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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. PAUL G. FEINMAN

Index Number : 108718/2011
NEW YORK HEALTH CARE, INC.
VS
NYC HUMAN RESOURCES ADMIN.
Sequence Number : 001
ARTICLE 78

PART 12

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

This petition is decided in accordance with the decision and order and judgment filed under motion sequence number 001 for index no. 402003/11

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 2/27/2012

PFF, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

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NEW YORK HEALTH CARE, INC.,

Petitioner,

Index No. 108718/2011
Mot. Seq. No. 001

-against-

NEW YORK CITY HUMAN RESOURCES ADMINISTRATION HOME CARE SERVICES PROGRAM, ROBERT DOAR in his official capacity as ADMINISTRATOR OF THE CITY OF NEW YORK HUMAN SERVICES ADMINISTRATION AND COMMISSIONER OF SOCIAL SERVICES, JOHN C. LIU, in his official capacity as COMPTROLLER OF THE CITY OF NEW YORK, CONTRACT RESOLUTION BOARD OF THE CITY OF NEW YORK, THE CITY OF NEW YORK,

Respondents.

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In the Matter of the Application of

CITY OF NEW YORK and NEW YORK CITY HUMAN RESOURCES ADMINISTRATION/DEPARTMENT OF SOCIAL SERVICES,

Petitioners,

Index No. 402003/2011
Mot. Seq. No. 001

For a Judgment Pursuant to Article 78 of the N.Y. Civil Practice Law & Rules

-against-

CONTRACT DISPUTE RESOLUTION BOARD OF THE CITY OF NEW YORK and NEW YORK HEALTH CARE, INC.,

Respondents.

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APPEARANCES:

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Papers considered on review of these two article 78 proceedings:

	PAPERS	NUMBERED
108718/2011	New York Health Care's Notice of Pet., Verified Pet., Exs. A - H	1
	Verified Ans. of Resp. CDRB, Exs. 1 -2	2
	Verified Ans. of City & Other Municipal Resps., Exs.1 - 12,Ulberg Aff.	3
	City& Other Muncipal Resps.'s Memorandum of Law	3A
	Petitioner's Reply Memorandum of Law	4
402003/2011	City's Notice of Pet., Verified Pet., Exs. 1 - 12, Appendix	1, 1A, 2
	Petitioner's Memorandum of Law	3
	Verified Ans. of Resp. CDRB, Exs. 1 - 2	4
	Verified Ans. of Resp. New York Health Care,	5
	Resp. New York Health Care's Memorandum of Law	6
	Petitioner's Reply Aff.	7

PAUL G. FEINMAN, J.:

These two Article 78 petitions arise as a result of a determination issued by the New York City Contract Dispute Resolution Board (the Board) on March 28, 2011 (March 2011 Determination). The determination attempted to resolve a dispute between New York Health Care, Inc. (NYHC) and New York City Human Resources Administration/Department of Social Services (HRA). The proceedings with index numbers 108718/2011 and 402003/2011 have been joined for disposition.

BACKGROUND AND FACTUAL ALLEGATIONS

Both NYHC and HRA, together with The City of New York (collectively, HRA) have brought actions either with respect to the March 2011 Determination, or seeking alternate related relief. The facts leading up to the dispute are as follows:

NYHC provides personal health care services to Medicaid recipients in Kings County. It had a contract with The City of New York, through HRA, to provide home attendant services. The home attendant services provided pursuant to the contract with HRA were funded by Medicaid funds, some of which were specifically Health Care Reform Act (HCRA) funds. The

purpose of these HCRA funds was to "support the recruitment and retention of personal care service workers." NYHC Petition, ¶ 10. New York Public Health Law (Public Health Law) § 2807-v (1) (bb) (iii) provides that the New York State Commissioner of the Department of Health (DOH) is authorized to audit these funds. Specifically, the statute states the following, in pertinent part:

> The commissioner is authorized to audit each such provider to ensure compliance with the written certification required by this subdivision and shall recoup any funds determined to have been used for purposes other than recruitment and retention of non-supervisory personal care services workers or any worker with direct patient care responsibility.

After conducting an audit of the fiscal years 2003 and 2004, pursuant to a letter dated October 20, 2008, HRA maintained that NYHC must give back $1,538,578 in unspent HCRA funds that were not used in the year in which they were received. HRA also advised NYHC that it must repay $4,312,315 in non-HCRA funds. NYHC submitted an appeal of this determination, which HRA denied. HRA responded, in pertinent part:

> New York State law has designated [DOH] as the government agency responsible for administering the Medicaid program. DOH in turn administers the Program through 58 local social service districts, of which New York City is one. The New York City social service district is headed by the Commissioner of HRA. Furthermore, HCRA payments are Medicaid payments as evidenced by the HCRA legislation which became effective in 2002. (*See*, the Public Health Law (PHL) 2807-v (1) (bb) (i) where HCRA payments are said to be "adjustments to Medicaid rates of payment for personal care services provided ..."; *See also*, the attached letter from DOH confirming that HCRA payments "are in all legally relevant respect Medicaid payments ... ."

HRA's Exhibit 6, at 2.

NYHC notes that, while the letter confirms DOH's ability to audit and recoup funds, there is no statutory authority provided which confers this ability on HRA to recoup HCRA payments.

Pursuant to the appropriate grievance process, NYHC then submitted a Notice of Dispute to the Commissioner of HRA. The Notice of Dispute outlined reasons why NYHC believed that HRA was not entitled to recoup both the HCRA and non-HCRA payments. HRA did not respond to this Notice of Dispute.

NYHC then submitted a Notice of Claim to the Office of the Comptroller of the City of New York (Comptroller). In its Notice of Claim, NYHC describes the funds at issue as being HCRA funds, and specifically mentions that the "amount in issue is $1,538,578." HRA's Exhibit 8, at 1. NYHC's Notice of Claim provides the following, in pertinent part:

> The funds at issue were appropriated by New York State under the Health Care Reform Act Healthcare Workforce Recruitment and Retention Program; and the authority to audit and recoup said funds rests exclusively with New York State ... [NYHC] intends to use the funds in question for statutorily authorized purposes; i.e. recruitment and retention of direct care workers, whereas HRA is insisting on recouping the funds rather than allowing them to be spent on [NYHC's] employees (with no profit to the company).

Id.

NYHC then concluded by referring the Comptroller to the attachments included with the Notice of Claim, which included the original Notice of Dispute to the Commissioner, with attachments. HRA submitted a response to the Notice of Claim, and included arguments why HRA is allegedly entitled to recoup both HCRA and non-HCRA funds.

On July 15, 2010, the Comptroller issued a response to the Notice of Claim. The response noted that "NYHC disputes HRA's authority to recoup $1,538,578 in funds that were appropriated by New York State under the Health Care Reform Act (HCRA) of 2002." NYHC's Exhibit D, at 1. The Comptroller indicated that, although the non-HCRA funds were part of the original Notice of Dispute, the Notice of Claim only referenced the HCRA funds. As such, the

Comptroller only reviewed the HCRA funds at issue.

The Comptroller denied NYHC's claim. The Comptroller's findings are as follows, in pertinent part:

> HRA as the local social service district to administer Medicaid payments in New York City clearly has the authority to recover unspent Medicaid funding including HCRA funding. HCRA funds are Medicaid payments authorized on an annualized basis and although the funds may be subject to additional requirements that does not mean the HCRA payments get treated any differently than any other Medicaid payments to a provider. Accordingly, HCRA funds are subject to the same processes and audit procedures applicable to any other Medicaid payments; i.e., Medicaid payments received on an annual basis are subject to annual audits and recoupment by HRA.
> NYHC's argument that HCRA funds are outside the scope of the contract and therefore not subject to the audit, close-out and recovery process contained in the HRA contract is baseless. The HCRA funds were paid to NYHC through the HRA contract as add-on adjustments to the Medicaid Rate. As such, HRA has the right to recover unspent HCRA funds that were paid to NYHC under the contract.

HRA's Exhibit 10, at 3.

Again, pursuant to the appropriate grievance processes, NYHC filed a petition with the Board. The petition included all of the previous determinations by the HRA and the Comptroller regarding the HCRA and non-HCRA funds. NYHC discussed how under the Alternative Rate Methodology (ARM), HRA is entitled to audit and recover funds. However, according to NYHC, HCRA funds are not part of the ARM since HCRA funds were created after the ARM was established. NYHC claimed that the audit of HCRA funds is governed by a Memorandum of Understanding (MOU), which is different from the ARM. NYHC also cited again to the Public Health Law, with respect to HCRA funds, which states that the Commissioner, as in DOH, "is authorized to audit each such provider to ensure compliance with the written certification required by this subdivision and shall recoup any funds ... ." HRA's Exhibit 11, at 4. NYHC further explained that the statute above does not confer authority or jurisdiction on

HRA to audit HCRA funds. The MOU expressly provides exclusive jurisdiction to DOH, with respect to HCRA funds, and, according to NYHC, DOH never delegated this jurisdiction to HRA.

NYHC further noted that the requirement that HCRA funds be expended within the fiscal year is "ultra vires, and arbitrary and capricious since the only statutory limitation placed on such funds under Public Health Law § 2807-v (1) (bb) is that the funds be expended for appropriate recruitment and retention purposes, without regard to the timing of such expenditures." *Id.* at 6. NYHC additionally maintained that HRA, pursuant to the contract between HRA and NYHC, is only authorized to audit and recoup funds under the ARM.

NYHC summarized that it is undisputed that NYHC only used or intended to use, HCRA funds for the statutorily authorized "recruitment and retention" purposes. *Id.* at 8. NYHC then addressed non-HCRA issues.

HRA responded to the NYHC's petition. It argued that, according to the contract between the parties, HRA is entitled to conduct periodic audits. For instance, HRA points to a part of the contract which provides the following:

> Upon termination of this Agreement the Contractor shall comply with the Department or City close-out procedures, including but not limited to:
> A. Accounting for and refund to the Department or City, within thirty (30) days, any unexpected direct labor funds which have been paid to the Contractor pursuant to this Agreement.

HRA's Exhibit 12, at 5.

HRA cited to a recent New York State Supreme Court case in which, in dicta, the court noted that HRA's audit and recoupment of HCRA funds is not ultra vires. *See Matter of Barele, Inc. v City of New York Human Resources Administration*, 2010 NY Slip Op 30760(U)(Sup Ct,

NY County 2010). HRA continued that HCRA funds are Medicaid payments, and as such, are subject to audit and possible recoupment. HRA explained, "[s]ince HCRA funds are Medicaid funds, they are subject to the same processes and audit procedures applicable to any other Medicaid payments." HRA's Exhibit 12, at 9. HRA also maintained that, although DOH agreed that it would be flexible and accommodating in certain situations, HCRA funds which were issued in a particular year should be used within that year. HRA then summarized its arguments by reiterating what the Comptroller had written in his determination. HRA also discussed how it is also allowed to audit and recoup non-HCRA funds.

As well as providing written submissions, HRA and NYHC presented their arguments orally in front of the Board. According to the Board, it "determines disputes between suppliers and agencies of the City of New York pursuant to an alternative dispute resolution clause contained in City construction and service contracts and pursuant to title 9, chapter 4, section 4-09 of the Rules of the City of New York (RCNY)." Board Answer, ¶ 1. The Board is the third step in the dispute resolution process. Neither party is allowed to submit any material to the Board that was not before the Comptroller, unless specifically asked for by the Board. The Board, "in its discretion, may seek such technical or other expert advice as it shall deem appropriate ... ." 9 RCNY 4-09 (g) (3).

The Board's decision is final and binding on the parties. A party may seek review of the decision pursuant to an Article 78 petition. "Such review by the court shall be limited to the question of whether or not the [Board's] decision was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion." 9 RCNY 4-09 (g) (6).

NYHC now brings an Article 78 petition seeking to have the court order that the Comptroller determine whether there is a statutory basis for HRA to recoup the HCRA funds. It also requests that the court annul the October 20, 2008 determination made by HRA about the initial recoupment of HCRA and non-HCRA funds. In addition, NYHC seeks to have the Comptroller determine whether HRA is entitled to recoup the non-HCRA funds.

HRA also brought an Article 78 petition seeking to annul and vacate the Board's March 28, 2011 determination. HRA is also requesting that NYHC be directed to remit to HRA all of the unspent HCRA and non-HCRA funds.

ORDERING COMPTROLLER TO DETERMINE STATUTORY BASIS

In his decision, the Comptroller stated that HRA had been authorized legislatively and under the contract to recoup unspent HCRA funds. The Comptroller did not specify any statute in his review, but maintained that, since HRA is the agency which administers Medicaid payments, it also has the authority to recover HCRA payments, which are also Medicaid payments. NYHC is now asking the Comptroller and/or the court to provide the statutory basis for HRA's ability to recoup HCRA payments. NYHC states that it is now "forced to seek this Court's intervention to get a final resolution ... ." Petition, ¶ 22. Thus, NYHC claims that the Comptroller should be ordered to provide a complete administrative review.

In the context of an Article 78 proceeding, courts have held that "a reviewing court is not entitled to interfere in the exercise of discretion by an administrative agency unless there is no rational basis for the exercise, or the action complained of is arbitrary and capricious." *Matter of Soho Alliance v New York State Liquor Authority*, 32 AD3d 363, 363 (1st Dept 2006), citing to *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and*

Mamaroneck, Westchester County, 34 NY2d 222 (1974); *see* CPLR 7803 (3). "The arbitrary and capricious standard asks whether the determination in question had a rational basis [internal quotation marks and citations omitted]." *Matter of Mankarios v New York City Taxi and Limousine Commission*, 49 AD3d 316, 317 (1st Dept 2008).

As set forth by the Board in its answer, the Board "determines disputes between suppliers and agencies of the City of New York ... ." Yet, the Board, despite reviewing the Comptroller's decision, specifically refused to rule on whether or not statutory law or regulations provide HRA with the authority to recover unspent HCRA funds. The Board stated that it is only allowed to review the terms of the contract between the parties, and cites to 9 RCNY 4-09 (a) (2), which states, the following:

> (2) For construction, this section shall apply only to disputes about the scope of work delineated by the contract, the interpretation of contract documents, the amount to be paid for extra work or disputed work performed in connection with the contract, the conformity of the vendor's work to the contract, and the acceptability and quality of the vendor's work; such disputes arise when the Engineer, Resident Engineer, Engineering Audit Officer, or other designee of the Agency Head under the contract (as defined in the contract) makes a determination with which the vendor disagrees. For construction, this section shall not apply to termination of the contract for cause or other than for cause.

However, this language cited by the Board, which is applicable to construction vendors, does not prohibit the Board from adjudicating all of the issues in this dispute, including the statutory ones. Contrary to NYHC's assertions, the Comptroller would not be the party to determine the statutory basis. The Board is expected to review the Comptroller's decision, and, in the Comptroller's decision, although he did not specifically cite to a statute, he alleged that there was statutory authority for HRA to recoup the unspent HCRA funds.

When the Board issued its determination that the contract did not allow HRA to recoup

these funds, regardless of whether there may be statutory authority which allows HRA to do so, the Board did not provide a final resolution for the parties. The Board left the parties with an ambiguous decision which did not resolve all of the issues, namely the ones before the Comptroller. As such, the court finds that the Board's decision was arbitrary and capricious, and the matter is remanded to the Board for a complete and final determination of the dispute consistent with this decision.

HRA'S PETITION

As a result of this decision, HRA's petition to vacate and annul the Board's decision is granted inasmuch as the matter is remanded to the Board for further review. Since the matter has not yet been resolved, any other relief requested by HRA, such as directing NYHC to remit HCRA and non-HCRA funds to HRA, is denied.

HRA'S OCTOBER 20, 2008 DETERMINATION

On October 20, 2008, HRA advised NYHC that, after an audit, it was seeking to recoup the unspent HCRA funds. The Board did not address this letter in its determination. NYHC seeks to have HRA's October 20, 2008 determination annulled and set aside.

Although the Board did not address this letter in its review, the decision by the Board superceded this letter in that the Board determined that HRA was not able to recoup these funds. Regardless, NYHC is not permitted to seek review of the October 20, 2008 determination at this time. It is well settled that Article 78 review is limited to determinations that are "final and binding." CPLR 217 [1]. Pursuant to 9 RCNY 4-09 (d), the "Agency Head's" decision is final and binding, unless the party presents it to the Board. As such, when NYHC presented HRA's determinations to the Comptroller, and then to the Board, any determinations made prior to the

Board's ultimate decision, according to the grievance procedures, were not final and binding, nor appropriate for Article 78 review.

COMPTROLLER'S REVIEW OF THE NON-HCRA FUNDS

NYHC requests that this court force the Comptroller to rule on the merits of who gets the non-HCRA funds. NYHC argues that the non-HCRA payments were mentioned in the Notice of Claim to the Comptroller, and therefore should have been reviewed by the Comptroller. However, the Notice of Claim submitted by NYHC did not actually notify the Comptroller about the disputed non-HCRA funds. The Notice of Claim specifically said that "the amount in issue is $1,538,578." This statement indicates that the amount in dispute is the $1,538,578 in HCRA funds. With respect to the non-HCRA funds, nothing in the Notice of Claim even refers to such funds. As such, the Comptroller could not be expected to review any claim regarding the non-HCRA funds.

NYHC alleges that it referred the Comptroller to the non-HCRA funds in dispute, by advising it to refer to the attachments included with the notice of claim. NYHC cites to *Lore v New York Racing Association Inc.* (12 Misc 3d 1159[A], 2006 NY Slip Op 50968(U),*3 [Sup Ct, Nassau County 2006]), a Nassau County case which held the following, in pertinent part, "[i]n assessing the legal sufficiency of a claim, the Court may consider those facts alleged in the complaint, documents attached as an exhibit therefor or incorporated by reference ... and documents that are integral to the plaintiff's claims, even if not explicitly incorporated by reference [internal quotation marks and citation omitted]."

However, this case is not relevant to the present situation. A Comptroller presented with a Notice of Claim cannot be expected to search any extraneous documents in search of additional

potential claims which are not even referred to in the actual Notice of Claim. As such, NYHC's request for the Comptroller to adjudicate any claims arising out of the non-HCRA funds, is denied.

CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED that the petition brought by New York Health Care, Inc. (108718/2011) is denied; and it is further

ORDERED and ADJUDGED that the petition brought by The City of New York and the New York City Human Resources Administration/Department of Social Services (402003/2011), is granted to the extent that the March 28, 2011 determination is remanded to the Contract Resolution Board of the City of New York for a review and determination consistent with this decision, and the petition is otherwise denied.

Dated: February 27, 2012

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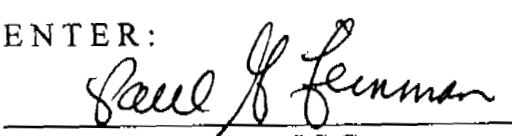

J.S.C.