member's departure from the agency or how quickly the team member must be replaced.

31. On June 4, 2013, Alliance conducted an onsite investigation of Heartfelt relating to the sufficiency of its IIH staffing—the identical issue raised by MeckLINK. Alliance requested that Heartfelt produce proof of good faith efforts to hire staff to fill vacancies. Heartfelt produced over 100 pages of documentation containing leadership team minutes, advertising efforts, and interview schedules. Heartfelt submitted the same documentation to Alliance that it did to MeckLINK, showing its good-faith efforts to replace the team member who resigned. After Heartfelt produced the requested information, Alliance closed the matter and did not require any further action from Heartfelt.

32. MeckLINK also alleged that one of Heartfelt's employees did not have the proper credentials to provide the service. When Alliance reviewed this individual's credentials, it determined in contradiction of MeckLINK's finding that the individual was qualified to provide the exact same service. DHHS accepted the staff member as the CABHA's clinical director, a more senior position.

33. Prior to issuing its September 3, 2013 Notice, MeckLINK had not imposed on Heartfelt any other sanction or required any plan of correction. Heartfelt requested reconsideration of the MeckLINK termination notice. MeckLINK reconsidered the decision and upheld it.

34. Heartfelt then appealed MeckLINK's decision to the OAH. At the time that Heartfelt submitted its RFP responses, the OAH had accepted the Petition for Contested Case Hearing. Heartfelt notified Alliance in its RFP responses that the MeckLINK appeal was pending at the OAH and was not final.

35. On April 2, 2014, MeckLINK and Heartfelt entered a Consent Voluntary Withdrawal. The MeckLINK Consent Voluntary Withdrawal expressly superseded and rendered ineffective any prior notice of termination issued by MeckLINK. Thus, the basis for Alliance's decision is no longer valid.

36. Alliance's RFPs required that Providers who wanted their proposals for services to be considered by Alliance needed to meet several minimum requirements. One minimum requirement required that the applicant-provider be in good standing with Alliance Behavioral Healthcare, other LME/MCOs, all applicable federal and state oversight agencies and the organizations' accrediting body.

37. On November 12, 2013, Alliance notified Heartfelt that Alliance would not consider its proposal to continue to provide CST and IIH services because Heartfelt's proposal did not meet minimal requirements for review. The purported reason for this determination was that Heartfelt was not in good standing with another LME/MCO.

38. Despite the fact that Heartfelt's RFPs explained that the MeckLINK action was not final and was currently under appeal, Alliance prohibited Heartfelt from continuing past Step 1 of the RFP response review process because Alliance contended that Heartfelt was not in good standing with another LME/MCO, MeckLINK in Mecklenburg County, North Carolina.

39. LME/MCOs define good standing in different ways. Some LME/MCOs do not consider losing a contract with another LME/MCO to affect good standing. The North Carolina Department of Health and Human Services, and its Divisions, including the Division of Medical Assistance, which oversees Medicaid services, the Division of Health Services Regulation, which oversees licensed healthcare provider facilities and agencies, and the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, which oversees behavioral health services, in North Carolina do not have a uniform definition for good standing. There was no evidence that a non-final decision of an MCO would place a provider in bad standing with any State agency.

40. Alliance's Provider Manual was available on its website, and providers were required to abide by the terms of the Provider Manual. Alliance's Provider Manual defines good standing to exclude providers who have had their contract with another LME/MCO terminated or suspended. The manual does not state Alliance's policy on good standing with other LME/MCOs if the decision by the other LME/MCO is not final.

41. Alliance's Selection and Retention of Providers policy indicates that a provider's contract would not be renewed if the provider was "not in good standing with . . . other LME/MCOs." The policy does not define good standing. This policy also does not set forth Alliance's policy if the other LME/MCO's decision is not final.

42. After MeckLINK's termination, Heartfelt was allowed to provide services in the Alliance network until the expiration of its contract with Alliance. During the term of Heartfelt's contract with Alliance, MeckLINK's notice of termination did not have any effect on Heartfelt's ability to provide services in Alliance's network.

43. Alliance admitted that Heartfelt explained in its RFP responses that MeckLINK's termination was under appeal, and Alliance understood it to be under appeal. Dr. Johnson testified that Alliance considered the MeckLINK decision to be final but admitted that Alliance did not have any discussion with MeckLINK to confirm that the decision was final.

44. Alliance did not apply MeckLINK's definition of good standing. Although Alliance asked for appeal information, Dr. Johnson testified that Alliance would have considered Heartfelt not in good standing even if MeckLINK was actively reconsidering the termination and even if MeckLINK considered its decision not to be final.

45. Although MeckLINK's decision was not final because it was pending before the Office of Administrative Hearings, Alliance did not consider Heartfelt's pending appeal of the MeckLINK termination to be even relevant.

46. An agreement between Heartfelt and MeckLINK provided in part that a settlement reached by the parties was a compromise of disputed claims and was not an admission of error by any party. MeckLINK's termination was ultimately superseded by a voluntary mutual consent withdrawal. The withdrawal contained language that the mutual consent to withdraw superseded and rendered ineffective any prior notice of termination issued by MeckLINK. Alliance did not consider this information. The fact that MeckLINK was willing to withdraw its termination is strong evidence that MeckLINK's decision was not final and was subject to change at the time Alliance made its decision that Heartfelt was not in good standing with MeckLINK.

47. Alliance overlooked certain sanctions that it issued or were issued by other LME/MCOs if those sanctions were not final.

48. The evidence demonstrated that Heartfelt's RFP disclosed an alleged overpayment action initiated by DHHS. Heartfelt had appealed that action to the OAH, and the appeal was pending at the time Heartfelt submitted its RFP responses. Alliance, however, did not consider the overpayment action when Alliance determined Heartfelt was not in good standing.

49. The evidence also demonstrated that another provider that submitted a RFP indicated that the provider had an open plan of correction, which was under appeal. That provider was allowed to move forward in the RFP process.

50. Based on the above, Alliance had no policy to determine when another LME/MCO action was "final" for the purposes of determining if a provider was in good standing with that LME/MCO.

51. Alliance inconsistently applied the definition of good standing such that at times it considered decisions that were under appeal to be final and at other times determined that decisions that were appealed were not final for the purposes of allowing a provider to move passed Step 1 of the RFP process.

52. Dr. Johnson admitted that Alliance did not have any other basis for its decision in this case other than the MeckLINK termination. Alliance did not have any evidence demonstrating that Heartfelt was not a high quality network provider or that Heartfelt was not meeting Alliance's expectations for quality. Alliance did not have any evidence that Heartfelt was not providing good outcomes for consumers, evidence-based care, or managing levels of service appropriately.

53. Attachment O of the Contract between DMA and Alliance sets forth the criteria that should be used for provider retention. The evidence shows that Heartfelt did not fail to meet any of the retention criteria set forth in Attachment O of the Alliance contract with DMA.

54. Alliance did not conduct any investigation or consider any of the reasons or facts behind MeckLINK's termination decision. Of particular note is the fact that Alliance failed to consider that it had made an identical finding involving Heartfelt and determined that the finding warranted no action.

55. Alliance's notice did not provide Heartfelt with any appeal rights. It only allowed Heartfelt to have an informal meeting with the CEO. After Alliance notified Heartfelt that it was being removed from the RFP process, Alliance's CEO met informally with Heartfelt. Alliance explained that the meeting was not a hearing and that there would not be a decision or reconsideration.

56. Dr. Johnson testified at the hearing that Alliance does not want to contract with Heartfelt for intensive-in-home. There was the belief that Alliance has sufficient providers available in its network for 2014 to provide the CST and IIH services to the enrollees in Alliance's catchment area, including the enrollees that Heartfelt served in 2013 and is currently serving. Dr. Johnson's statements were not based on any consideration of quality of care or the needs of consumers.

57. Every consumer currently being served by Heartfelt for Alliance chose to receive services from Heartfelt despite that fact that Heartfelt was obligated by the Undersigned to inform them that they were going through a legal process and may not be able to serve them in the future. If Alliance were to terminate Heartfelt from providing services, it would sever the therapeutic relationship. Mr. Noyes testified that based on his experience, these consumers may have problems with transitioning to a different provider.

BASED UPON the foregoing findings of fact and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following Conclusions of Law.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings (OAH) has jurisdiction over the parties and the subject matter of this action. Petitioner timely filed the petition for contested case hearing and the parties received proper notice of the hearing in the matter. To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein as Conclusions of Law.

2. An ALJ need not make findings as to every fact which arises from the evidence and need only find those facts which are material to the settlement of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612 (1993).

3. N.C. Gen. Stat. § 108C-2(3) defines the term "Department" to mean DHHS and its legally authorized agents, contractors, and vendors acting within the scope of their authorized activities. The statute specifically sets forth that agents and contractors authorized to manage "any waivers of the federal Medicaid Act granted by the United States Department of Health and Human Services" are subject to the statute. N.C. Gen. Stat. § 108C-2(3). Alliance is an authorized agent and contractor of the North Carolina Department of Health and Human Services, acting within the scope of its authority pursuant to a waiver of the federal Medicaid Act. Therefore, Alliance is the Department as defined in N.C. Gen. Stat. § 108C-2.

4. In North Carolina, a decision made by the Department, including the Department's contractors, to terminate a provider from participation in the Medical Assistance Program is an "adverse determination" subject to the contested provisions of Chapter 150B. *See* N.C. Gen. Stat. §§ 108C-2(1), (3), 108C-12. Alliance's decision to terminate Heartfelt's participation in the 1915(b)/(c) Medicaid Waiver is an adverse determination subject to the contested case provisions of Chapter 150B.

5. N.C. Gen. Stat. § 108C-12(a) governs "the process used by a Medicaid provider or applicant to appeal an adverse determination made by the Department." N.C. Gen. Stat. § 108C-12(b) states that "a request for a hearing to appeal an adverse determination of the Department is a contested case subject to the provisions of Article 3 of Chapter 150B of the General Statutes."

6. An "adverse determination" is defined by the statute as a "final decision by the Department to deny, terminate, suspend, reduce, or recoup a Medicaid payment or to deny, terminate, or suspend a provider's or applicant's participation in the Medical Assistance Program." N.C. Gen. Stat. § 108C-2(1).

7. Alliance's action in this case meets the definition of an adverse determination. Heartfelt is a current participant in Alliance's network and but for Alliance's decision, which is the subject of this contested case, Heartfelt could continue to participate in the Alliance network. Because Alliance's decision terminates and denies Heartfelt's ability to participate in the Medicaid program in the four-county area in which Alliance manages all Medicaid mental health services, this decision is an adverse determination.

8. Alliance contends that Section 4 of Session Law 2013-397 (codified at N.C. Gen. Stat. § 150B-23(a3)) has the effect of removing the OAH's jurisdiction to consider provider appeals of adverse determinations by LME/MCO's. Session Law 2013-397, entitled LME/MCO Enrollee Grievances and Appeals, created a new chapter of the General Statutes, Chapter 108D. Chapter 108D sets forth the rights, responsibilities, and procedures for Medicaid enrollees to challenge managed care actions taken by an LME/MCO. N.C. Gen. Stat. § 108D-1(10); *see* 42 C.F.R. § 438.400(b). Medicaid enrollees are Medicaid recipients not providers. On its face, this session law has no applicability to provider appeals.

9. N.C. Gen. Stat. § 150B-23(a3) clarifies that the LME/MCO is directly considered an agency for the limited purpose of enrollee appeals. The fact that an LME/MCO is a State agency as defined by the APA in the case of Medicaid enrollee appeals does not impact OAH's jurisdiction to consider provider appeals under N.C. Gen. Stat. Chapter 108C. Alliance's argument that an entity must expressly meet the definition of an Agency under the APA for the OAH to have jurisdiction over that entity is not supported by the law or the legislative history. This Tribunal has jurisdiction because Alliance is a contractor and agent of DHHS and therefore is the Department as defined by N.C. Gen. Stat. 108C-2(3).

10. The General Statutes contain numerous examples of entities that do not meet the definition of "agency" under the APA and yet are subject to the provisions of the APA. *See e.g., Avant v. Sandhills Ctr*., 132 N.C. App. 542, 545, 513 S.E.2d 79, 82 (1999) ("[A]lthough local appointing authorities such as respondent are not 'agencies' under the APA, their employees are subject to the provisions of the State Personnel Act and may commence a contested case hearing under the APA.").

11. The Undersigned takes official notice of the recent decision by the Wake County Superior Court, sitting in an appellate capacity in *Yelverton's Enrichment Services, Inc. v. PBH*, 13-CVS-11337 (March 14, 2014). The Superior Court's decision in *Yelverton's* provides additional support for this Undersigned's conclusion that the OAH has jurisdiction to consider Heartfelt's contested case.

12. Alliance's argument that Heartfelt has no right to a hearing before the OAH because its relationship with Heartfelt is contractual in nature is not supported by *Yelverton's*. The Wake County Superior Court found that "contract provisions cannot override or negate the protections provided under North Carolina law, specifically the appeal rights set forth in N.C. Gen. Stat. Chapter 108C." *Id*. (Citing *Corbin on Contracts* § 88.7, at 595 (2011) stating "When the law confers upon an individual a right, privilege, or defense, the assumption is that the right, privilege or defense is conferred because it is in the public interest. Thus, in many cases, it is contrary to the public interest to permit the holder of the right, privilege, or defense to waive or to bargain it away. In these situations, the attempted waiver or bargain is unenforceable."); *State ex rel. Utilities Comm'n v. Carolina Water Serv., Inc. of N.C*., 149 N.C. App. 656, 659, 562 S.E.2d 60, 63 (2002) ("When certain provisions of a contract violate the public policy of the state, however, those provisions will not be enforced by the courts.").

13. Alliance violated the standards of N.C. Gen. Stat. § 150B-23(a) by failing to move Alliance to the next step of the RFP review. MeckLINK's decision was not a final decision and was subsequently withdrawn.

14. A decision to terminate a provider's ability to provide Medicaid services cannot be based on a decision by another LME/MCO that is not a final decision. Alliance has no policy on how it treats non-final decisions by other LME/MCOs. As this case shows, decisions that are not final by their very nature are subject to change. Basing actions on decisions that are not final undermines and makes ineffective the appeal rights provided to Medicaid providers by the General Assembly in N.C. Gen. Stat., Ch. 108C.

15. Respondent acted erroneously and arbitrarily and capriciously by requesting information from the provider regarding the appeals status of a sanction and then not considering that information in its decision or prior decisions made by Alliance. Of particular note is the fact that Alliance failed to consider that it had made an identical finding involving Heartfelt and the good-faith efforts to replace a team member who resigned, and determined that the finding warranted no action.

16. Respondent acted erroneously and arbitrarily and capriciously by not considering the underlying finding for the non-final MeckLINK termination, particularly when Alliance had previously determined that finding warranted no action.

17. Respondent acted arbitrarily and capriciously by treating Heartfelt differently than other providers and by maintaining its decision even after the MeckLINK termination was superseded and rendered ineffective.

18. Respondent violated federal law by not basing its RFP decision on the Provider Enrollment and Retention criteria found in Attachment O of its contract with DMA. Although the contract does not anticipate that Heartfelt will be a third-party beneficiary, 42 C.F.R. 438.2(14) expressly requires and obligates MCOs, such as Alliance, to create and follow its retention policy. Alliance's failure to do so, therefore, violates federal law and, accordingly, N.C. Gen. Stat. § 150B-23.

19. Respondent has substantially prejudiced Petitioner's rights. Under N.C. Gen. Stat. 108C, Medicaid providers have the right to contest adverse determinations of DMA and its contractors, including Alliance pursuant to the standards set forth in the APA. If the Administrative Law Judge determines that the MCO violated the standards of N.C. Gen. Stat. § 150B-23(a) the next step is to determine if the provider rights are substantially prejudiced. To make this determination the Tribunal must look to how the provider would have been treated but for the MCO's error. The preponderance of the evidence demonstrates that but for these errors by Alliance, Heartfelt would have continued in the RFP process just as every other provider was allowed to do in this process. Heartfelt as a provider has a right to be treated in a manner similar to other providers in the Alliance Network. Respondent Alliance Behavioral Healthcare failed to do so in this case and as such, Heartfelt Alternatives, Inc's rights were substantially prejudiced.

BASED UPON the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following Final Decision.

FINAL DECISION

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above. The Undersigned enters the following Final Decision based upon the preponderance of the evidence, having given due regard to the demonstrated knowledge and expertise of the Agency with respect to facts and inferences within the specialized knowledge of the Agency.

Based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned determines that Respondent substantially prejudiced Petitioner's rights, and acted erroneously, acted arbitrarily and capriciously, used improper procedure, and failed to act as required by law or rule in its decision to deny Petitioner the ability to continue forward in the Request for Proposal Process created by Alliance for Intensive In-Home and Community Support Team Services provided in the Alliance Catchment Area.

Respondent Alliance Behavioral Healthcare's decision is hereby REVERSED. Alliance is accordingly ordered to move forward with its review of Heartfelt's RFP in a complete, unbiased and fair manner.

NOTICE

THIS IS A FINAL DECISION issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statutes Chapter 150B, Article 4, any party wishing to appeal the Final Decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county in which the party resides. The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision. N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties.

In conformity with the Office of Administrative Hearings' Rules, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.

Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

IT IS SO ORDERED.

This is the 11th day of December, 2014.

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Augustus B. Elkins II
Administrative Law Judge