

**Matter of People Care Inc. v City of N.Y. Human
Resources Admin. Dept. of Social Servs.**

2013 NY Slip Op 33493(U)

December 20, 2013

Supreme Court, New York County

Docket Number: 111467/11

Judge: Peter H. Moulton

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Moulton
Justice

PART 40B

People Care Inc.
- v -
City of New York

INDEX NO. 111867/11
MOTION DATE _____
MOTION SEQ. NO. 01
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for Att 78

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
_____	_____
_____	_____
_____	_____

Cross-Motion: Yes No

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

*public is held at the cross motion
to dismiss is granted, for the
reasons stated in the written decision dated
12/20/13*

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).

Dated: 12/20/13

[Signature]
HON. PETER H. MULLY, S.C.
SUPREME COURT JUSTICE

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

Supreme Court: New York County
Part 40B

-----X

In the Matter of the Application of

PEOPLE CARE INCORPORATED, d/b/a
ASSISTED CARE,

Petitioner,

For a Judgment under Article 78 of the
Civil Practice Law and Rules,

-against-

Index No. 111467/11

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

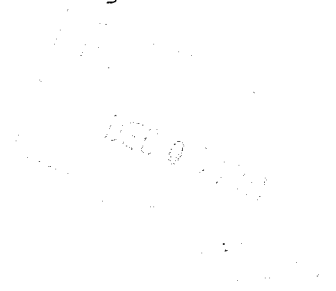
Respondent.

-----X

Peter H. Moulton, Justice

In this Article 78 proceeding petitioner seeks an order 1) compelling respondent to vacate a performance evaluation "in its entirety," and to remove it from the City's VENDEX contract registry, and 2) remanding the matter to respondent to consider petitioner's objections to the performance evaluation. Petitioner's order to show cause also seeks a preliminary injunction while the petition is pending enjoining and restraining respondent from using the evaluation in awarding or extending contracts, or "in any other way adverse to Petitioner."

The parties agreed on the return date to a temporary restraining order that prevents respondent from using the



evaluation.

Respondent has moved to dismiss the petition as moot, arguing that it has withdrawn the evaluation and will not reinstate it.¹

FACTS

Petitioner People Care Inc. is an employee-owned home care services agency licensed in the State of New York. It contracts with respondent New York City Human Resources Administration ("HRA") to provide home attendant and/or housekeeping services to individuals who are in stable medical condition but who have difficulty with daily life activities, such as walking, cooking, cleaning, or personal hygiene. People Care has performed under contracts with HRA to provide services in Brooklyn, Queens and Manhattan. As of the date of the petition these contracts had expired, but HRA continues to refer clients to petitioner under the terms of the contract. The petition avers that the letting of new contracts has been slowed by the State's move to move the client population from Medicaid to managed care.

People Care has had an ongoing dispute with HRA concerning

¹The petition was brought in late 2011. After the petition and motion were filed, the parties engaged in lengthy settlement negotiations which did not bear fruit. Oral argument on the petition was held before the court on June 6, 2013. At the request of the court, the parties submitted further papers. Petitioner subsequently brought a motion for contempt, alleging a violation of the TRO. This motion for contempt is not yet fully submitted.

Health Care Reform Act ("HCRA") Recruitment and Retention Funds, which petitioner had used to fund an Employee Stock Ownership Plan ("ESOP"). In June 2009, petitioner brought an Article 78 proceeding against HRA challenging its jurisdiction and authority to audit and recoup HCRA Recruitment and Retention Funds ("the ESOP Article 78"). The ESOP Article 78 was dismissed by the Supreme Court on the ground that petitioner had failed to comply with the dispute resolution procedures contained in the governing agreement. People Care appealed.

The First Department reversed the in a decision dated November 15, 2011. It held that the Supreme Court improperly dismissed the petition, holding that exhaustion of administrative remedies is not necessary where the petitioner brings a substantive claim that the challenged agency action is "wholly beyond its grant of power." The court noted that there was nothing in the record to indicate that HRA had been given the authority by the State Department of Health ("DOH") to audit the use of HCRA Recruitment and Retention Funds.

[R]espondents cite no specific statute or regulation that gives them the power to recoup funds awarded pursuant to Public Health Law § 2807-v(1)(bb). Nonetheless, it may be well within DOH's power to delegate auditing responsibilities to another agency such as HRA. (Cite omitted.)

The First Department went on to hold that:

DOH has not been shown to be a necessary party (see CPLR 1001[a]). Petitioner seeks no

relief against it (cite omitted) and reversal is sought solely on the basis of HRA's lack of power. Furthermore, a finding that HRA is without authority to recoup the subject funds will not impact the DOH Commissioner's ability to recover the funds from petitioner and thus would not inequitably affect his interests.

Petitioner opines that its bringing of this ESOP Article 78 proceeding caused respondent to give it the negative performance evaluation that is the subject of this proceeding.

On June 29, 2011, HRA issued the performance evaluation at issue herein, which concerned petitioner's Brooklyn Home Attendant Program for fiscal year 2009 ("Evaluation"). The Evaluation's overall rating for the Brooklyn program was "poor." Petitioner avers that the Brooklyn Program received ratings in prior fiscal years that were "very good" and "excellent."

Petitioner faults several aspects of the Evaluation.

First, it avers that HRA applied new standards of performance ex post facto, after the 2009 fiscal year had expired, which gave petitioner no chance to mold its performance to the new standards.

Second petitioner disagrees with the Evaluation's "fiscal performance" rating of "unsatisfactory." Petitioner avers that the 2005 audit upon which this rating was based in fact shows that petitioner is entitled to an "excellent" rating.

Third, petitioner disputes the Evaluation's statement that petitioner improperly established an Employee Stock Ownership Plan without HRA's prior approval. According to petitioner, no such

prior approval was required.

Fourth, petitioner argues that the Evaluation inaccurately concludes that it was incorrect for petitioner to include the ESOP as a payable for fiscal year 2005, as that question was the subject of the ESOP Article 78 proceeding and the appeal of the ESOP Article 78 had not yet been concluded.

The Mayor's Office of Contract Services ("MOCS") mailed the Evaluation to People Care on June 28, 2011. Accompanying the Evaluation were instructions from MOCS that gave People Care notice that it had 15 days to respond to the Evaluation. The instructions stated that MOCS will forward the vendor's response to the agency for review, and conclude "[f]ailure to respond within the specified time shall constitute your agreement with the contents of the evaluation, and the evaluation will be posted and visible on the new VENDEX system."

VENDEX is an automated data base maintained by the City concerning prospective contractors seeking to work with City agencies. Its primary purpose is to provide information about vendors to City contract officers.

On July 12, 2011, petitioner submitted a formal objection to MOCS pursuant to Section 4-01 of the City of New York Procurement Policy Board Rules ("PPBR"). On July 26, 2011, out of what it describes as an "abundance of caution," petitioner filed a formal Notice of Dispute with respect to the Evaluation pursuant to

another section of the PPBR, § 4-09.

On September 21, 2011, respondent issued its determination denying relief to People Care. The determination was based on the assumption that People Care had not timely grieved the Evaluation. This finding was based on the Notice of Dispute filed on July 26, 2011, and ignores the earlier objection filed on July 13, 2011.

Soon after this determination, petitioner filed this Article 78 proceeding.

DISCUSSION

The petition argues that HRA's finding that the objection was not timely is arbitrary and capricious. It also asserts that the Evaluation contains "numerous factual errors and assumptions" and deviated from "objective standards."

HRA responded by withdrawing the Evaluation. HRA vacated the September 21, 2011 determination and MOCS permanently removed the Evaluation from petitioner's VENDEX file. At first, HRA stated that it would be issuing a new performance evaluation. Subsequently, on April 5, 2013, HRA and MOCS determined that no performance evaluation would be conducted for fiscal year 2009. On this basis, respondent argues that the matter is moot as petitioner can no longer be aggrieved by the complained-of agency action. (See Usatynski v Daines, 86 AD3d 914.)

Petitioner argues that the matter is not moot because HRA could use the same allegedly improper criteria in its next evaluation of People Care's operations. It also argues that HRA has recently made demands, in the context of 2006 and 2007 audits of People Care's operations, that petitioner stop listing the "ESOP payable" in its audit report. Based on these arguments, petitioner argues that the issues present in this lawsuit fall within the "capable of repetition, yet evading review" exception to the mootness doctrine. (E.g. Avella v Batt, 33 AD3d 77.)

This argument is unpersuasive. Respondent has stated unequivocally that there will be no 2009 Evaluation. People Care's performance in future evaluations is not before the court. Other facts, other criteria, might enter into HRA's future determination. The First Department faced a similar situation in Encore College Bookstores Inc. v City University of New York (75 AD3d 442). In that case, the petitioner challenged respondents' practice of debiting Pell Grant Funds from students' accounts when they purchased textbooks at another nonparty bookstore that competed with petitioner. During the pendency of the Article 78 proceeding challenging this action, the respondents ceased the program at the Borough of Manhattan Community College ("BMCC") and Kingsborough Community College ("Kingsborough"), the two colleges named in the petition.

The First Department found that the proceeding was moot upon

the cessation of the program at the two named colleges, even though respondents had similar, albeit modified, textbook programs at other colleges, and even though petitioner stated that there was a danger of reinstatement of the program at BMCC and Kingsborough. The First Department said the likelihood of reinstatement, or the institution of one of the modified programs

[was] not clear [and] are not sufficient reasons to consider the merits of an appeal that no longer involves an actual controversy between the parties in this particular case and where the issues are not such as to typically evade review and are not substantial. [Citations omitted.]

(Id at 443.)

Moreover, if People Care disagrees with a future HRA evaluation there is a means of administrative review that may give it redress, or, at the least, provide the court with a fuller record of the reasons for HRA's determination. Indeed, People Care attempted to invoke administrative review with respect to the now-vacated 2009 Evaluation. Because of agency error concerning the timeliness of People Care's objections, HRA did not respond to the substance of People Care's objections. That does not mean that the parties could not engage in a productive debate via administrative review, assuming some decision adverse to People Care at some point in the future. In any event, there is "a realistic likelihood that the issues presented here will recur with an adequately developed record and with a timely opportunity to review." (Gold-Greenberger

v Human Resources Administration, 77 NY2d 973, 974-5.) Accordingly the exception to the mootness doctrine does not apply.

CONCLUSION

For the reasons stated, the petition is denied, the cross-motion is granted, and this proceeding is dismissed. This constitutes the Decision and Judgment of the Court.

DATED: December 20, 2013



A. J. S. C.

**HON. PETER H. MOULTON
SUPREME COURT JUSTICE**

UNFILED JUDGMENT

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