New York Health Care, Inc. v City of N.Y. Human Resources Admin.
2020 NY Slip Op 32421(U)
July 26, 2020
Supreme Court, New York County
Docket Number: 159410/17
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

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NEW YORK HEALTH CARE, INC.,

Petitioner,

Index No.159410/17

DECISION AND ORDER

- against -

MOT SEQ. NO. 1

CITY OF NEW YORK HUMAN RESOURCES ADMINISTRATION and CITY OF NEW YORK OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS CONTRACT DISPUTE RESOLUTION BOARD,

Respondents.

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Nancy M. Bannon, J.:

I. INTRODUCTION

In this article 78 proceeding, petitioner, New York Health Care, Inc., petitions the court seeking to annul, in part, the decision (OATH Index No. 235/17), dated June 26, 2017, issued by the New York City Office of Administrative Trials and Hearings Contract Dispute Resolution Board (CDRB) in the proceeding entitled *New York Health Care, Inc. v. Human Resources Administration* (the Decision) as arbitrary and affected by error of law. Petitioner argues that (1) there is no statutory authority for respondent, City of New York Human Resources Administration (HRA) to recoup unspent Health Care Reform Act (HCRA) Funds from petitioner, and (2) there is no regulatory authority for HRA to recoup unspent HCRA Funds from

petitioner; and remanding this matter to the CDRB to issue a determination consistent with such finding.[1]

II. BACKGROUND

Petitioner is a home care services agency duly licensed under article 36 of the Public Health Law and is authorized to provide personal health care services. Respondent City of New York Human Resources Administration (HRA), is a duly constituted agency of the City of New York, that provides programs and services to eligible individuals and families, including income assistance, food stamps, and public health insurance.

Petitioner has been involved in an ongoing dispute with HRA concerning Health Care Reform Act (HRCA) Recruitment and Retention Funds. Specifically, the dispute arose out of a contract dated November 1, 2001, between petitioner and HRA for the provision of home attendant services funded by Medicaid. In 2002, HRCA directed that funds from the tobacco control and insurance initiatives pool be used "for the purpose of supporting the state share of adjustments to Medicaid rates of payment for personal care services" (Public Health Law [PHL] § 2807-v [1] [bb] [i]). The funds were to be distributed in accordance with memoranda of understandings between the Department

[1] By order of the court dated January 11, 2018, on consent, the related matter *City of New York v Contract Dispute Resolution Board of the City of New York* (Sup Ct., NY County, index No. 452903/2017) was assigned to this Part. The application for consolidation, however, was denied without prejudice to renew.

of Health (DOH) and local social services for the purpose of supporting the recruitment and retention of personal care service workers, also known as home attendant services (*id.*).

The dispute involves the audit of fiscal years 2003 and 2004, completed by HRA in October 2008. HRA determined that petitioner must repay unspent HCRA funds totaling $1,538,578[2] and non-HCRA funds totaling $4,312,315 (non-HRCA Funds), for a total of $5,850,893 (*see* FY2004 Closeout Demand, petition, exhibit B).

By letter dated October 20, 2008, a cumulative close-out and funds recovery analysis was sent to petitioner demanding repayment. In response, as required by HRA, by letter dated November 11, 2008, petitioner submitted an appeal of the closeout demand to the director of the Home Services Program.

On October 16, 2009, by administrative determination, HRA denied the part of petitioner's appeal contesting HRA's proposed recovery of the HRCA Funds (10/16/09 administrative determination) (petition, exhibit C). The administrative determination also claimed that there was a contractual right for HRA to recover the unspent funds as it was entitled to recoup the HCRA funds not spent within the same year pursuant to its authority as the local social services district, and demanded petitioner repay to HRA the full amount of $5,859,893.

[2] These monies were made available to the Department of Housing and awarded to petitioner under the HCRA Personal Care Worker Recruitment and Retention Program (PCWRRP).

By letter dated November 12, 2009, petitioner submitted a notice of dispute of the 10/16/09 administrative determination to the Commissioner (petition, exhibit D). Petitioner claimed: 1) that HRA lacked the authority or jurisdiction to audit Medicaid reimbursements made under the "Personal Care Worker Recruitment and Retention Program"; 2) that HRA impermissibly and arbitrarily demanded repayment claiming that the funds were not spent in the fiscal year received, and that petitioner failed to have a plan and process in place for the expenditure of said funds, which is in contravention law, as PHL § 2807-v (1) (bb) only requires that the funds be expended for appropriate recruitment and retention purposes, and exceeded its authority; and 3) that the claimed timeliness requirement was not properly communicated to Home Care Services Program (HCSP) vendors. Petitioner also claimed that it did have a plan and process in place to expend such funds.

HRA failed to respond, which allowed petitioner to proceed to the next step of the contract's dispute resolution process. Specifically, on January 11, 2010, petitioner submitted a notice of claim to the Office of the New York City Comptroller (petition, exhibit E). On March 15, 2010, respondent submitted its response (petition, exhibit F). On July 15, 2010, the Comptroller denied petitioner's claims finding that HCRA funds are Medicaid funds that are covered by the Contract and may be audited and recouped by HRA (petition, exhibit G).

Thereafter, petitioner submitted a petition to the CDRB, in accordance with the Board's rules and art. 8.15, part II of the Contract (petition, exhibit H). On February 16, 2011, the parties appeared before the Board for a hearing. On March 28, 2011, the CDRB issued a board decision finding that while the Contract allowed HRA to audit HCRA funds, it did not provide HRA with the authority to recoup HCRA funds not spent within a year. Further, the CDRB noted that while components of the Contract "Rate" could be recovered by HRA, HCRA funds are not deemed part of the Contact Rate. Further, the Contract did not apply temporal limitations to the HCRA Funds. The CDRB also found that the non-HCRA issues referenced by petitioner in its notice of claim to the Comptroller were not before the Board (CDRB 3/28/11 decision, petition, exhibit I).

On July 28, 2011, petitioner filed an article 78 petition in the proceeding entitled *New York Health Care, Inc. v New York City Human Resources Home Care Svcs. Program* (Sup Ct, NY County, index No. 108718/11), wherein, petitioner challenged the following: (i) the failures of the Office of the Comptroller of the City of New York and the Board to determine whether a statutory basis existed for HRA to recoup the HCRA Funds; (ii) the October 20, 2008 determination of HRA which petitioner claims exceeded HRA's jurisdiction in determining that the recoupment of such disbursements was within its authority to recoup; and (iii) the failures of the Board and Comptroller to review

and adjudicate the recoupment by HRA of the non-HCRA Funds as addressed in petitioner's notice of claim (petition, exhibit J).

HRA and the City of New York (the City) filed a separate article 78 petition on July 22, 2011 entitled, *City of New York v Contract Dispute Resolution Board*, Sup Ct, NY County, index No. 402003/11, seeking a determination that the Board acted in an arbitrary and capricious manner by failing to adjudicate whether a statutory basis for the recoupment of the HCRA Funds existed (petition, exhibit K). The two petitions were joined for disposition.

On February 27, 2012, this court (Paul G. Feinman, J.)issued a decision holding that the Board's March 28, 2011 decision was arbitrary and capricious in that while the Board correctly determined that there was no contractual basis for HRA's recoupment of the HCRA Funds, it failed to determine whether a *statutory* basis existed, and remanded the case to the Contract Resolution Board for a determination (2/27/12 decision, petition exhibit L).

Petitioner appealed. The Appellate Division, First Department found that

> "(t)he court properly remanded the matter to CDRB to make a complete and final determination regarding HRA's authority to recoup unspent HCRA funds, on the ground that CDRB's failure to address whether there is any statutory bases for such authority rendered its determination arbitrary and capricious. The remand to review this statutory issue was appropriate notwithstanding that the court found no error in the aspect of CDRB's determination concluding that HRA has no contractual basis to recoup HCRA funds"

Matter of City of New York v Contract Dispute Resolution Bd. Of City of New York, 110 AD3d 647, 647 (1st Dept 2013).

By letter dated September 16, 2016, the CDRB directed the parties to submit legal briefs regarding the "two limited issues" raised in the First Department's decision (petition, exhibit M). On April 19, 2017, oral argument was held before the CDRB (petition, exhibit P).

On June 26, 2017, the CDRB issued its decision (petition, exhibit A). The Board concluded that under the applicable statutory and regulatory authority, HRA may recoup HCRA funds not spent for proper purposes; however, the CDRB found that the law does not provide a basis for HRA to seek recovery of HCRA funds that have not been spent within a year.

III. DISCUSSION

"A special proceeding under CPLR article 78 is available to challenge the actions or inaction of agencies and officers of state and local government" Matter of Gottlieb v City of New York, 129 AD3d 724, 725 (2nd Dept 2015). It is well settled that judicial review of an administrative determination pursuant to CPLR article 78 is limited to whether the determination was arbitrary and capricious or rationally based on the record. See Matter of Peckham v Calogero, 12 NY3d 424 (2009). An action is arbitrary and capricious when it is

taken "without a sound basis in reason, and is made without regard to the facts." Matter of Gottlieb, supra at 725.

"Deference is generally accorded to an administrative agency's interpretation of statutes it enforces when the interpretation involves some type of specialized knowledge" Matter of Belmonte v Snashall, 2 NY3d 560, 565-566 (2004); Matter of Smith v Donovan, 61 AD3d 505, 508 (1st Dept 2009) ("(i)t is well settled that an agency's interpretation of a statute that it is charged with administering is entitled to deference if it is not irrational or unreasonable"). Where, as here, "the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, [however,] there is little basis to rely on any special competence or expertise of the administrative agency. Smith, supra at 508 [internal quotation marks and citation omitted]). "In such a case, courts are free to ascertain the proper interpretation from the statutory and legislative intent." Id. at 509 [internal quotation marks and citation omitted]).

Petitioner argues that the CDRB erred when it found authority in the HCRA statute for HRA to recoup unspent HCRA Funds from petitioner. Additionally, petitioner argues that the CDRB misapplied the definition of "department" set forth in 18 NYCRR 504 to include HRA, as HRA does not meet the statutory definition of a local services district (LSSD) where enrollment has been delegated or retained by it. Respondent counters that NYC social services programs

are overseen by the State through commissioners of local social service districts, and that the City constitutes one single local social services district administered by the HRA, and while Medicaid is overseen by the DOH, HRA administers Medicaid in the City, and grants HRA auditing and recoupment authority.

PHL § 2807-v (1) (bb) (iii) provides as follows:

> "Personal care service providers which have their rates adjusted pursuant to this paragraph shall use such funds for the purpose of recruitment and retention of nonsupervisory personal care services workers or any worker with direct patient care responsibility only and are prohibited from using such funds for any other purpose. Each such personal care services provider shall submit, at a time and in a manner to be determined by the commissioner, a written certification attesting that such funds will be used solely for the purpose of recruitment and retention of nonsupervisory personal care services workers or any worker with direct care responsibility. 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 service workers or any worker with patient care responsibility. Such recoupment shall be in addition to any other penalties provided by law."

Further, the HCRA "Memorandum of Understanding" (MOU) states, "PHL § 2807-v (1) (bb) further provides that DOH may audit each provider receiving such a rate adjustment to ensure compliance with the provisions of such statute." Petitioner argues that the First Department recently held, in an identical case to the one at bar, that "(n)either the statute nor the memorandum of understanding between the [DOH] and HRA delegates this power to HRA" relying on a *Matter of People Care Inc. v City of N.Y. Human Resources Admin.*, (89

AD3d 515, 516 [1st Dept 2011]). The Court, however, went on to say that "it may be well within DOH's power to delegate auditing responsibilities to another agency such as HRA" (*id*, citing Social Services Law §§ 364-a, 368-c [2]). In *People Care, Inc.*, the petitioner, a supplier of personal care services under Medicaid, sought to prohibit the HRA from recouping close to $7 million in contested funds. The Court remanded the matter to develop the record as to whether the HRA was so authorized.

On remand, the court found that while SSL § 364-a (1) confers the DOH with the "authority to delegate responsibility to the other state department agencies," it is required to do so in conjunction with entering into an memorandum of understanding with such agencies, but the MOU must "include language delegating the DOH's authority to audit and recoup HCRA funds to HRA" (*Matter of People Care Inc. v City of N.Y. Human Resources Admin.*, 175 AD3d 134, 140 [1st Dept 2019]). There, as here, the interagency agreement did not include any language delegating this authority to HRA.

The case was again appealed, and the First Department affirmed the lower court, finding that "the sole interagency agreement in question is the aforementioned MOU, which is entirely devoid of any language delegating and auditing and [sic] recoupment powers to HRA, and by virtue of its merger clause, constitutes the entire agreement by DOH and HRA on the subject of HCRA payments, audits and

recoupment" (*id.*). The First Department held that, therefore, the Social Services Law did not support HRA's position.

Further, the First Department found that HRA's authority to conduct audits and recoup overpayments pursuant to 18 NYCRR 517-518 is not applicable to HCRA payments, as it affirmed the court's finding that the relevant portions of said regulations "refer[s] to a local district's power to recoup overpayments to Medicaid providers made in connection with a 'medical assistance program' provided for under" the SSL, and the HCRA program is *unquestionably not such a program."* Id. at 142. Moreover, the appellate court held, contrary to HRA's position herein, that "references throughout 18 NYCRR 517-518 to the authority of the 'department' to audit and recoup funds are to the 'State Department of Social Services' which is now the DOH[;]"[3] and that "to the extent that 18 NYCRR 505.14 (c) (iv) provides that audit and recoupment provisions of 18 NYCRR 517-518 apply to the auditing and recoupment of funds granted to personal care services providers, the auditing and recoupment power provisions that 505.14 (c) (iv) incorporates by reference are *solely* those of the DOH" id. [emphasis added]. In other words, there needs to be an explicit delegation to HRA in order for HRA to have such authority, which there is not.

[3] The First Department relied on the NYCRR's references to the authority of the department citing "18 NYCRR 515.1 (b) (5) ('*Department* means the State Department of Social Services'); 18 NYCRR 517.2, 518.2 (incorporating by reference the 18 NYCRR 515.1 (b) definition of 'Department)."

Moreover, the court rejects HRA's position that it finds its authority as a Department based on 18 NYCRR 504. The court find that HRA cannot be considered a local social services district because in that provision Department is defined as the State Department or local social services department "where enrollment of specified provider types has been delegated to or retained by such local district" (18 NYCRR 504.1). As discussed above, Medicaid enrollment for personal care providers has not been delegated or retained by HRA.

In addition, the First Department rejected the affidavit of John E. Ulberg, Jr., Medicaid chief financial officer and director of the Division of Finance and Rate Setting, Office of Health Insurance Programs, DOH, finding, as we do here, that it is merely a statement of opinion and not binding on the DOH. Specifically, the First Department opined,

> "The Ulberg affidavit, in which the affiant opines that DOH has conferred upon HRA auditing and recoupment authority with respect to HCRA funds by virtue of longstanding practice, fails to take into account that the sole reference to the authority to audit HCRA funds in the MOU between DOH and HRA is to the provision of Public Health Law § 807-v (1) (bb) authorizing DOH to 'audit each provider receiving [an HCRA] rate adjustment to ensure compliance with provisions of said statute' without further language providing for delegation HRA, or any other agency, of DOH's auditing or recoupment powers. . . . Moreover, . . . [u]nder the terms of the MOU, the sole function expressly delegated to HRA with respect to HCRA funds was to collect written certification from providers on forms to be determined by DOH, attesting that the funds would be used solely for the purposes specified in the statute. Notwithstanding HRA's arguments to the contrary, the MOU renders HRA the agent of DOH *only to the limited extent that HRA collected certifications from providers and acted as a*

> *conduit for the distribution of those funds from DOH to those providers."*

People Care Inc., supra at 143.

There, as here, HRA cites to "no specific statute or regulation that gives them the power to recoup funds awarded to Public Health Law § 2807-v (1) (bb)" Id.

The court considers HRA's additional arguments and finds them without merit. Given the First Department's most recent finding in the identical case, *People Care Inc.*, this court sees no reason to deviate from this precedent. The court, therefore, grants the petition and remands the matter to the CDRB for a determination consistent with this decision.

IV. CONCLUSION

Accordingly, it is,

ORDERED and ADJUDGED that the article 78 petition brought by New York Health Care Inc. for an order to annul in part the decision issued by the New York City Office of Administrative Trials and Hearings Contract Resolution Board dated June 26, 2017 (OATH Index No. 235/17), in the proceeding entitled *New York Health Care, Inc. v Human Resources Administration* is granted to the extent that the June 26, 2017 determination is remanded to the Contract Dispute Resolution Board for a review and determination consistent with this decision, and the petition is otherwise denied.

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This constitutes the Decision, Order and Judgment of the court.

Dated: June 26, 2020

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON