SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

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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.: 452903/2017

For a Judgment Pursuant to Article 78 of the New York Civil Practice Law and Rules

DECISION AND ORDER

-against-

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

Respondents.

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Nancy M. Bannon, J:

In this article 78 special proceeding petitioners, City of New York and the New York City Human Resources Administration Department of Social Services (HRA), petition the court for an order and judgment: (a) vacating and annulling that portion of respondent Contract Dispute Resolution Board's (Board or CDRB) June 26, 2017 decision which adhered to the Board's March 28, 2011 decision holding that HRA lacked contractual authority to recoup funds allocated under the New York Health Care Reform Act (HCRA) and paid to respondent New York Health Care, Inc. (NYHC) in connection with a contract between the City and NYHC (the Contract); (b) vacating and annulling that portion of the Board's June 26, 2017 decision holding that HRA may recoup HCRA funds only if and when NYHC spends such funds on anything other than recruitment and retention of personal care workers; (c) declaring that HRA has the authority under the Contract and applicable statutes and regulations to recoup

HCRA funds according to the same rules and procedures applicable to all other Medicaid funds, including the requirement that HCRA funds not expended on authorized costs incurred during the year of allocation must be returned to HRA; and (d) directing NYHC to immediately remit payment of $5,850,893.00 in Medicaid funds, including $1,538.578 in HCRA funds, outstanding and due to HRA pursuant to the results of the FY 2003 and 2004 audit and in accordance with HRA's written determination issued on October 16, 2009.

Background

This action directly relates to the matter *New York Health Care, Inc. v City of New York Human Resources Admin.* (index No. 159410/2017).[1] For purposes of this motion, only those facts relevant to this motion will be discussed.

On June 26, 2017, the CDRB issued a decision, *New York Health Care, Inc. v Human Resources Admin.* (OATH index NO. 235/17), wherein the Board concluded that although HRA had the authority to audit Medicaid funds allocated to NYHC pursuant to the New York Health Care Reform Act (HCRA) in connection with a contract between the City, acting through HRA, and respondent NYHC for the provision of personal care services (home attendant services) to eligible Medicaid recipients in the City (the Contract), it did not have the authority to recoup those funds. In addition, the Board found that applicable statutes and regulations did not require that such funds be spent during the year of allocation and allowed for the recoupment of funds only if and when spent by NYHC on costs unrelated to recruitment and retention of personal care workers.

[1] By order of the court dated January 11, 2018, on consent, this matter was assigned to this Part to be heard in conjunction with *New York Health Care, Inc. v City of New York Human Resources Admin.*, (index No.: 159410/2017). The application for consolidation, however, was denied without prejudice to renew. No consolidation application was subsequently filed.

The underlying dispute involves a challenge by NYHC after an audit of fiscal years (FY) 2003 and 2004 was conducted, and HRA determined that NYHC must repay unspent HCRA funds in the sum of $1,538,578 (HCRA Funds), as well as other non-HCRA funds in the sum of $4,312,315 (non-HCRA Funds), for a combined total of $5,850,893. NYHC challenged HRA's authority to audit and recoup the HCRA Funds.

After following the multiple procedures required to challenge this demand, NYHC submitted a petition to the CDRB. After submitting briefs and appearing for argument, the Board, on March 28, 2011, issued a decision vacating the portion of HRA's determination with respect to the HCRA Funds. Specifically, the Board found that: (1) the Contract does not provide HRA with the authority to recover unspent HCRA Funds; and (2) it was beyond the scope of CDRB to determine if such authority rests in statutory and/or regulator law (CDRB Decision I). NYHC challenged CDRB Decision I and filed an article 78 petition with this court *New York Health Care, Inc. v New York City Human Resources Admin. Home Care Servs. Program* (Sup Ct, NY County, Index No.: 108718/11).

There, Justice Feinman held that CDRB's Decision I was arbitrary and capricious in that while it determined that no contractual basis for HRA's recoupment of the HCRA funds existed, it failed to determine whether a statutory or regulatory basis existed (*Matter of New York Health Care v New York City Human Resources Admin. Home Care Services Program*, 2012 NY Slip Op 30459[U] [Sup Ct, NY County Feb. 27, 2012], *affd sub nom City of N.Y. v Contract Dispute Resolution Bd. of the City of N.Y.*, 110 AD3d 647 [1st Dept 2013]). The court ordered that the matter be remanded to the CDRB to review HRA's authority to recoup unspent HCRA funds (*id.*). On appeal, the First Department held:

> "The 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 basis 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"

(110 AD3d at 647).

On remand, the CDRB stated that the court "found that the Board should have looked beyond the Contract to the statutory and regulatory basis for recoupment of [HCRA] funds, and remanded the matter for resolution of these issues. . . . This decision was affirmed by the First Department" (CDRB Decision II at 2). The Board determined that, on remand, it was "directed to decide: (1) whether there was a basis in the statute and regulations for recoupment of HCRA funds by HRA and (2) whether those funds must be spent during the year of allocation" (*id*). In CDRB Decision II, the Board held "that HRA's recoupment of HCRA funds is supported by the statutory law and regulations[; and further] that there is no restriction in the statute or rules that those funds must be used in the same year that they are allocated" (*id.*).

Relevant Terms of the Contract

The contract provides for reimbursement of HRA from "Medicaid Management Information System" (MMIS) on a weekly basis for all service hours authorized by recipients' individual service plans, according to a rate established pursuant to a specified formula. Specifically, the contract provides:

> "A. The Contractor shall, in accordance with the fiscal procedures set forth in Article 7 of Part I of this Agreement and its approved budget, be reimbursed for Home Attendant Services provided pursuant to a service authorization **in an amount not to exceed the Allowable Payments**; provided, however, the Contractor shall not be reimbursed for Home Attendant Services unless the **claim for reimbursement is verified by billings** submitted in accordance with the time frames and billings procedures established by the Department. . . .

> "In no event shall such reimbursement exceed $14.24 per hour of Service performed per Case. Said Rate is subject to [DOH] approval.
> "B. It is understood by the Contractor that any amount which the Department is required to pay pursuant to this Agreement will be paid through MMIS."

(Contract, Part I, art. 3.1 (A) at 5 [bold emphasis added; underlined emphasis in the original], petition, ¶ 15).

In order to receive payment for services rendered, providers, including NYHC, must submit billings directly to the Department of Health's (DOH) billing agent, Computer Sciences Corporation (CSC (petition, ¶ 16). CSC verifies the billings against State Medicaid data to ensure that providers have billed only for authorized services (*id.*). DOH then issues weekly reimbursement checks to providers (*id.*).

Under the Contract, "Funds" is defined as "money or anything of value transferred by the Department or MMIS or both, to the Contractor in accordance with this Agreement, and shall include, but shall not be limited to the Rate payments" (Contract, Part I, art. 1, 17 at 3). Funds is limited to "expenditures . . . properly incurred pursuant to, and during the performance period of" the Contract (Contract, Part I, art. 2.3 (B), at 5).

Discussion

An administrative determination is subject to challenge in an article 78 proceeding where the "determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803 [3]). It is well settled that judicial review of an administrative determination pursuant to CPLR article 78 is limited to whether the determination was arbitrary or rationally based on the record (*Matter of Peckham v Calogero*, 12 NY3d 424, 430 [2009]). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of Educ. of*

Union Free School Dist. No. 1of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231 [1974]).

Petitioners claim that the CDRB Decision II was arbitrary and capricious, affected by errors of law, and constituted an abuse of discretion, both in its substantive ruling that HRA lacked authority to recoup HCRA funds unless and until NYHC spent such overpaid funds on costs other than recruitment and retention, and in its adherence to the CDRB Decision I that HRA lacked contractual authority to recoup HCRA funds.

Specifically, petitioners argue that in the CDRB Decision I, the Board correctly determined that HRA had the authority to audit HCRA funds; however, petitioners argue that the Board irrationally determined that although the HCRA funds were subject to audit by HRA under the contract, they were not subject to *recoupment* by HRA. Petitioners argue that since the CDRB Decision I was irrational, the CDRB Decision II was arbitrary and capricious, unsupported by evidence and effected by error of law in so far as the CDRB Decision II adhered to CDRB Decision I in this regard.

HRA counters that the matter was appealed to both the Supreme Court and the Appellate Division. On appeal, the court affirmed the determination that HRA had no right to recoup HCRA funds under its contract with Respondent, and remanded the dispute for a determination only as to whether HRA had any statutory authority to recoup HCRA funds from NYHC. HRA appealed to the Appellate Division seeking reversal of the CDRB's determination that there is no contractual right for HRA to recoup HCRA funds from NYHC. The First Department affirmed the Supreme Court, holding, among other things, "(t)he 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 N.Y. Y*, 110 AD3d 647).

NYHC argues that: (1) HRA has exhausted all statutory appeals on this issue; (2) the CDRB Decision I finding of lack of contractual authority to recoup HCRA funds is not subject to challenge here; and (3) HRA submits no legal basis or authority to support its claims that it was an error of the Board in its CDRB Decision II to not reconsider its final and binding CDRB Decision I.

Petitioners contend that NYHC essentially raises a collateral estoppel argument with respect to HRA's claim. "The doctrine of collateral estoppel precludes a party from relitigating an issue which has been previously, actually and necessarily decided against him or her in a prior proceeding in which there was a full and fair opportunity to litigate the point" (*A to Z Assoc. v Cooper*, 161 Misc 2d 283, 285-286 [Sup Ct, NY County 1993). "The doctrine is applicable not only to court decisions, but to prior determinations made in administrative forums that are 'quasi-judicial' in nature and governed by 'procedures substantially similar to those used in a court of law'" (*id.* at 286, quoting *Ryan v New York Telephone Co.*, 62 NY2d 494, 499 [1984] [other citation omitted]). However, "the doctrine of collateral estoppel does not operate to bar relitigation of a pure question of law" (*New Hampshire Ins. Co. v Clearwater Ins. Co.*, 129 AD3d 99, 110-111[1st Dept 2015][internal quotation marks and citation omitted]). The interpretation of whether a contractual language is ambiguous is a question of law for the court (*id.* at 111, citing *Kass v Kass*, 91 NY2d 554, 566 [1998]; *Banco Espirito Santo, S.A. v Concessionaria Do Rodoanel Oeste S.A.*, 100 AD3d 100, 107 [1st Dept 2012]; *Sterling Natl. Bank v Eastern Shipping Worldwide, Inc.*, 35 AD3d 222, 223 [1st Dept 2006], among others).

Petitioners state that Justice Feinman remanded the matter to the Board to determine not only the statutory and regulatory basis but also contractual basis of determining whether HRA has the authority to recoup HCRA funds. Specifically, Judge Feinman states:

> "When the Board issues its determination that the contract did not allow HRA to recoup these [HCRA] funds, regardless of whether there may be statutory authority which allows HRA to do so, the Board id 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"

(petition, exhibit 4 at 9-10).

Petitioners argue that neither the Appellate Division nor the Supreme Court determined that HRA lacks contractual authority to recoup HCRA funds or that the Board's determination of such issue was lawful and proper. Therefore, the law of the case doctrine does not apply and this court, it argues, may consider whether HRA has contractual authority to recoup HCRA funds like all other Medicaid funds paid under the Contract. As this is a matter of contractual interpretation, the court considers petitioners' argument and finds it with merit, and therefore, will look to the specifics of HRA's claim.

Petitioners claim that the Board erred in concluding that because HCRA funds were not part of the contractual rate, and because HRA's recoupment authority was limited to components of the rate, HRA lacked contractual authority to recoup HCRA funds. Petitioners further claim, however, that this reasoning ignores the fact that HCRA funds were paid as add-ons to the rate, issued weekly through MMIS in the same manner as contract payments, which respondent does not dispute (petition exhibits 12 and 13); and argues that while the specific

add-ons were not calculated according to the established rate formula, such funds were nevertheless paid as add-ons to the rate, and therefore paid according to the contractual rate.

Further, petitioners claim that the Boards' finding in CDRB Decision II, that HCRA funds may be recouped only if and when NYHC spends such funds on something other than recruitment and retention, stems from the erroneous assumption that HCRA funds cannot be deemed part of the rate. Petitioner also claims that because HCRA funds constitute Rate payments, HRA may recoup unspent HCRA funds via normal auditing procedures for Medicaid funds. HRA argues that if it is not permitted to recoup excess HCRA funds based on its annual audit each year, each service provider, in this case NYHC, will be at liberty to keep the extra funds it receives in any given year indefinitely and then claim that it intends to spend them on a proper purposed at some future date, creating a perpetual, rolling overpayment.

NYHC counters that assuming the court reverses the CDRB Decision I concerning the lack of contractual authority to recoup HCRA funds, it would be inconsistent with the nature of the HCRA funds or the manner in which they were treated by respondent to retroactively impose a "temporal" limit on the use of HCRA funds. According to the CDRB Decision I, in December of 2004, HRA directed NYHC to set aside HCRA funds pending the implementation of a United States Court of Appeals decision in *Coke v Long Is. Care at Home* (376 F3d 118 [2d Cir 2004]), which concerned payment of additional overtime compensation to employees (CDRB Decision I at 3, petition, exhibit 2). The Second Circuit's decision was overturned (*Long Is. Care at Home, Ltd. v Coke*, 551 US 158 [2007]). HRA would not allow NYHC to spend the money it had previously set aside, and after conducting an audit of FY 2003 and 2004, HRA determined that NYHC must repay the unspent HCRA funds as well as monies from other funds (CDRB Decision I at 3). Moreover, respondent counters that to the

extent petitioners argue that service providers would be able to keep such funds indefinitely, it is the DOH that has the authority to recoup these funds,

The Board specifically found that the HCRA funds "do not appear to be covered by the Contract. The Contract was created prior to their existence and accordingly does not address them" (CDRB Decision I at 7). The Board noted that the dispute falls under the contract's ADR provision, however, its "jurisdiction is limited to interpreting the terms of the Contract" citing *Barele, Inc. v New York City Human Resources Admin.* (2010 NY Slip Op 30760[U] at *15-16 [Sup Ct, NY County Apr. 2, 2010]) (*id.*).

In analyzing the terms of the Contract, the Board found that there was no question that HRA may *audit* HCRA funds, as the Contract specifically provides:

> "All books, vouchers, records reports, cancelled checks and any and all similar material related to this contract and the work thereunder may be subject to periodic inspection, review and audit by the State of New York, Federal Government and other persons duly authorized by the City including the Department's Office of Inspector General. Such audit may include examination, review and cop[y]ing of the source and application of all funds whether from the City, any State, the Federal Government, private resources or otherwise"

(*id.*, quoting contract part II, art. 4.4 at 36). The Board found that since the contract is based on Medicaid rates and HCRA funds are Medicaid rate adjustments, it is clear that HCRA funds are related to the Contract and, therefore, may be audited by HRA given the City's charter authorizing HRA to conduct audits of Medicaid funds (*id.* at 7-8). The Board, however, found that while the audit provision in the Contract can be interpreted to cover the HCRA funds, the provisions permitting HRA to recover unspent funds cannot. The Contract's provision limits recovery of unspent funds to components of the Rate (Contract Part I, art. 3.2 (A) at 6-7). After defining what the Rate is composed of as provided under article 3.4 of the Contract, the Board found that "(b)ecause the Contract specifies that providers may take a profit on the Rate

components, and providers are prohibited from taking a profit on the HCRA funds, . . ., HCRA funds cannot be deemed part of the Rate. Thus, the recovery provision in the Contract is inapplicable to HCRA funds" (CDRB Decision I at 9).

The Board also considered HRA's argument that its authority to recoup the HCRA funds could be covered under the "Termination" provision but found that like the recoupment provision, the clause is limited to direct labor funds, and therefore does not apply to HCRA funds. The Board further held that the clause applies to closeout procedures upon termination of the Contract and, as the Contract was not terminated in 2003 or 2004, it is inapplicable (*id*). Likewise, the Board disagreed with HRA's argument, as petitioners argue here, that it would be consistent with the Contract to impose a temporal limit on the use of HCRA funds, as the Contract specifies that MMIS will make payment for home attendant services *after* such services have been provided and verified by billing. The Board further found that a temporal restriction is not consistent with the manner in which the HCRA funds were administered, again with such funds being distributed *after* they were supposed to have been spent.

CDRB Decisions I & II are supported by the recent precedent *Matter of People Care Inc. v City of N.Y. Human Resources Admin.* (Sup Ct, NY County Feb. 5, 2018, index No. 109193/2009, *affd* 175 AD3d 134 [1st Dept 2019]). *People Care*, a home care services agency, entered into a nearly identical contract with HRA. There, HRA audited and demanded recoupment of HCRA funds. People Care appealed and argued that: (1) HRA could not audit and recoup HCRA funds because HCRA funds are not considered when calculating the Medicaid reimbursement rate under HRA's alternative rate methodology (ARM); (2) HRA's demand was arbitrarily based on People Care's failure to expend funds in the fiscal year received; and (3) HCRA funds were vested by statute in DOH and expressly reserved in the

City-State MOU. HRA contended that it is authorized to audit and recoup HCRA funds pursuant to its contract with People Care, among others.

This court in a decision by the Justice Eileen Rakower, after a detailed discussion finding HRA lacked authority to audit and recoup HCRA funds under the applicable statutory and regulatory laws, held that

> "[w]hether the contract permits HRA to audit and recoup HCRA funds is moot. Any provisions empowering HRA to audit and recoup People Care's HCRA funds would contravene Public Health Law § 2807-v (1) (b) (iii) and constitute an unlawful undertaking. (*Scotto v Mei*, 219 AD2d 181, 183 [1st Dept 1996]). . . . With respect to the auditing and recoupment of HCRA funds, HRA 'cannot assume additional powers not contained in enabling litigation.' (*Vink v New York State Div. of Housing and Community Renewal*, 285 AD2d 203, 210 [1st Dept 2001]). Accordingly, the Court finds that DOH did not authorize HRA to audit or recoup HCRA funds under the regulations or the memoranda of understanding"

(*People Care*, Sup Ct, NY County Feb. 5, 2018 at 16-17, index No. 109193/2009). The First Department affirmed finding that neither Public Health Law §2807-v (1) (bb), as the governing statute, nor the MOU between DOH and HRA, entered into pursuant to that statute, contains any language delegating DOH's auditing and recoupment authority to HRA or any other agency (*Matter of People Care*, 175 AD3d at 145). The First Department held that "even if the terms of the . . . contract providing for HRA audit and recoupment authority . . . were not deemed modified by the statute and the MOU in accordance with section 3.1 (D),[2] those terms would not be in conflict with them and therefore could not supersede them" (*id.* at 144-145, quoting *Ministers & Missionaries Benefit Bd. v Snow*, 26 NY3d 466, 482 [2015] ["(W)here a conflict arises between the provisions of a statute and the terms of a contract, the statute

[2] Paragraph 3.1 (D) in both the contract at issue herein and the contract in *People Care* are identical, and state: "In the event that the New York State Department of Health's method of reimbursing the Contractor for Home Attendant Services is changed during the term of this Agreement, this Agreement shall be modified to reflect the new method of reimbursement."

typically controls because it is binding on the substantive policy determination of the legislature"]).

The First Department concluded, as the court does here, that the "legality of the 2001 contract does not affect the fact that interpreting the contract as delegating auditing and recoupment authority to HRA with respect to HCRA funds would contravene Public Health Law § 2807-v (1) (bb) (iii). That statute expressly refers only to DOH's authority to audit HCRA funds, without any provision authorizing DOH to delegate its authority to audit and recoup such funds to HRA, nor actually doing so" (*Matter of People Care*, 175 AD3d at 146). Further, the First Department held that "[a]s there is no conflict between the . . . contract, on the one hand, and Public Health Law § 2807-v (1) (bb) and the MOU on the other reading section 3.1(D) out of the . . . contract in order to imply into the statute a power not provided by the Legislature would be inappropriate" (*id.* at 147).

Based on the foregoing, it cannot be concluded that the Board's decisions in CDRB Decision I and CDRB Decision II are arbitrary and capricious, contrary to law or an abuse of discretion. Therefore, the court denies the petition.

Conclusion

Accordingly, it is

ORDERED that the petition by City of New York and New York City Human Resources Administration Department of Social Services is denied in its entirety and the proceeding is dismissed.

This constitutes the Decision and Order of the court.

Dated: June 26, 2020

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